

Faculty of law

Animal welfare and Culling: A legal analysis of South African Biodiversity Law

A mini thesis submitted in partial fulfilment of the requirements for the LL.M degree in
the Department of Public Law and Jurisprudence

By

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Declaration

I declare that **Animal welfare and Culling: A legal analysis of South African Biodiversity Law** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

MA Stuurman

Signed: Michael A Stuurman



Acknowledgements

First, I would like to thank the Almighty and Heavenly Father for his love and grace over my life and throughout my research and studies. You have my heart.

Secondly, to my supervisor Dr Angela van der Berg, I am incredibly thankful for your assistance, for your encouragement, and for helping me achieve my dream of completing my Masters degree. Without your guidance and supervision this dissertation would not have come to fruition.

Thirdly, I want to express my sincere appreciation to Professor Werner Scholtz. I am eternally grateful for the funding of this dissertation. I am also grateful for the opportunity of being your assistant for two years. Without your expert guidance and supervision this dissertation would not have been possible. It really is a privilege to have learnt as much as I have from you throughout this process.

Fourth, I would like to thank my family for their unwavering belief and support in my quest to complete this dissertation. To my mother, Daphne Stuurman, to my brother and sister Amilcar and Lo-Ann, to my granny, and uncle Mark Geweld, thank you. I am eternally grateful to have you in my life and will continue to make you proud in every task I pursue.

Fifth, to the staff at the Faculty of law of University of the Western Cape for their encouragement and support. In particular, I would like to thank Ms Lynn Thomas who has help me in more ways than one. Your support and welcoming nature I will remember forever. Thank you to Ms Grace van Niekerk that helped me to upload sources on ikamva as well as taught me how to do research.

Lastly, to my friends *inter alia* Cheslyn, Jamie, Theresa, Lyle and Liam. Thank you for your support and words of encouragement throughout this process. Your friendship and support kept me going.



Abstract

South Africa lacks an effective wildlife welfare regulatory framework. Biodiversity legislation focuses on the conservation and sustainable use of natural resources under the auspices of section 24 of the Constitution. The legislation however does not expressly promote animal welfare. This *lacuna* is as a result of the anthropocentric nature of the regulatory framework in the approach towards the conservation and use of biodiversity. Conservation has been understood in South Africa from an anthropocentric view which allows for the culling of wildlife.

The courts in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* and *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs* rejects this understanding of conservation in Biodiversity law. The courts explicitly recognise the intrinsic value and welfare of wildlife in the interpretation of section 24. The court confirms that an integrative approach towards wildlife is an integral part of section 24. As such animal welfare and conservation are intertwined values. These are progressive declarations made by the courts.

This research puts forward that of the practice of culling is inconsistent with the integrative approach. This research considers the relationship between the culling practice, and animal welfare in Biodiversity law. This research critically engages with the Biodiversity law framework in order to determine whether wildlife welfare is provided for. This research then analyses the court cases which changes the way wildlife must be treated in law. This

study argues that the integrative approach rejects the use of culling on the baboons as they have intrinsic value and their welfare must be respected under section 24.



Keywords

Animal Welfare

Conservation

Culling

Human-wildlife Conflict

Biodiversity Law

Integrative approach

Protection

South Africa

Sustainable Development

Sustainable Use



List of Abbreviations

APA	Animal Protection Act 71 of 1962
AU	African Union
BTT	Baboon Technical Team
CBD	Convention on Biological Diversity 1992
CC	Constitutional Court
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973
COP	Conference of the Parties
CPA	Criminal Procedure Act
DAFF	Department of Agriculture, Forestry and Fisheries
DALRRD	Department of Agriculture, Land Reform and Rural Development
DEA	Department of Environmental Affairs
DFFE	Department of Forestry, Fisheries and the Environment
HWC	Human-wildlife conflict
IFAW	International Fund for Animal Welfare

IUCN	International Union for Conservation of Nature
KEAG	Kommetjie Environmental Awareness Group
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMLA	National Environmental Management Laws Amendment Act 2 of 22
NEMPAA	National Environmental Management: Protected Areas Act 57 of 2003
NPA	National Prosecuting Authority
NSPCA	National society for the Prevention of Cruelty to Animals
OIE	World Organisation for Animal Health
PAJA	Promotion of Administrative Justice Act 3 of 2000
SADC	Southern African Development Community
SANParks	South African National Parks
SDGs	Sustainable Development Goals
SEMA	Specific Environmental Management Act
SPCA	Societies for the Prevention of Cruelty to Animals
TMNP	Table Mountain National Park

TOPS

Threatened and Protected Species Regulations



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The information used and presented in this research is accurate and up to date on 30 November 2022. Any later legal developments have not been considered.



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CHAPTER 1: INTRODUCTION

1.1 Problem Statement

The Anthropocene is a scientific term used to describe the current human dominated geological epoch. The term emphasises the central role of mankind as a major driving force in modifying the biosphere which is rapidly moving the Earth into a critically unstable state.¹ This socio ecological crisis threatens all life on Earth. The Anthropocene is causing rapid species extinction, climate change and biodiversity loss.² The loss and fragmentation of the natural environment, due to human interventions and anthropogenic activities is confining many species into a more geographically limited and controlled environment.³ When wild animals lose their habitat and have limited access to food and shelter, they injure or kill people and livestock, and destroy crops and property.⁴ This inevitably leads to an increase in confrontations between people and wildlife. This is known as human-wildlife conflict (HWC). The tide of wildlife forced under the management and control of humans may arguably 'increase the need to inject

¹ See Lubbe WD and Kotzé LJ 'Holistic Biodiversity Conservation in the Anthropocene: A Southern African Perspective' (2019) 27(1) *African Journal of International and Comparative Law* 76-77. See also Vidas D, Zalasiewicz J and Williams M 'What Is the Anthropocene – and Why Is It Relevant for International Law?' (2015) 25(1) *Yearbook of International Environmental Law* 3-23.

² Lubbe WD and Kotzé LJ (2019) 76-77.

³ Harrop S 'Climate Change, Conservation and the Place for Wild Animal Welfare in International Law' (2011) *Journal of Environmental Law* 2.

⁴ Sifuna N 'Using Eminent Domain Powers to Acquire Private Lands for Protected Area Wildlife Conservation: A Survey Under Kenyan Law' (2006) 2(1) *Law, Environment and Development Journal* 89.

compassion into environmental law and policy'.⁵ HWC is increasingly experienced around the world⁶ and is one of the main obstacles to the conservation of wildlife. HWC is defined as when wildlife or humans harm or threaten one another in the course of pursuing their natural or instinctive goals.⁷ The conflict⁸ flows both ways; wildlife negatively impacting the interest of humans and vice versa. The result of this conflict arouses negative feelings. These negative feelings lead to the conflict between the parties intensifying as humans may retaliate against individual animals or entire populations.⁹ Madden mentions that a few causes of HWC are the augmentation of human populations into or near regions inhabited by wildlife, intensification and modification of human uses of those regions, and fragmentation and loss of habitat in those regions.¹⁰ Another cause is the designation of protected areas that are insufficient in size for the needs of wild animals.¹¹ According to Madden the contributing tensions at play include the following lack of co-management and ownership opportunities for local people. Additionally, the general costs that communities incur that were supposed to have been offset by conservation and development efforts, are out of proportion to benefit for local people from living close to

⁵ Harrop S (2011) 2.

⁶ Hamman E, Woolastin K & Lewis B 'Legal Responses to Human-Wildlife Conflict: The Precautionary principle, Risk Analysis and the 'lethal Management' of Endangered Species' (2016) 7 *IUCNAEL EJournal* 57-83.

⁷ Madden FM 'The Growing Conflict between Humans and Wildlife: Law and Policy as Contributing and Mitigating Factors' (2008) 11 *Journal of International Wildlife Law and Policy* 189.

⁸ Hamman E, Woolastin K & Bridget L (2016) 62, defines conflict as 'any significant interaction between humans and wildlife which results in an adverse effect (including perceived effects) on either wildlife or humans'.

⁹ Madden FM (2008) 190. See also Sifuna N 'Damage Caused by Wildlife' (2009) 39 *Environmental Policy and Law* 105.

¹⁰ Madden FM (2008) 190.

¹¹ Madden FM (2008) 191. See Sifuna N (2009) 106.

wildlife.¹² Common threats in HWC indicate that societies respond to wildlife encounters in emotional and irrational ways.¹³ In some instances, species have even become extinct due to the manner in which humans have responded to this conflict.¹⁴ HWC, consequently, is becoming one of the key threats to the survival of species. In order to resolve the conflict, conservation authorities have used several mechanisms, in particular culling,¹⁵ also known as therapeutic hunting, in certain areas.

An example of HWC in the context of South Africa, is that of the Chacma Baboon population and humans in the Cape Peninsula. The Chacma Baboon, also known as *Papio ursinus*, forms a part of South Africa's rich biodiversity and is a considerable tourism asset and plays a potentially significant ecological role in the Cape Floristic Region.¹⁶ They are distributed throughout South Africa, Swaziland, Lesotho, Mozambique, Botswana, Namibia, Zimbabwe and Southern Angola.¹⁷ Notably, the Chacma Baboon is not listed as threatened or endangered species, but as a 'least concern' according to the International Union for Conservation of Nature's (IUCN) Red List of Threatened

¹² Madden FM (2008) 191.

¹³ Hamman E, Woolastin K & Lewis B (2016) 60.

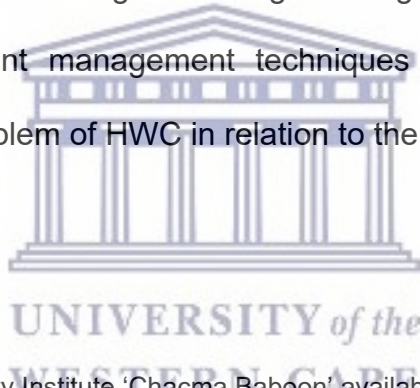
¹⁴ Muir MJ 'Human-Predator Conflict and Livestock Depredation: Methodological Challenges for Wildlife research and Policy in Botswana' (2010) 13(4) 293, the Tasmanian wolf (*Thylacinus cynocephalus*) and the Falkland Island fox (*Dusicyon australis*). Also, Hamman E, Woolastin K & Lewis B (2016) 64.

¹⁵ Pinter-Wollman N 'Human-Elephant Conflict in Africa: The Legal and Political Viability of Translocation, Wildlife Corridors, and Transfrontier Parks for Large Mammal Conservation' (2012) 15(2) *Journal of International Wildlife Law and Policy* 153. See also Woolastin K 'Ecological Vulnerability and the Devolution of Individual Autonomy' (2018) 43 *Australasian Journal of Legal Philosophy* 114.

¹⁶ City of Cape Town, Cape Nature and SANParks 'Joint Media Release: Baboon Management on the Cape Peninsula' available at <http://www.sanparks.org/about/news/default.php?id=55317> (accessed 24 January 2020).

¹⁷ IUCN Red List 'Chacma Baboons' available at <https://www.iucnredlist.org/species/16022/168568698> (accessed 13 June 2020).

Species.¹⁸ Yet in the Cape Peninsula, populations are considered to be potentially threatened.¹⁹ The Chacma Baboon can occupy diverse habitats because of their dietary and behavioural flexibility.²⁰ They can thrive in human-modified environments, particularly areas that offer easily accessible foods that are situated in close proximity to water and their sleeping sites.²¹ Due to the baboon's proximity to humans in the Cape Peninsula area, they frequently cause damage to property, raid human grown food resources and are increasingly exposed to injury and death. Chacma Baboons are widely considered to be "damage causing", "nuisance animals" and most troublesome genus.²² This perception has resulted in an increase in both legal and illegal culling.²³ Subsequently, culling has become one of the dominant management techniques employed by conservation authorities to address the problem of HWC in relation to the Chacma Baboon.²⁴



¹⁸ South African National Biodiversity Institute 'Chacma Baboon' available at <https://www.sanbi.org/animal-of-the-week/chacma-baboon/> (accessed 26 February 2020). On the IUCN Red List of Threatened Species, the chacma baboons are listed as least concern, IUCN Red List 'Chacma Baboons' available at <https://www.iucnredlist.org/species/16022/168568698> (accessed 13 June 2020).

¹⁹ South African National Biodiversity Institute 'Chacma Baboon' available at <https://www.sanbi.org/animal-of-the-week/chacma-baboon/> (accessed 26 February 2020).

²⁰ South African National Biodiversity Institute 'Chacma Baboon' available at <https://www.sanbi.org/animal-of-the-week/chacma-baboon/> (accessed 26 February 2020).

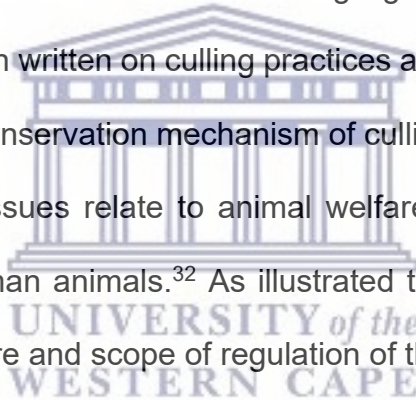
²¹ Hoffman T, Beamish E, Kaplan B, Lewis M, O'Riain MJ, Sithaldeen R & Stone O 'A conservation assessment of *Papio ursinus*' in Child MF, Roxburgh L, Do Linh San E, Raimondo D & Davies-Mostert HT (2016) *The Red List of Mammals of South Africa, Swaziland and Lesotho* 3.

²² Hoffman T.S and O'Riain M.J 'Monkey Management: Using Spatial Ecology to Understand the Extent and Severity of Human-Baboon Conflict in the Cape Peninsula, South Africa' (2012) 17 *Ecology and Society* 1.

²³ Trethowan J 'Cape Town Baboon Management: How legal is it?' available at <https://baboonmatters.org.za/cape-town-baboon-management-how-legal-is-it/> (accessed on 5 December 2022).

²⁴ Keeton C 'Furore over baboon culling' *The Herald* available at <https://www.pressreader.com/south-africa/the-herald-south-africa/20180710/281539406718469/textview> (accessed on 27 March 2020).

While the culling of the Chacma Baboon is one example of many HWC situations in South Africa,²⁵ legally permitted culling of these, and other wildlife is potentially controversial. The controversy stems from various debates relating to animal welfare and environmental conservation²⁶ needs on the one hand, and human rights²⁷ related to health, property, agricultural practices such as farming.²⁸ Culling is a form of lethal management or lethal control. It is used as an anthropocentric 'precautionary' measure to avoid inflicting injury or disease to humans, even where the species concerned is endangered or threatened.²⁹ Culling generally refers to 'the intentional or state-sanctioned reduction of a population of species as a direct response to HWC'.³⁰ As will be highlighted later in this research,³¹ it seems that not much has been written on culling practices and the Chacma Baboon from the perspective of law. The conservation mechanism of culling raises several ethical and legal issues. These ethical issues relate to animal welfare including the physical and mental well-being of non-human animals.³² As illustrated throughout this research, the legal issues relate to the nature and scope of regulation of the culling practice and a lack



²⁵ Mountain Lions, grey wolves, elephants and other wildlife are being culled. see Hamman E, Woolastin K & Lewis B (2016) 58-59. See also Scholtz W 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity: Issues of Biodiversity and Custodial Sovereignty' (2005) *Macquarie J. Int'l & Comp. Envrle. L.* 9.

²⁶ Bilchitz D 'Exploring the Relationship between the Environmental Right in the South African Constitution and Protection for the Interests of Animals' (2017) 134(4) *South African Law Journal* 767-772.

²⁷ Hamman E, Woolastin K & Lewis B (2016) 72-78.

²⁸ Dickson P and Adams WM 'Science and Uncertainty in South Africa's Elephant Culling Debate' (2009) *27 Environment and Planning C: Government and Policy* 110-123.

²⁹ Hamman E, Woolastin K & Lewis B (2016) 58.

³⁰ Hamman E, Woolastin K & Lewis B (2016) 67.

³¹ Chapter 2 at 2.2 and 2.3.

³² World Organisation for Animal Health 'Animal Welfare' available at <https://www.oie.int/en/what-we-do/animal-health-and-welfare/animal-welfare/> (accessed 19 July 2021).

of a clear and comprehensive consideration of animal welfare in South African law and policy.

1.1.1 The Emergence of Animal Welfare

International and domestic biodiversity law is primarily focused on the conservation and use of wildlife and still largely ignores that it regulates sentient beings.³³ Wildlife is conserved to achieve the greatest benefit for humans or the environment as a whole.³⁴ This is as a result of the anthropocentric approach of international environmental law.³⁵ Hence wildlife welfare law is non-existent on the international and domestic levels.³⁶

Conservation and welfare are seen as two opposing concepts with different goals. Conservation is not defined in biodiversity law, however, the World Commission on Environment and Development Experts Group on Environmental law defines the concept as embracing 'the preservation, maintenance, sustainable utilization, restoration and enhancement of a natural resource or the environment'.³⁷ Conservation is based on scientific and economic assumptions through an anthropocentric view, whereas animal welfare law follows a more biocentric view and is concerned about the humane treatment of animals or the prevention of unnecessary pain of individual animals.³⁸ A holistic

³³ Scholtz W 'Trading Rhinoceros Horn for the sake of Conservation: Dehorning the Dilemma through a Legal Analysis of the Emergence of Animal Welfare' (2019) in Scholtz W (ed) *Animal Welfare and International Environmental Law From Conservation to Compassion* 253.

³⁴ Bilchitz D (2017) 748.

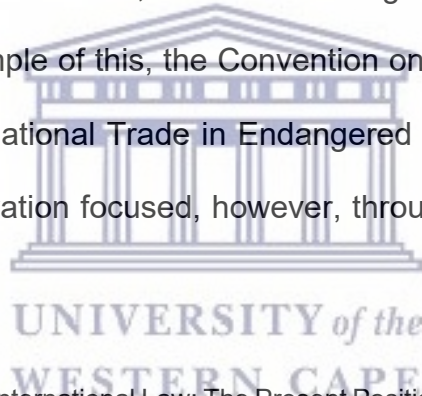
³⁵ Scholtz W (2019) 247

³⁶ Scholtz W (2019) 253.

³⁷ Scholtz W (2019) 256. No universal definition of conservation exists.

³⁸ Harrop S 'From Cartel to Conservation and on to Compassion: Animal Welfare and the International Whaling Commission' (2003) 6 *Journal of International Wildlife Law and Policy* 80.

approach is used in conservation as it relates to species.³⁹ The conservationist seeks to preserve species that may become extinct as a result of anthropocentric activities.⁴⁰ The conservation agenda is not concerned with the welfare of individual beings, for example the harmful effect that invasive animals have on the status of endangered species.⁴¹ The welfare agenda seeks to reduce the suffering of individual wildlife irrespective of their conservation status or benefit to humans.⁴² Conservation and welfare will only walk the same road where cruelty is being inflicted upon a species whose population is being minimised below the critical mass for survival.⁴³ It is submitted that no wildlife welfare legislation exists.⁴⁴ In some instances, conservation legislation will include incidental welfare provisions.⁴⁵ An example of this, the Convention on Biological Diversity (CBD)⁴⁶ and the Convention on International Trade in Endangered Species of Flora and Fauna (CITES)⁴⁷ are mainly conservation focused, however, throughout these instruments are



³⁹ Scholtz W (2019) 257.

⁴⁰ Harrop S (2003) 81.

⁴¹ Harrop S 'Wild Animal Welfare in International Law: The Present Position and the Scope for Development' (2013) 4 *Global Policy* 382.

⁴² Harrop S (2003) 81.

⁴³ Harrop S (2003) 82.

⁴⁴ Various authors have criticised the absence of a wildlife welfare normative framework and advocated for the need for welfare protection measures for individual animals. See White S 'Into the Void: International Law and the Protection of Animal Welfare' (2013) 4 *Global Policy* 391. Sykes K 'Nations Like unto Yourselves: An Inquiry into the Status of General Principle of International Law on Animal Welfare' (2011) 49 *Canadian Yearbook of International Law* 3-50. Adam R and Schaffner J 'International Law and Wildlife Well-Being: Moving from Theory to Action' (2017) 20 *International Wildlife Law and Policy* 1-17. Futhazar G 'Biodiversity, Species Protection, and Animal Welfare under International Law' in Peters A *Global Animal Law* ed (2020) Springer 1-12.

⁴⁵ Scholtz W (2019) 253.

⁴⁶ Convention on Biological Diversity, 1760 UNTS 79 (adopted 5 June 1992, entered into force 19 December 1993).

⁴⁷ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, DC (United States (US)), 3 Mar.1973, in force 1 July 1975, available at <https://www.cites.org/sites/default/files/eng/disc/CITES-Convention-EN.pdf> (accessed 12 March 2020). Welfare provisions are incidental or accidental to conservation measures, for example, the transport of wild animals.

provisions of a welfare nature.⁴⁸ Thus, international biodiversity law perpetuates a distinction between welfare and conservation. Interestingly, the CBD and the Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention)⁴⁹ acknowledges the intrinsic value of biological diversity and wild flora and fauna in their respective preambles. This suggests a move away from the anthropocentric instrumental valuation of biological resources.⁵⁰ An assertion is made that the intrinsic value of sentient beings means that 'any sound ethical policy should additionally have regard to the extent to which individual organisms are permitted to flourish in accordance with their biological nature'.⁵¹ What this suggests is that biodiversity law should not only provide for conservation but also include the welfare of individual animals.⁵²

In South Africa, the dichotomy between welfare and conservation is illustrated in *SA Predator Breeders Association v Minister of Environmental Affairs and Tourism*.⁵³ The court dealt with validity of certain provisions of the Threatened and Protected Species Regulations (TOPS) published under National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA)⁵⁴ which wanted to restrict the practice of canned lion hunting. For the purpose of this study, it is not necessary to discuss this case in detail. The aim is merely to point out the old position of the court in relation to animal welfare. The court

⁴⁸ The welfare provisions include: Art VII(3), III(2)(c), III(4)(b), IV(5)(b), IV(6)(b), IV(2)(b), VII(7)(c).

⁴⁹ Adopted 19 September 1979; in force 1 June 1982.

⁵⁰ Scholtz W (2019) 253.

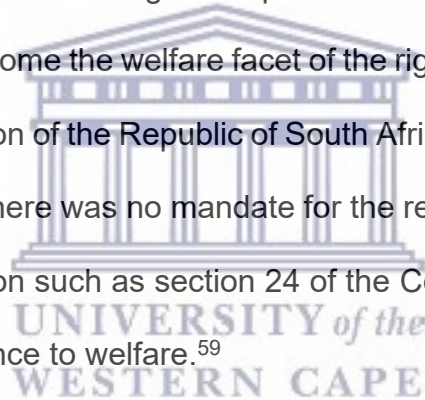
⁵¹ Bowman M, Davies P and Redgwell C *Lyster's International Wildlife Law* 2 ed (2010) 672.

⁵² Scholtz W (2019) 254.

⁵³ 2011 (2) ALL SA 529 (SCA) (SA Predator Breeders case).

⁵⁴ National Environmental Management: Biodiversity Act 10 of 2004: Threatened or Protected Species Regulations GN R152 GG 29657 of 23 February 2007.

remarked, 'it is by no means clear to me how either ethical hunting (whatever its limits may be) and fair chase fit into a legislative structure which is designed to promote and conserve biodiversity in the wild, and more especially in relation to captive-bred predators that are not bred or intended for release into the wild'.⁵⁵ This indicates that the court struggled to connect the collective environmental notions such as biodiversity, conservation and survival of a species to the normative basis for regulating a practice such as canned hunting.⁵⁶ The court also stated that 'the Minister was entitled to take account of the strong opposition and even revulsion expressed by a substantial body of public opinion (welfare) to the hunting of captive-bred lions.'⁵⁷ This case laid the foundation for what would become the welfare facet of the right to an environment contained in Section 24 of the Constitution of the Republic of South Africa, 1996 (the Constitution).⁵⁸ This case made it clear that there was no mandate for the regulation of animal welfare in terms of biodiversity legislation such as section 24 of the Constitution. Section 24 of the Constitution makes no reference to welfare.⁵⁹



The South African Constitution is the supreme law of the Country.⁶⁰ Thus, all laws have to be in line with the Constitution. Section 7 of the Constitution reinforces the importance

⁵⁵ *SA Predator Breeders* para 37.

⁵⁶ *Bilchitz D* (2017) 774.

⁵⁷ *SA Predator Breeders* para 44.

⁵⁸ 'Everyone has the rights (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic development.'

⁵⁹ Chapter 3 at 3.4.1.1

⁶⁰ Section 2 of the Constitution.

of a right protected by the Constitution.⁶¹ The environmental right in Section 24 is anthropocentric in nature.⁶² It is generally accepted that people are the focus of environmental protection and governance efforts.⁶³ This view has changed in several profound judgments (described below) which represent a radical paradigm shift, which is not only of domestic interest. In addition, it might have a significant impact on a decision to cull individual animals such as the Chacma Baboons. These judgments are applauded for opening the doors to interpreting environment legislation in a welfare-centric manner in disputes concerning conservation.⁶⁴ These judgments are important because they deal with the recognition of the intrinsic value and welfare of wildlife in the interpretation of section 24 of the Constitution. In the *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*,⁶⁵ the question before the Constitutional Court (CC) whether the applicant National Society for the Prevention of Cruelty to Animals (NSPCA) is entitled to privately prosecute crimes of animal cruelty in relation with its mandate. What is relevant to this study is that the court recognise the intrinsic value and animal welfare of individual animal.⁶⁶ Importantly, this case connects welfare and conservation, which suggest that conservation measures must take

⁶¹ '(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the right of all people in our country and affirms the democratic values of human dignity, equality and freedom. (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights. (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.'

⁶² Murcott M 'Transformative Environmental Constitutionalism's Response to the Setting Aside of South Africa's Moratorium on Rhino Horn Trade' (2017) 6 *Humanities* 4. Also see Kotze LJ 'The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection' (2007) 17(3) *Review of European, Comparative & International Environmental Law* 300.

⁶³ Kotze LJ (2007) 300.

⁶⁴ Scholtz W (2019) 262.

⁶⁵ 2017 (4) BCLR 517 (CC) (NSPCA case).

⁶⁶ Chapter 4 at 4.2.

cognisance of the welfare of individual animals.⁶⁷ In the *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs*,⁶⁸ the court dealt with the process by which South Africa sets annual export quotas for trade in lion bone, bone pieces, bone products, claws skeletons, skulls and the like for commercial purposes which are derived from captive breeding operations in Africa.⁶⁹ What is relevant to this study about the case is that the Court directly links the treatment of lions in captivity (in particular the welfare facet) and its relationship with the commercial activities that arise from the operations of lion breeders (export of lion bone) to the right to an environment in section 24 of the Constitution.⁷⁰

Interestingly, the courts linked animal welfare to section 24(b). Section 24(b) embodies the notion of sustainable development as it states that everyone has the right to have the environment protected 'for the benefit of present and future generations, through reasonable and other measures'.⁷¹ The National Environmental Management Act (NEMA)⁷² is South Africa's pioneering framework legislation which gives effect to the constitutional mandate in Section 24. NEMA's goal is to promote sustainable development. Section 2(2) of NEMA which determines that 'environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably' is described as

⁶⁷ Scholtz W (2019) 255.

⁶⁸ [2019] ZAGPPHC 337; 2020 (1) SA 249 (GP) (Lion Bone case).

⁶⁹ Lion Bone case Para 1.

⁷⁰ Lion Bone case Para 41. Chapter 4 at 4.3.

⁷¹ S24(b) of the Constitution.

⁷² 107 of 1998.

following an anthropocentric approach.⁷³ The anthropocentric approach has been criticized for ignoring the rights of nature and animals.⁷⁴ Also important, is the national environmental management principles⁷⁵ because they ‘serve as guidelines by reference to which any organ of state must exercise any function taking any decision in terms of this act or any statutory provision concerning the protection of the environment’.⁷⁶ Thus, this research argues the acknowledgment of animal welfare, linked to section 24 which promotes sustainable development, gives rise to a diluted form of anthropocentrism.⁷⁷ As such sustainable development may not only be interpreted and implemented through an anthropocentric view, but recognise the welfare of individual animals in conservation mechanisms.

South African has a robust environmental regulatory framework based on section 24, biodiversity being one of the elements.⁷⁸ South African Biodiversity law consists of various legislation and policies.⁷⁹ Nationally the environment is governed by two departments:



⁷³ Scholtz W ‘The Anthropocentric approach to Sustainable Development in the National Environmental Management Act and the Constitution of South Africa’ (2005)1 *Tydskrif vir die Suid-Afrikaanse Reg* 69.

⁷⁴ Redgwell ‘Life, The Universe and Everything: A Critique of Anthropocentric Rights’ in Boyle and Anderson (ed) *Human Rights Approaches to Environmental Protection* (1996) 87.

⁷⁵ S2 of NEMA.

⁷⁶ S2(1)(c).

⁷⁷ Scholtz W (2005) 73 and Scholtz W (2019) 261.

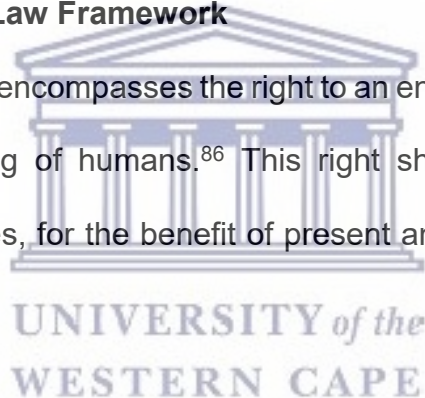
⁷⁸ The others elements being water (National Water Act 36 of 1998, Water Services Act 108 of 1997); waste (National Environmental Management Waste Act 59 of 2008); and air (National Environmental Management: Air Quality Act 39 of 2008).

⁷⁹ For the purpose of this research, the focus shall be limited to the following laws only, the Constitution; NEMA; NEMBA; TOPS and Norms and Standards for the Management of Elephants. There are various other pieces of legislation and policy relevant to biodiversity protection which are relevant but not discussed for the purposes of this research. See for example, DFFE ‘Draft Biodiversity Offset Guideline’ available at https://www.dffe.gov.za/mediarelease/creecy_nationalbiodiversity_offsetguidelinepublished (accessed on 17 December 2022) and DFFE ‘National Biodiversity Strategy and Action Plan’ available at https://www.dffe.gov.za/sites/default/files/docs/publications/SAsnationalbiodiversity_strategyandactionplan2015_2025.pdf (accessed on 17 December 2022).

Forestry, Fisheries and the Environment (DFFE)⁸⁰ and Agriculture, Land Reform and Rural Development (DALRRD).⁸¹ SANParks is a public entity under the jurisdiction of DFFE, responsible for managing national parks and protected areas.⁸² CapeNature is the government entity responsible for the Western Cape natural environment.⁸³ The City of Cape Town is an important body on the municipal level.⁸⁴ SANParks, CapeNature and City of Cape Town have statutory mandates that interconnect on the baboon issue, however their responsibilities relating the management of the baboons not exactly described.⁸⁵

1.1.2 National Biodiversity Law Framework

Section 24 of the Constitution encompasses the right to an environment that is not harmful to their health and well-being of humans.⁸⁶ This right should be protected, through legislative and other measures, for the benefit of present and future generations.⁸⁷ The



⁸⁰ NEMA is administered by DFFE.

⁸¹ DALRRD is responsible for the administration of the Animal Protection Act 71 of 1962 (APA). The Game Theft Act is administered by the Department of Justice and Constitutional Development.

⁸² The function of SANParks is in terms of section 55 of National Environmental Management: Protected Areas Act 57 of 2003 is to protect, conserve and control the national Parks and other protected areas assigned to it and to manage those areas in accordance with the Act. As such, SANParks is a public body performing a public function. The Act aims to provide a framework for the declarations and management of protected areas. Section 17 sets out the purpose of protected areas and these include 'preserve the ecological integrity of protected areas; protect areas representatives of all ecosystems, habitats and species naturally occurring in South Africa and sustainable use of natural and biological resources' and 'manage the interrelationship between natural environmental biodiversity, human settlement and economic development.'

⁸³ CapeNature is governed by the Western Cape Nature Conservation Board Act 15 of 1998. CapeNature 'About CapeNature' available at <https://www.capenature.co.za/about-us> (accessed on 5 December 2022).

⁸⁴ Schedules 4(B) and 5 (B) of the Constitution.

⁸⁵ Ayele Z 'Monkey Business: A Case Study of Roles and Responsibilities' available at <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-11-issue-4-october-2009/lgb-iss11-4-monkey-business.pdf> (accessed on 5 December 2022).

⁸⁶ S24(a) of Constitution.

⁸⁷ S24(b) of Constitution.

right does not provide for culling or mention animals and the protection of their interest. However, Section 24 is underpinned by the principle of sustainable development. NEMA was promulgated to give effect to section 24 in the Constitution. NEMA requires all specific environmental management Acts (SEMAs) must be developed in terms of this Act. NEMA focuses on providing co-operative governance by establishing principles for decision making on matters affecting the environment found in section 2. These principles are important as it must guide state organs in decision making concerning the environment, such as culling of wildlife. At the core of these principles is the attainment of sustainable development.

The NEMBA⁸⁸ is a SEMA created under the auspices of NEMA. The objectives of the Act are the management and conservation of biological diversity; the use of indigenous biological resources in a sustainable manner; and the fair and equitable sharing of involving indigenous biological resources.⁸⁹ The Act binds all organs of state in the national and local spheres of government and in the provincial sphere of government, subject to section 146 of the Constitution.⁹⁰ NEMBA is a conservation statute and contains no direct reference to welfare of animals.⁹¹

⁸⁸ 10 of 2004.

⁸⁹ S2 of NEMBA. The other objectives are: '(b) to give effect to ratified international agreements relating to biodiversity which are binding on the Republic; (c) to provide for co-operative governance in biodiversity management and conservation; and (d) to provide for a South African National Biodiversity Institute to assist in achieving the objectives of this Act'.

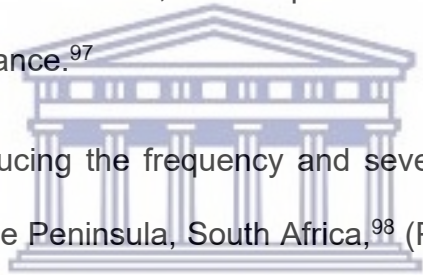
⁹⁰ S4(2) of NEMBA.

⁹¹ Centre for Environmental Rights 'Fair Game? Improving the Well-being of South African wildlife: Review of the Legal and Practical Regulations of the Welfare of Wildlife Animals in South Africa, 2018' available at <https://cer.org.za/wp-content/uploads/2018/06/CER-EWT-Regulation-of-Wildlife-Welfare-Report-25-June-2018.pdf> (accessed on 29 March 2020) 36.

1.1.3 Biodiversity Law Framework in the Western Cape

In 1975, the Cape Nature and Environmental Conservation Ordinance⁹² was promulgated and some provisions amended in the Western Cape Nature Conservation Laws Amendment Act.⁹³ The hunting of wild animals is regulated under this ordinance. The Chacma Baboon is considered to be 'protected wild animal'⁹⁴ in terms of CITES and not the Ordinance.⁹⁵ Therefore they are classified as protected wild animals. In a Report compiled by the Centre of Environmental Rights, CapeNature confirmed that it does not adhere to TOPS regulations, using solely the ordinance.⁹⁶ The Report mentions further, that there is a violation of NEMBA TOPS, it is not possible to assess the compliance by the department with the ordinance.⁹⁷

In 2010, the Protocol for reducing the frequency and severity of raiding behaviour by Chacma Baboons on the Cape Peninsula, South Africa,⁹⁸ (Protocol) was created by the



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⁹² This part of the study will only include the laws applicable to the Cape Peninsula. This ordinance is applicable in the Western Cape and Eastern Cape, namely The Cape Nature and Environmental Conservation Ordinance 19 of 1974 and the Western Cape Nature Conservation Laws Amendment Act 3 of 2000. The Cape Nature and Environmental Conservation Ordinance 19 of 1974 was first named Cape Nature Conservation Ordinance. This section also discusses the Protocol for Reducing the Frequency and Severity of Raiding Behaviour by Chacma Baboons on the Cape Peninsula, South Africa.

⁹³ 3 of 2000.

⁹⁴ Protected wild animal is defined as 'any species of wild animal specified in Schedule 2 or Appendix 11 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, provided that it shall not include any species of wild animal specified in such Appendix and Schedule 1.'

⁹⁵ CapeNature 'Position Statement With Regard To The Management Of "Problematic" Primates in Urban Areas Of The Western Cape' available at <https://www.capenature.co.za/wp-content/uploads/2019/07/CapeNature-Baboon-Memorandum.pdf> (accessed on 9 February 2020). See also Living with Baboons 'Legislation Protects Wild Animals from Harm and Exploitation' available <http://www.baboons.org.za/index.php/legislation/baboons-and-the-law#ordinance-19-of-1974> (accessed 28 January 2020).

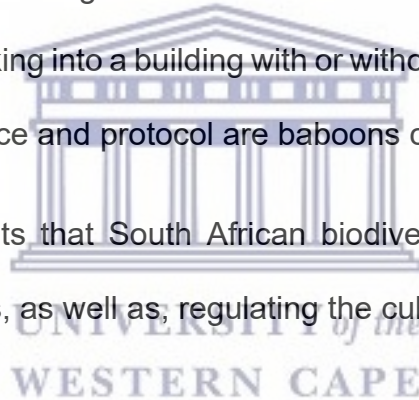
⁹⁶ Centre for Environmental Rights (2018) 57.

⁹⁷ Centre for Environmental Rights (2018) 57.

⁹⁸ This protocol was reviewed and approved in concept by a panel of local and internationally recognised experts in human wildlife conflict and Chacma Baboons' biology. The protocol was presented during a workshop hosted by the Baboon Research Unit at the University of Cape Town in July 2011, entitled:

Baboon Conservation Authorities (BCA), the three authorities⁹⁹ involved in baboon management on the Cape Peninsula. As part of the provincial authority's wildlife management programme, they have developed the Protocol to reduce the frequency and severity of raids by the baboons. The BCA created the protocol to address the management of individual raiding baboons in municipal areas on the Cape Peninsula. The protocol guides both long term management plans and short-term interventions to reduce the frequency and severity of raiding behaviour that is considered to be a threat to human health and safety and may result in damage to property.¹⁰⁰ Raiding baboons are defined as a baboon which forages on human-derived food by entering a property or car with people inside or breaking into a building with or without people or attacking people directly.¹⁰¹ Under this ordinance and protocol are baboons culled.¹⁰²

The above overview highlights that South African biodiversity law fails to provide for wildlife welfare considerations, as well as, regulating the culling practice in general or for



Pioneering Sustainable Solutions to Human-Baboon Conflict in the Cape Peninsula: Local Solutions for a Continental Problem.

⁹⁹ South African National Parks, City of Cape Town and CapeNature respectively.

¹⁰⁰ CapeNature 'Protocol for Reducing the Frequency and Severity of Raiding Behaviour by Chacma Baboons on the Cape Peninsula, South Africa' available at <https://www.capenature.co.za/wp-content/uploads/2013/11/Protocol-for-raiding-baboons.pdf> (accessed on 2 February 2020).

¹⁰¹ CapeNature 'Protocol for Reducing the Frequency and Severity of Raiding Behaviour by Chacma Baboons on the Cape Peninsula, South Africa' available at <https://www.capenature.co.za/wp-content/uploads/2013/11/Protocol-for-raiding-baboons.pdf> (accessed on 2 February 2020).

¹⁰² See Constantia Bulletin 'Another Baboon Put Down' available at <http://www.baboons.org.za/index.php/2015-04-02-12-21-19/media-archives/in-the-press/send/6-2014/13-21-february-constantia-bulletin-another-baboon-put-down> (accessed on 27 March 2020). Sunday Argus 'Time for second look at Baboon Control' available at <http://www.baboons.org.za/index.php/2015-04-02-12-21-19/media-archives/in-the-press/send/6-2014/7-3-august-2014-weekend-argus-time-for-second-look-at-baboon-control> (accessed on 27 March 2020). Cape Argus 'Farmers Criticised for Baboon Killings' available at <https://www.pressreader.com/south-africa/cape-argus/20180710/281526521816767/textview> (accessed on 27 March 2020). Also Keeton C 'Furore over Baboon culling' *The Herald* available at <https://www.pressreader.com/south-africa/the-herald-south-africa/20180710/281539406718469/textview> (accessed on 27 March 2020).

the Chacma baboons. Therefore, this leads this study to the aim of analysing the relationship between animal welfare, the culling practice and South African biodiversity law. As such, the main research question of this study is; to what extent does South Africa's Biodiversity legislation acknowledge animal welfare in the legally permitted culling of the Chacma Baboon as a means to address HWC?

In order to answer the legal question, and to ultimately determine whether animal welfare considerations are promoted in law, this research will draw from existing legal Norms and Standards in relation to the management of elephants. In South Africa, the overpopulation of elephants in national parks was addressed by culling.¹⁰³ The culling of elephants at Kruger National Park provoked a tremendous local and international outcry that a moratorium was imposed on this practice in 1995.¹⁰⁴ In 2004, the Kruger National Park again experienced the overpopulation of elephants. SANParks proposed the resumption of culling as a solution.¹⁰⁵ The elephants were endangering the existence of other animals in the park with their fast consumption and destruction of vegetation.¹⁰⁶ However, it became evident that scientists could not prove that elephants necessarily harmed biodiversity.¹⁰⁷ There was also evidence that culling was harmful to the elephants, causing trauma to them and nearby populations.¹⁰⁸ Thus, science could not support the

¹⁰³ Scholtz W 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity: Issues of Biodiversity and Custodial Sovereignty' (2005) 2(2) *Macquarie Journal of International and Comparative Environmental Law* 9.

¹⁰⁴ Bilchitz D 'Animal Interests and South African Law: The Elephant in the Room?' in Cao D & White D (ed) *Animal Law and Welfare- International Perspectives* 53 (2016) 148.

¹⁰⁵ Scholtz W (2005) 10. Bilchitz D (2016) 148.

¹⁰⁶ Scholtz W (2005) 9.

¹⁰⁷ Bilchitz D (2016) 149.

¹⁰⁸ Bilchitz D (2016) 149.

resumption of culling. Consequently, there was no rational basis upon which to do so without qualification.¹⁰⁹ In the process of debating about the resumption of culling, the Minister at the time promulgated the National Norms and Standards for the Management of Elephants in South Africa¹¹⁰ (Norms and Standards) which was adopted in terms of section 9¹¹¹ of NEMBA. The Norms and Standards provide guiding principles for the management of elephants.¹¹² This includes recognising that ‘elephants are intelligent, have strong family bonds, and operate within highly socialised groups and unnecessary disruption of these groups by human intervention should be minimised’.¹¹³ Culling is also provided for as a management tool however only as a last resort. The Norms and Standards are a significant example of legislation that acknowledge the need to protect individual elephants and at the same time ensure that people’s interest and other environmental concerns are also addressed.¹¹⁴ These Norms and Standards apply to elephants but it could be a useful tool to gain answers in respect of the Chacma Baboon. Importantly, these Norms and Standards can also serve to highlight how conservation statutes which include culling can incorporate welfare provisions.

¹⁰⁹ Bilchitz D (2016) 149.

¹¹⁰ GN 251 GG 30833 of 29 February 2008 (Norms and Standards).

¹¹¹ S9(1) of NEMBA ‘The minister may issue norms and standards for the achievement of any of the objectives of this Act, including for the- (i) management and conservation of South Africa’s Biological diversity and its components; (ii) restrictions of activities which impact on biodiversity and its components.’

¹¹² S3 of Norms and Standards.

¹¹³ S3(a) of Norms and Standards.

¹¹⁴ Bilchitz D (2017) 768.

1.2 Objectives of this study

This research analyses the role of animal welfare and culling in South African Biodiversity law. In doing so, it seeks to provide a brief background of HWC in relation to the baboons. Additionally, this paper also briefly discusses the use of lethal control on wildlife in general, from a welfare perspective. This research aims to answer to what extent does South Africa's Biodiversity legislation acknowledge animal welfare in the legally permitted culling of the Chacma Baboon as a means to address HWC. The aim of this research is also to analyse several progressive judgments for the recognition of animal welfare and the impact it has on culling in South African Biodiversity law.

1.3 Significance of Study

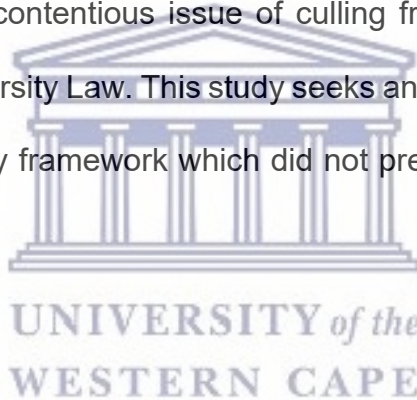
Culling is a highly contentious topic.¹¹⁵ Culling is employed in South Africa as a conservation mechanism to resolve HWC as in the case of the Chacma Baboons. Due to the anthropocentric nature of the regulatory system, animal topics are roofed under environmental law (biodiversity), animal welfare and human/ animal health, among others. The regulatory framework is largely outdated and does not reflect the changing circumstances, new thoughts and development. All the animal welfare laws were promulgated before the South Africa became a constitutional democracy. Hence there are few animal welfare laws. Nevertheless, there has been a rise in the advocacy that animals require precise and comprehensive recognition and protection in legislation.¹¹⁶

¹¹⁵ Hamman E, Woolastin K & Lewis B (2016) 57.

¹¹⁶ Wilson AP 'Animal Law in South Africa: 'Until the Lions have their own Lawyers, the Law will continue to Protect the Hunter'' (2019) 10(1) *Derecho Animal. Forum of Animal Law Studies*.

The current framework would allow the culling of the baboons as they are not listed as threatened or endangered species. Additionally, the framework does not protect 'vermin' which the baboons are categorise as.¹¹⁷

The Constitutional Court has explicitly confirmed that the section 24 includes animal welfare.¹¹⁸ The judgments are significant in elevating the standing of wildlife *vis a vis* human and is an important foundation in the fight for better protection and laws for all animals in the country. Hence, the question arises what are the implications of the recognition of animal welfare for wildlife. The significance of this study lies in its engagement to address the contentious issue of culling from a welfare perspective in terms of South African Biodiversity Law. This study seeks answers to the legality of culling of the baboons in a regulatory framework which did not previously acknowledge animal welfare.



1.4 Research question

To what extent does South Africa's Biodiversity legislation acknowledge animal welfare in the legally permitted culling of the Chacma Baboon as a means to address HWC?

1.5 Literature Review

In relation to the notions of conservation and welfare, Harrop states there is an epistemological gulf between nature conservation and animal welfare.¹¹⁹ He notes

¹¹⁷ *Macrae v State* (93/2013) [2014] ZASCA 37 (28 March 2014) Para 11, the court relied on its own research. Note the court determined this under Schedule 8 of the Nature Conservation Ordinance 12 of 1983 (Transvaal).

¹¹⁸ Discussed in Chapter 4.

¹¹⁹ Harrop S (2011) 1.

welfare components are non-existent in international wildlife management law and are subordinate to conservation objectives.¹²⁰ He goes further that welfare and conservation seek the same main goal 'to ensure that wild animals live in their natural habitats in natural conditions'.¹²¹ Scholtz on the other hand states the divide between welfare and conservation is not clear cut.¹²² Scholtz maintains that the convergence between conservation and welfare indicates a movement towards 'protection', a concept that is broader than conservation.¹²³ He also argues that conservation without welfare is overtly anthropocentric and cruel.¹²⁴

In relation to Section 24, De Wet and Du Plessis argue that the CC has not had sufficient opportunity to clarify the meaning of section 24.¹²⁵ Feris asserts, in turn, that the content and nature of Section 24 remains largely undefined.¹²⁶ She further explains the inclusion of Section 24 in the Constitution indicates an anthropocentric choice to environmental protection.¹²⁷ Kotze and Du Plessis argue that the environmental right must be interpreted in the context of intergenerational environmental protection and within the context of

¹²⁰ Harrop S (2011) 1.

¹²¹ Harrop S (2013) 382.

¹²² Scholtz W (2019) 257.

¹²³ Scholtz W (2017) 482.

¹²⁴ Scholtz W (2017) 483.

¹²⁵ De Wet E and Du Plessis A 'The Meaning of Certain Substantive Obligations Distilled from International Human Rights Instruments for Constitutional Environmental Rights in South Africa' (2010) 10(2) *African Human Rights Law Journal* 346.

¹²⁶ Feris L 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24(1) *South African Journal on Human Rights* 29.

¹²⁷ Feris L (2008) 49.

sustainable development.¹²⁸ The authors further state that constitutional environmental protection requires the balancing of different rights and interests.¹²⁹

Scholtz indicates that the above progressive judgments¹³⁰ represent a radical paradigm shift and may contribute to the recognition of animal welfare as a general principle of international law.¹³¹ He posits that South African biodiversity laws do not contain a direct consideration of animal welfare and that the law perpetuates the dichotomy between conservation and welfare. Scholtz further asserts that the remark of the courts that conservation and welfare reflect two intertwined values means that conservation measures may not ignore the issue of animal welfare.¹³² He states that the acknowledgement of the intrinsic value (animal welfare) of wildlife does not mean that all forms of pain and suffering (killing/culling) must be prevented in all instances.¹³³ It implies that wildlife cannot be used only as means to satisfy human needs. What the recognition of the intrinsic value of wildlife means is that the person who wants to cull an animal is obliged to offer a sufficient justification for the intrusion.¹³⁴ He also asserts that the recognition of animal welfare warrants an injection of an ethical component in the notion of sustainable development. In this vein, sustainable development may not be interpreted

¹²⁸ Kotze LJ and Du Plessis A 'Some Brief Observations on Fifteen years of Environmental Rights Jurisprudence in South Africa' (2010) 3(1) *Journal of Court Innovation* 171.

¹²⁹ Kotze LJ and Du Plessis A (2010) 171.

¹³⁰ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another (Corruption Watch as amicus curiae)* 2017 (4) BCLR 517 (CC) and *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others* (86515/2017) [2019] ZAGPPHC 337; 2020 (1) SA 249 (GP).

¹³¹ Scholtz W (2019) 256.

¹³² Scholtz W (2019) 259.

¹³³ Scholtz W (2019) 261.

¹³⁴ Scholtz W (2019) 261.

and implemented exclusively in favour of anthropocentric interest, but should recognise a concept of conservation that does not merely pursue humankind's interests, but also acknowledges the welfare of individual animals.¹³⁵ Thus, a balancing of the pillars of sustainable development is required.

According to Schaffer our current anthropocentric legal system is focused on conservation, viewing wildlife as resources for human use and preservation of species that the law does not adequately protect the well-being of individual wild animals. She states what is required is a paradigm shift towards a non-anthropocentric ethic.¹³⁶ This is where human interest does not automatically dominate over the interests of animals and where focus turns beyond managing wild animals as resources for human use but towards protecting individual wildlife. Furthermore, both 'conservation and protection of individual wild animal well-being resides in a nuanced understanding of the intrinsic value of various entities, including humans, wild animals, other life forms and the ecosystem, and accounting for their value in an unbiased, non-specialist manner'.¹³⁷ The recognition of the intrinsic value of wildlife that justifies their moral significance is key to creating this paradigm shift. She asserts further 'recognising the intrinsic value of wildlife would shift the burden to those who wish to harm a wild animal to justify their actions and would provide greater protection for wild animal well-being'.¹³⁸

¹³⁵ Scholtz W (2019) 261.

¹³⁶ Schaffer JE 'Value, Wild Animals and Law' in Scholtz W (ed) *Wildlife Law and International Environmental Law From Conservation to Compassion* (2019) 33.

¹³⁷ Schaffer JE (2019) 33.

¹³⁸ Schaffer JE (2019) 25.

Bilchitz states the integrative approach is a legal doctrine to be adopted towards interpreting the environmental right and consequently environmental legislation as this approach was approved by the CC. He defines the integrative approach as ‘the adoption of an attitude of respect for individual animals that make up a species, an ecosystem or the components of biodiversity’.¹³⁹ This approach also acknowledges the importance of relationships between individual animals, the location in which they live, plus their connection with human beings. ‘It insists that respect for individuals and their value is an essential component in ensuring the survival of the species as well as the protection of the environment more generally’.¹⁴⁰ Bilchitz asserts that conservation has been understood by using an aggregative approach – focusing on broad collective environmental goals such as the long-term survival of a species, the health of ecosystems or conserving biodiversity. He points out ‘how one can promote respect for the broad concept of a species surviving without respecting the individuals that make it up’. The aggregative view places little or no value on individual animals because it adopts a purely instrumental approach towards individual animals. He notes that the aggregative approach is self-defeating on its own terms: to achieve the very purposes and goals it sets itself. According to Bilchitz when conflict arises between individuals and collective goals, by using the integrative approach, animal interest will not be subordinated immediately to collective goals or the justifications underlying them (whether that be collective human utility or the interest of the environment as a whole). He is of the view,

¹³⁹ Bilchitz D (2017) 749.

¹⁴⁰ Bilchitz D (2017) 749.

what would be required is a method of reasoning that recognizes a conflict of interests and value and attempts to resolve them in the best way possible. He states that this is in line with the structure of section 24(b), because one of the key notions is the obligation upon the state to take 'reasonable legislative and other measures. Furthermore, the notion of reasonableness could be interpreted to require such a balancing approach in relation to the measures that are adopted. Bilchitz

Bilchitz and Wilson observe the regulation of wildlife is confusing, unclear and problematic given that the environment is regulated at both a national and provincial levels, which have concurrent authority.¹⁴¹ They note due to major flaws, vested interest and governmental failure the regulatory framework is inefficient at providing animals with any real protection.¹⁴²

The above scholars' have similar views on the legal implication of the recognition of the intrinsic value of wildlife. The courts do not explain to what extent conservation and welfare reflect two intertwined values or the legal implication on biodiversity law. This research seeks answers to this failure by the courts. The research discussion on animal welfare and the intrinsic value which will shed light on the contention's topic of culling wildlife, and provide insight into the legal implication and potential influence the recognition of animal welfare will have on biodiversity law in relation to the baboons and the attainment of sustainable development.

¹⁴¹ Bilchitz D and Wilson A 'Key Animal Law in South Africa' in *Routledge Handbook of Animal Welfare* 1 ed (2022) 433

¹⁴² Bilchitz D and Wilson A (2022) 434

1.6 Methodology

This research comprises a desktop literature review of primary and secondary sources of law. This method is also supported by literature from non-legal sources. In chapter 2, the research focuses on the background of HWC, culling and the notion of animal welfare. The culling of the Chacma Baboons in die Western Cape is used as an illustrative example of how law the permits culling as a means to address HWC without sufficient acknowledgement of the welfare of these animals. For this purpose, the study consults non-legal and legal sources such as newspaper articles, journal articles and books. This study only considers the ordinance that is applicable in the Western Cape. Chapters 3 and 4 draws from primary sources of law such as international instruments, the constitution and legislation, as well as, secondary legal sources such as journal articles, chapters in books, books related to animal welfare and biodiversity. Chapter 4 provide an analysis of recent case law and the impact of them on biodiversity law. This chapter draws from the Norms and Standards related to elephants to develop answers and an appropriate approach towards the culling of the Chacma Baboons. The sources utilised substantiate and strengthen the arguments posed in this study, and ultimately towards answering the research question. Chapter 5 provides the recommendations and conclusion regarding the extent South African Biodiversity legislation acknowledge animal welfare in the legally permitted culling of the Chacma Baboons as a means to address HWC. It is envisioned that this research method will enable the author to critically evaluate the potential impact of the recognition of animal welfare required for an effective

biodiversity framework as well as a change in the approach of the governmental bodies towards animals.

1.7 Proposed Chapter Outline

Chapter 1 provides an overview of the problem statement to the subject matter of this study. It provides background information for the study; the significance, objective, the research question thereof, as well as the literature review, hypothesis, research methodology and chapter outlines.

Chapter 2 provides a brief background of the concept of HWC, in particular, the conflict that exists between humans and the Chacma Baboons. This chapter also discusses the mechanism used to resolve the conflict, the culling of wildlife. Moreover, this chapter explains the animal welfare issues in respect of culling.

Chapter 3 provides a breakdown and analyses of the biodiversity legislation applicable to wildlife in the South African context. This comprises two parts: First, the international and regional legal framework is provided. As South Africa is bound by the international and regional law and policy it has signed and ratified. The second part comprises of the South African legal framework. The third part provides the weaknesses and strengthens of the framework.

Chapter 4 discusses the emergence of wildlife welfare as a consideration of the environmental right. This chapter analyses the impact of several progressive judgments on biodiversity law and the utilisation of culling on the Chacma Baboon.

Chapter 5 contains the conclusion and recommendations with regard to the impact the progressive judgments might have on the question posed at the beginning of the study.



CHAPTER 2: CULLING AS A HUMAN-WILDLIFE CONFLICT: ANIMAL WELFARE AND LEGAL CONSIDERATIONS

2.1 Introduction

HWC occurs around the world, particularly in developing countries such as Africa. It is a fundamental threat to the conservation of wildlife. Scholarly literature on the topic tends to focus on the economic and local elements associated with such conflict.¹⁴³ A report by the World Wildlife Fund asserts 'HWC is one of the most pervasive environmental problems of the current day, threatening both wildlife and some of the most impoverished human communities on earth. Managing HWC requires the harmonization of both environmental and human development goals, and is essential to secure a sustainable future for both people and wildlife.'¹⁴⁴

This chapter is structured into four sections. Section one provides a brief overview of the crisis of HWC. Section two discusses the use of lethal control on wildlife in general. It highlights that lethal control has serious implications for wildlife and the environment. Lastly, this chapter discusses the notion of animal welfare in section three. Culling of wildlife raises ethical issues in terms of the welfare perspective. Section four provides the overall conclusion for this analysis. This chapter moves from the position that lethal control (culling operation) is an anthropocentric approach towards HWC and has

¹⁴³ Digun-Aweto O and Van Der Merwe P 'Coping Strategies for Human-Wildlife Conflicts: A Case Study of Adjacent Communities to Nigeria's Cross River National Park' (2020) 23(2) *Journal of International Wildlife Law and Policy* 109-126. See also Fentaw T and Duba J 'Human-Wildlife Conflict among the Pastoral Communities of Southern Rangelands of Ethiopia: The Case of Yabello Protected Area' (2017) 20(2) *Journal of International Wildlife Law and Policy* 198-206.

¹⁴⁴ WWF *Common Ground: Solutions for Reducing the Human, Economic and Conservation Costs of Human Wildlife Conflict* (2008) 14.

significant shortcomings from a welfare standpoint. Despite this, lethal control is still regarded as having a legitimate role in the conservation of wildlife. This chapter further posits that the broad consequences lethal control calls for a reduction of culling wildlife.

2.2 Human-Wildlife Conflict: The Chacma Baboon

The conflict between humans and baboons in the Cape Peninsula dates back to the 15th century with the arrival of Dutch settlers in South Africa.¹⁴⁵ To date, almost half of the province has been transformed, *inter alia*, through urbanisation and farming.¹⁴⁶ As a result of the anthropogenic transformation of the natural environment, the baboon population is now a geographically remote population.¹⁴⁷ The baboons have survived in the fragmented province is due to them having retained access to natural habitat under the protection of Table Mountain National Park (TMNP).¹⁴⁸ However, most of the troops of baboons are found outside of the TMNP borders and are in close proximity to human areas. As a consequence of their limitation to natural food sources and decreased and fragmented habitat, the baboons frequently cause damage to property, raid human food resources and are exposed to injury and death.¹⁴⁹

¹⁴⁵ Hoffman T *The Spatial Ecology of Chacma Baboons (Papio ursinus) in the Cape Peninsula, South Africa: Towards Improved Management and Conservation Strategies* (unpublished Ph.D thesis, Cape Town University, 2011) 4.

¹⁴⁶ Hoffman T (2011) 4.

¹⁴⁷ Hoffman T (2011) 4.

¹⁴⁸ Hoffman T (2011) 4. There is limited information to date about the Cape Peninsula population. The Cape of Good Hope area of TMNP is home to five of the 16 troops consisting of approximately 460 chacma baboons. The other 11 troops are found in a variety of natural, urban and agricultural areas.

¹⁴⁹ Terblanche R *Good Fences Make Good Neighbours: A Qualitative, Interpretive Study of Human-Baboon and Human-Human Conflict on the Cape Peninsula* (unpublished MA thesis, Stellenbosch University, 2015) 5.

Prior to 1998, culling was a common practice for baboon population management in the Cape Peninsula.¹⁵⁰ Culling was deemed necessary, in order to regulate and control wildlife populations in an enclosed area.¹⁵¹ As local residents encountered problems with the baboons, conservation authorities of the Cape Peninsula removed whole troops of baboons from Kommetjie, Kalk Bay and Chapman's Peak areas to reduce baboon-human conflicts.¹⁵² In 1990, the culling of the whole Kommetjie troop, led to public outcry and to the establishment of the nongovernmental organisation, Kommetjie Environmental Awareness Group (KEAG).¹⁵³ In 1998, the Cape Peninsula baboons were the first to be granted protected status under the Cape Nature Conservation and Environmental Ordinance 19 of 1974.¹⁵⁴ This led to them becoming the only protected, free-roaming baboon troops outside of national park borders.

In the 2000s, the conflict intensified as the baboons increasingly entered domesticated areas.¹⁵⁵ Over the years different strategies were implemented in order to minimise the conflict, amongst others, deterrents, installing of baboon-proof bins, educational and awareness-raising materials to the public, installing electrified fencing and baboon

¹⁵⁰ CapeNature 'Protocol for Reducing the Frequency and Severity of Raiding Behaviour by Chacma Baboons on the Cape Peninsula, South Africa' available <http://www.capenature.co.za/wp-content/uploads/2013/11/Protocol-for-raiding-baboons.pdf> (accessed 25 January 2020) 7.

¹⁵¹ Terblanche R (2015) 6.

¹⁵² CapeNature 'Protocol for Reducing the Frequency and Severity of Raiding Behaviour by Chacma Baboons on the Cape Peninsula, South Africa' available <http://www.capenature.co.za/wp-content/uploads/2013/11/Protocol-for-raiding-baboons.pdf> (accessed 25 January 2020) 7.

¹⁵³ Terblanche R (2015) 6. See also Koutstaal K "Blurred Lines" *How Different Views on Baboon Agency Shape the Conservation Policy Making Dialogue in the Cape Town, South Africa* (unpublished MA thesis, Leiden University, 2013) 40.

¹⁵⁴ Cape Nature Conservation and Environmental Ordinance 19 of 1974, date of commencement 1 September 1975.

¹⁵⁵ Terblanche R (2015) 15.

monitors.¹⁵⁶ To control and manage baboons is extremely difficult because of their ability to seize opportunities and due to their adaptability to various ecosystems, particularly those baboons that have lost their fear of people and the urban areas they find themselves in.¹⁵⁷ In recent years the conservation authorities have been accused of culling individual baboons under the auspices of the Protocol for Reducing the Frequency and Severity of Raiding Behaviour by Chacma Baboons on the Cape Peninsula, South Africa.¹⁵⁸ In 2017, the conservation authorities granted permits for the culling of baboons to two farmers in the Constantia Valley¹⁵⁹ which resulted in seven baboons being culled. The granting of those permits lead to another public outcry.

From the human viewpoint, HWC generally results in negative impacts, in terms of property, livelihoods and lives of humans. However, in the context of HWC interactions no term exists that describes the positive interactions between human beings and wildlife.¹⁶⁰ This gap highlights that the term HWC is one sided as it only sees the negative impacts that wildlife has on human interest and does not consider the effect of anthropogenic activities on wildlife.¹⁶¹ In some cases, the conservation of a species may

¹⁵⁶ Terblanche R (2015) 7. Hoffman T (2011) 5.

¹⁵⁷ Terblanche R (2015) 18.

¹⁵⁸ Yield J 'Stop Baboon Killings, urge Conservationists' *Cape Argus* 5 September 2012 available at <https://www.iol.co.za/news/stop-baboon-killings-urge-conservationists-1376275> (accessed on 13 July 2020).

¹⁵⁹ Dano Z 'Farmers Criticised for Baboon Killings' *Cape Argus* 10 July 2018 available at <https://www.pressreader.com/south-africa/cape-argus/20180710/281526521816767/textview> (accessed on 13 July 2020). See also Keeton C 'Furore Over Baboon Culling' *The Herald* 10 July 2018 available at <https://www.pressreader.com/south-africa/the-herald-south-africa/20180710/281539406718469> (accessed on 13 July 2020).

¹⁶⁰ Digun-Aweto O and Van Der Merwe P 'Coping Strategies for Human-Wildlife Conflicts: A Case Study of Adjacent Communities to Nigeria's Cross River National Park' (2020) 23(2) *Journal of International Wildlife Law and Policy* 110.

¹⁶¹ Digun-Aweto O and Van Der Merwe P (2020) 110.

be so effective that it leads to overpopulation of a specific species.¹⁶² As a result, might negatively affect the existence of other species.¹⁶³

In addition to the challenges described above, it is also worth noting that climate change will exacerbate the HWC in the Cape Peninsula as it will 'alter the location and nature of the geographical environment'.¹⁶⁴ Therefore, as a way of adapting the animals will likely be forced to migrate to other areas in search of new homes.¹⁶⁵ The conflict, exacerbated by climate change, is a fundamental threat to the survival of many species, particularly large and endangered wild animals.

2.3 The Use of Lethal Control

Various factors play a role in developing a response to HWC. The way humans perceive risks by wildlife are influenced by social, cultural perceptions, values and history.¹⁶⁶ Humans have preconceived ideas about wildlife which are shaped by their life experiences, such as culture.¹⁶⁷ Madden notes the level of public outcry is entirely disproportionate to the damage suffered, and often more to do with perceptions of potential risk and lack of control over addressing the problem.¹⁶⁸ In a similar vein, Dickman states that '[R]esponse to conflict appears disproportionate, and even a small level of

¹⁶² Scholtz W (2005) 9.

¹⁶³ Scholtz W (2005) 9.

¹⁶⁴ WWF (2008) 5.

¹⁶⁵ WWF (2008) 5.

¹⁶⁶ Dickman AJ 'Complexities of Conflict: The Importance of Considering Social Factors for Effectively Resolving Human-Wildlife Conflict' (2010)13 *Animal Conservation* 459. Madden FM (2008) 191.

¹⁶⁷ Hamman et al (2016) 63.

¹⁶⁸ Madden FM 'Creating Coexistence Between Humans and Wildlife: Global Perspectives on Local Efforts to Address Human-Wildlife Conflict' (2004) *Human Dimensions of Wildlife* 250.

wildlife damage can still elicit harsh responses'.¹⁶⁹ Therefore decisions are not made on rational grounds in respect of the conflict.¹⁷⁰ Hamman *et al* assert that an understanding of people's culture and perceptions are important in developing 'effective strategies for decision-making' in order to respond to conflict. Moreover, 'decision-makers must simultaneously walk a delicate line between cultural sensitivity and scientific rationalism.'¹⁷¹

The damage to human interests has visible and hidden impacts.¹⁷² This leads humans to make irrational and emotional decisions in HWC scenarios.¹⁷³ They tend to respond with lethal control. Over the years humans have used several techniques to protect their interests.¹⁷⁴ The cheapest and practical mechanism at the time was killing the animal.¹⁷⁵ Traditionally, the mission of conservation authorities was not to protect wildlife but to kill all wild animals that threatened human safety or agricultural development.¹⁷⁶ As Treves and Naughton-Treves note, 'formal and informal lethal control programmes have driven to the decline and even the extinction of several wildlife species'.¹⁷⁷ Generally, activities

¹⁶⁹ Dickman AJ (2010) 461.

¹⁷⁰ Hamman et al (2016) 62. For example, in Zanzibar the government ordered an eradication program of the Zanzibar leopard. The decision was based on the beliefs of people that witches exercised magical control over the leopards to harass and intimidate citizens. As a result, the Zanzibar leopards is believed to be extinct.

¹⁷¹ Hamman et al (2016) 66.

¹⁷² Barua M, Bhagwat SA & Jadhav S 'The Hidden Dimensions of Human-Wildlife Conflict: Health Impacts, Opportunity and Transaction Costs' (2013) 157 *Biological Conservation* 309-316.

¹⁷³ Hudenko HW 'Exploring the Influence of Emotion on Human Decision Making in Human-Wildlife Conflict' (2012) *Human Dimensions of Wildlife* 24.

¹⁷⁴ Treves A and Naughton-Treves L 'Evaluating Lethal Control in the Management of Human-Wildlife Conflict' in Woodroffe R, Thirgood S and Rabinowitz A *People and Wildlife: Conflict or Coexistence?* ed (2005) 86

¹⁷⁵ Treves A and Naughton-Treves L (2005) 86

¹⁷⁶ Treves A and Naughton-Treves L (2005) 86.

¹⁷⁷ Treves A and Naughton-Treves L (2005) 86.

in respect of animals such as animal research activities are required to be performed with the oversight from some kind of welfare committee, to ensure that animal use is ethically justifiable and compliant with legislation. However, this is not the case with conservation authorities that undertake culling operations. The activities are often regulated by procedural documents and often lack formal oversight from welfare committees or monitoring of the outcomes. Typically, no reporting is required by the conservation authorities on welfare issues. As a result, management operations that produce suboptimal animal welfare results learn nothing to guide refinement for programs in the future.¹⁷⁸

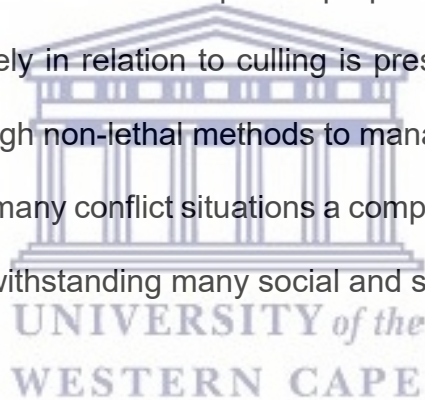
Depending on the context, lethal control can be interpreted into a broad and narrow meaning. The broad meaning encompasses those anthropogenic activities that incidentally diminish populations of wild animals for example habitat conversion and pollution.¹⁷⁹ This study focuses, however, on the narrow meaning which pertains to the deliberate measures to reduce or remove wildlife with the aim to protect the lives and livelihoods of humans.¹⁸⁰ The deliberate lethal control measures can be classified into

¹⁷⁸ Hampton JO and Hyndman TH 'Underaddressed Animal-Welfare Issues in Conservation' (2018) 33 *Conservation Biology* 804.

¹⁷⁹ Treves A and Naughton-Treves L (2005) 87.

¹⁸⁰ Treves A and Naughton-Treves L (2005) 88.

four groups: eradication measure;¹⁸¹ public hunts;¹⁸² selective removal;¹⁸³ and culling. The use of lethal control is aimed at fostering coexistence of people and wildlife. For this to happen, lethal control must reduce the impact of wildlife on people or raise public tolerance for damage without a significant reduction in the population of wildlife.¹⁸⁴ The culling measure which is the reduction of a population of problem wildlife in an area of anticipated conflict as it is believed that reducing the populations will reduce the HWC. In other words, the 'killing of wildlife in a specific area, prior to or in the absence of specific, recent complaints about wildlife'.¹⁸⁵ Culling which is sponsored by the state uses trained agents, while private persons can also cull on private property.¹⁸⁶ Moreover, the methods, actors and location respectively in relation to culling is prescribed.¹⁸⁷ There have been efforts to reduce conflict through non-lethal methods to manage wildlife, these efforts are continuing.¹⁸⁸ Regrettably, in many conflict situations a comprehensive resolution through non-lethal means is rare, notwithstanding many social and scientific efforts.¹⁸⁹



¹⁸¹ The eradication measure extirpate problem wildlife from entire regions by all means available. This measure may lead to the extinction on a local, regional and global level. The use of this measure is motivated by various factors, including economic benefits. See Treves A and Naughton-Treves L (2005) 88.

¹⁸² The public hunt measure includes regulations that prescribe the actors, timing, location and methods that must be used and limits on the number and type of animals that are allowed to be killed. Public hunts differ from culling as private citizens pay or volunteer to be able to kill wildlife. See Treves A and Naughton-Treves L (2005) 90.

¹⁸³ This measure includes the killing of a specific individual animal that has caused damage to property. Thus, less wildlife is killed compared to culling. This measure is usually used by governments to control problems associated with rare or endangered wildlife. See Treves A and Naughton-Treves L (2005) 90.

¹⁸⁴ Treves A and Naughton-Treves L (2005) 87.

¹⁸⁵ Treves A and Naughton-Treves L (2005) 88.

¹⁸⁶ Hamman E, Woolanstin K & Bridget L (2016) 67.

¹⁸⁷ Treves A and Naughton-Treves L (2005) 88.

¹⁸⁸ Hamman E, Woolanstin K & Bridget L (2016) 67.

¹⁸⁹ Dickman AJ (2010) 459.

The South Africa conservation system began during the colonial and apartheid periods and reflects the authoritarian norms.¹⁹⁰ Culling is therefore grounded in these medians of control and in anthropocentric resourcism.¹⁹¹ Treves and Naughton-Treves state the main justification for the use of lethal control is conflict prevention and the underlying assumption is that when wild animals are removed the conflict will decline.¹⁹² The authors state the eradication measures can reduce conflict, however might have unpredictable consequences.¹⁹³ They note the effectiveness of the other measures is not clear and need further investigation.¹⁹⁴ The removal of wildlife only achieves a temporary reduction in conflict as other wildlife only replace the previous problem wildlife.¹⁹⁵ The authors share that during lethal control operations innocent animals are killed.¹⁹⁶ In relation to the impact of lethal control, the authors are of the view that the eradication measure will cause local extinction on a wildlife population. On the other hand, culling and the other measures are assumed to have a less drastic impact on a population.¹⁹⁷ Culling enables the conservationist to have control over the numbers of wildlife to be culled. Moreover, the authors states “with good management and careful balancing of human and wildlife

¹⁹⁰ Koutstaal K “*Blurred Lines*” *How Different Views on Baboon Agency Shape the Conservation Policy Making Dialogue in the Cape Town, South Africa* (unpublished MA thesis, Leiden University, 2013) 22.

¹⁹¹ ‘Animal Rights Africa Briefing Document on Elephant Management to Environment and Tourism Parliamentary Portfolio Committee; available at https://static.pmg.org.za/docs/2007/070911ara.htm#_Toc177185347 (accessed on 12 June 2021).

¹⁹² Treves A and Naughton-Treves L (2005) 90.

¹⁹³ Treves A and Naughton-Treves L (2005) 91.

¹⁹⁴ Treves A and Naughton-Treves L (2005) 91.

¹⁹⁵ Treves A and Naughton-Treves L (2005) 91.

¹⁹⁶ Treves A and Naughton-Treves L (2005) 96.

¹⁹⁷ Treves A and Naughton-Treves L (2005) 98.

interest culling can reduce wildlife populations in conflict areas without resulting in a regional extinction”.¹⁹⁸

Public sentiments around the world support the increase in the protection of biodiversity. For example, in a United States poll on policies in Botswana 78% percent of respondents did not support the culling practice.¹⁹⁹ This indicate that culling of wildlife should be approached differently from other management interventions.

Despite the above, the authors remain of the view that lethal control has a legitimate role in the conservation of wildlife.²⁰⁰ Their reasons are the following; first, if lethal control is managed well, it has the potential to reduce threat to human lives and interest, without entailing the extinction of a species.²⁰¹ Second, the removal of problem-animals may calm locals and deter them from taking the law into their own hands (illegal killing of wildlife).²⁰² If the removal of the animal benefits the local people it may lead to the local people supporting conservation efforts. Lastly, the killing of some problem animals may select for conspecifics that avoid humans and their interests, which exert directional selection for a wilder population of that species.²⁰³ Indeed, the authors warn that lethal control must

¹⁹⁸ Treves A and Naughton-Treves L (2005) 98.

¹⁹⁹ Humane Society International 'U.S Poll Shows Strong Support for Protecting Elephants and Keeping Trophy Hunting Ban in Botswana' available at <https://www.hsi.org/news-media/u-s-poll-shows-strong-support-for-protecting-elephants-and-keeping-trophy-hunting-ban-in-botswana/> (accessed on 13 December 2022).

²⁰⁰ Treves A and Naughton-Treves L (2005) 87.

²⁰¹ Treves A and Naughton-Treves L (2005) 87.

²⁰² Treves A and Naughton-Treves L (2005) 87.

²⁰³ Treves A and Naughton-Treves L (2005) 87.

be undertaken with care, given the technical challenges as well as political and moral issues concerning such a decision.²⁰⁴

This research strongly disagrees with the assertions of the above-mentioned authors regarding their statements that the use of lethal control is necessary to resolve conflict. Culling poses inherent risks to animal welfare.²⁰⁵ Indeed, the intended animals of the operation are killed or adversely affected and innocent animals may also be exposed to the mechanism. The use of lethal control to resolve HWC can have serious effects on wildlife and the ecosystem as a whole.²⁰⁶ Animals that interact with the intended animals may be affected by the impacts of lethal control.²⁰⁷ Lethal control has led to the extinction of several species.²⁰⁸ Lethal control can collapse the distribution of a species in an area²⁰⁹ and can lead to a decline in the local population of wildlife.²¹⁰ One example includes a study relating to the impact of lethal control on elephant populations in Botswana.²¹¹ It was noted by the authors that the 'problem animal control' measure used on the elephants is as serious a threat to the populations as ivory poaching.²¹² Moreover, the movement of

²⁰⁴ Treves A and Naughton-Treves L (2005) 87.

²⁰⁵ Bilchitz D 'Making Democracy Work: The Impact of the Constitutions upon the 'Management' of Elephants in Post-apartheid South Africa' (2004) available at http://www.sanparks.org/docs/events/elephants/2004-10-17_DB_Paper_Elephant_Indaba.pdf (accessed on 4 July 2021), para 4(a).

²⁰⁶ Woodroffe R, Thirgood S and Rabinowitz A 'The Impact of Human-Wildlife Conflict on Natural Systems' in Woodroffe R, Thirgood S and Rabinowitz A *People and Wildlife: Conflict or Coexistence?* ed (2005) 10.

²⁰⁷ Littin K, Fisher P, Beausoleil NJ and Sharp T 'Welfare Aspects of Vertebrate Pest Control and Culling: Ranking Control Techniques for Humaneness' (2014) 33(1) *Rev. Sci. Tech. Off. Int. Epiz* 282.

²⁰⁸ Woodroffe R et al (2005) 3.

²⁰⁹ Woodroffe R et al (2005) 4.

²¹⁰ Woodroffe R et al (2005) 7.

²¹¹ See Woodroffe R et al (2005) 7.

²¹² In Botswana between 1989 -1996, 230 elephant deaths are as result of problem animal control while 259 were poached. Woodroffe R et al (2005) 7.

wildlife is how populations connect with one another, therefore the use of lethal control on a local population can impact a population in a different area.²¹³ Lethal control also negatively impacts on the social structure and behaviour of a population which can lead to a decline in a population. Making it difficult for a population to hunt, raise their young or defend themselves against attacks from stronger animals.²¹⁴ Moreover, lethal control can affect an ecosystem as a whole as well as drive to habitat destruction, especially when the species is a keystone species.²¹⁵

2.4 The Notion of Animal Welfare

In the nineteenth century, animal welfare theory emerged through the work of utilitarian philosophers Jeremy Bentham and John Stuart Mill.²¹⁶ In this early stage of the research, it was asserted that welfare hold the view that animal life has a lesser value than human life. As such, it is morally acceptable to use and exploit nonhuman animals as resources; as long as the animals are treated humanely and that unnecessary suffering is not inflicted on them by humans.²¹⁷ In 1965, the five freedoms of animal welfare were developed in the period of Ruth Harrison's famous *Animal Machines*.²¹⁸ In 1979 the five freedoms was officially endorsed in Europe and North America and formed the basis of welfare assessment of animals under the control of humans.²¹⁹ Thereafter the World Organisation

²¹³ Woodroffe R et al (2005) 8.

²¹⁴ Woodroffe R et al (2005) 9.

²¹⁵ Woodroffe R et al (2005) 10-11.

²¹⁶ Francione G.L 'Animal Welfare and the Moral Value of Nonhuman Animals' (2010) 6(1) *Law, Culture and the Humanities* 26.

²¹⁷ Francione G.L (2010) 24.

²¹⁸ Harrison R *Animal Machines: The New Factory Farming Industry* (1964) London: Vincent Stuart Ltd.

²¹⁹ Centre for Environmental Rights (2018) 9.

for Animal Health (OIE) adopted a standard definition of animal welfare which states ‘the physical and mental state of an animal in relation to the conditions in which it lives and dies’.²²⁰ This definition of animal welfare also includes the five freedoms. These five freedoms are:

- they are freedoms from hunger and thirst;
- discomfort; pain, injury or disease;
- fear and distress;
- and express natural behaviour.²²¹

More recently, there has been a shift away from the five freedoms towards the five domains which consist of nutrition, environment, health and behaviour.²²² Animal welfare is concerned with ethical assumptions which are our moral duties to prevent suffering to animals.²²³ In other words, to prevent the suffering that is inflicted by humans irrespective of the animal conservation status and benefit of such actions to human beings.²²⁴ The welfare movement allows some exploitation of animals as necessary but would advocate that welfare standards be increased to be consistent with the evolution of social acceptability of animal practices and scientific advances.²²⁵ Animal welfare proponents

²²⁰ World Organisation for Animal Health ‘Animal Welfare’ available at <https://www.oie.int/en/what-we-do/animal-health-and-welfare/animal-welfare/> (accessed 19 July 2021).

²²¹ World Organisation for Animal Health ‘Animal Welfare’ available at <https://www.oie.int/en/what-we-do/animal-health-and-welfare/animal-welfare/> (accessed 19 July 2021).

²²² World Animal Protection ‘Five Domains vs. Five Freedoms of Animal Welfare’ available at <https://www.worldanimalprotection.us/blogs/five-domains-vs-five-freedoms-animal-welfare> (accessed on 17 January 2022). See also Mellor DJ ‘Updating Animal Welfare Thinking: Moving Beyond the “Five Freedoms towards “A Life Worth Living”’ (2016) 6(3) *Animals* 1-20.

²²³ Harrop SR (2003) 80.

²²⁴ Harrop SR (2003) 81.

²²⁵ Harrop SR (2011) 5.

strongly hold that humans are obligated to treat nonhuman animals with respect and care.²²⁶ This means that humans have an obligation to ensure that wildlife have an environment in which they can flourish, as well as, not to hurt or harm them.²²⁷ In terms of a welfare perspective, humans are morally superior to animals and regard animals as property.²²⁸ Animals may therefore be exploited and used to advance and develop human interests in terms of which 'humane' treatment of animals only extends to mitigate animal suffering.²²⁹ Therefore the welfare approach requires a balancing process which weighs the interest of humans against those of animals, in order to determine whether the pain and suffering caused by humans to animals are justified.²³⁰

In the South African context, the prevention of animal cruelty can be traced back to 1870 with the establishment of the South African Society for the Prevention of Cruelty to Animals, and then through the adoption of the SPCA Act of 1914. In *Rex v Masow*,²³¹ the court explained that the Legislature has a duty to entrench the need to protect animals against cruel treatment.²³² The court, in *R v Smit*,²³³ stated the process to destroy an animal must be carried out as humanely and with as little suffering as possible.²³⁴ This

²²⁶ Bilchitz D 'Making Democracy Work: The Impact of the Constitutions upon the 'Management' of Elephants in Post-apartheid South Africa' (2004) available at http://www.sanparks.org/docs/events/elephants/2004-10-17_DB_Paper_Elephant_Indaba.pdf (accessed on 4 July 2021), para 4(a).

²²⁷ Bilchitz D 'Making Democracy Work: The Impact of the Constitutions upon the 'Management' of Elephants in Post-apartheid South Africa' (2004) available at http://www.sanparks.org/docs/events/elephants/2004-10-17_DB_Paper_Elephant_Indaba.pdf (accessed on 4 July 2021), para 4(a).

²²⁸ Scholtz W (2017) 465.

²²⁹ Scholtz W (2017) 465

²³⁰ Scholtz W (2017) 465.

²³¹ *Ex Parte: The Minister of Justice: In re Rex v Masow and Another* 1940 AD.

²³² *Ex Parte: The Minister of Justice: In re Rex v Masow and Another* 1940 AD 75 para 81.

²³³ 1929 TPD 397.

²³⁴ *R v Smit* 1929 TPD 397 para 401.

case also established the principle that animals should not be treated as things, in turn overriding the common law. In *Rex v Moato*²³⁵ the court stated that ‘the object of the legislation was plainly to prohibit one legal subject behaving so cruelly to animals that he offends the finer feelings and sensibilities of his fellow humans. These sentiments indicate the acknowledgement that the welfare of animals is connected with the dignity of humans. Similarly, *S v Edmunds* affirmed *Moata* and held that cruelty was prohibited so as to ‘prevent degeneration of the finer human values in the sphere of treatment of animals.’²³⁶

In relation to the culling of wildlife, advocates of the animal welfare movement strongly disagree with the use of culling in most instances of HWC. Indeed, the welfare position is that a decision to cull nonhuman animals is a drastic one. As the International Fund for Animal Welfare (IFAW) states ‘...culling is a cruel, unethical and scientifically unsound practice that does not consider the welfare implications...’²³⁷ First, Animal welfare proponents maintain that the shooting of nonhuman animals has a significant effect on the behaviour of those that survive a cull.²³⁸ In a report by IFAW on the culling of elephants, the organisation states that there is scientific research indicating that elephants suffer psychological trauma which can lead to behaviour abnormalities.²³⁹ Second, the proponents of culling have an impact on wildlife, for example ‘disturbance of nearby groups of elephant populations coming from the culling operations itself and the

²³⁵ *R v Moato* 1947 (1) SA 490 (O).

²³⁶ *S v Edmund* 1968 (2) PH H398 (N).

²³⁷ International Fund for Animal Welfare *The Debate on Elephant Culling in South Africa* (2005) 19.

²³⁸ International Fund for Animal Welfare (2005) 19- 20.

²³⁹ International Fund for Animal Welfare (2005) 20.

longer term effects of the loss of family members and bonds.²⁴⁰ It is further believed that the culling of wildlife is a violation of the interest of individuals and the community of those who are concerned with the welfare and interest of animals.²⁴¹

Lastly, it is argued that the practice of culling wildlife would highlight South Africa's negative attitude towards wildlife and wildlife management.²⁴² Such a reputation may lead to a significant tourist boycott of South Africa and impact negatively on social and economic developments upon which many communities depend.²⁴³ The other factor which a decision to cull raises are legal in nature. No legislation exists that explicitly regulates the culling of the wildlife or, in this instance, the baboons. The failure to regulate culling operations is highly problematic. This lacuna allows the authorities to indiscriminately cull animals as there is no legislation or policy to prescribe the limits on animals to be culled or the methods to be utilised.

It is prevalent to view the broader welfare movement in light of growing legal philosophies in the international sphere, namely Earth Jurisprudence.²⁴⁴ Earth Jurisprudence is an emerging legal theory that seeks to regulate humans on the premise that humans are

²⁴⁰ Bilchitz D 'Making Democracy Work: The Impact of the Constitutions upon the 'Management' of Elephants in Post-apartheid South Africa' (2004) available at http://www.sanparks.org/docs/events/elephants/2004-10-17_DB_Paper_Elephant_Indaba.pdf (accessed on 4 July 2021), para 4(a).

²⁴¹ Bilchitz D 'Making Democracy Work: The Impact of the Constitutions upon the 'Management' of Elephants in Post-apartheid South Africa' (2004) available at http://www.sanparks.org/docs/events/elephants/2004-10-17_DB_Paper_Elephant_Indaba.pdf (accessed on 4 July 2021), para 4(a).

²⁴² International Fund for Animal Welfare (2005) 20.

²⁴³ Bilchitz D (2004) para 4(a). International Fund for Animal Welfare (2005) 5.

²⁴⁴ United Nations Harmony with Nature 'Earth Jurisprudence' available at <http://www.harmonywithnatureun.org/ejinputs/> (accessed on 3 November 2021). See also Murray J 'Earth Jurisprudence, Wild Law, Emergent Law: The Emerging Field of Ecology and Law- Part 1' (2014) 35 *Liverpool Law Review* 215-231.

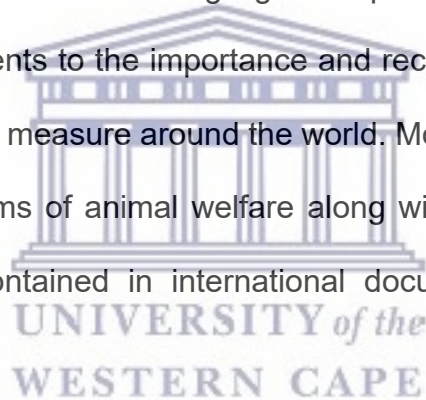
only one component of a wider community of beings and that the welfare of each member of that community is dependent on the welfare of the Earth as a whole.²⁴⁵ Earth Jurisprudence developments are monitored and supported by the United Nations Harmony with Nature programme. Harmony with Nature encompasses the recognition of a non-anthropocentric paradigm through which the relationship between Earth and mankind must be viewed.²⁴⁶ This approach highlights a departure from viewing nature as a commodity to be exploited and used (short-term interest) for the benefit of humans, towards an approach that embraces maintaining the health and integrity of the ecological communities that sustain life. This earth jurisprudence approach involves recognising and complying with the rights and obligations of the Universal Declaration of the Rights of Mother Earth (UDRME).²⁴⁷ In applying the UDRME means that humans are required to respect the interest of the baboons to live in a suitable habitat and are only entitled to limit their interest in limited circumstances. The culling of the baboons would be unlawful. The UDRME arguably requires a balancing approach between the interest of the baboons and interest of humans in HWC.

²⁴⁵ United Nations Harmony with Nature 'Earth Jurisprudence' available at <http://www.harmonywithnatureun.org/ej/inputs/> (accessed on 3 November 2021).

²⁴⁶ United Nations Harmony with Nature available at <http://www.harmonywithnatureun.org/> (accessed on 3 November 2021). Scholtz W (2020) 4.

²⁴⁷ Global Alliance for the Rights of Nature 'Universal Declaration of Rights of Mother Earth' available at <https://566259-1852283-raikfcquaxqncofqm.stackpathdns.com/wp-content/uploads/2021/09/FINAL-UNIVERSAL-DECLARATION-OF-THE-RIGHTS-OF-MOTHER-EARTH-APRIL-22-2010.pdf> (accessed on 4 December 2021).

Some jurisdictions have recognised the legal rights of nature. In 2008, Ecuador became the first to recognise rights of nature in their Constitution.²⁴⁸ Notably, several countries have recognised rights of nature in their legislation and policies, in particular Uganda²⁴⁹ and Bolivia.²⁵⁰ New Zealand went as far as promulgating legislation recognising specific mountains, rivers and ecosystems as legal persons capable of holding rights.²⁵¹ In addition, some courts in countries such as Atrato River²⁵² and Colombian amazon²⁵³ expressly recognised aspects of nature as legal persons. This study is of the view that Rights of Mother Earth strengthen the progressive cases, as it deals with non-anthropocentric values and ethics. It also highlights respect towards nature. The above is indicative of the developments to the importance and recognition of animal welfare in the regulation of conservation measure around the world. More importantly, for purposes of this study, the five freedoms of animal welfare along with the recognition of a non-anthropocentric paradigm contained in international documents such as the above



²⁴⁸ See Georgetown University 'Constitution of the Republic of Ecuador' available at <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (accessed on 18 July 2022).

²⁴⁹ National Environment Act 2019, section 4. The Gaia Foundation 'Uganda Recognises Rights of Nature, Customary Laws, Sacred Natural Sites' available at <https://www.gaiafoundation.org/uganda-recognises-rights-of-nature-customary-laws-sacred-natural-sites/> (accessed on 18 July 2022).

²⁵⁰ Law of the Rights of Mother Earth/ *Ley de Derechos de la Madre Tierra*, No 071, 7 December 2010. Peoples Agreement 'Bolivia: Law of the Rights of Mother Earth/ *Ley de Derechos de la Madre Tierra*, No 071, 7 December 2010. Peoples Agreement' available at <http://peoplesagreement.org/?p=1651> (accessed on 18 July 2022) and Framework Law 300 of Mother earth and Integral Development for Living Well, 15 October 2015. For discussion on these laws see Calzadilla PV and Kotzé LJ 'Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia' (2018) 7(3) *Transnational Environmental Law* 397-424.

²⁵¹ Te Urewera Act 2014, No 51, Art 4 available at <https://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html> (accessed on 18 July 2022).

²⁵² Wesche P 'Rights of Nature in Practice: A Case Study on the Impacts of the Colombian Atrato River Decision' (2021) *Journal of Environmental Law* 531-556.

²⁵³ IUCN 'Colombian Supreme Court Recognizes Rights of the Amazon River Ecosystem' available at <https://www.iucn.org/news/world-commission-environmental-law/201804/colombian-supreme-court-recognizes-rights-amazon-river-ecosystem> (accessed on 18 July 2022).

Harmony with Nature are imperative considerations for dealing with HWC and Chacma Baboons in the South African legislative context.

2.5 Conclusion

HWC is a critical threat to the survival of many species. Human activities have transformed the world which has forced wildlife into areas with limited capacities. This is causing conflict between humans and wildlife, particularly in developing countries. The damage to human interests has resulted in them making emotional decisions to resolve the conflict. Consequently, a mechanism to resolve the conflict is culling or lethal control. The use of lethal control, as highlighted above, has a highly anthropocentric approach in that it is believed that the reduction of nonhuman animals is the most effective, affordable and accessible way to resolve HWC. Culling was adopted in the apartheid area to promote conservation. Wildlife was viewed as resources for economic gain.

Lethal control is still seen as valuable mechanism. It is believed that lethal control will reduce threat to livelihoods and not cause extinction to species. This research has highlighted that lethal control is not an accepted practice. Animal welfare strongly oppose the utilisation of lethal control. In terms of welfare, humans are morally superior to animals and regard animals as property. Animals may therefore be exploited and used to advance and develop human interests in terms of which 'humane' treatment of animals only extends to mitigate animal suffering.²⁵⁴ This research indicated lethal control can cause

²⁵⁴ Scholtz W (2017) 465

species extinction, the collapse of wildlife geographic ranges, and decline in local populations and affected associated populations.

The use of lethal control would violate the interests of individuals and the communities that is concerned with the interests of animals. This can cause an outrage to internationally and within the country.

The broad impact of HWC thus calls for an urgent need to reduce the culling of wildlife. Evolving environmental protection principles are increasingly calling for the recognition of the fact that human development should not trump the interest of species and ecosystems. This research moves now to the legal framework for Biodiversity in order to determine does it regulate the culling practice and also provide greater protection for wildlife in terms of animal welfare.



CHAPTER 3: A CRITICAL REVIEW ON THE RECOGNITION OF ANIMAL WELFARE IN THE INTERNATIONAL, REGIONAL (SADC AND AU) AND SOUTH AFRICAN LAW AND POLICY CONTEXT

3.1 Introduction

Lethal Control, or in this context culling of wildlife is not always an agreeable measure. In most cases, where culling is proposed, the question arises whether the utilisation on wildlife will be justifiable on animal welfare grounds in order to resolve HWC. Culling has implications on the welfare of animals as well as the environment. Animal welfare is a global concern, which requires global regulations.²⁵⁵ This chapter provides an overview of the legal recognition of animal welfare in the international, regional and South African context. This discussion commences with international law as South Africa is a party to several international and regional treaties dealing with the protection of biodiversity. As alluded to earlier, biodiversity legislation does not cater for welfare consideration of wildlife. Wild animal welfare law is sparse, almost non-existent in the international context.²⁵⁶ There is a lack of international consensus on the topic of animal welfare.²⁵⁷ As a result of the controversial topic no international agreement exists that deals with welfare and protection of animals, as well as, no international standard of the acceptable treatment of animals.²⁵⁸ This chapter then turns to regional law, namely Southern African

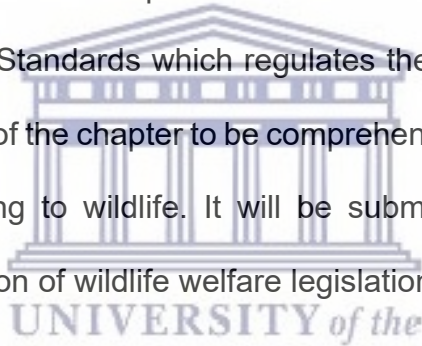
²⁵⁵ Peters A 'Symposium Foreword- Global Animal Law: What It Is and Why We Need It' (2016) 5(1) *Transnational Environmental Law* 9-23.

²⁵⁶ Harrop SR (1997) 287.

²⁵⁷ Favre D 'An International Treaty for Animal Welfare' in Cao D & White D (ed) *Animal Law and Welfare- International Perspectives* 53 (2016) 87.

²⁵⁸ Favre D (2016) 87.

Development Community (SADC) and the African Union (AU). The chapter determines that South African biodiversity legislation is centred on the conservation and sustainable use of biodiversity as well as benefit sharing of indigenous biodiversity. Moreover, it will also highlight that the attainment of sustainable development is prevalent to South African biodiversity legislation. The implementation of sustainable development tends to favour (short-term) economic development rather than ecological preservation. The aim of achieving economic interest is in line with an anthropocentric approach that underlies international and domestic environment law.²⁵⁹ This chapter argues that South African biodiversity law does not contain an express consideration of animal welfare, with the exception for the Norms and Standards which regulates the management of elephants. Take note that it's not the aim of the chapter to be comprehensive but to provide an outline of the main legislation relating to wildlife. It will be submitted that the status quo is unsatisfactory and promulgation of wildlife welfare legislation is thus required.



3.2 The Recognition of Animal Welfare in the International Law Context

3.2.1 Convention on Biological Diversity and Other Related International Instruments

South Africa ratified the Convention on Biological Diversity (CBD)²⁶⁰ in 1995 and thus obligated to implement its provisions within its domestic law and policies.²⁶¹ The CBD

²⁵⁹ Scholtz W (2019) 247.

²⁶⁰ 1760 UNTS 79, 31 ILM (adopted 5 June 1992, entered into force 19 December 1993).

²⁶¹ Kidd M (2003) 65. South Africa promulgated NEMBA to give effect to CBD.

affirms that the conservation of biological diversity is a common concern of humankind;²⁶² and that states are responsible for conserving and for using their biological resources²⁶³ in a sustainable manner, because biodiversity is being significantly reduced by certain human activities.²⁶⁴ The aim of the CBD is the conservation of biodiversity; the sustainable use of its components; and the fair and equitable sharing of benefits of the utilisation of genetic resources.²⁶⁵ Signatories are required to develop national strategies and plans or adapt existing ones; and then to integrate the conservation and sustainable use of biodiversity into sectoral or cross-sectoral plans, programmes, policies and national decision-making.²⁶⁶ Signatories are also obliged to identify and monitor components of biodiversity which require urgent conservation measures or offer the greatest potential for sustainable use. In addition, the signatories must monitor processes and categories of activities which will have a significant adverse impact on conservation and use of biodiversity.²⁶⁷ The CBD recognises *in situ* conservation²⁶⁸ as fundamental to the conservation of biodiversity; whilst *ex situ* conservation²⁶⁹ is there to complement *in*

²⁶² The preamble recognises that the conservation of biological diversity is a 'common concern of humankind'. This implies a common responsibility of the international community to the importance biodiversity. As a result, no state may take actions which may be detrimental to biodiversity. See Scholtz W (2005) 22-24.

²⁶³ Art 2 of CBD states biological resources 'include genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.' Example of biological resources is real entities such as the chacma baboons.

²⁶⁴ Preamble of CBD.

²⁶⁵ Art 1 of CBD.

²⁶⁶ Art 6 and 10 of CBD.

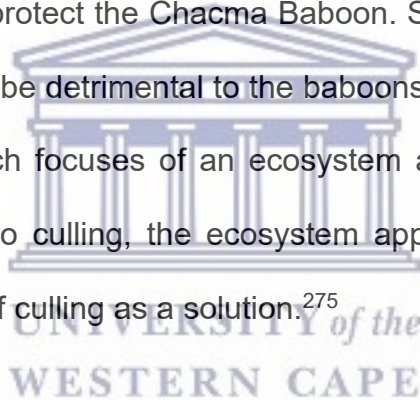
²⁶⁷ Art 7 of CBD.

²⁶⁸ Art 8 of CBD. Art 2 defines *in-situ* conservation as 'the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.'

²⁶⁹ Art 9 of CBD. Art 2 defines *ex-situ* conservation as 'the conservations of components of biological diversity outside their natural habitats.'

situ.²⁷⁰ Article 10 provides obligations in respect of sustainable use. Hence the CBD makes a clear distinction between conservation²⁷¹ and sustainable use.²⁷² Moreover, the CBD follows an ecosystem approach.²⁷³

Reference to common concern implies a common responsibility of the international community in respect of biodiversity. Parties cannot allow activities which will be detrimental to biodiversity. The notion of common concern implies that all states have an expectation to act as custodian of their biodiversity, and that the expectation exist that the state will protect the biodiversity.²⁷⁴ Hence, South Africa as custodian has the responsibility to respect and protect the Chacma Baboon. South Africa should therefore not allow activities that would be detrimental to the baboons. As stated, the CBD follows an ecosystem approach which focuses of an ecosystem as a whole and not only on specific species. In relation to culling, the ecosystem approach does not necessarily prescribe to the mechanism of culling as a solution.²⁷⁵



²⁷⁰ See Art 8(h) of CBD, an example of *in-situ* conservation is that the parties are required to prevent, control or eradicate alien species which threaten ecosystems, habitats or species.

²⁷¹ The CBD does not define conservation, only *in-situ* and *ex-situ* conservation. See Art 2.

²⁷² Art 2 of CBD define sustainable use 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.'

²⁷³ The preamble states 'noting further that the fundamental requirements for the conservation of biological diversity is the in-situ conservation of ecosystems...'. See also Art 8(d) reads that each contracting party shall 'promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.'

²⁷⁴ Scholtz W (2005) 25.

²⁷⁵ Scholtz W (2005) 25.

In relation to sustainable use, the Conference of the Parties (COP) to the CBD adopted Decision VII/12 (Sustainable Use decision)²⁷⁶ which is the main decision on sustainable use of biological diversity, and contains in an annex II the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity.²⁷⁷ The Sustainable Use decision recognise that the Addis Ababa Principles provide parties with an important tool to achieve the objectives of the CBD. The decision also invites parties and other governments to implement the Addis Ababa Principles in accordance with article 6 and 10 of the CBD. The Addis Ababa Principles provide a framework for advising parties on their use of biodiversity components and the operational guidelines provide functional advice on the implementation of the principles.²⁷⁸ Practical principle 11 of the Addis Ababa Principles states that users of biodiversity components should seek to minimize waste and adverse environmental impact and optimize benefits from users. Of importance is the operational guideline that requires the promotion of a 'more efficient, ethical and humane use of components of biodiversity'. Moreover, international and national policies should consider the intrinsic value of biological diversity.²⁷⁹ This could be seen as a normative interpretation of sustainable use as the Addis Ababa Principles are contained within a COP decision.²⁸⁰

²⁷⁶ CBD 'Decision VII/12, Sustainable Use (Article 10)' UN Doc UNEP/CBD/COP/DEC/VII/12 (13 April 2004).

²⁷⁷ CBD 'Decision VII/12, Annex II.

²⁷⁸ Para 8-9 of Decision VII/12.

²⁷⁹ Practical principle 10(b) of Decision VII/12.

²⁸⁰ Scholtz W (2020) 2.

The CBD is the modern framework treaty on biodiversity, in international law, that does not make mention to wildlife welfare considerations within its provisions, as the focus is on conservation and sustainable use of biological resources. This highlights that in general biodiversity instruments does not cater for welfare consideration of wildlife. Wild animal welfare law is sparse, almost non-existent in the international context.²⁸¹ However, the CBD recognises albeit in its preamble the intrinsic value of biological diversity.²⁸² Preambles to international instruments are most of the time used as vehicles to advocate for ideas which are too controversial to be assumed as binding obligations by nations.²⁸³ This indicates that welfare is a legitimate concern for the CBD.²⁸⁴ The scarcity of animal welfare in the international space is as a result of the political and cultural differences on the topic.²⁸⁵

The CBD is seen as a sustainable development treaty which attempts to internationalise conservation and sustainable use of biodiversity.²⁸⁶ In 2015, the 2030 Agenda for Sustainable development²⁸⁷ was adopted by South Africa and 192 other countries at the Sustainable Development Summit.²⁸⁸ The 2030 Agenda contain the Sustainable

²⁸¹ Harrop SR (1997) 287.

²⁸² See also Convention on the Conservation of Migratory Species of Wild Animals 1979, which recognise the intrinsic value in its preamble.

²⁸³ Harrop SR 'Wild Animal in International Law: The Present Position and the Scope for Development' (2013) 4(4) *Global Policy* 383. The intrinsic value is the foundation for extending welfare to animals.

²⁸⁴ See Conference of the Parties to the Convention on Biological Diversity, Decision VII/12, Sustainable Use (Art 10). The Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, under the heading Practical Principle 11, refer is made to the ethical and humane use of biodiversity.

²⁸⁵ Harrop SR (1997) 289.

²⁸⁶ Scholtz W (2020) 5.

²⁸⁷ UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, 21 October 2015, UN Doc A/RES/70/1 (2030 Agenda).

²⁸⁸ Department: Statistics South Africa 'Tracking South Africa's Sustainable Development Goals' available at <https://www.statssa.gov.za/?p=12813> (accessed on 21 March 2023).

Development Goals (SDGs). The SDGs is a document that consist of 17 goals and 169 targets for the achievement of sustainable development. The SDGs are deemed important in addressing all the facets of sustainable development. However, the failure to recognise animal welfare is also seen in the SDGs. The 2030 Agenda envisages ‘a world in which humanity lives in harmony with nature and in which wildlife and other living species are protected’.²⁸⁹ Yet the document does not expressly provide for an environmental goal. The environmental cluster²⁹⁰ or environmental goal comprise of biodiversity,²⁹¹ the sustainable management of water resources,²⁹² climate change,²⁹³ and the conservation and sustainable use of marine resources.²⁹⁴ Failure of the SDGs, has led scholars to suggest the formation of an 18th goal to cater for animal welfare.²⁹⁵

In 1982, South Africa voted for the World Charter for Nature.²⁹⁶ The World Charter for Nature is aimed at protecting the environment from a conservation point of view.²⁹⁷ The Charter recognise the intrinsic value of living creatures.²⁹⁸ Even though the Charter does not directly provide for animal welfare, but can be seen as a first step to include welfare

²⁸⁹ Para 9 of 2030 Agenda.

²⁹⁰ Scholtz W and Barnard M ‘The Environment and the Sustainable Development Goals: “We are on a road to nowhere” ‘in French D and Kotzé LJ (ed) *Sustainable Development Goals: Law, Theory and Implementation* (2018) 222.

²⁹¹ SDG 15. SDG 15 focuses on species conservation and does not consider the interest of individual animals.

²⁹² SDG 6

²⁹³ SDG 13.

²⁹⁴ SDG 14.

²⁹⁵ See Visseren-Hamakers IJ ‘The 18th Sustainable Development Goal’ (2020) 3 *Earth System Governance* 1-5.

²⁹⁶ United Nations Digital Library ‘World Charter for Nature: resolutions / adopted by the general Assembly’ available at <https://digitallibrary.un.org/record/609285?ln=en> (accessed on 21 March 2023).

²⁹⁷ UNGA World Charter for Nature UN Doc A/RES/37/51 (28 October 1982).

²⁹⁸ The preamble affirms that ‘every form of life is unique, warranting respect regardless of its worth to man and that we should accord other organisms such recognition and be guided by a moral code of action’.

ethics into wildlife conservation.²⁹⁹ South Africa is a signatory to the Rio Declaration on Environment and development (Rio Declaration).³⁰⁰ Rio obliges parties 'in a spirit of global partnership to conserve, protect and restore the health and integrity of Earth's ecosystem'.³⁰¹ Other soft law instruments that reflect a concern for the welfare of animals are the Johannesburg Declaration on Sustainable Development³⁰² and the revised World Conservation Strategy.³⁰³ Currently, no binding international instrument in respect of animal welfare exists. There has been attempts to broach this problem on the international level but with no success.³⁰⁴

²⁹⁹ Harrop S (2013) 383.

³⁰⁰ DFFE 'Policy and Legal Context' available at https://www.dffe.gov.za/sites/default/files/docs/policyand_legalcontext.pdf (accessed on 21 March 2023).

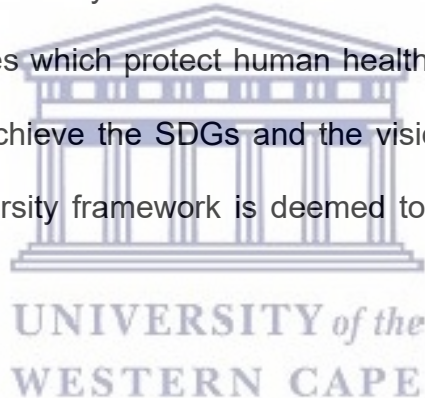
³⁰¹ Principle 7 of Rio Declaration on Environment and Development, 1992(1992) 31 ILM 874 (Rio Declaration).

³⁰² Johannesburg Declaration on Sustainable Development in 'Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002' UN Doc A/CONF.199/20 (4 September 2002) Annex, preamble. The preamble strives for a 'humane, equitable, caring global society' and affirms humanity's 'responsibility to one another, to the greater community of life and to our children'. South Africa is a signatory to the Johannesburg declaration on Sustainable Development, see DFFE 'Policy and Legal Context' available at https://www.dffe.gov.za/sites/default/files/docs/policyand_legalcontext.pdf (accessed on 21 March 2023).

³⁰³ International Union for Conservation of Nature, UN Environment Programme and World Wildlife Fund 'Caring for the Earth: A Strategy for Sustainable Living' (1991) 14. Includes as elements of a world ethic for living sustainably: 'Every life form warrants respect independently of its worth to people'. Conservation is also defined as 'The management of human use of organisms and ecosystems, to ensure such use is sustainable. Besides sustainable use, conservation includes protection, maintenance, rehabilitation, restoration, and enhancement of population and ecosystems.

³⁰⁴ Global Alliance for the Rights of Nature 'Universal Declaration of Rights of Mother Earth' available at <https://566259-1852283-raikfcquaxqncofqfm.stackpathdns.com/wp-content/uploads/2021/09/FINAL-UNIVERSAL-DECLARATION-OF-THE-RIGHTS-OF-MOTHER-EARTH-APRIL-22-2010.pdf> (accessed on 4 December 2021) (UDRME). Global Animal Law GAL Association 'UN Convention on Universal on Animal Health and Protection' available at <https://www.globalanimallaw.org/downloads/Folder-UNCAHP.pdf?m=1593419043&> (accessed on 4 December 2021) (UNCAHP). Animal Law legal Center 'International Convention for the Protection of Animals' available at <https://www.animallaw.info/treaty/international-convention-protection-animals> (accessed on 16 November 2021) (ICPA). World Animal Protection 'Universal Declaration on Animal Welfare' available at https://www.worldanimalprotection.ca/sites/default/files/media/ca_-_en_files/case_for_a_udaw_tcm22-8305.pdf (accessed on 25 October 2022) (UDAW).

The most recent development on animal welfare is the adoption of a resolution by the United Nation (UN) Environment Assembly.³⁰⁵ The UN acknowledged that animal welfare can contribute to address environmental challenges and in achieving the SDGs. It was also noted that the health and welfare of animals, sustainable development and the environment are connected to human health and well-being. This is the first resolution to be approved with the explicit reference to animal welfare. In December of this year, the parties to the UN Convention on Biological Diversity will meet to determine the post-2020 global biodiversity framework.³⁰⁶ This is an important gathering to bring animal welfare to the fore, as the degradation of ecosystems and decline of biodiversity is worsening and threaten the natural processes which protect human health.³⁰⁷ The IUCN states a new framework is necessary to achieve the SDGs and the vision of living in harmony with nature.³⁰⁸ This global biodiversity framework is deemed to be the Paris Agreement of biodiversity protection.³⁰⁹



³⁰⁵ Animal Welfare-Environment-Sustainable Development Nexus, 2022 United Nations Environment Assembly of the United Nations Environment Programme Resolution UNEP/EA.5/Res.1 (2022).

³⁰⁶ CBD 'First Draft of the Post-2020 Global Biodiversity Framework' available at <https://www.cbd.int/doc/c/abb5/591f/2e46096d3f0330b08ce87a45/wg2020-03-03-en.pdf> (accessed on 17 December 2022).

³⁰⁷ IUCN 'Post-2020 Global Biodiversity Framework' available at https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_096_EN.pdf (accessed on 19 October 2022).

³⁰⁸ IUCN 'Post-2020 Global Biodiversity Framework' available at https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_096_EN.pdf (accessed on 19 October 2022).

³⁰⁹ The Nature Conservancy 'Its Time for Biodiversity's Paris Moment' available at https://www.nature.org/en-us/what-we-do/our-insights/perspectives/time-biodiversity-paris-moment-lacerda/?en_txn1=s_p.gc.eg.cop15 (accessed on 17 December 2022).

3.3 The Recognition of Animal Welfare in the SADC and AU Region

3.3.1 Animal Welfare recognition in the AU

South Africa³¹⁰ ratified the Revised African Convention on the Conservation of Nature and Natural Resources³¹¹ on 23 April 2013.³¹² The objectives of the Convention is the enhancement of environmental protection, the conservation and sustainable use of natural resources and to harmonise policies to achieve ecological, economically and socially development policies and programmes.³¹³ The actions of Parties must be guided by the right of all people to a satisfactory environment favourable to their development, the duty of states individually and collectively to ensure the enjoyment of the right to development as well as that development and environment needs are met in a sustainable, fair and equitable manner.³¹⁴ Parties must establish and implement policies for the conservation and sustainable use of species and genetic diversity whether terrestrial, fresh-water or marine. In addition, parties must pay attention to socially, economically and ecologically valuable species, which are threatened and species which

³¹⁰ South Africa is bound by the obligations of the AU. The AU was established in terms of the Constitutive Act of the African Union of 2000. South Africa joined the African Union on 6 June 1994. See African Union 'Member States' available at https://au.int/en/member_states/countryprofiles2 (accessed on 17 December 2021).

³¹¹ African Union 'Revised African Convention on the Conservation of Nature and Natural Resources' available at https://au.int/sites/default/files/treaties/7782-treaty-0029_-_revised_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf (accessed on 4 December 2021).

³¹² African Union 'Revised African Convention on the Conservation of Nature and Natural Resources' available at https://au.int/sites/default/files/treaties/7782-sl-revised_african_convention_on_the_conservation_of_nature_and_natural_resources.pdf (accessed on 4 December 2021).

³¹³ Art II of Convention.

³¹⁴ Art III of Convention.

are under the jurisdiction of parties.³¹⁵ The management of species must be based on scientific research.³¹⁶ Article X provides protection to protected species. This includes legislating by identifying and eliminating factors that are causing the depletion of animals which are threatened and to the habitat necessary for their survival. Further, this article places special responsibility on a party to protect a species, where the species is only under the jurisdiction of that party.³¹⁷ In order to promote sustainable development, parties must take all necessary measures to ensure that development activities are based on environmental policies and do not have adverse effects on natural resources and the environment in general.³¹⁸

The Convention does not reflect any wildlife welfare considerations. AU may allow for culling. As parties are obligated to focus on socially, economically and ecologically valuable species. Further, sustainable development is explicitly provided for. The Agenda 2063 which is linked to the SDGs also fails to mention animal welfare.³¹⁹ In 2019, the AU expressly recognised animal welfare in its Animal Welfare Strategy for Africa.³²⁰

³¹⁵ Art IX(1) of Convention.

³¹⁶ Art IX(2) of Convention.

³¹⁷ Art X(1) of Convention.

³¹⁸ Art XIV(2)(a) of Convention.

³¹⁹ African Union 'Linking Agenda 2063 and the SDGs' available at <https://au.int/agenda2063/sdgs> (accessed on 20 October 2022).

³²⁰ African Union Interafrican Bureau for Animal Resources 'Animal Welfare Strategy for Africa 2018-2021' available at http://repository.aubiar.org/bitstream/handle/123456789/548/AWSA_Brief_ENG.pdf?sequence=1&isAllowed=y (accessed on 20 October 2022).

3.3.2 Animal Welfare Recognition in the SADC Region

The SADC³²¹ Protocol on Wildlife Conservation and Law Enforcement in the South African Development Community,³²² was ratified by South Africa on 31 October 2003. The main objective is to establish common approaches to the conservation and sustainable use of wildlife resources and to assist with the effective enforcement in relation to these resources. In doing so, the protocol aims to promote the sustainable use of wildlife, and to harmonise legal instruments governing wildlife use and conservation. The protocol also aims to promote the enforcement of wildlife laws, and to facilitate the exchange of information concerning wildlife management and use. Further, the Protocol aims to build national and regional capacity for wildlife management, conservation and enforcement of wildlife laws. Moreover, the conservation of shared wildlife resources through trans frontier conservation areas and facilitate community-based natural resources management practices are aims of the Protocol.³²³ Article 7 provides for the conservation of wildlife. This Article requires parties to establish management programmes for the conservation and sustainable use of wildlife and to integrate such it into national development plans.³²⁴ Parties must assess and control activities which may significantly affect the conservation and use in order to avoid or minimise negative

³²¹ SADC is an organisation established by several African governments in terms of the Consolidated Text of the Treaty of the Southern African Development Community. SADC has several objectives found in Article 5, such as the sustainable utilisation of natural resources and protecting the environment.

³²² SADC 'SADC Protocol on the Wildlife Conservation and Law Enforcement in the South African Development Community' available at <https://www.sadc.int/document/protocol-wildlife-conservation-and-law-enforcement-1999> (accessed on 25 October 2022).

³²³ Art 4 of SADC Protocol.

³²⁴ Art 7(1) of SADC Protocol.

impacts.³²⁵ In addition, this Article provides measures to ensure the conservation and sustainable use, *inter alia*, the protection of wildlife resources and wildlife habitats to ensure the maintenance of viable wildlife populations, prevention of over-exploitation and extinction of wildlife species, as well as, restriction on the 'taking'³²⁶ of wildlife.³²⁷

It is clear in the way sustainable use of wildlife is used within SADC is to focus on the species as a whole and allows for the sacrifice of many individual wildlife. No reference is made to the consideration of wildlife welfare. SADC may allow for culling in order to maintain of viable wildlife populations.

3.4 Animal Welfare Recognition in the South African Legal Context

3.4.1 National Law

3.4.1.1 The Constitution

The discussion in this section emphasises that all biodiversity and related legislation in South Africa stems from the Constitution environmental right. During the time the Constitution was being drafted, the second most submissions made to the Constitutional Assembly was to provide for express protection for animals.³²⁸ Unfortunately, the Constitutional Assembly decided not to include express protections for the interest of animals.³²⁹ In addition to the Constitution, a number of environmental laws were passed

³²⁵Art 7(2) of SADC Protocol.

³²⁶ 'Taking' is defined as the hunting, killing, injuring, capturing, harassing, collecting, picking, uprooting, digging up, cutting, destruction and removal of any attempt to engage in such conduct,

³²⁷ Art 7(3) of SADC Protocol.

³²⁸ Bilchitz D (2016) 132.

³²⁹ Bilchitz D (2016) 132.

to give effect to the environmental right. As this research illustrates below, these laws also avoid any reference to welfare of animals.

The laws are however underpinned by the notion of sustainable development³³⁰ which is expressly mentioned in Section 24 of the Constitution.³³¹ In terms of the latter, section 24(b) of the Constitution places a positive duty on the state to protect the 'environment' through reasonable legislative and other measures that promote conservation and secure ecological sustainable development while promoting justifiable economic and social development. Moreover, the concepts of intra- and inter- generational equity are included within section 24.³³² In the interpretation of section 24 ecologically sustainable development, it is vital to take note that economic and social development is essential to the well-being³³³ of human beings as well as environmental protection which is inexorably connected.³³⁴ The environmental right recognise the need to exploit and use the natural resources; however, this should be done in a manner that is sustainable. Section 24 is anthropocentric in nature; the reason for this is that South Africa is in urgent need of development that is sustainable. It is thus through the concept of sustainable development that in principle the interests of the environment will be balanced with socio-

³³⁰ Sustainable Development consist of three pillars environmental protection, economic development and social development

³³¹ *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2017 (10) BCLR 1059 (CC) (*Fuel Retailers Association*) para 53.

³³² S24(b)(iii).

³³³ The notion of 'well-being' is a broad concept which includes a concern for aesthetic and spiritual dimension of the natural environment. Reference to 'well-being' may be used to protect the environment and its components, such as animal life, on the bases of their intrinsic value. See Scholtz W (2005) 74.

³³⁴ *Fuel Retailers Association* para 44.

economic interests.³³⁵ Furthermore, at the core of the right is ecological sustainability which guides the approach to be taken in the creation of environmental law and policies. This indicates that ecological sustainability is important in the realisation of section 24. Activities such as culling should be in line with this concept as well as inter-generational equity. This means that government bodies should only approve activities and use of resources if it's in line with ecological sustainability and does not go against this concept and negatively affect future generations. Activities must therefore be weighed against this criterion.

Schedule 4 of the Constitution provides that national and provincial governments have concurrent legislative competency in relation to the environment and nature conservation, excluding national parks, national botanical gardens and marine resources.³³⁶

The purpose of the environmental right is to protect the human interest in the environment and not because of its intrinsic value. No mention to animals or their welfare is made within section 24. NEMA which is discussed in the next section, defines the environment as: 'the surroundings within which humans exist and that are made up of- (i) the land, water and atmosphere of earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationship among and between them; and (vi) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.' This definition is criticised as being too narrow

³³⁵ Scholtz W (2005) 73.

³³⁶ Schedule 4 Part A of Constitution. See also Schedule 5 Part A and B of Constitution.

and that humans are at the core of the environment.³³⁷ Nonetheless, NEMA acknowledges that animal life is part of the environment. Therefore, the protection afforded by section 24 must inevitably extend to animals which include their welfare as well as humans.

Section 24 provides that legislation is to be promulgated in order to realise the rights. This position was affirmed in *Government of the Republic of South Africa v Grootboom* where the court held that the government has the responsibility to ensure that laws, policies, programmes and strategies are adequate to meet the state's obligation.³³⁸ Legislative measures must be supported by appropriate well-directed policies and programs. These policies and programs must be reasonable both in conception and implementation as well as balanced and flexible.³³⁹ Thus, the focus of this section 24 sustainable development is on 'use' to advance human interests. As such natural resources (like wildlife) can be used by humans but this must be done sustainably. As mentioned above, the constitutional right makes no reference to animals. Therefore, this research is of the view that s24(b) provides an opportunity for the state to promulgate wildlife welfare legislation in order to provide protection of wildlife welfare interests.

3.4.1.1.1 National Environmental Management Act 10 of 2004

The preamble in NEMA explicitly mentions the environmental right and sustainable development which is indicative that NEMA is aimed at giving effect to the right at a

³³⁷ Kidd M (2003) 22.

³³⁸ 2001 (1) SA 46 (CC) 32 (*Grootboom*).

³³⁹ *Grootboom* para 42.

framework level. The purpose of the Act is to provide for 'co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.'³⁴⁰ An encapsulation of sustainable development is contained in NEMA which furthermore obligates the state to take into account the environmental impact, social and economic development. NEMA defines 'sustainable development as 'the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations'.³⁴¹

Chapter 1 provides for national environmental management principles under the auspices of sustainable development which apply throughout the Republic and must govern actions of all organs of state that 'may'³⁴² significantly affect the environment. The first two principles are anthropocentric in nature as they provide that environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interest equitably;³⁴³ and development must be socially, environmentally and economically sustainable.³⁴⁴ The principles relating to wildlife, are those that state sustainable development requires (1) the disturbance of

³⁴⁰ Long title of NEMA.

³⁴¹ S1 of NEMA.

³⁴² The use of the word 'may' indicate that these principles can be applicable to a wide range of scenarios.

³⁴³ S2(2) of NEMA.

³⁴⁴ S2(3) of NEMA.

ecosystems and loss of biological diversity are avoided, or if they cannot be avoided, are minimised and remedied;³⁴⁵ (2) that development, use and exploitation of renewable resources and the ecosystem of which they are part do not exceed the level beyond which their integrity is jeopardised;³⁴⁶ and (3) a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions;³⁴⁷ (4) that negative impacts on the environment and the people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.³⁴⁸

Other principles of importance are that global and international responsibilities relating to the environment must be discharged in the national interest;³⁴⁹ and the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.³⁵⁰ These principles are of great importance because they serve as guidelines to which any state organ must exercise any function taking any decision in terms of this act or any statutory provision concerning the protection of the environment.³⁵¹ In addition, the principles must guide the state in the interpretation, administration and implementation as well as any other law concerned with the protection and management of the

³⁴⁵ S2(4)(a)(i) of NEMA.

³⁴⁶ S2(4)(a)(vi) of NEMA.

³⁴⁷ S2(4)(a)(vii) of NEMA.

³⁴⁸ S2(4)(a)(viii) of NEMA.

³⁴⁹ S2(4)(n) of NEMA.

³⁵⁰ S2(4)(o) of NEMA.

³⁵¹ S2(1)(c) of NEMA.

environment.³⁵² NEMA therefore requires the integration of environmental protection and economic and social development in light of section 24. As such the interest of the environment must be balanced with the socio-economic interest.³⁵³

In light of the above, whenever a development/activity which may significantly impact the environment, such as culling, is planned there will be a need to weigh development considerations against environmental considerations as required by NEMA as well as the environmental right. This in essence will make sure that environmental decisions will achieve a balance between environmental and socio-economic consideration under the auspices of sustainable development.³⁵⁴ The court in *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil Pty Ltd*³⁵⁵ noted that the Act requires the interpretation of any law concerned with the protection and of the environment must be guided by the principles in section 2. Furthermore, sustainable development is at the heart of the principles which require the state to evaluate the social, economic and environmental impacts of activities.³⁵⁶ In *Fuel Retailers* the court stated 'the principles provide guidance for the interpretation and implementation not only of NEMA but any other legislation that is concerned with the protection and management of the environment'.³⁵⁷ The court observed 'it is plain that these principles must be observed as

³⁵² S2(1)(e) of NEMA.

³⁵³ *Fuel Retailers Association* para 61.

³⁵⁴ *Fuel Retailers Association* para 61.

³⁵⁵ 2006 (5) SA 483 (SCA) (*Sasol Oil*).

³⁵⁶ *Sasol Oil* para 15.

³⁵⁷ *Fuel Retailers Association* para 67.

they are of considerable importance to the protection and management of the environment'.³⁵⁸

A reading of NEMA show that the Act places the needs of people at the forefront of its concern and does not provide for animal welfare consideration. Of importance the state must be guided and consider the environmental principles in decisions. Culling of wildlife has serious effects on the environment.³⁵⁹ Culling is a disturbance to wildlife and which causes loss of wildlife must be avoided, if they cannot be avoided, are minimised and remedied. The principles also provide for the precautionary approach which is a principle of sustainable development. The precautionary approach entails that even when there is no scientific information that an action/activity may damage the environment, protective measures must be put in place or activities prohibited that may damage the environment. This principle means that if government bodies are uncertain of a risk or consequence with an activity that they should rather stay on the safe side and not continue with the activity. Moreover, if government bodies are uncertain as to the degree of suffering the activity might cause to rather assume that its high and to stay on the save side and avoid causing unknown suffering to wildlife. To go against welfare provisions has a negative impact on section 24 which government bodies must anticipate and prevent. Government bodies are required to act in public trust, serve the interest and protect the environment as a common heritage. It is evident that before a decision to cull wildlife is made, several factors must be considered which include the interests of the environment, in particular

³⁵⁸ *Fuel Retailers Association* (2017) 67.

³⁵⁹ Chapter 2 at 2.3.

the welfare wildlife as they are part of the environment. Hence, decisions cannot be made in isolation regarding the environment.

3.4.1.2 Biodiversity Law and Policy

3.4.1.2.1 National Environmental Management: Biodiversity Act 10 of 2004

The State is given trusteeship over biodiversity and obliges the state to manage, conserve and sustain biodiversity in order to achieve the progressive realisation of the environmental right.³⁶⁰ NEMBA also requires in the application and implementation of the Act that it must be guided by the national environmental principles set out in NEMA.³⁶¹ Chapter 4 provides for the protection of threatened or protected ecosystems and species. Section 51 provides for the purpose of this chapter.³⁶² This includes making regulations of threatened or protected indigenous species to ensure that the utilisation of these species is managed in an ecological sustainable manner.³⁶³

Chapter 4 focuses on providing protection to (1) ecosystems³⁶⁴ and (2) species.³⁶⁵ This chapter operates by means of a listing mechanism as critically endangered, endangered

³⁶⁰ S3 of NEMBA.

³⁶¹ S7 of NEMBA.

³⁶² (a) provide for the protection of ecosystems that are threatened or in need of protection to ensure the maintenance of their ecological integrity; (b) provide for the protection of species that are threatened or in need of protection to ensure their survival in the wild; (c) give effect to the Republic's obligations under international agreements regulating international trade in species of endangered species; and (d) ensure that the utilisation of biodiversity is managed in an ecological sustainable way; (d) ensure that the utilisation of biodiversity is managed in an ecologically sustainable way .

³⁶³ S51(e) of NEMBA.

³⁶⁴ NEMBA define 'ecosystem' as a dynamic complex of animal, plant and micro-organism communities and their non-living environment interacting as a functional unit.

³⁶⁵ NEMBA define species as a kind of animal, plant or other organism that does not normally interbreed with individuals of another kind, and includes any sub-species, cultivar, variant, geographic race, strain, hybrid or geographically separate population.

species, vulnerable species and protected ecosystem or species.³⁶⁶ Interestingly, this chapter refers to the concept of ecological integrity.³⁶⁷ NEMBA requires the consideration of 'development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised' in decision making. Section 53 provides that the Minister may identify any process or activity in a listed ecosystem as a threatening process. Threatening process is defined as 'a process which threatens or may threaten (a) the survival, abundance or evolutionary development of an indigenous species or ecological community; or (b) the ecological integrity of an ecosystem.'³⁶⁸ A permit is required to carry out a restricted activity issued in terms of chapter 7.³⁶⁹ Restricted activities in respect of TOPS species include hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch capture or kill any such specimen.³⁷⁰ This section is not limited, as it provides for any other prescribed activity which involves a specimen of a listed threatened or protected species. In addition, the Minister is entitled to prohibit the carrying out of any activity which is of a nature that may negatively impact on the survival of a listed species and which is specified in a notice or proclaim that a permit is necessary.³⁷¹

³⁶⁶ The Minister must review this list at least every five years.

³⁶⁷ This concept indicates that individual wildlife must be protected on the basis of their ecological integrity. This could possibly strengthen the argument for the concern of their welfare.

³⁶⁸ S1 of NEMBA.

³⁶⁹ S57(1) of NEMBA.

³⁷⁰ Chapter 1 of NEMBA.

³⁷¹ S57(2) of NEMBA.

Section 9 empowers the Minister to issue norms and standards regarding the conservation of biological biodiversity and its components. This includes restriction of activities which impact biodiversity. These norms and standards may apply nationwide or in a specific area. Likewise, the Minister is granted the authority to make regulations relating to a broad range of topics.³⁷² These include compliance and enforcement of norms and standards; restricted activities; minimising threats to the survival of species in the wild and ecological integrity of ecosystems; management of species that cause damage as well as any matter that is necessary or expedient to achieve the objectives set out in NEMBA.

NEMBA is accordingly concerned with the conservation of biodiversity for human interest. NEMBA protects only species which are not targeted for exploitation.³⁷³ Thus biological resources such as wildlife can be used however in an equitable and sustainable manner. In relation to animal interest, NEMBA contains no direct reference to the welfare of animals.³⁷⁴

As seen above the concept of ecological integrity is referenced in both NEMA and NEMBA. The notion has been used in several international environmental instruments over the years,³⁷⁵ such as the Rio Declaration which obliges parties 'in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's

³⁷² S97 of NEMBA.

³⁷³ S2 of NEMBA.

³⁷⁴ Centre for Environmental Rights (2018) 36.

³⁷⁵ Convention on the Conservation of Antarctic Marine Living Resources, 1980 (1980) 19 ILM 837; Draft International Covenant on Environment and Development, Environmental Policy and Law Paper, (2010) 31 Rev 3, Article 2; and The Future We Want, 2012 United Nations General Assembly Resolution 66/288, para 40.

ecosystem'.³⁷⁶ The use of this notion has been to promote the conservation of the environment from human activities as well as to advocate that humans use the environment wisely. There is no universal definition for the concept, however it seems to embrace 'connotations of naturalness, wholeness, soundness and completeness'.³⁷⁷ The concept should be understood in the context of planetary boundaries. Human activities have pushed the planets over its limits and have given rise to biophysical thresholds that could be catastrophic for the resilience of humankind.³⁷⁸ This entails that humans should not view wildlife as commodities as their integrity is important for the resilience of a Holocene-like state that humans need to survive. Therefore, threats to nature, such as using culling to promote conservation, must be avoided. Government bodies should seek other methods to promote development. The recognition of the notion provides the opportunity to change how conservation is understood in our legal system. It is evident from chapter 4 that the act focuses on species that are threatened or need protection. However, in terms of the act a species listed as threatened or protected can be utilised if a person has a permit in terms of the chapter 7. This research submits Section 97 or section 9 can be utilized to provide protection to wildlife. These sections empower the Minister of Forestry, Fisheries and the Environment to make regulations or norms and standards to biodiversity, as NEMBA fails to provide for the welfare of individual wildlife. These provisions can be utilised to promulgate legislation that considers the welfare of

³⁷⁶ Principle 7 of Rio Declaration on Environment and Development, 1992(1992) 31 ILM 874 (Rio Declaration).

³⁷⁷ Bridgewater P, Kim RE & Bosselmann K 'Ecological Integrity: A Relevant Concept for International Environmental Law in the Anthropocene?' (2005) 25 *Yearbook of International Environmental Law* 64.

³⁷⁸ Bridgewater P et al (2005)

wildlife. In terms of the Act, culling is a restricted activity and would require a permit by the issuing authority. There is no requirement currently that the issuing authority must consider the welfare consideration.³⁷⁹

3.4.1.2.2 Threatened or Protected Species Regulations

The TOPS Regulations³⁸⁰ were adopted in terms of section 97 of NEMBA. The purpose of the regulations is found in regulation 2.³⁸¹ TOPS allow for certain species to be proclaimed as listed threatened or protected species.³⁸² Animals not listed under the regulations, may be protected under provincial legislation due to their perceived biodiversity value in the jurisdiction of their province.³⁸³

Chapter 2 establishes the permit system in relation to listed threatened or protected species. A person may not carry out a restricted activity in respect of a listed species without a permit in terms of Chapter 7.³⁸⁴ Regulation 10 provides for a list of factors that the issuing authority must take into account when considering a permit application, *inter alia*, whether a species is listed as critically endangered, endangered, vulnerable or

³⁷⁹ S88 of NEMBA.

³⁸⁰ National Environmental Management: Biodiversity Act 10 of 2004: Threatened or Protected Species Regulations GN R152 GG 29657 of 23 February 2007 (TOPS Regulations).

³⁸¹ '(a) further regulate the permit system set out in Chapter 7 of the Biodiversity Act insofar as that system applies to restricted activities involving specimens of listed threatened or protected species; (b) provide for the registration of captive breeding operations, commercial exhibitions facilities, game farms, nurseries, scientific institutions, sanctuaries and rehabilitation facilities and wildlife traders; (c) provide for the regulations of the carrying out of a specific restricted activity, namely hunting; (d) provide for the prohibition of specific restricted activities involving specific listed threatened or protected species; (e) provide for the protection of wild populations of listed threatened species; and (f) provide for the composition and operating procedure of the Scientific Authority.'

³⁸² Regulation 1 of TOPS.

³⁸³ Centre for Environmental Rights (2018) 37.

³⁸⁴ Chapter 7 of NEMBA

protected in terms of section 56 of NEMBA³⁸⁵; the IUCN Red List status of the species³⁸⁶; also whether the restricted activity is likely to have a negative impact on the survival of the relevant species.³⁸⁷ The factors to be considered contain further requirements within them.³⁸⁸ In addition, regulation 17 requires that the decision on a permit must be consistent with all applicable legal requirements.³⁸⁹

Chapter 1 provides a definition for culling - culling is permitted in three scenarios. First, culling is permitted [in a protected area] in order to manage the species in said area. The culling operation must be executed by an official or other person designated by the management authority of that area. The operation must also be in accordance with the management plan of the area. Secondly, culling is permitted if a specimen has escaped [from a protected area] and has become a damage causing animal. The operation can only be executed by an official or person designated by the provincial department or management authority of the protected area. The provincial department or management authority can kill the animal as a matter of a last resort. Thirdly, culling is permitted on a [registered game farm]. This is in order to manage the species on the farm. The operation must be executed by the land owner or other person designated by the landowner.³⁹⁰

³⁸⁵ Regulation 10(b) of TOPS.

³⁸⁶ Regulation 10(c) of TOPS.

³⁸⁷ Regulation 10(g)(iii) of TOPS.

³⁸⁸ See regulations 11, 12 and 13 of TOPS respectively.

³⁸⁹ Section 17(1) of TOPS. TOPS define 'applicable legal requirements' as (a) all legislation and instruments mentioned in section 88(3) of NEMBA; any national norms and standards in terms of section 9 of NEMBA and (c) any specific requirements of these regulations.

³⁹⁰ Chapter 1 of TOPS

The hunting of a specimen is given an extensive definition. Hunt is defined as (a) to intentionally kill such species by any means, method or device whatsoever; (b) to capture such species by any means, method or device whatsoever with the intent to kill; (c) to search for, lie in wait for, pursue, shoot at, tranquillise or immobilise such species with the intent to kill; or (d) to lure by any means, method or device whatsoever, such species with the intent to kill. In terms of the definition the prerequisite to be regarded as hunt there has to be the intention to kill the specimen. Moreover, the definition excludes the culling of a listed species in a protected area or on a registered game farm or the culling of a listed species that has escaped from a protected area and has become a damage causing animal.³⁹¹ Prohibited methods of hunting are found in Regulation 26, *inter alia*, poison and snares.

Regulation 14(1) provides for the specimen to be listed as damage causing animals.³⁹² A 'damage causing animal' is defined as an individual specimen of listed threatened or protected species interacting with human activities, and there is substantial proof that it (a) causes losses to stock or to other wild specimens;³⁹³ (b) causes excessive damage to cultivated trees, crops, natural flora or other property; (c) present a threat to human life; or (d) is present in such numbers that agricultural grazing is materially depleted.³⁹⁴ If the damage causing animal originated from a protected area, the following control options

³⁹¹ Chapter 1 of TOPS.

³⁹² In terms of the previous regulations, a damage causing animal could have been any animals, now the definitions is limited to only listed species in accordance with TOPS.

³⁹³ The phrase 'other wild specimens' is vague as it is in the nature of an animal to cause damage to other wild animals.

³⁹⁴Chapter 1 of TOPS.

must be considered by the provincial department.³⁹⁵ The control options include (a) capture and relocation or (b) control by culling or using methods prescribed in terms of regulations (4), (5) and (6). The last option (c) applies to a person, other than a hunting client, which must be designated in writing by the provincial department or management authority to capture, relocate or control by means of methods prescribed in sub-regulation (4), (5) and (6).³⁹⁶

An exception to regulation 14(1) is where human life is threatened, a landowner may kill a damage causing animal in self-defence.³⁹⁷ If a damage causing animal is killed in an emergency situation, the landowner must inform the relevant issuing authority. The issuing authority must then evaluate the evidence. The holder of a permit may hunt a damage causing animal as specified, *inter alia*, poison, darting and a firearm suitable for hunting.³⁹⁸

Risk assessment³⁹⁹ are required in respect of wild populations of listed endangered species⁴⁰⁰ and restricted activities in terms of the Biodiversity Act,⁴⁰¹ among others. The risk assessment help in identifying the impact of restricted activities on a species and possibility of causing or threatening extinction of the affected species. This assessment

³⁹⁵ Regulation 14(2) of TOPS.

³⁹⁶ Regulation 14(2) of TOPS.

³⁹⁷ Regulation 14(3) of TOPS.

³⁹⁸ Regulation 14(4) of TOPS.

³⁹⁹ Regulation 15 of TOPS.

⁴⁰⁰ Regulation 11(a) of TOPS.

⁴⁰¹ Regulation 11(b) of TOPS.

provides more protection to threatened or protected species. This gives the issuing authority the information required to make decisions in respect of the permits.

In light of the above, TOPS make the distinction between hunting and culling in order to prevent specimens being hunted for commercial purposes which originated from a protected area under the guise of culling or damage causing animals. TOPS take on a conservationist approach to wildlife. The regulations focus on regulating the permit system for human benefit and is not concerned with the welfare of individual animals. It is also imperative to take note of the definition of trade as it does not appear in other legislation in respect of biodiversity.⁴⁰² This is applicable to the disposal of any specimen parts or derivatives arising a cull operation.

3.4.1.2.3 The National Norms and Standards for the Management of Elephants in South Africa

The Norms and Standards provides a regulatory framework for the management of elephants within the Republic. The purpose is to ensure that elephants are managed in a way: to ensure their long term survival; the promotion of broader biodiversity and socio-economic goals that are ecologically, socially and economically sustainable; does not disrupt the ecological integrity of the ecosystem in which elephants live; that elephants are treated in ways that is ethical and humane as well as acknowledge that elephants are sentient, highly organised social structure and their ability to communicate.⁴⁰³ The Norms

⁴⁰² Regulation 1 of TOPS. The definition of trade 'includes the import into the Republic, export from the Republic, selling or otherwise trading in, buying, receiving, giving, donating, or accepting as a gift, or in any way acquiring or disposing of any specimen'.

⁴⁰³ S2(2) of Norms and Standards.

and Standards were adopted after an extensive public process which included various stakeholders. This came about after a major debate on the decision to cull elephants in order to manage the populations and their impact on the environment in the Kruger National Park.

Important is Section 3 which provides for guiding principles that any person must consider when dealing with elephants. The first principle is to recognise that 'elephants are intelligent, have strong family bonds and operate within highly socialised groups and unnecessary disruption of these groups by human intervention should be minimised'.⁴⁰⁴

The principles recognise that elephants are engineers of habitat change and their presence or absence has a critical effect on the way in which ecosystems function.⁴⁰⁵ The principles recognise that the movement of elephants throughout history have been disrupted by human activities.⁴⁰⁶ The guiding principles also create a balance which acknowledges the impact of elephants on biodiversity and on human beings who live in close proximity to them.⁴⁰⁷ Further, the principles require management intervention must be based on scientific knowledge and take into account their social structure as well as avoid stress and disturbance to elephants.⁴⁰⁸ In relation to lethal management (such as culling), measures must be undertaken with caution and only after all other alternatives have been considered.⁴⁰⁹ Lethal management must therefore only be undertaken as a

⁴⁰⁴ Section 3(a) of Norms and Standards.

⁴⁰⁵ S(3)(c) of Norms and Standards.

⁴⁰⁶ Section 3(d) of Norms and Standards.

⁴⁰⁷ Section 3(b) and (f) of Norms and Standards.

⁴⁰⁸ Section 3(h) of Norms and Standards.

⁴⁰⁹ Section 3(i) of Norms and Standards.

last resort. The principles affirm that elephants used in the tourism sector should not be treated in a manner that is inappropriate, inhumane or unethical.⁴¹⁰ Lastly, the Norms and Standards declare that efforts must be made to protect elephants from abuse and neglect.⁴¹¹ Even though the Norms and Standards are progressive in welfare provisions, it still provides for measures such as culling and trophy hunting. Indeed, the Norms and Standards are important as it affirms the need to protect individual elephants, at the same time, ensuring the promotion of human interests and other environmental concerns.

No restricted activities involving an elephant may be undertaken without a permit issued in terms of regulation 18 of the TOPS Regulations.⁴¹² Regulation 19(2) of TOPS provide that if any norms and Standards apply to the restricted activity for which a permit is issued, that permit must be issued subject to a condition that the permit holder is bound by those norms and standards and must act in accordance with those norms and standards when carrying out the restricted activity.⁴¹³

The norms and standards declare the responsible person to prepare a management plan in relation to elephants. The management plan must include an initial assessment, which contains the following information: the availability of adequate food plants; adequate shelter; adequate water for drinking and bathing and the size of the land available to the

⁴¹⁰ S3(j) of Norms and Standards.

⁴¹¹ The Norms and Standards also do not prohibit other kinds of abuses such as the use of elephants in circuses or safari back riding.

⁴¹²Section 4 of Norms and Standards.

⁴¹³ Centre for Environmental Rights (2018) 40. The report states that no permit issued in respect of captive elephants contain this mandatory condition.

population of elephants.⁴¹⁴ In addition, determine if the responsible person can provide for the physical, physiological, social and natural behavioural needs of the elephants.⁴¹⁵ The management plan must consider the guiding principles. The norms and standards also contain a duty of care section.⁴¹⁶ The duty of care states the responsible person is obliged to, *inter alia*, provide the elephants with responsible veterinary care and not allow any neglect or abuse to the elephant. In respect of sedation of elephants,⁴¹⁷ this can only be done as an extraordinary measure. An elephant cannot be repeatedly sedated and can only be carried out by a veterinarian. Furthermore, sedation can only be done in specific situations.⁴¹⁸ In relation to translocation, an elephant may not be translocated. This is only allowed if certain conditions are met and require strong justification for the decision.

The Norms and Standards states that when it becomes necessary to manage the size of a population of elephants, it must take place in terms of a management plan.⁴¹⁹ One of the management options⁴²⁰ provided is culling.⁴²¹ Section 19 provides for conditions under which culling can take place. First, a culling plan must be prepared by the responsible person with the assistance of an ecologist who is a recognised elephant

⁴¹⁴ Section 7(b) of Norms and Standards.

⁴¹⁵ Section 7(d) of Norms and Standards.

⁴¹⁶ Section 8 of Norms and Standards.

⁴¹⁷ Section 10 of Norms and Standards.

⁴¹⁸ Section 10(2)(c) of Norms and Standards: '(i) to carry out a disease control procedure, scientific research or for management purposes; (ii) for treatment by a veterinarian; or (iii) to translocate or transport the animal.'

⁴¹⁹ Section 15(1)(a) of Norms and Standards.

⁴²⁰ The other options provided are contraception; range manipulation; translocation; introduction of elephants and hunting.

⁴²¹ Section 15(1)(b)(vi) and 19 of Norms and Standards.

management specialist and approved by the relevant issuing authority.⁴²² The culling plan must be included within the management plan of the area. The culling plan must then include the following information, *inter alia*, evidence that the actual or projected elephant numbers at the specific location are incompatible with the agreed land use; evidence that all other population management options have been rejected by the ecologist; the proposed number of elephants to be culled; and proposed culling methods. This section affirms that culling must be done with methods that are quick and humane.⁴²³

Hunting is provided for in Section 20. This section permits the hunting of specific elephants, namely solitary males, females (in terms of regulation 14(2)(b) of TOPS and section 25 of Norms and Standards), and females on private or communal land according to the management plan. The exception is that no elephant may be hunted in the immediate proximity of any female or calf group. Moreover, section 21 prohibited certain methods of hunting and this should be read together with regulation 26 of TOPS.

The Norms and Standards is a conservation document but provide strong recognition to animal welfare. The document allows for culling as a last resort and that the methods must be quick and humane. The document also provide for other management options before culling is permitted. Although the Norms and Standards apply to elephants this document can be used in order to promulgate baboon specific legislation that recognise the welfare of the baboons.

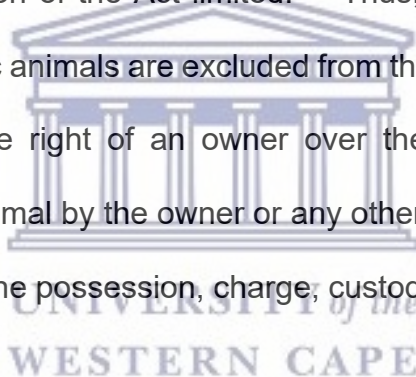
⁴²² Section 19(a) of Norms and Standards.

⁴²³ Section 19(d)(i) of Norms and Standards.

3.4.1.3 Law and Policy related to Animals

3.4.1.3.1 Animal Protection Act 71 of 1962

The primary animal welfare legislation⁴²⁴ in South Africa is the Animal Protection Act (APA).⁴²⁵ The aim of the APA is to regulate the prevention of cruelty to animals.⁴²⁶ The animals to which the APA applies are ‘any equine, bovine, sheep, goat, pig, fowl, ostrich, cat or other domestic animal or bird, or any wild animal,⁴²⁷ wild bird or reptile which is in captivity or under the control of any person’.⁴²⁸ The definition of ‘animal’ indicates that only animals in captivity or under the control of humans are protected by the Act. This makes the scope of application of the Act limited.⁴²⁹ Thus, animals in the wild (natural habitat), fish and other aquatic animals are excluded from the protection and scope of the Act. The APA recognises the right of an owner over their animal, but still prohibits unnecessary cruelty to the animal by the owner or any other person.⁴³⁰ The APA defines owner as any person having the possession, charge, custody or control of that animal. In



⁴²⁴ For the purpose of this research the focus is on the APA. However, there are other legislation in relation to animals, see Societies for the Prevention of Cruelty to Animals Act 169 of 1993; Veterinary and Para-Veterinary Professions Act 19 of 1982; Performing Animals protection Act 24 of 1935.

⁴²⁵ The Act is subject to be amended by the Animal Protection Amendment Act 2021. The Amendment Act provides for the amendment of the definition of animal and includes provisions in relation to cosmetic testing. See Parliament ‘Animal Protection Amendment Bill’ available at https://www.parliament.gov.za/storage/app/media/Bills/2021/B1_2021_Animals_Protection_Amendment_Bill/B1_2021_Animals_Protection_Amendment_Bill.pdf (accessed on 25 October 2022).

⁴²⁶ The long title of the Act, which states ‘To consolidate and amend the laws relating to the prevention of cruelty to animals.’

⁴²⁷ The APA does not define ‘wild’ nor ‘wild animal’.

⁴²⁸ Section 1 of APA.

⁴²⁹ World Animal Protection ‘Animal Protection Index 2020 – Republic of South Africa’ (2020) *Animal Protection Index* 5.

⁴³⁰ S1 of APA define ‘owner’ as in relation to an animal, includes any person having the possession, charge, custody or control of that animal.

addition, it is accepted that the act was only enacted to protect the interest of owners over their property (animal) and not the animals in their own right.⁴³¹

Section 2 of the Act provides for certain offences in respect of the treatment of animals. The offences listed include, section 2(1)(a) that protect an animal from overloading, overdriving, overriding, ill-treatment, neglect, infuriation, torture, maim,⁴³² cruel⁴³³ beatings, kicking, goading, or terrifying. This offence is limited as it must be subjective considering whether the animal is deemed to be cruelly beaten or not.⁴³⁴ This includes being confined, chained or secured that will cause unnecessary suffering.⁴³⁵ It is also prohibited to lay or expose any poison or any poisoned fluid or edible matter or infectious agents except for the destruction of vermin or marauding domestic animals without taking reasonable precautions to prevent injury or disease being caused to animals.⁴³⁶ Further, the Act prevents the use of or attached to any animal any equipment, appliance or vehicle which causes or will cause injury to such animal or which is loaded, used or attached in such a manner as will cause such animal to be injured or suffer unnecessarily.⁴³⁷ This offence is limited because suffering that is considered to be necessary is legal. Furthermore, the Act prevents the laying of any trap or other device for the capturing or

⁴³¹ Centre for Environmental Rights (2018) 24.

⁴³² In *S v Gerwe* 1977 (3) SA 1078 (T) p1079; the court dealt with terms 'torture' and 'maim'. The court stated the words 'torture' and 'maim' are not defined and should be given their ordinary meaning. Torture means the infliction of bodily pain as punishment, or as a means of persuasion. While the word maim means to mutilate.

⁴³³ The term cruelty in the context of the APA refers to actions which inflict unreasonable or unnecessary pain. As stated in *R v Helderberg* 1993 NPD 507, the mere infliction of pain alone is not a contravention of the prohibition.

⁴³⁴ Centre for Environmental Rights (2018) 21.

⁴³⁵ S2(1)(b) of APA.

⁴³⁶ S2(1)(d) of APA.

⁴³⁷ S2(1)(f) of APA.

destroying of any animal, wild animal or wild bird the destruction of which is not proved to be necessary for the protection of property or for the prevention of spread of disease.⁴³⁸ It is asserted that the wording of the offences in this section contains subjective exceptions and contradictions which actually weaken the protection provided by the Act.⁴³⁹ As a criminal statute, the offences listed is vast, but weaken by terms such as 'unnecessarily' and 'cruelly'. Such terms result in ambiguity as to their application and meaning. Also, the APA require a high evidentiary burden of proof beyond reasonable doubt.

Section 2(2) provides a presumption that the owner of any animal shall be deemed to have permitted or procured the commission or omission of any act in relation to that animal if by the exercise of reasonable care and supervision in respect of that animal could have prevented the commission or omission of such act.

In relation to killing, the APA does not prohibit the killing of animals. The APA only prohibits the manner or method of killing the animal, that is the unnecessary infliction of pain and suffering must be avoided.⁴⁴⁰ Moreover, the Minister has the power to prohibit the killing of an animal. In other words, trade with the skin or meat or any other part of such animal is prohibited.⁴⁴¹ The Court is also granted the power to order an animal to be destroyed if, in the opinion of the court, it would be cruel to keep such an animal alive.⁴⁴²

⁴³⁸ S2(1)(j) of APA.

⁴³⁹ Centre for Environmental Rights (2018) 20.

⁴⁴⁰ S2 of APA.

⁴⁴¹ S2(3) of APA.

⁴⁴² S3(a) of APA.

Section 5 allows a police officer to destroy animals. The destruction of an animal is only allowed if the officer is of the opinion that the animal is 'so diseased or severely injured, or in such a physical condition that it ought to be destroyed'. The police officer may destroy the animal even if the owner is absent or refuses to consent to the destruction. If this is the case, the police officer must summon a veterinarian or two adult persons whom the officer considers to be reliable and of sound judgment to examine if the animal is diseased or in such a physical condition it would be cruel to keep it alive. The destruction may be done with such instruments or appliances and with such precautions as well as in a manner as to inflict a little suffering as practicable.

The APA has been enforced before South Africa's Constitution in 1996. Over the years, the Constitution has overridden many concepts within the Act, and therefore, the Act is seriously considered to be out-dated⁴⁴³ and entirely inadequate to tackle the implications of welfare. Interestingly, section 10 provides the Minister with the authority to make regulations in relation to the prevention of cruelty or suffering of any animal, destruction of an animal; and matters as required for the better carrying out of the objects and purposes of the Act. A major setback is that the last regulations promulgated in terms of the Act were done in 1986.⁴⁴⁴ This section could be used to bring the APA in line with recent developments. In light of the above, the focus of the APA is on prohibiting of animal cruelty and does not expressly provide for the welfare of animals. The focus of the APA

⁴⁴³ Centre for Environmental Rights (2018) 20.

⁴⁴⁴ Regulations relating to the seizure of animals by an officer of a society for the prevention of cruelty to animals in GN R468 GG 10121 of 14 March 1986.

is on animals in captivity or under the control of humans. Wild animals are not within the scope and protection of the APA. The use of the word 'any' in the definition gives rise to a wide interpretation to which animals the APA applies. Nevertheless, this excludes the Chacma Baboons as they are neither domestic nor wild. A court held that baboons are 'problem animals' and if found outside a nature reserve or national park are deemed vermin or animals that cause damage.⁴⁴⁵ Therefore, the scope and application of the APA is limited. Consequently, the welfare of wild animals is not a concern for the APA. Therefore, animals not covered under the APA must find protection under other legislation.

It is evident that the treatment in various animals indicates that the APA was adopted to protect the property (animal) of owners and not the interests of the animals in their own right. As the APA provides for the owner to be financially compensated when his/her property is damaged. Bilchitz observes that the courts have favoured the indirect duty approach to animal welfare, the courts have based the purpose of legislation on the degree of offence to human sensibilities – the subjective status of the property.⁴⁴⁶ The APA recognises some elements of animal sentience as it mentions that animals can experience physical pain. The APA is restricted in scope and application as it does not apply to wildlife in their natural habitat. It is submitted that the State should expand the scope of application to all animals so that every animal can be protected from cruelty.

⁴⁴⁵ *Macrae v State* (93/2013) [2014] ZASCA 37 (28 March 2014) Para 11, the court relied on its own research. Note the court determined this under Schedule 8 of the Nature Conservation Ordinance 12 of 1983(Transvaal).

⁴⁴⁶ Bilchitz D 'Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals' (2009) 25 *SAJHR* 44-46.

Moreover, it is submitted that the APA should be amended to include a duty of care onto the owners of animals to guarantee the welfare of their animals.⁴⁴⁷ The APA should also expressly indicate that animals covered under its protection are sentient in terms of the APA.⁴⁴⁸ In addition, the APA must recognise the welfare of animals on the basis of their intrinsic value in their own right. Section 5 provides police officers with the authority to cull animals without the presence of a veterinarian. This provision might be used as a loophole to cull animals and thus should be declared invalid. Accordingly, it is submitted that section 10 provides the opportunity to amend certain sections of the APA that go against the welfare of animals. This provision could also be utilised to bring it in line with current developments, as discussed in the next chapter, which recognise the welfare of animals and their intrinsic value.

The APA does not inadequately protect wildlife or in this case the baboons, particularly in respect to culling and damage causing animals. The scope of protection of APA does not apply to Chacma baboon as the baboons are classified as damage causing animals. The APA also does not recognise the sentience of the baboons.

3.4.2 Law and Policy in the Western Cape

South Africa has nine recognised provinces. Each province applies its own ordinances.⁴⁴⁹ Sometimes the provinces do not apply national legislation because they follow these out-

⁴⁴⁷ World Animal Protection (2020) 19.

⁴⁴⁸ World Animal Protection (2020) 8.

⁴⁴⁹ Nature Conservation Ordinance 8 of 1969; Nature Conservation Ordinance 19 of 1974; Transvaal Nature Conservation Ordinance 23 of 1983; Nature Conservation Act 29 of 1992; Nature Conservation Act 10 of 1998; Limpopo Environmental Management Act 7 of 2003; Nature Conservation Act 9 of 2009.

dated ordinances. The ordinances of the provinces are mostly similar with only minor differences in the detail.⁴⁵⁰ Common provisions in relation to biodiversity are, *inter alia*, definition of wild animal, requirements for hunting animals, and prohibited methods. The provinces have concurrent jurisdiction over certain matters in respect of wild animals.⁴⁵¹ This means that regulation of wildlife will vary between provinces and between provinces and national governments. Generally, in conflict between national and provincial legislation, national legislation prevails over provincial legislation.⁴⁵² National legislation does not become invalid where the provincial legislation prevails. According to section 149 of the Constitution, the national legislation merely becomes inoperative in that province for the duration of the conflict. As a result, this has created a lack of uniformity in complying with and applying relevant legislation.⁴⁵³ This can be seen in the issuing of permits for certain activities. The unaligned framework has created legal loopholes that have had a detrimental impact on wildlife.⁴⁵⁴ There are some welfare provisions with the ordinances, such as the prohibition of cruel hunting methods. This study only considers the ordinance that is applicable in the Western Cape.

3.4.2.1 Cape Nature and Environmental Conservation Ordinance 19 of 1974

CapeNature⁴⁵⁵ is the regulatory authority in the Western Cape for the issuing of permits in relation to the protection of animals. In relation to *casu*, the Chacma Baboons are not

⁴⁵⁰ Kidd M (2011) 100.

⁴⁵¹ Schedule 4 Part A of the Constitution.

⁴⁵² Section 146 of the Constitution.

⁴⁵³ Centre for Environmental Rights (2018) 43. See also Kidd M (2011) 100-101.

⁴⁵⁴ Wilson AP (2019) 42.

⁴⁵⁵ CapeNature available at <https://www.capenature.co.za/about-us> (accessed on 21 January 2022).

listed in schedule 2 of the Ordinance but are listed in Appendix II of CITES. Thus, the baboons are classified as protected wild animals in the Cape Peninsula. This means the Chacma Baboons may only be hunted if a person has a valid hunting permit or license; or hunting on own property or have the explicit written consent of the landowner.

A few provisions of the Cape Nature and Environmental Conservation Ordinance were amended in the Western Cape Nature Conservation Laws Amendment Act.⁴⁵⁶ The Amendment Act focus on the conservation of nature⁴⁵⁷ and makes no explicit mention of animal welfare. The only welfare-based provisions are the prohibited ways of hunting.⁴⁵⁸ In terms of the Amendment Act, wild animals are protected if they are listed in Schedule 2 of Ordinance or Appendix II of the CITES, provided that it shall not include any species of wild animal specified in such Appendix and Schedule 1.⁴⁵⁹ A protected wild animal can only be hunted if a person is the (1) a holder of a permit or a licence issued by the Board⁴⁶⁰ or (2) is hunting on own property and has the explicit written consent of the landowner on whose property the hunt is taking place.⁴⁶¹ A person may not kill or capture any species of protected wild animal greater than the daily bag limit.⁴⁶² If the local authority is satisfied that damage is being done to crops or other property of an owner, may issue a permit to the owner, to hunt any species on the land and at the place of the owner,

⁴⁵⁶ Western Cape Nature Conservation Laws Amendment Act 3 of 2000 (Amendment Act).

⁴⁵⁷ Long title of Amendment Act states 'to consolidate and amend the laws relating to nature and environmental conservation and for matters incidental thereto'.

⁴⁵⁸ S29 of Amendment Act.

⁴⁵⁹ Chapter 1 of Amendment Act.

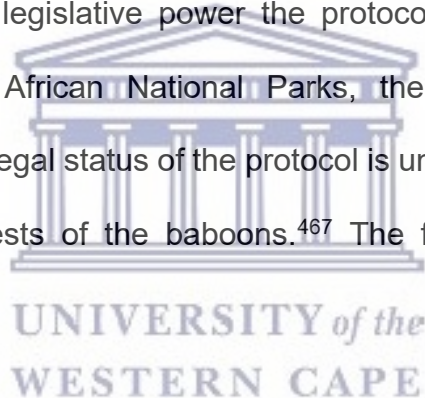
⁴⁶⁰ S 27(1) of Amendment Act.

⁴⁶¹ S 39 of Amendment Act.

⁴⁶² S 28 of Amendment Act.

where damage is being done.⁴⁶³ The Minister is granted the authority to make regulations, in respect of licences, permits as well as any matter required or permitted to be prescribed.⁴⁶⁴ The latter also include any matter the Minister considers necessary or expedient in order to achieve the objects of the ordinance.⁴⁶⁵

The Protocol for Reducing the Frequency and Severity of Raiding Behaviour by Chacma Baboons on the Cape Peninsula, South Africa⁴⁶⁶ guides both long term management plans and short interventions to reduce raiding of baboons that is considered to be a threat to human health and safety and may lead to damage of property. The Protocol does not state under which legislative power the protocol was created by the three government bodies (South African National Parks, the City of Cape Town and CapeNature). Therefore, the legal status of the protocol is unknown. The Protocol makes no mention of welfare interests of the baboons.⁴⁶⁷ The focus of the Protocol is on



⁴⁶³ S 47 of Amendment Act.

⁴⁶⁴ S 82 of Amendment Act.

⁴⁶⁵ S 82(1)(q) of Amendment Act.

⁴⁶⁶ CapeNature 'Protocol for reducing the frequency and severity of raiding behaviour by chacma baboons on the Cape Peninsula, South Africa' available at <https://www.capenature.co.za/wp-content/uploads/2013/11/Protocol-for-raiding-baboons.pdf> (accessed on 2 February 2020).

⁴⁶⁷ The current process for dealing with raiding baboons entail that the Cape Nature Wildlife Advisory Committee (WAC) be provided with a detailed case history (The case history is put together by the service provider, local residents, conservation authorities and both local and international researchers involved in baboon management. This file includes, inter alia, the social status, history of management interventions and the current troop) of each individual raiding baboon that is considered to be potentially dangerous to public health and safety. The case history is then assessed by WAC using a decision framework in the form of a checklist (the health and raiding behaviour are then assessed within the context of the individual baboon's current social and physical environment.) This is to make sure that factors which may have promoted the raiding behaviour of the specific baboon are considered as potential mitigating factors. This is also to make sure that the authorities focus their attention on reducing the impact of such factors on future raiding. An example of potential mitigating factors that will be considered is a drought when assessing the specific raiding behaviour of a baboon. According to the Protocol there is no single category of raiding that either results in a decision to euthanize a baboon or mitigating factors that prevent the baboon from being euthanized. The Protocol states further that, the weight of evidence for and against euthanasia is assessed as a whole. Furthermore, a baboon is only considered for euthanasia when the Baboon

individual baboons rather than a population. The Protocol includes the concept of euthanasia. The Protocol states that:

“Culling [i.e. euthanasia] is always the last and least preferred management option for wildlife managers but it remains a necessary tool in any closed population including zoo’s, sanctuaries and closed parks when translocation is not considered to be a viable management option.”⁴⁶⁸

3.4.3 Strengths and weaknesses with current regulatory framework

The above analysis, from a welfare perspective, highlights that the current regulatory framework is inadequate to protect the welfare of wildlife and that urgent law reform is required. This discussion draws from the 2018 Fair Game Report⁴⁶⁹ and Animal Protection Index 2020,⁴⁷⁰ these reports identified several gaps and shortfalls with the current regulation of wildlife. The points identified here are not a closed list.

3.4.3.1 The following strengths:

- Section 24 of the Constitution fails to mention animal welfare. However, the environmental right expressly mentions ecologically sustainable development and

Conservation Authorities (BCA) can show to the WAC that they have implemented short- and long-term management plans to curb the raiding behaviour and reduce the probability that other baboons will acquire similar behaviour. WAC then makes recommendations to the Executive Committee of CapeNature for approval. The decision by the Executive Committee is then communicated to the BCA on the individual baboon.

⁴⁶⁸ P7 of Protocol.

⁴⁶⁹ Centre for Environmental Rights ‘Fair Game? Improving the Well-being of South African wildlife: Review of the Legal and Practical Regulations of the Welfare of Wildlife Animals in South Africa, 2018’ available at <https://cer.org.za/wp-content/uploads/2018/06/CER-EWT-Regulation-of-Wildlife-Welfare-Report-25-June-2018.pdf> (accessed on 29 March 2020) 72.

⁴⁷⁰ World Animal Protection ‘Animal Protection Index 2020 – Republic of South Africa’ (2020) *Animal Protection Index*.

use of natural resources. Section 24 is used as the basis for commodification and consumptive use of wildlife under the umbrella of sustainable development. The relationship between sustainable development and animal welfare is underexplored in the literature. The ideal of sustainable development is conducive for animal welfare integration.⁴⁷¹ Scholars advocate for an evolutionary interpretation of sustainable development that include welfare of animals as well as the consideration of the intrinsic value of animals.⁴⁷² These scholars promote governmental bodies to acknowledge animal welfare as an important part of sustainable development. Furthermore section 24 is broad and an integrative interpretation of section 24 allows the courts to extend the scope of protection in section 24 to animal welfare.⁴⁷³

- The various legislation empowers Ministers⁴⁷⁴ to promulgate legislation on several topics in relation to animals.⁴⁷⁵ For example the Minister of Forestry Fisheries and the Environment can also prohibit an activity that can negatively impact the survival of species.⁴⁷⁶ It is therefore submitted that the Ministers can utilise this power and

⁴⁷¹ See Lion Bone case. See also Verniers E 'Bringing animal welfare under the umbrella of sustainable development: A legal analysis' (2021) *RECIEL* 349-362.

⁴⁷² Scholtz W (2020) 7. See also Scholtz W *Animal Welfare and International Environmental Law. From Conservation to Compassion* (2019) Edward Elgar

⁴⁷³ Bilchitz D 'Exploring the Relationship between the Environmental Right in the South African Constitution and Protection for the Interests of Animals' (2017) 134(4) *South African Law Journal* 767-772.

⁴⁷⁴ The Minister of Forestry Fisheries and the Environment and the Minister of Agriculture, Land Reform and Rural Development.

⁴⁷⁵ S9 and S97 of NEMBA. S10 of APA. Regulation 82 of Amendment Act.

⁴⁷⁶ S57(2) of NEMBA.

promulgate specific legislation that recognise the intrinsic value of Chacma Baboon and the importance of their welfare.

- The APA prohibits animal cruelty in section 2(1). The Act also recognises some aspects of sentience as it acknowledges that animals can experience physical pain.⁴⁷⁷
- Governmental bodies must in any decisions concerning the environment consider the NEMA principles.
- The use of risk assessment can provide protection to species.⁴⁷⁸

3.4.3.2 The following weaknesses:

- No formal acknowledgement of animal sentience is made in the legislation or policy.⁴⁷⁹ Even though, the APA allude to the psychological suffering of animals, animals are not clearly defined as sentient.⁴⁸⁰ The APA is outdated and not in line with the new constitutional dispensation.⁴⁸¹ The APA is full of loopholes which constitutes a dilution in the protection the act is supposed to provide. As stated above, the Act excludes wild animals in their natural state from its scope of application, since only wild animals ‘in captivity or under the control of any person’ are included within the Act. This indicates that the welfare of wild animal is not important.

⁴⁷⁷ Section 2(1)(a) which prohibits on infuriating and terrifying animals hint to the psychological suffering of animals.

⁴⁷⁸ Regulation 15 of TOPS.

⁴⁷⁹ World Animal Protection (2020) 3.

⁴⁸⁰ World Animal Protection (2020) 3.

⁴⁸¹ Centre for Environmental Rights (2018) p20.

- No legislation exists that prohibit the private ownership of wild animals.⁴⁸² The Game Theft Act⁴⁸³ takes away the common law *res nullius* status of the wild animal. If the wild animal is on the owner's property, the owner only has to provide a certificate that states the wild animal was or is adequately enclosed, then the owner can still exercise his/her ownership rights of the wild animal. The Act turns wild animals into commodities. As a result, there are few, if any, truly free wild animals.⁴⁸⁴ This Act provides that the owner of property is the owner of game animals on that property provided that the property is adequately enclosed with a fence that can contain that species of game. Consequently, animals are still treated as property and in turn mean that animals are incapable of having rights.⁴⁸⁵ This mirror the way slaves were treated in the past.⁴⁸⁶ This Act means more wildlife will be removed from the wild, restricting the natural movement of wildlife, and farmed for profit.
- The Government amended the Animal Improvement Act⁴⁸⁷ to add 33 species of wildlife to the list of species which can be farmed.⁴⁸⁸ The Act authorises 'the

⁴⁸² World Animal Protection (2020) 15.

⁴⁸³ 105 of 1991.

⁴⁸⁴ Centre for Environmental Rights (2018) 42.

⁴⁸⁵ EMS Foundation and Animal Law Reform South Africa 'Submission in respect of High Level Panel – Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 13 April 2022) P45.

⁴⁸⁶ EMS Foundation and Animal Law Reform South Africa 'Submission in respect of High Level Panel – Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 13 April 2022) P45.

⁴⁸⁷ Animal Improvement Act 62 of 1998.

⁴⁸⁸ World Animal Protection (2020) 15.

breeding, identification and utilisation of genetically superior animals in order to improve the production and performance of animals'. The Government has clarified that even though the species are listed under the Animal Improvement Act, the Act does not supersede the conservation laws.⁴⁸⁹ It is apparent that the government regard wildlife as commodities and property and does not recognise their inherent right to exist and to play their part within the ecosystem.

- The main focus of biodiversity legislation is on conservation of species. The above framework highlights that the regulation of wildlife 'follows the traditional but outdated distinction between animal welfare and biodiversity conservation'.⁴⁹⁰ Wildlife are seen as resources for sustainable use.

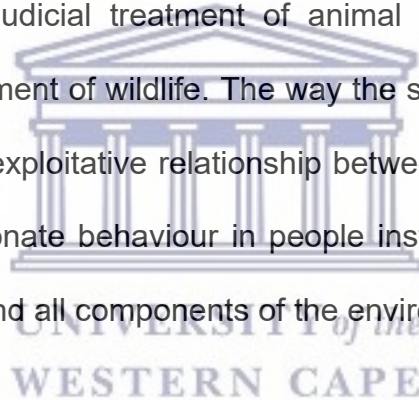
- The APA is administered by the Department of Agriculture, Land Reform & Rural Development. NEMA is administered by the Department of Environment, Forestry & Fisheries. The separation of the two departments are negatively affecting animals. The welfare implications of the amendments to agricultural legislation are concerning. The welfare of wildlife has in the past been inadequately protected. This is as a result of environmental authorities consistently denying that they have a welfare mandate. Agricultural authorities continue to devote few or no resources to the welfare of wildlife.

⁴⁸⁹ World Animal Protection (2020) 15.

⁴⁹⁰ Centre for Environmental Rights (2018) 5.

- The government view hunting as a valuable economic activity and has expressed its commit to build a close relationship with the hunting industry.⁴⁹¹ In addition, the government sees hunting as a financially valuable tourist activity in the country.⁴⁹² This stance in support of the hunting industry may prevent the development on wildlife welfare issues.

The Fair Game Report identified that the legal framework in respect of wildlife are divided into conservation and welfare which is outdated tradition, welfare considerations are absent in biodiversity laws and permits, inadequacy in the application and enforcement of laws, jurisdiction divide, judicial treatment of animal cruelty cases, the focus of economic value and development of wildlife. The way the system treats wild animals as commodities can lead to an exploitative relationship between people and animals. This will cultivate an uncompassionate behaviour in people instead of encouraging respect and compassion for wildlife and all components of the environment as a whole.⁴⁹³



⁴⁹¹ Department Forestry, Fisheries and the Environment 'Minister Edna Molewa's Speech During the Official Opening of the First Hunting Indaba' available at https://www.dffe.gov.za/speech/molewa_firsthuntingindaba_opening (accessed on 22 May 2022). See also WAP (2020) 28

⁴⁹² Department Forestry, Fisheries and the Environment 'Minister Edna Molewa's Speech During the Official Opening of the First Hunting Indaba' available at https://www.dffe.gov.za/speech/molewa_firsthuntingindaba_opening (accessed on 22 May 2022). See also World Animal Protection (2020) 28.

⁴⁹³ EMS Foundation and Animal Law Reform South Africa 'Submission in respect of High Level Panel – Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 13 April 2022) P45.

3.5 Conclusion

The culling of wildlife is not always an agreeable measure as the welfare movement would strongly disagree with the appropriateness of the measure in most cases. The topic of animal welfare is controversial thus no universal definition of animal welfare exists. South African Biodiversity legislation (as well as internationally) does not cater for welfare consideration of wildlife. It is focused on the conservation and sustainable use of biodiversity (such as wildlife) as well as benefit sharing of indigenous biodiversity for the benefit of humans. This chapter highlighted that the attainment of sustainable development is a major objective of biodiversity law. The ideal of sustainable development tends to favour economic development rather than ecological preservation. This approach is consistent with an anthropocentric view. The absence of welfare considerations within biodiversity legislation was made clear in the Predator *Breeders* case. The remarks made by the court indicate that this is a normative problem.

The preamble of CBD recognises the intrinsic value of biological diversity. The recognition constitutes a departure from anthropocentric hold of biological resources.⁴⁹⁴ The APA fails to provide for animal welfare and the intrinsic value of animals. The APA is criticised for being inadequate to provide protection to wildlife. It's observed above, The APA is restricted in scope and application as it does not apply to wildlife in their natural habitat. This chapter submitted that the State should expand the scope of application to all animals so that every animal can be protected from cruelty. Moreover, The APA should

⁴⁹⁴ Scholtz W (2019) 253.

also expressly indicate that animals covered under its protection are sentient in terms of the APA. The exception, to the absence of welfare consideration is the Norms and Standards which regulates the management of elephants. The document, which indicates a point of departure, is concerned with conservation and still contains strong provisions of animal welfare. It is submitted that the Norms and Standards can be used in order to resolve the conflict well ensuring that the intrinsic value of the baboons are considered. In relation to culling, the framework does not adequately regulate the culling practice. Culling is allowed if one has a permit.

The Chacma Baboon is governed on a provincial level. The City of Cape Town has a constitutional mandate to participate in the baboon management. CapeNature has the authority to participate in baboon management because its aligned with the objects and some functions and powers. The protocol adopted by the baboons Conservation Authorities, as discussed above, guides both long term management plans and short-term interventions to reduce raiding of baboons that is considered to be a threat to human health and safety and may lead to damage to property. This protocol has inherent shortcomings mainly a lack of clear legal status and it makes no mention of baboon welfare interests. The author asserts this protocol is wholly sufficient to provide protection to the baboons. The legal status of the protocol is unknown thus making it difficult to determine under which legislation it was adopted.

The Fair Game Report provides recommendations on biodiversity law reform. The entire legal framework must be amended so that anomalies and loopholes are removed. First,

legislation must be amended to provide for a clear wildlife welfare mandate.⁴⁹⁵ Mandatory welfare standards for all animals must be developed and included in the legal framework in accordance with science and societal views.⁴⁹⁶ There must be an investment made in the compliance, monitoring and enforcement capacity of conservation authorities.⁴⁹⁷ The report indicates that a standardised and transparent permit system is important. Proposals are provided for short term and long-term reform of the permit system.⁴⁹⁸ Lastly, the report ends by noting the improvement of welfare and conservation laws and the consistent implementation, compliance, monitoring and enforcement is an urgent constitutional imperative.

The preamble of CBD recognises the intrinsic value of biological diversity. The recognition constitutes a departure from anthropocentric hold of biological resources.⁴⁹⁹ As alluded the position has changed in South Africa in regards to wildlife and their welfare. The next chapter discuss the significant developments that promises a change in how wildlife is considered and treated in our law.

⁴⁹⁵ Centre for Environmental Rights (2018) p71.

⁴⁹⁶ Centre for Environmental Rights (2018) p71.

⁴⁹⁷ Centre for Environmental Rights (2018) p72.

⁴⁹⁸ Centre for Environmental Rights (2018) p72 - 73.

⁴⁹⁹ Scholtz W (2019) 253.

CHAPTER 4: JUDICIAL INTERPRETATION OF ANIMAL WELFARE: RECENT DEVELOPMENTS

4.1 Introduction

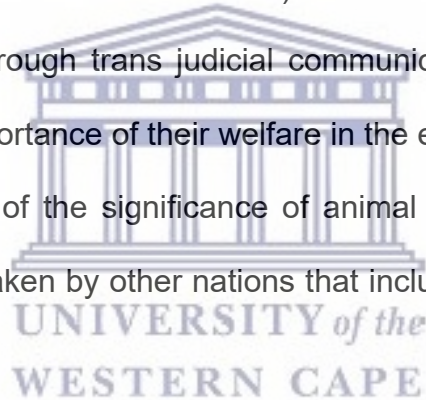
One commentator aptly remarks biodiversity law does not reflect recognition for the moral worth of animals and therefore perpetuates the dichotomy between conservation and welfare.⁵⁰⁰ The normative framework on biodiversity law, reflects this as it is focused on conservation and sustainable use and benefit sharing of indigenous biological diversity under the auspices of sustainable development in section 24 of the Constitution.⁵⁰¹ The absence of wildlife welfare in relation to South African biodiversity legislation was affirmed in the *SA Predator Breeders* case. The case affirmed the consumptive approach of the department towards animals and the rejection of the welfare mandate. This is as a result of legislators, policy-makers and courts that tend to avoid expressly recognising the interest of animals in law.⁵⁰² This chapter determines that the status quo position has changed within the South African context in two progressive judgments which override the position in the *SA Predator Breeders* case. In doing so, this chapter highlights and analyses the salient points of the judgments. These cases are important as the courts recognised the intrinsic value and animal welfare of individual animals under Section 24 of the Constitution. This chapter poses that the recognition of intrinsic value arguably leads to an attitude of respect and care for the legal concern of wildlife welfare. It is within

⁵⁰⁰ Scholtz W (2017) 464.

⁵⁰¹ Chapter 3 at 3.4.1.1 and 3.4.1.1.1

⁵⁰² Bilchitz D (2005) 132.

this context that the impact of the cases on biodiversity law is discussed. The judgments indicate the need to recognise the intrinsic value of wildlife as the basis for the reconciliation of conservation and welfare in biodiversity law. Such an affirmation of intrinsic value arguably ensure that wildlife welfare deserves consideration under the ambit of protection afforded in the constitutional environmental right. This chapter also discusses the implication of recognition of the intrinsic value and animal welfare applied to the context of the culling of the Chacma Baboons in order to promote conservation. The judgments must be viewed in a global context as it might influence the outcome of other judicial decisions (national or international) that are dealing with similar wildlife welfare related scenarios, through trans judicial communication.⁵⁰³ The recognition of animal sentience and the importance of their welfare in the environmental right reflects a non-instrumental recognition of the significance of animal interest. To this extent it is consistent with approaches taken by other nations that include recognition of animals in their constitutions.



4.2 National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development

4.2.1 Facts

In 2010, the applicant, NSPCA, became aware of a religious sacrificial slaughter of two camels.⁵⁰⁴ The sacrifice of these camels involved several attempts to slice open the

⁵⁰³ Scholtz W (2019) 256. See also Slaughter AM 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

⁵⁰⁴ NSPCA case para 4.

throats of the camels until the slits were deep enough for the camels to bleed out.⁵⁰⁵ The inspectors of the NSPCA, in an act of compassion, shot the camels to relieve them of pain and suffering. The NSPCA was of the view that animal cruelty was committed under the APA and referred the matter to the second respondent, National Prosecuting Authority (NPA). The NPA declined to prosecute.⁵⁰⁶ The NSPCA then applied for a certificate *nolle prosequi* in terms of section 7(1)(a) of the Criminal Procedure Act (CPA)⁵⁰⁷ to institute a private prosecution.⁵⁰⁸ The NPA refused to issue the certificate to the NSPCA. The NPA contended that the applicant could not prosecute under section 7(1)(a) of CPA as this section required the applicant to be a natural person and not a juristic person.⁵⁰⁹ Further the NPA stated that neither section 6(2)(e) nor section 9(2)(i) of Societies for the Prevention of Cruelty to Animals Act (SPCA Act)⁵¹⁰ confers the right to privately prosecute on the NSPCA.⁵¹¹ If, the NPA stated, the SPCA Act did confer the right on the applicant, this would be in terms of section 8 and not section 7(1)(a) of CPA as alleged by the NSPCA.⁵¹² The NPA did not see reasonable prospects of a successful prosecution.⁵¹³ As a result, the NSPCA brought a constitutional challenge to section 7(1)(a) of the CPA.⁵¹⁴ The NSPCA felt the inability to privately prosecute rendered them unable to fulfil their

⁵⁰⁵ NSPCA case para 4.

⁵⁰⁶ NSPCA case para 5.

⁵⁰⁷ Criminal Procedure Act 51 of 1977.

⁵⁰⁸ NSPCA case para 6.

⁵⁰⁹ NSPCA case para 7.

⁵¹⁰ SPCA Act 169 of 1993.

⁵¹¹ NSPCA case para 7.

⁵¹² NSPCA case para 7.

⁵¹³ NSPCA case para 8.

⁵¹⁴ NSPCA case para 9.

statutory mandate.⁵¹⁵ The applicant was unsuccessful in both the High Court and Supreme Court of Appeal.⁵¹⁶ The question before the Constitutional Court was whether the NSPCA, is entitled to privately prosecute crimes of animal cruelty in relation with its mandate.⁵¹⁷

4.2.1.1 The Arguments

The NSPCA sought leave to appeal the decision of the Supreme Court of Appeal. The NSPCA brought a constitutional challenge and contended that section 7(1)(a) creates an arbitrary distinction between juristic persons and natural persons.⁵¹⁸ The NSPCA argued that section 7(1)(a) of CPA violates section 9(1) of the Constitution and the rule of law.⁵¹⁹ Furthermore, the applicant was allowed to widen the basis upon which the applicant seeks relief. The alternative argument was that section 8 of the CPA read with section 6(2)(e) of SPCA Act already confers a right to conduct a private prosecution to a statutory body under a statutory right and that they are a statutory body performing a statutory public interest function.⁵²⁰ Thus, the power to institute legal proceedings arising from section 6(2)(e) of SPCA Act includes the power to institute criminal proceedings.⁵²¹ The first respondent, Minister of Justice and Constitutional Development and National Director rejected the applicant's contention that section 7(1)(a) of the CPA is unconstitutional.⁵²²

⁵¹⁵ NSPCA case para 9.

⁵¹⁶ NSPCA case para 10 -17.

⁵¹⁷ NSPCA case para 1.

⁵¹⁸ NSPCA case para 18.

⁵¹⁹ NSPCA case para 24.

⁵²⁰ NSPCA case para 21

⁵²¹ NSPCA case para 21.

⁵²² NSPCA case para 20.

The state respondents shared the view with the applicants that the section differentiates between natural and juristic persons.⁵²³ However, the state respondents stated the differentiation is rational as it is connected to a legitimate government purpose.⁵²⁴ Furthermore, the State respondents during the proceedings argued that redress for the NSPCA lies in section 8 and not section 7 of the CPA.⁵²⁵ Accordingly, this argument of the state respondents, the applicant adopted as an alternative.

4.2.1.1.1 The law

The court stated that the NSPCA is a statutorily-created public body and is appropriate to locate its prosecutorial powers, if any, under section 8.⁵²⁶ The court contended that if section 6(2)(e) can be construed in a constitutionally-compliant manner that provides the NSPCA with the remedy it seeks that this would be the preferable route.⁵²⁷ The court used a purposive and contextual interpretative⁵²⁸ approach to determine whether section 6(2)(e) of the SPCA Act expressly confers a right of private prosecution.⁵²⁹ The court stated, that it is necessary to look at the specific statutory language, its textual, historical and social context as well as constitutional values which underpin it.⁵³⁰ Section 6(2)(e) of the SPCA Act provides that 'in order to perform its functions and achieve its objects', the

⁵²³ NSPCA case para 20.

⁵²⁴ NSPCA case para 20.

⁵²⁵ NSPCA case para 21.

⁵²⁶ NSPCA case para 26.

⁵²⁷ NSPCA case para 27.

⁵²⁸ The court relied on statements held in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* to strengthen its point. The courts use *purposive or contextual interpretative approach* to determine the purpose of legislation. This approach includes taking the social and historical background into account. One must understand the provision within the context of the grid, related provisions and the statute as a whole including the underlying values.

⁵²⁹ NSPCA case para 34.

⁵³⁰ NSPCA case para 34.

NSPCA is permitted to ‘institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law or prohibit the commission by any person of a particular kind of cruelty to animals, and assist a society in connection with such proceedings against or by it.’ The court noted that both the High Court and SCA did not undertake a purposive and contextual interpretation of section 6(2)(e).⁵³¹ The court stated ‘this holistic interpretive approach is generous and gives expression to the underlying values of the Constitution within bounds of language and context.’⁵³² The court approached this section with a plain reading. In the opinion of the court, the language of the provision is broad and permissive.⁵³³ Further, the court noted nothing in the text excludes the power to institute legal proceedings.⁵³⁴ Accordingly, the court stated that the power cannot be divorced from its function.⁵³⁵

The court observed that the term ‘institute legal proceedings’ are found in numerous statutes.⁵³⁶ To understand the meaning informed by the SPCA Act it is necessary to look at the statutory scheme, this includes the APA and other associated Acts. The court contended ‘together these statutes set the standard for how animals are to be cared for, treated and used’.⁵³⁷ The court further stated ‘underscoring these is the notion that the prevention of unnecessary cruelty to animals’ which ‘is a goal of our society’.⁵³⁸ The court

⁵³¹ NSPCA case para 35.

⁵³² NSPCA case para 34.

⁵³³ NSPCA case para 36.

⁵³⁴ NSPCA case para 36.

⁵³⁵ NSPCA case para 36.

⁵³⁶ NSPCA case para 37.

⁵³⁷ NSPCA case para 45.

⁵³⁸ NSPCA case para 45.

stated that the functions of the NSPCA are intrinsically connected to the protection of animals which is enumerated with the offences set out in the APA as well as the other associated acts and related to the mistreatment of animals.⁵³⁹ Further the court noted that the NSPCA is explicitly charged with upholding these statutes and preventing animal cruelty.⁵⁴⁰ Therefore, the term 'institute legal proceedings connected with its functions' must be interpreted to encompass prosecutions of animal cruelty.⁵⁴¹ Further the court noted conferring the power to private prosecutions is to give effect to the objects and purposes of the regime.⁵⁴² This will harmonise the power and purpose of the NSPCA within legislation as well as protect animal welfare.⁵⁴³ In the opinion of the court, to read section 6(2)(e) as excluding the power would render the regime a 'toothless tiger'.⁵⁴⁴ The court asserted that legislation should not create futile provisions.⁵⁴⁵ In this context, the court held that the term 'institute legal proceedings' takes on a specific and nuanced meaning, capable of conferring the power of initiating court proceedings which include the power of private prosecutions.⁵⁴⁶ In addition to the above, the court highlighted that the term 'institute legal proceedings' has a precise meaning as it is intrinsically connected to the offences within the APA and animal protection regime generally.⁵⁴⁷ As such, the term includes private prosecutions. The court indicated that the NSPCA has a unique

⁵³⁹ NSPCA case para 46

⁵⁴⁰ NSPCA case para 46.

⁵⁴¹ NSPCA case para 46.

⁵⁴² NSPCA case para 47.

⁵⁴³ NSPCA case para 47.

⁵⁴⁴ NSPCA case para 48.

⁵⁴⁵ NSPCA case para 48.

⁵⁴⁶ NSPCA case para 48.

⁵⁴⁷ NSPCA case para 53.

historical and statutory role that enables it to pursue private prosecutions.⁵⁴⁸ This power is underpinned by the intention to prevent animal cruelty.

In analysing animal cruelty, the court made reference to *NCSPCA v Openshaw*⁵⁴⁹ which recognised that animals are worthy of protection because animals are sentient beings capable of suffering and of experiencing pain.⁵⁵⁰ The court also cited *Lemthongthai v S*⁵⁵¹ which dealt with rhino poaching which stated that ‘constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general’.⁵⁵² The court noted this obligation was pertinent as a result of our history.⁵⁵³ Therefore, the court explained ‘the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals.’⁵⁵⁴ Moreover, the Court noted that *Lemthongthai* relates animal welfare to questions of biodiversity.⁵⁵⁵ The court proceeded to explain that animal welfare is connected with the constitutional right in Section 24 of the Constitution (especially s24(b)).⁵⁵⁶ Furthermore, this integrative approach the court noted ‘links the suffering of individual animals to conservation’.⁵⁵⁷ The integrative approach, according to the court, emphasise that showing respect and concern for individual animals reinforces broader

⁵⁴⁸ NSPCA case para 49.

⁵⁴⁹ (462/07) [2008] ZASCA 78 (RSA).

⁵⁵⁰ NSPCA case Para 56.

⁵⁵¹ *Lemthongthai v S* (849/2013) [2014] ZASCA 131 (25 September 2014)

⁵⁵² *Lemthongthai v S* Para 20 and NSPCA para 57.

⁵⁵³ NSPCA case para 57.

⁵⁵⁴ NSPCA case Para 57.

⁵⁵⁵ *Lemthongthai v S* para 20.

⁵⁵⁶ NSPCA case para 58.

⁵⁵⁷ NSPCA case Para 58.

environmental protection efforts.⁵⁵⁸ Thus, ‘animal welfare and animal conservation together reflect two intertwined values’.⁵⁵⁹ Hence, this case connected conservation to welfare. Accordingly, the court held that ‘in the context of the statutory regime that now exists, a contextual and purposive reading of the SPCA Act must be taken to include the right to prosecute’.⁵⁶⁰ Finally, the court held that the NSPCA has the statutory power of private prosecution conferred upon it by section 6(2)(e) of SPCA Act read with section 8 of CPA.⁵⁶¹

4.2.2 Analysis of the salient points

The court begins the judgment by making the following declaration which arguably indicates humans and animals have a relationship that has changed over the years: *“Humans and animals have a storied relationship, one that is a part of the fabric of our society, homes and lives. Animals have shifted from being ‘mere brutes or beasts’ to fellow beasts, fellow mortals or fellow creatures and finally ‘companions, friends and brothers. To protect these voiceless companions, individuals have time and again stepped in when animals are mistreated.”*⁵⁶²

The court used a purposive approach to interpret Section 24 of the Constitution. This is important as this approach requires taking relevant factors such as social and historical background into account. The court held that a caring approach is required in terms of

⁵⁵⁸ NSPCA case Para 58.

⁵⁵⁹ NSPCA case Para 58.

⁵⁶⁰ NSPCA case para 61.

⁵⁶¹ NSPCA case para 65.

⁵⁶² NSPCA case para 1.

section 24 towards humans, animals and the environment in general. According to the court, this obligation is pertinent because of our history.⁵⁶³ The culling practice is grounded in the medians of control and anthropocentric resourcism, conceived during colonialism and apartheid.⁵⁶⁴

The court acknowledged inclusive within section 24 is that animals are sentient beings that need protection. This is important point as no formal recognition of animal sentience in South African legislation.⁵⁶⁵ Sentience refers to the fact that animals are perpetually aware⁵⁶⁶ which in turn affect the way they should be treated by humans. Sentience means that animals have the capacity to learn, reason, anticipate and remember events similar to humans.⁵⁶⁷ Chacma Baboons can thrive in human modified environments due to their shared biological features and adaptations as a result of their close evolutionary relationship to humans.⁵⁶⁸ This close evolutionary relationship indicates that the baboons share similar features to humans such as to feel pain. Section 24 thus requires the courts to consider that individual wildlife not instantly killed during the culling operation will

⁵⁶³ The court does not explain that it means by 'especially pertinent because of our history'. Nevertheless, it is assumed that the court is talking about South Africa's racially, discriminative and legally unjust past.

⁵⁶⁴ 'Animal Rights Africa Briefing Document on Elephant Management to Environment and Tourism Parliamentary Portfolio Committee; available at https://static.pmg.org.za/docs/2007/070911ara.htm#_Toc177185347 (accessed on 12 June 2021).

⁵⁶⁵ World Animal Protection 'Animal Protection Index (API) 2020 – Republic of South Africa: ranking E' available https://api.worldanimalprotection.org/sites/default/files/api_2020_-_south_africa_0.pdf (accessed on 21 January 2021) at p3.

⁵⁶⁶ Scholtz W (2017) 465, footnote 12 of his article, Scholtz notes animals are sentient beings which mean that they are perpetually aware. See also Francoine G.L 'Animal Welfare and the Moral Value of Nonhuman Animals' (2010) 6(1) *Law, Culture & Humanities* p31.

⁵⁶⁷ Slotow R, Blackmore A, Henley M, Trendler K & Garai M 'Could Culling of Elephants Be Considered Inhumane and Illegal in South African Law?' (2021) *Journal of International Wildlife Law and Policy* 6.

⁵⁶⁸ Chowdhury S, Brown J & Swedell L 'Anthropogenic Effects on the Physiology and Behaviour of Chacma Baboons in the Cape Peninsula of South Africa' (2020) 8 *Conservations Physiology* 2.

experience significant pain and suffering until such time as the animal is dead. It also needs to be considered that during operations that wildlife can be traumatised as well as experience high levels of anxiety and chronic stress, caused by the noise of the operation or by the death and suffering of wildlife that are wounded.⁵⁶⁹ The acknowledgement of sentience means that the term must be incorporated into legislation to give effect to the interpretation of section 24. Several countries around the world such as Tanzania, New Zealand and the USA to mention a few, have acknowledged the sentience of non-human animals in legislation.⁵⁷⁰

As indicated in chapter three, the Constitution does not expressly mention animal welfare.⁵⁷¹ In this case, the court explained that animal welfare is a constitutional value and connected it to section 24 (a) safeguarding the moral status of humans and (b) the welfare of animals (which is protecting the environment). This interpretation moves away from the anthropocentric interpretation taken in the past by governmental bodies.

This case is important as the court affirmed the intrinsic value of individual animals as the main reason for protecting the welfare of wildlife. There is an apparent omission in law to recognise biodiversity as having intrinsic value. Scholtz notes the 'intrinsic value seems more ornamental than influential to the substantive law... and the intrinsic value of

⁵⁶⁹ Slotow R et al (2021) 6.

⁵⁷⁰ Animal Law Reform Submission on the Draft Policy Position on the Conservation and Sustainable Use of Elephants, Lion, Leopard and Rhinoceros available at <https://www.animallawreform.org/wp-content/uploads/2021/07/Submission-on-the-DFFE-Draft-Policy-Position.pdf> (accessed on 12 September 2021) p17.

⁵⁷¹ Chapter 3 at 3.4.1.1.

individual organisms has received little attention'.⁵⁷² Intrinsic value is the value that an entity possesses of itself, for itself, regardless of interest or utility of others.⁵⁷³ The recognition of intrinsic value of individual organisms embodies itself in two forms; phenotype (a good-of-its-own) and genotype (a good-of- its-kind).⁵⁷⁴ The good-of-its-kind of any organism includes the aspects that are shared with all others of its kind (i.e. species), regardless of location.⁵⁷⁵ The good-of-its-own of any organism include the attributes and capacities as shaped environmentally, such as shelter and food, which determine the extent individual organism's flourish.⁵⁷⁶ Commentators posit that the recognition of the intrinsic value means that a corpus of rules should emerge for the protection of individual wildlife owing to the recognition of their moral concern on their own account.⁵⁷⁷ This is consistent with the sentiments of the court that the rationale behind protecting animal welfare is to place intrinsic value on animals as individuals. The court further connected animal welfare to section 24 (b). This section places a duty on the state to promulgate legislation. The acknowledgment of intrinsic value indicates that conservation measures must consider the needs of individual animals.⁵⁷⁸

Moreover, the court adopted the integrative approach to interpret conservation within the constitution and ultimately biodiversity legislation. The court held the connection of

⁵⁷² Scholtz W (2020) 6.

⁵⁷³ Schaffner JE (2019) 10. See also Scholtz W (2020) 5.

⁵⁷⁴ Scholtz W (2020) 5.

⁵⁷⁵ Bowman M, Davies P & Redgwell C (2010) 74. See also Scholtz W (2020) 5.

⁵⁷⁶ Bowman M, Davies P & Redgwell C (2010) 75. See also Scholtz W (2020) 5.

⁵⁷⁷ Bowman M, Davies P & Redgwell C (2010) 672. See also Scholtz W (2020) 7.

⁵⁷⁸ Scholtz W (2019) 258.

'suffering of individual animals to conservation'.⁵⁷⁹ The court affirmed a respectful and caring approach to wildlife. Bilchitz explains the integrative approach as 'requiring the adoption of an attitude of respect for individual animals which is important for protecting a species or ecosystem'.⁵⁸⁰ This approach essentially 'recognises the important relationship between individual animals and the environment in which they live, including their connection with human beings'.⁵⁸¹ He further provides that this approach to wildlife will ensure the survival of the species as well as the protection of the environment more generally.⁵⁸² The main idea behind the integrative approach is that the enhancement of respect for individual animals is essential for preserving the species as a whole'.⁵⁸³ Hence animal welfare is not secondary to conservation. Culling is used to promote conservation. These sentiments mean that culling, in order to achieve conservation, can no longer outweigh the concerns that culling will have on the welfare of wildlife. Culling is unnecessary and cruel and does not align with the integrative approach.

In sum the importance of this case is the recognition of the intrinsic value of wildlife. The intrinsic value is the rationale for animal welfare under section 24 of the Constitution. This is important as it has a tremendous implication of activities in relation to wildlife and the baboons. As humans must value the baboons for itself, in itself. Hence a rejection of the commodification of wildlife. And the practices (culling) in relation the baboons must conform to wildlife welfare and the intrinsic value of the baboons. Essentially, this means

⁵⁷⁹ NSPCA case Para 58.

⁵⁸⁰ Bilchitz D (2017) 749.

⁵⁸¹ Bilchitz D (2017) 749.

⁵⁸² Bilchitz D (2017) 749.

⁵⁸³ Bilchitz D (2017) 750.

that humans must look for alternatives to the anthropocentric consumptive use approach. The anthropocentric consumptive use cannot be the approach towards the baboons which has as value in itself for itself in terms of section 24.

4.3 National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs

4.3.1 Facts

In 2016, at the 17th meeting of the Conference of the Parties to CITES (COP 17), a proposal was submitted by several parties that stated all populations of the African Lion be transferred to Appendix I.⁵⁸⁴ The decision would result in limiting trade in African lions too only in exceptional circumstances. The proposal was rejected. The parties rather decided the African Lion remain on Appendix II, subject to a zero annual export quota is established for specimens removed from the wild and traded for commercial purposes.⁵⁸⁵ Furthermore, annual export quotas for trade for commercial purposes, derived from captive breeding operations, in South Africa will be established and communicated annually to the CITES Secretariat.⁵⁸⁶ Consequently, if South Africa wishes to trade in lion bone, sources acquired from lions in captivity are required to establish an annual export quota. As a result of COP 17, the second respondent Head of the Department of Environmental Affairs (DEA) invited several stakeholders to a Consultative Meeting where

⁵⁸⁴ Lion Bone case Para 13.

⁵⁸⁵ Lion Bone case Para 13.

⁵⁸⁶ Lion Bone case Para 13.

the applicant, NCSPCA shared their concerns about welfare of lions held in captivity and made their point that it should be taken into account in the determination of the export quota.⁵⁸⁷ The Minister is required to consult with the scientific authority before setting an annual export quota.⁵⁸⁸ The scientific authority is obligated to make a non-detrimental finding in respect of specimens of species and base its findings and advice on scientific and professional review of available information. This includes consulting various stakeholders before making any finding or giving advice.⁵⁸⁹ The First respondent is the member of the National Executive responsible for management and implementation of NEMBA; the second respondent is head of the DEAD and third respondent is the voluntary association that is the main representatives of the owners and operations of captive lion breeding operations in South Africa. The Minister published her determination for export permits for 800 in 2017 and 1500 in 2018.⁵⁹⁰ The court dealt with the process by which South Africa sets annual export quotas for trade in lion bone, bone pieces, bone products, claws skeletons, skulls and the like for commercial purposes which are derived from captive breeding operations in South Africa.⁵⁹¹

4.3.1.1 The arguments

The applicant (NSPCA) sought the decision of the Minister of Environmental Affairs of 28 June 2017 and 7 June 2018 in which quotas for the exportation of lion bone were determined, be reviewed and declared unlawful and constitutionally invalid in terms of the

⁵⁸⁷ Lion Bone case Para 24.

⁵⁸⁸ S59 of NEMBA.

⁵⁸⁹ S61 and S62 of NEMBA.

⁵⁹⁰ Lion Bone case Para 28.

⁵⁹¹ Lion Bone case Para 1.

Promotion of Administrative Justice Act (PAJA).⁵⁹² The review was sought on the basis relevant animal welfare considerations were not taken into account in reaching the decision.⁵⁹³ Further the applicant claimed that they were also excluded from the decision-making process.⁵⁹⁴ The applicant contended that the decision-making process was irrational and must be set aside. The position of the State respondents was that they were only required to consider scientific information in determining an annual export quota and that the information submitted by the applicant (welfare considerations) was not scientific in nature.⁵⁹⁵ Furthermore, the state respondents argued that the Minister did not have the responsibility in law for regulating and enforcing welfare standards for wild animals.⁵⁹⁶ They contended further the welfare of lions bred in captivity was not a factor relevant in determining the annual CITES quotas.⁵⁹⁷ They argued that the responsibility for the administration of APA falls within the legislative mandate of the Department of Agriculture, Forestry and Fisheries (DAFF). On this basis the welfare considerations of lions in captivity falls under DAFF and the applicant.⁵⁹⁸ In the determination of the annual CITES export quota, the Minister emphasised the principle of sustainable development.⁵⁹⁹ As such, the Minister contended that she had to find a balance between social, economic and environmental pillars as well as suggested the NCSPCA has under the guise of

⁵⁹² 3 of 2000.

⁵⁹³ Lion Bone case Para 31.

⁵⁹⁴ Lion Bone case Para 31.

⁵⁹⁵ Lion Bone case Para 26

⁵⁹⁶ Lion Bone case Para 26

⁵⁹⁷ Lion Bone case Para 26.

⁵⁹⁸ Lion Bone case Para 27.

⁵⁹⁹ Lion Bone case Para 58.

environmental concerns over-emphasized the welfare factor to the exclusion of the social and economic factors.⁶⁰⁰

4.3.1.1.1 The Law

The court analysed mootness. In answering this question, the court referenced *Minister of Mineral Resources v Sishen Iron Ore Company Limited*⁶⁰¹ in which it was noted that when it is in the interest of justice to hear and determine a case, the court may do so even if the dispute has become moot.⁶⁰² The court stated even though the 2017 and 2018 setting of export quotas is a matter of history, the Minister will still continue setting quotas.⁶⁰³ Notably, the Court mentions the treatment of lions in captivity is an environmental issue.⁶⁰⁴ The environmental issue and its relationship with the commercial activities that arise from the operations of lion breeders (export of lion bone) is invoked in section 24 of the Constitution.⁶⁰⁵ The court considered whether welfare considerations are relevant in determining export quotas. As a starting point for answering this question, the court cited section 24 and referenced the NSPCA.⁶⁰⁶ In the opinion of the court, the sentiments of the latter courts 'provide guidance of the legal conduct that is expected of us' but 'speaks to the kind of custodial care we are enjoined to show to the environment for the benefit of this and future generations.'⁶⁰⁷

⁶⁰⁰ Lion Bone case Para 59.

⁶⁰¹ [2014] 2 SA 603 (CC).

⁶⁰² Lion Bone case Para 38.

⁶⁰³ Lion Bone case Para 39.

⁶⁰⁴ Lion Bone case Para 41.

⁶⁰⁵ Lion Bone case Para 41.

⁶⁰⁶ Lion Bone case Para 64.

⁶⁰⁷ Lion Bone case Para 65.

In relation to the welfare mandate, the court rejected the argument by the state respondents that the Minister does not have the welfare mandate.⁶⁰⁸ The court proceeded to explain that there is a distinction between in law having responsibility for the welfare mandate and taking welfare considerations into account.⁶⁰⁹ The court explained that taking welfare consideration into account means 'having an understanding that even if the mandate does not reside with the decision maker, that this does not preclude the decision maker from considering them if indeed they are relevant'.⁶¹⁰ Further, the relevance of a matter falls to be determined by the relationship and connection between it and the decision being made.⁶¹¹

In view of the court, the Minister failed to consider welfare considerations as the Minister did not have the welfare mandate.⁶¹² In the opinion of the court, the Minister erred in her understanding that since she was not seized with the welfare mandate for lions in captivity, she was not obligated to consider the welfare issues relating to lions in captivity when determining the quota.⁶¹³ The court did not agree with the assertion that the welfare mandate for lions in captivity resides exclusively in DAFF as the duty to set standards for the keeping and breeding of lions in captivity is on the respondent in terms of the National

⁶⁰⁸ Lion Bone case Para 67.

⁶⁰⁹ Lion Bone case Para 67.

⁶¹⁰ Lion Bone case Para 67.

⁶¹¹ Lion Bone case Para 67.

⁶¹² Lion Bone case Para 67.

⁶¹³ Lion Bone case Para 67.

Biodiversity Plan.⁶¹⁴ The court remarked that welfare considerations cannot be excluded as it contributes to the setting of standards.⁶¹⁵

In relation to whether welfare considerations of lions in captivity are relevant, the court again referred to the NSPCA case that welfare considerations and animal conservation together reflect intertwined values.⁶¹⁶ In light of these sentiments the court found that lions in captivity are part of the biodiversity challenge.⁶¹⁷ Therefore, the court stated ‘their suffering, the conditions under which they are kept and the like remain a matter of public concern and are inextricably linked to how we instil respect for animals and the environment of which lions in captivity are an integral part of’.⁶¹⁸ Finally, the court held that the state respondents did ignore welfare considerations in setting the annual export quota, which goes against the constitutional and legal obligations that arise from section 24, NEMBA and the Plan, which require the considerations of animal welfare issues.⁶¹⁹

4.3.2 Analysis of the salient points

The court affirmed the judgment of the NSPCA case.⁶²⁰ The first point is that the court held treatment of lions in captivity is an environmental issue and connected to section 24 of the Constitution.⁶²¹ This is confirmation that welfare is an integral to conservation and must be considered in terms of section 24.

⁶¹⁴ Lion Bone case Para 68

⁶¹⁵ Lion Bone case Para 68.

⁶¹⁶ Lion Bone case Para 70.

⁶¹⁷ Lion Bone case Para 70.

⁶¹⁸ Lion Bone case Para 71.

⁶¹⁹ Lion Bone case Para 74.

⁶²⁰ Lion Bone case Para 64 and 70.

⁶²¹ Lion Bone case Para 41.

Secondly, in respect of sustainable development, the Minister argued that the principle of sustainable development is relevant in determining the annual CITES export quota.⁶²² The Minister contended that she had to find a balance between the pillars - social, economic and environment of sustainable development.⁶²³ Section 24 of the Constitution as well as NEMA embodies sustainable development.⁶²⁴ The concept of sustainable development is regarded as the *Leitmotiv* of international environmental law.⁶²⁵ The World Commission on Environment and Development in their Brundtland Report defined the concept as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁶²⁶ The definition recognises the interlinked nature of environmental and economic considerations in decision making. The Brundtland report advocated for a new approach to development, a type of development that integrates production with resource conservation and enhancement, and that links both to the provision for all of an adequate livelihood and equitable access to resources.⁶²⁷ Hence, sustainable development involves the integration of environmental policies and developmental strategies. Sustainable development thus allows development to harm and exploit the environment and could have an impact on humans as well as the earth. In 1992, at the Rio Declaration,⁶²⁸ central to the declarations was sustainable

⁶²² Lion Bone case Para 58.

⁶²³ Lion Bone case Para 59.

⁶²⁴ Chapter 3 at 3.4.1.1 and 3.4.1.1.1

⁶²⁵ Scholtz W (2019) 247.

⁶²⁶ United Nations World Commission on Environment and Development 'Our common Future' (1987) UN Doc A/42/427, Ch2, para 1.

⁶²⁷ Our common future (2987) ch1 para 47.

⁶²⁸ The United Nations Conference on Environment and development, held in Rio de Janeiro, Brazil on 3-14 June 1992.

development. The Rio Conference was important because nation states gathered and international consensus was obtained on core principles of environmental protection and sustainable development. The main principles of the Rio Conference were Principle 3⁶²⁹ and Principle 4⁶³⁰ which recognise the interlinked between environmental protection and socio-economic developmental pillars of sustainable development. In addition, it is evident from the definition as well as the main principles that inter- and intra-generational equity are considered in sustainable development. Ultimately, central to sustainable development is that development and environment protection must be reconciled.

The ideal of sustainable development was approved in the *Fuel Retailers Association* case.⁶³¹ The court asserted that the Constitution acknowledged the interrelationship between the environment and development.⁶³² In other words, it 'recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development'.⁶³³ Furthermore, 'Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.'⁶³⁴ Thus it is expected that environmental consideration and socio-economic consideration must be balanced through sustainable development.⁶³⁵ In essence, sustainable development allows humans to use natural resources however this can only

⁶²⁹ Principle 3 provide the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations.

⁶³⁰ Principle 4 provide in order to achieve sustainable development; environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

⁶³¹ *Fuel Retailers Association* para 44-70.

⁶³² *Fuel Retailers Association* para 45.

⁶³³ *Fuel Retailers Association* para 45.

⁶³⁴ *Fuel Retailers Association* para 45.

⁶³⁵ *Fuel Retailers Association* para 45.

be done in a sustainable manner.⁶³⁶ Legal commentators are still uncertain of the legal nature of sustainable development.⁶³⁷ The concept is anthropocentric in nature.⁶³⁸ Viñuales aptly remarks sustainable development is vague and thus ill-suited to take a stance where there are trade-offs between environmental, social and economic considerations.⁶³⁹ As a result, in most cases the economic pillars take preference over the environmental considerations.⁶⁴⁰ The argument of the Minister was rejected by the Court. The court found that the welfare of wildlife is relevant as it forms part of the environmental pillar of sustainable development invoked in section 24. Moreover, as the welfare factor forms part of the environmental factors therefore it must be balanced against the other factors of sustainable development.

Third, the state respondents argued that the Minister and department did not have the responsibility in law for regulating and enforcing welfare standards for lions in captivity. Further, the state respondents contended that the welfare mandate resided with the DAFF under the APA.⁶⁴¹ The DEA asserted the same position in relation to the proposed amendment to the Norms and Standards.⁶⁴² This came about after a process as to whether the culling of elephants in the KNP should be allowed in order to manage the

⁶³⁶ Bilchitz D (2017) 751.

⁶³⁷ Barral V 'Sustainable Development in International Law: Nature and Operations of an Evolutive legal Norm' (2012) 2 *The European Journal of International Law* 377.

⁶³⁸ Scholtz W (2005) 69.

⁶³⁹ Viñuales JE 'The Rise and Fall of Sustainable Development' (2013) 22(1) *RECIEL* 7.

⁶⁴⁰ Scholtz W (2020) 5.

⁶⁴¹ Lion Bone case para 26.

⁶⁴² Department of Environmental Affairs 'Norms and Standards for the Management of Elephants in South Africa to be Amended' available at https://www.environment.gov.za/mediarelease/normsandstandards_managementofelephant (accessed on 28 July 2020).

population as well as their impact on the environment. As illustrated the Norms and Standard contain strong welfare-based provisions.⁶⁴³ This has resulted in resistance from parties that do not want restrictions on the use of elephants. The DEA asserted that it lacks the competence to regulate welfare of animals as it does not have the legislative welfare mandate.⁶⁴⁴ Therefore all welfare provisions in the documents must be removed. The argument of the DEA is centred on the fact that the Norms and Standards are adopted under the auspices of NEMBA. In answering this, this court explained that there is a difference in law in having responsibility for the welfare mandate and taking welfare consideration into account.⁶⁴⁵ As the duty to set standards for lions in captivity are located to DAFF and the DEA. This judgment is important as it confirm the Minister was required to consider welfare issues in respect of lions in captivity even if the welfare mandate resided with the DAFF under the APA. This judgement means that the government and conservationists have a custodial responsibility to care for the environment which must benefit the present and generations. The government is also required to change its stance and consider welfare as an important element of its mandate. Moreover, the department

⁶⁴³ Chapter 3 at 3.4.1.2.3.

⁶⁴⁴ DEA stated in its public note for the amendment that 'a number of the guiding principles relate to the prevention of abuse and the neglect of elephants, which is problematic as the DEA does not have the mandate to regulate welfare issues'. See Department of Environmental Affairs 'Key Challenges Regarding the Implementation and Enforcement of the Elephant Norms and Standards in South Africa' available at <https://conservationaction.co.za/wp-content/uploads/2014/09/Key-challenges-regarding-the-implementation-and-enforcement-of-the-Elephant-Norms-and-Standards-in-South-Africa.pdf> (accessed on 28 July 2020).

⁶⁴⁵ Lon Bone case Para 67.

must apply the integrative approach as affirmed by the court. This means that a decision to cull must be taken lightly that based on personal views or short-term need.⁶⁴⁶

4.4 Implication of the NCSPCA case and the Lion case on biodiversity law

The declarations of the judgments require humans to re-examine their relationship with and laws relating to wildlife. These judgments provide guidance on the framework and approach to be adopted by governmental bodies in the interpretation of section 24. This indicates a change in the approach taken by governmental bodies in the past that is not in line with the constitutional change that is required. The judgments also highlight that there is a clear interlinkage between the treatment of animals and their interests and human interest and rights⁶⁴⁷, this is a topic currently being developed in the literature.⁶⁴⁸ Hence, animal interests must be considered in decisions affecting them together with human interests.

The above discussion means the following for sustainable development⁶⁴⁹: the recognition of animal welfare means that a welfare element is part of the environmental pillar in the notion of sustainable development.⁶⁵⁰ As a result, this acknowledgment of animal welfare will give more weight to the environmental pillar and lead to the

⁶⁴⁶ Slotow R et al (2021) 10.

⁶⁴⁷ *Lemthongthai v S* Para 20 and NSPCA para 57.

⁶⁴⁸ Wilson AP (Non)human(imal) Rights: Dismantling the Separateness in Law and Policy (2019) 3(3) *Society Register* 39-65. See also Wilson AP 'Animal Law in South Africa: 'Until the lions have their own Lawyers, the Law will Continue to Protect the Hunter'' (2019) 10(1) *Derecho Animal. Forum of Animal Law Studies* 35-58.

⁶⁴⁹ For a discussion on how the notion of sustainable development can recognise animal welfare see Verniers E 'Bringing Animal Welfare under the Umbrella of Sustainable Development: A Legal Analysis' (2021) 30 *RECIEL* 349 – 362.

⁶⁵⁰ Scholtz W (2019) 261.

reconciliation of the environmental, social and economic elements of sustainable development.⁶⁵¹ The socio-economic pillar in turn does not dominate over the environmental consideration in the implementation of sustainable development in terms section 24.⁶⁵² The judgements impact on conservation and sustainable use as these notions are key principles aimed at the operationalisation of sustainable development. The recognition of the integrative approach requires a pursuit of conservation and sustainable use that acknowledges the intrinsic value and welfare of individual animals and should not mere be pursued for the interest of humans only. The integrative approach requires a form of conservation and sustainable use that gives expressions to the interconnectedness between good of its own and good of its kind as well as the acknowledgment of the intrinsic value of wildlife. Conservation measures as a result must pay attention to the interest of individual animals. Hence, the integrative approach must be considered in conservation and sustainable use. The recognition of the integrative approach rejects the Department's current approach to Section 24 of the Constitution, specifically as it pertains to the interpretation of the terms 'conservation' and 'sustainable use of natural resources' as applied to wild animals. The Department has followed an interpretation that focuses on the utilisation of wildlife in order to benefit humans which fails to account for the remainder of the section and its values. On ethical and legal grounds, as seen in case law the Department has continues to misinterpret these terms.

⁶⁵¹ Scholtz W (2019) 261. Scholtz W (2020) 8.

⁶⁵² Scholtz W (2020) 8.

It is clear that the notions of conservation and sustainable use have an anthropocentric focus.

The cases further highlight that the Department has consistently stated that welfare is not within its mandate. The DEA was required to consider animal welfare even though the welfare mandate fell under the APA administered by DAFF.⁶⁵³ In light of this judgment, the Department is required to change its stance and consider welfare as an integral part of its mandate. The Department is also required to consider and apply the “integrative approach” which has been adopted by the courts. Moreover, the case law emphasizes a custodial responsibility that humans and the Department have towards the environment. This custodial responsibility includes a notion of care and respect for the environment and such care is also beneficial humans.⁶⁵⁴ Accordingly, the court affirmed that animals are worthy of protection and that showing respect and concern for individual animals reinforces broader environmental protection. The courts emphasized a respectful and caring approach to wildlife, this will start the process from the anthropocentric utilitarian hold of biodiversity law in viewing wildlife as commodities to be used by humans. Currently, section 24 of the Constitution, as well as NEMBA does not explicitly refer to the intrinsic value of wildlife as biological diversity is only conserved for the benefit of humans. However, the court recognised the intrinsic value of wildlife and linked it to section 24 of the Constitution. In light of this, one should take note of Bowman, Davies and Redgwell

⁶⁵³ Lion Bone case 66-67.

⁶⁵⁴ Lion Bone case para 65.

who remark that 'any sound ethical policy' should consider the welfare of individual organisms so that they are permitted to flourish in accordance with their biological nature.⁶⁵⁵ As South African wildlife welfare framework is based on the above cases, and section 24(b) of the Constitution places constitutional imperative on the state to promulgate legislation in order to protect the environment which was determined that animal life is a part. These sentiments imply that a normative wildlife framework should be promulgated to protect wildlife animals in their own right irrespective of their use to humans or status of their species.⁶⁵⁶ Scholtz agrees by noting the emphasis on section 24(b) indicates the need to promulgate wildlife welfare legislation.⁶⁵⁷

For example is the National Environmental Management Laws Amendment Act⁶⁵⁸ which include for a definition of well-being.⁶⁵⁹ The Act amend section 2(a)(ii) of NEMBA which provides for the use of biodiversity in a sustainable manner, including the consideration of well-being of animals in the conservation and sustainable use of biodiversity.⁶⁶⁰ The Minister is empowered to prohibit certain activities that may negatively impact on the well-being if an animal.⁶⁶¹ The Minister is also empower to make regulations relating to the well-being of an animal.⁶⁶² Well-being is a broad concept which includes animal welfare.

⁶⁵⁵ Bowman M, Davies P and Redgwell C (2010) 672.

⁶⁵⁶ Scholtz W (2020) 6.

⁶⁵⁷ Scholtz W (2019) 255.

⁶⁵⁸ 2 of 2022 (NEMLA), which came into force on 24 June 2022.

⁶⁵⁹ S43 of NEMLA define 'well-being' as the holistic circumstances and conditions of an animal, which are conducive to its physical, physiological and mental health and quality of life, including the ability to cope with its environment'.

⁶⁶⁰ S22 of NEMLA.

⁶⁶¹ S46 of NEMLA.

⁶⁶² S50 of NEMLA.

The incorporation of well-being into sustainable use should therefore not be overlooked. This connection can realign the pillars of sustainable development. This can result in the fostering of welfare-centric ethics into environmental law and policies.⁶⁶³ Other examples include Draft Policy Position on the Conservation and Ecologically Sustainable Use of Elephants, Lions, leopards and Rhinoceros⁶⁶⁴ and the Draft White Paper on the Conservation and Ecologically Sustainable Use of South Africa's Biodiversity.⁶⁶⁵

The cases are also profound as it highlights how the courts use an environmental right in order to promote a welfare approach.⁶⁶⁶ The sentiments of the courts should together be



⁶⁶³ Scholtz w (2020) 4.

⁶⁶⁴ Draft Policy Position on the Conservation and Ecologically Sustainable Use of Elephants, Lion, Leopard and Rhinoceros *GN 566 GG 44776* of 28 June 2021 (Draft Policy Position). These cases led to the DEA strongly considering a ban on the breeding of captive lions. This document introduces a new approach to conservation that is consistent with the integrative approach in Section 24 of the Constitution. The Draft Policy Position provides for a definition of sustainable use which include acknowledgment of the well-being of animals as an element of the definition. The expended definition of sustainable use also includes the welfare and wellbeing of animals. The definition of well-being includes holistic circumstances and conditions of an animal which comprises the physical, physiological, mental health and quality of life. The Draft Policy Position adopts a One Welfare approach which include the recognition of the interconnections between animal welfare, human well-being and the environment. It further aims to promote and enhance HWC co-existence, while empowering and capacitating communities. The Draft Policy Position has the potential to shift the country away from past irresponsible, unethical and unsustainable wildlife practices. The document however does contain some elements that might restrict its transformative potential. For critical comments on the Draft Policy Position from a welfare perspective, see Animal Law Reform 'Submission on the Draft Policy Position on the Conservation and Sustainable Use of Elephants, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2021/07/Submission-on-the-DFFE-Draft-Policy-Position.pdf> (accessed on 5 May 2022).

⁶⁶⁵ Draft White Paper on the Conservation and Sustainable Use of Biodiversity in South Africa *GN 2252 GG 46687* of 8 July 2022 (White Paper). The White Paper include sentiments expressed by the departments that 'we need to do things differently', that there needs to be a 'new deal' for people and nature (including animals) and that people as well as Nature (including animals) should thrive. It is progressive as it includes concepts such as Ubuntu, animal sentience, and the One Health and One Welfare approach. On 28 October the department published for public comment a Revised Draft.

⁶⁶⁶ For a discussion on how environmental rights can promote animal welfare see Scholtz W (2017) 463-483.

considered with the concept of transformative constitutionalism.⁶⁶⁷ Moreover, the above judgments also resulted in a landmark judgment on the balancing of the right to freedom of expression and privacy in the context of the inhumane treatment of animals.⁶⁶⁸

4.5 Implications of intrinsic value and animal welfare on the culling of the Chacma Baboon

The above cases ultimately provide guidance on the framework to be adopted in interpreting the environmental right in respect of the baboons. The judgments indicate the need for a shift in the approach taken in the past by the governmental authorities as well as conservationists that has not adequately reflected the constitutional change that is required. The courts have affirmed an integrative approach is required as invoked by section 24 of the Constitution. This means that decision-making in respect of the environment must take account of animal welfare and must have regard to the intrinsic value of animals. The recognition of intrinsic value of wildlife and in turn the welfare of the baboons has major implications on a decision to cull them. The court held that animal welfare and conservation together reflect two intertwined values.⁶⁶⁹ What this decision means is that welfare of animals may no longer be ignored in conservation measures

⁶⁶⁷ Bilchitz D 'Does Transformative Constitutionalism Require the Recognition of Animal Rights' (2010) 25 *Southern African Public Law* 267-300. The concept 'entails that the Constitution in South Africa was not designed simply to entrench the status quo: rather it was enacted for the purpose of fundamentally transforming society'.

⁶⁶⁸ *Bool Smuts and Another v Herman Botha* (887/20) [2022] ZASCA 3 (10 January 2022) para 22-25. The Supreme Court of Appeal has recognised that the public has the right to know about the inhumane treatment of animals by commercial enterprises so that they can exercise their freedom of choice in deciding which enterprises to support.

⁶⁶⁹ NSPCA case Para 58.

such as culling.⁶⁷⁰ Scholtz has asserted the convergence between conservation and welfare indicates a notion broader than conservation and that is 'protection' in relation to wildlife.⁶⁷¹ In the past, these notions of protection and conservation were interchangeable.⁶⁷² However, protection and conservation developed to have different meanings.⁶⁷³ Protection in some cases, entails incidental protective action to prevent damage to an object to be protected.⁶⁷⁴ Furthermore, 'protection has an ethical implication and implies protection of the weak against the strong'.⁶⁷⁵ The remarks by the Scholtz indicate that the notion of protection encompasses both conservation and welfare implications. Conservationists favour culling as a mechanism to promote conservation. The court cases discussed in this chapter emphasise that this approach is no longer excusable. Animal welfare is an important aspect to be considered in the promotion of conservation under section 24. The governmental departments have a clear mandate to consider the welfare of the baboons. If the department and conservationist continue to misinterpret the notions of conservation and sustainable use, or if they continue to depend on an interpretation that is harmful to wildlife and the environment, they should provide a formal legal opinion as to the reason their view is correct and the legal basis for this.⁶⁷⁶ Given the statements made by the courts, this author is of the opinion that an

⁶⁷⁰ Scholtz W (2020) 259.

⁶⁷¹ Scholtz W (2019) 259.

⁶⁷² Scholtz W (2019) 259.

⁶⁷³ Scholtz W (2019) 259.

⁶⁷⁴ Scholtz W (2019) 259.

⁶⁷⁵ Scholtz W (2019) 259.

⁶⁷⁶ EMS Foundation and Animal Law Reform South Africa 'Submission in Respect of High-Level Panel Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 5 May 2022) p13.

interpretation of section 24 which does not consider the individual interest or welfare of is unacceptable, unlawful and subject to challenge in court. The Chacma Baboons are viewed by humans as commodities to be used in traditional medicine and educational as well as medical research.⁶⁷⁷ The Chacma Baboons that raid farms are being culled, trapped and poisoned by farmers⁶⁷⁸ as the raids damage property and adversely impact on the livelihoods of humans. This approach to resolve the conflict is in line with an anthropocentric ethic whereby wildlife is only valued and protected if they benefits humans. If wildlife becomes a threat to human interest the animal is culled and used. As determined in chapter three no legislation exists that takes the welfare of the baboons into account.⁶⁷⁹ The protocols provide for euthanasia as well as culling of baboons. Thus, the recognition of the intrinsic value of baboons indicates that a normative framework that considers the welfare of the baboons needs to be adopted in accordance with their intrinsic value. This argument is strengthened as this duty is consistent with section 24(b) that conservation and welfare are two intertwined values. The Chacma Baboon example and the current protocols in place to address HWC represent an opportunity for the departments to be guided by the integrative approach and recognise the intrinsic value and welfare considerations of biodiversity.

The acknowledgement of animal welfare in terms of section 24 means that conservation and sustainable use cannot be interpreted from an anthropocentric approach in respect

⁶⁷⁷ Seiphethlo N 'Chacma Baboon' *South African National Biodiversity Institute* February 2014 available at <https://www.sanbi.org/animal-of-the-week/chacma-baboon/> (accessed 15 January 2021).

⁶⁷⁸ Seiphethlo N 'Chacma Baboon' *South African National Biodiversity Institute* February 2014 available at <https://www.sanbi.org/animal-of-the-week/chacma-baboon/> (accessed 15 January 2021).

⁶⁷⁹ Chapter 3 at 3.4.2.1

of wildlife. The baboons can no longer be used as a means to satisfy human interest. This means that their lives can no longer just be sacrificed if they don't serve human interest. The recognition of an attitude of respect and care for the welfare of the baboon does not mean that all forms of pain and suffering, in this case the culling of baboons may not be used in all situations.⁶⁸⁰ As a result, the recognition of intrinsic value of the Chacma Baboon as individuals means that the person who wants to cull or interfere with any entity is morally obliged to offer a sufficient justification⁶⁸¹ for the intrusion or actions.⁶⁸² Thus the onus shifts to the person that wants to interfere with the entity rather than the person that wants to protect the entity.⁶⁸³ The integrative approach in turn require a balance of interests in order to give effect to section 24. This chapter asserts that section 24 must be understood to include a consideration of the inherent and intrinsic value, worth of baboons. Thus, a broad understanding of conservation which include all animals' well-being and not simply that of humans.⁶⁸⁴ It must also consider communities and persons that live in close contact with free-roaming wildlife, and communities' efforts to protect them, also involve such persons benefits of this approach, while minimising HWC.⁶⁸⁵

⁶⁸⁰ Scholtz W (2019) 261.

⁶⁸¹ The CC has in various cases held that all exercise s of public power must be capable of being justified. See *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 200 (2) SA 674 (CC).

⁶⁸² Scholtz W (2020) 8. See also Fox W 'What does the Recognition of Intrinsic Value Entail?' (1993)10 *Trumpeter* 1.

⁶⁸³ Fox W (1993) 1.

⁶⁸⁴ EMS Foundation and Animal Law Reform South Africa 'Submission in Respect of High-Level Panel Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 5 May 2022) p23.

⁶⁸⁵ EMS Foundation and Animal Law Reform South Africa 'Submission in Respect of High-Level Panel Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and

To give effect to the animal welfare as invoked by section 24 it is postulated that the Norms and Standards for Elephants can be utilised in order to resolve the conflict as well as provide greater protection to the baboons. First, if the control of the baboon population becomes necessary, a management plan applicable to the area must be prepared.⁶⁸⁶ Once the management plan is prepared the use of one or a combination of the following management options can be allowed: contraception, range manipulation, translocation, introduction, hunting and culling.⁶⁸⁷ Culling can only be undertaken in terms of a culling plan⁶⁸⁸ and it must be prepared by a responsible person with the assistance of an ecologist who is a recognised management specialist and approved by the relevant issuing authority. Additionally, an expert that is qualified to assess whether the methods are quick and humane in accordance with animal welfare must be included. If approved, culling must be done with quick and humane methods. Important, lethal measures, such as culling, can only be undertaken after all other alternatives have been considered. The Norms and Standards provide a point of departure for the governmental bodies to resolve the conflict. The government can learn from the Norms and Standards for Elephants on

Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 5 May 2022) p23.

⁶⁸⁶ S6 of Norms and Standards.

⁶⁸⁷ S15 of Norms and Standards.

⁶⁸⁸ S 19 of Norms and Standards. The culling plan must contain the following information that the actual and projected population numbers at a specific location are incompatible with the agreed land use objective spelt out in the management plan and that a reduction in population numbers is therefore necessary. Evidence must also be provided that all other population management options have been rejected by the ecologist after appropriate consideration and evaluation. The culling plan must provide the proposed numbers to be culled; the method of animal selection; time frames; culling methods and intended use of products.

how to develop a framework to provide for the conservation and recognise the welfare of the baboons.

4.6 Conclusion

The discussions in this chapter illustrate that conservation and sustainable use are important objectives in section 24 of the Constitution. It was found that conservation and sustainable use is centred on the anthropocentric utilitarian approach to wildlife which is typical of the anthropocentric approach that underlie sustainable development in section 24 as well as biodiversity law. This approach to biodiversity law results in the exclusion of non-anthropocentric values. Thus, culling would be allowed as the anthropocentric approach views wildlife as commodities to be used and exploited for the benefit of human development.

This is evident in the fact that no wildlife welfare framework exists within South Africa. This position was determined in the *SA Predator Breeders* case. Authors have advocated that what is required is a paradigm shift from the anthropocentric approach to wildlife toward recognition of their intrinsic value in their own right.⁶⁸⁹ The above judgments are progressive as they confirmed the recognition of intrinsic value of wildlife which lead to recognising the concern for the welfare of individual animals. The affirmation of the value of wildlife will instil an attitude of respect and care toward wildlife.

⁶⁸⁹ Scholtz W *Animal Welfare and International Environmental Law. From Conservation to Compassion* (2019) Edward Elgar.

Authors also share the view that recognition of intrinsic value means that an ethical policy should be promulgated in accordance with the welfare of those entities.⁶⁹⁰ This is consistent with the view of the above judgments. The court used a purposive approach to interpret section 24 of the Constitution and found welfare is part of conservation. This means that conservation measures cannot ignore the welfare of animals. Accordingly, the court found that welfare is part of the environmental pillar under sustainable development. This leads to the realignment of the pillars of sustainable development. Thus, the economic-development pillar will not trump environmental consideration. These cases thus moved from the position of in the *SA Predator Breeders* case.

In relation to the Chacma Baboon, culling is embedded in the conservationist approach. The recognition of the intrinsic value means that a wildlife welfare framework is to be adopted that considers the welfare of the baboons. As no legislation exists that acknowledges the welfare of the baboons. The recognition of the intrinsic value of the baboons entails that the baboons cannot just be used to satisfy human interest. Accordingly, if the government wants to cull the baboons they have to provide a sufficient justification. Furthermore, litigation and advocacy strategies must in the future ensure that animal interests are expressly placed on the table as to invite the courts and other stakeholders to make further pronouncements on the topic in order to achieve greater protection to nonhuman animals. This is important as such statements, as the progressive judgments discussed, can potentially lead to the alteration of the status and seriousness

⁶⁹⁰ Bowman M, Davies P & Redgwell C (2010) 672. Scholtz W (2020) 6.

to which wildlife are treated. This approach to the interest of nonhuman animals, will be in line with the ideas that shaped the liberation struggle as well as new constitutional order of South Africa and recognise that compassion, humanity and a refusal to sanction injustice must not arbitrarily be confined to the human species but extend to other animals as well.⁶⁹¹



⁶⁹¹ Bilchitz D (2005) 133.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

HWC has a long-storied history in the South African context. This stems from the rich biodiversity within the country and growing populations.⁶⁹² Anthropogenic activities are transforming the natural habitat of the Chacma Baboons.⁶⁹³ As a consequence of their limitation to natural food sources are decreased and fragmented habitat, the baboons frequently cause damage to property, raid human food resources and are exposed to injury and death.⁶⁹⁴ Over the last number of years various mechanisms have been developed to deal with the conflict. These include nonlethal as well as lethal mechanisms.⁶⁹⁵ The mechanism of culling the baboons occurs on an individual level⁶⁹⁶ and is proposed in order to resolve the HWC. This research has explored the relationship between culling and animal welfare in the context of Section 24 of the Constitution. The central aim of this research is to answer the question to what extent does South Africa's Biodiversity legislation acknowledge animal welfare in the legally permitted culling of the Chacma Baboon as a means to address HWC?⁶⁹⁷

Chapter 2 provided a background to the HWC in relation to the baboons. This chapter also discussed lethal control which include the culling operation.⁶⁹⁸ Lethal control follows

⁶⁹² Chapter 1 at 1.1.

⁶⁹³ Chapter 2 at 2.2

⁶⁹⁴ Chapter 2 at 2.2

⁶⁹⁵ Chapter 2 at 2.2.

⁶⁹⁶ Chapter 3 at 3.4.2.1

⁶⁹⁷ Chapter 1 at 1.4

⁶⁹⁸ Chapter 2 at 2.3.

an anthropocentric approach in that it is believed that the reduction of nonhuman animals is the most effective, cheapest and accessible way to resolve HWC.⁶⁹⁹ The conclusion reached in this chapter was that lethal control leads to species extinction, the collapse of wildlife geographic ranges, a decline in local populations and affected associated populations.⁷⁰⁰ In addition, to the environmental affects lethal control also criticised for not considering the welfare of individual animals.⁷⁰¹ Animal welfare proponents strongly hold that humans are obligated to treat nonhuman animals with respect and care.⁷⁰² This means that humans have an obligation to ensure that wildlife have an environment in which they can flourish, as well as, not to hurt or harm them.⁷⁰³ The culling practice will damage the South Africa's brand and have a serious effect on the conservation reputation of South Africa.⁷⁰⁴

Chapter 3 analysed the biodiversity framework from the international to domestic level in relation to wildlife to determine whether the framework recognise animal welfare. This chapter determined wild animal welfare law is sparse, almost non-existent in the international and regional context, result of the political and cultural differences. It was also determined that South African biodiversity law is focused on the conservation and sustainable use of biodiversity as well as benefit sharing of indigenous biodiversity under

⁶⁹⁹ Chapter 2 at 2.3.

⁷⁰⁰ Chapter 2 at 2.3.

⁷⁰¹ Chapter 2 at 2.4.

⁷⁰² Chapter 2 at 2.4

⁷⁰³ Chapter 2 at 2.4.

⁷⁰⁴ EMS Foundation and Animal Law Reform South Africa 'Submission in Respect of High-Level Panel Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 5 May 2022) p109.

the auspices of sustainable development of section 24 of the Constitution.⁷⁰⁵ As a result, it does not contain mention of the notion of animal welfare, the only exception is the Norms and Standards for the management of elephants.⁷⁰⁶ The absence of animal welfare was confirmed in the Predator Breeders case.⁷⁰⁷

The chapter identified the strengths and weaknesses of the national biodiversity law and policy framework. The main strength is that the attainment of sustainable development is goal of the framework.⁷⁰⁸ The concept of sustainable development requires the interests of the environment must be balanced with socio-economic interests.⁷⁰⁹ In addition to this that ecological sustainability is important element in the realisation of section 24. The author submits that sustainable development is conducive for animal welfare integration.⁷¹⁰ The author further shares the view of other scholars that advocate for an evolutionary interpretation of sustainable development that include intrinsic value welfare of animals for the consideration of the animal welfare of animals.⁷¹¹ Another strength is that the framework empowers ministers to promulgate legislation on several topics in relation to animals. Animal cruelty is prohibited in terms of the APA. The weaknesses identified is no formal recognition of animal sentience is in legislation and policy.⁷¹² The

⁷⁰⁵ Chapter 3 at 3.4.1.1 and 3.4.1.1.1

⁷⁰⁶ Chapter 3 at 3.4.2.5.

⁷⁰⁷ Chapter 1 at 1.1.1.

⁷⁰⁸ Chapter 3 at 3.4.3.1

⁷⁰⁹ Scholtz W (2005) 73.

⁷¹⁰ Chapter 3 at 3.4.3.1. See Verniers E (2021) 349-362.

⁷¹¹ Scholtz (2020) 9. See also Bilchitz D 'Why Conservation and Sustainability Require Protection for the Interests of Animals' in Scholtz W (ed) *Animal Welfare and International Environmental Law From Conservation to Compassion* (2019).

⁷¹² Chapter 3 at 3.4.3.2

APA, covers only domestic animals and birds, as well as wild animals, birds and reptiles who are in captivity or under the control of humans.⁷¹³ This makes the APA limited in its scope of application as it does not cover wild animals in their natural state.⁷¹⁴ This situation illustrates that wildlife welfare is not a priority. No formal body, board or group of governmental officials exists responsible for implementing the APA and its secondary regulations or for promoting measures on animal welfare in policy or legislation in the country.

The main premise of Chapter four was to highlight that the position has changed from the Predator Breeders case in South African biodiversity law. The discussions illustrate that the position regarding animal welfare has changed in two progressive cases, the NCSPA and Lion Bone cases respectively. The NCSPCA recognised the intrinsic value of individual wildlife as well as the importance of adopting an integrative approach to understanding the relationship between conservation and animal welfare.⁷¹⁵ In the Lion Bone the court approved the judgment of the NCSPCA. The court asserted that the welfare factor is far from irrelevant as it forms part of the environmental pillar that must be balanced against the other economic-social pillars under sustainable development invoked in section 24.⁷¹⁶

This chapter illuminated that the recognition of the intrinsic value and animal welfare has implications on biodiversity law. First, the concept of sustainable development is

⁷¹³ Chapter 3 at 3.4.1.3.1

⁷¹⁴ Chapter 3 at 3.4.1.3.1

⁷¹⁵ NSPCA case Para 57.

⁷¹⁶ Lion Bone case Para 41.

anthropocentric and ill-suited to take a stance where there are trade-offs between environmental, social and economic considerations.⁷¹⁷ Consequently, this anthropocentric approach tends to favour economic interest over environmental protection.⁷¹⁸ Sustainable use of wildlife is an important element of sustainable development. The principle of sustainable use likewise has a strong anthropocentric focus which is only limited as the use must be sustainable. The affirmation of the intrinsic value of wildlife means that wildlife may not be used only through anthropocentric interests but recognise a form of conservation and use that aligns with an integrative approach that respects and cares for the welfare of wildlife. Second, the recognition of intrinsic value necessitates a need for 'ethical policy' in accordance with the duty placed on the state to protect the environment...through reasonable legislative and other measures that recognise the intrinsic value of wildlife. Third, the affirmation of the intrinsic value means that a sufficient justification must be provided for the intrusion.⁷¹⁹ It is evident that animal welfare must be considered during culling. Due to the fact as indicated in the case law that animal welfare and conservation are intertwined values. This means that conservation measures must also provide for the welfare of individual animals under the auspices of section 24. Hence the conservation needs to reflect an approach that incorporates respect and concern for individual animals which is vital for the preservation of a species as a whole.

⁷¹⁷ Viñuales JE (2013) 7.

⁷¹⁸ Scholtz W (2020) 5.

⁷¹⁹ Scholtz W (2020).

In light of the above, the author presents the following broad and non-exhaustive recommendations:

1. Governmental bodies in terms of section 24 are legally obligated to recognise and consider the welfare of the baboons. In light of this, the government bodies dealing with the Chacma baboons must in respect of the Chacma baboons recognise that they have a clear mandate to deal with animal welfare considerations. All decisions-making concerning the baboons must take account of the welfare and have regard for the intrinsic value of the baboons.⁷²⁰

2. The governmental bodies must follow integrative approach towards conservation and sustainable use of wildlife. The integrative approach requires the prohibitions of all forms of exploitive behaviours towards the baboons.⁷²¹ Moreover, the integrative approach allows for humans to benefit from the baboons who co-habit the Cape Peninsula area: this is through education, filming and research in accordance with care and respect.⁷²²

3. In the situation regarding the baboons the government must make use of the Norms and Standards in order to resolve the conflict. Section 15 requires the following option:

⁷²⁰ EMS Foundation and Animal Law Reform South Africa 'Submission in Respect of High-Level Panel Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 5 May 2022) p15.

⁷²¹ EMS Foundation and Animal Law Reform South Africa 'Submission in respect of High-Level Panel Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 5 May 2022) p14.

⁷²² EMS Foundation and Animal Law Reform South Africa 'Submission in respect of High-Level Panel Management, Breeding, Hunting, Trade, Handling and Related Matters Elephant, Lion, Leopard and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> (accessed on 5 May 2022) p14.

contraception, range manipulation, translocation, introduction, hunting before culling can be used. Culling should only be done where there are no alternatives. The Norms and Standards, in addition, require evidence to be provided why culling is necessary together with reasons why other population management options have been rejected by the ecologist. If culling is approved, the Norms and Standards require that it be done with quick and humane methods. The following recommendations would ensure that the intrinsic value of individual baboons is considered in order to promote section 24. The Norms and Standards already contain animal welfare considerations and could be used as a point of departure to develop animal welfare legislation in respect of the Chacma baboons.

4. The government must promulgate specific and comprehensive legislation for the baboons that must explicitly recognise that the baboons are sentient beings, in terms of the authority granted by Section 97 or section 9 of NEMBA. The government must expand the scope of application of the APA so that all animals, in particular the baboons, can benefit from the anti-cruelty prohibition contained in the Act. The legislation must also contextualise relevant existing and proposed legislation.

5. The integrative approach to section 24 must be explicitly recognised as an underlying thread within the specific baboon legislation.⁷²³ The courts have recognised the importance of adopting an integrative approach to understanding the relationship

⁷²³ Animal Law Reform South Africa 'Submission on the Draft Policy Position on the Conservation and Sustainable Use of Elephants, Lions, Leopards and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2021/07/Submission-on-the-DFFE-Draft-Policy-Position.pdf> (28 October 2022) 6.

between animal welfare and conservation. The integrative approach will require the governmental bodies to change the way they have approach the baboons as resources to be utilised and culled for their own ends. This is a legal consequence of the judgments and governmental bodies is required to adhere to them.

6. The One Welfare approach in accordance with an integrative approach must be recognised in the baboon specific legislation. The One Welfare approach must also be recognised as a guiding principle in all biodiversity, conservation, and wildlife decision-making. The One Welfare system recognises the interconnectedness between human well-being, animal welfare and the environment. The One Welfare system is recommended as the government favour the one welfare approach.⁷²⁴

7. The government must also establish an advisory body to provide input and guidance on all further legal, policy, and administrative steps on animal welfare. This body must be independent from government and include relevant organisations such as NCSPCA.⁷²⁵ This is to ensure the interest of wildlife are heard and protected.

⁷²⁴ Animal Law Reform South Africa 'Submission on the Draft Policy Position on the Conservation and Sustainable Use of Elephants, Lions, Leopards and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2021/07/Submission-on-the-DFFE-Draft-Policy-Position.pdf> (28 October 2022) 6.

⁷²⁵ Animal Law Reform South Africa 'Submission on the Draft Policy Position on the Conservation and Sustainable Use of Elephants, Lions, Leopards and Rhinoceros' available at <https://www.animallawreform.org/wp-content/uploads/2021/07/Submission-on-the-DFFE-Draft-Policy-Position.pdf> (28 October 2022) 7. Recently, the DFFE has established a Wildlife Welfare Forum which can serve as a benchmark.

8. All the governmental bodies in relation to the baboon management must enter into an implementation agreement that clearly describe their responsibilities.⁷²⁶

In light of the above recommendations, it is important to note that while there is legislation that can be utilised to protect animal welfare and environmental rights in the context of wildlife, they are inadequate. Animal welfare in biodiversity law remain fruitful for critical research. Much more research is needed on the increasing body of welfare of wildlife. Ultimately the extent to which government will start the process for greater protection of wildlife welfare depends on many factors, including political will finance and investments. In the context of South Africa, it is however encouraging to see a gradual shift towards a framework that provide real protection to wildlife. The recent Draft Biodiversity White Paper present a new path in the approach of conservation and sustainable use of wildlife that is hopeful. The document includes the African philosophy of *Ubuntu* to guide the future of the biodiversity sector, and emphasising an African-centric approach to conservation and sustainable use. In addition, NEMLA that include well-being of animals in the conservation and sustainable use of biodiversity. These are positive steps in the law and policy of the country and is definitely a country to watch in the future.

(Word count: 29 726 excluding footnotes and bibliography)

⁷²⁶ Ayele Z 'Monkey Business: A Case Study of Roles and Responsibilities' available at <https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-11-issue-4-october-2009/lgb-iss11-4-monkey-business.pdf> (accessed on 5 December 2022).

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