25. Animal law through a utilitarian lens

Régis Bismuth

Utilitarianism, especially through the writings of its influential contemporary proponent Peter Singer, has been one of the most prevalent ethical theories to articulate how humans ought to treat non-human animals. It is thus not a surprise that it has played a key role in the evolution of the debates surrounding animal law[1] over the past decades. Before exploring how utilitarian thought has resonated in the development of animal law, it is first necessary to explore why, how, and to what extent it has taken into consideration the fate of animals. This chapter will specifically focus on the utilitarian approach as it pertains to the individual treatment of animals and does not address the protection of animals as species within an environmental context.

1. ANIMALS IN THE UTILITARIAN PERSPECTIVE

1.1 Foundations

Utilitarianism is a highly influential Western philosophy which has shaped the ethical discourse surrounding the treatment of animals. By asserting that animals, akin to humans, experience pain and, therefore, have interests deserving of protection, some utilitarians have argued that such considerations are essential in determining how humans should treat animals. This philosophical approach challenged the prevailing view that animals, allegedly being deeply different from humans and lacking reason, are not deserving of moral consideration. Utilitarianism's emphasis on the consequences of actions and the intrinsic value of pleasure and pain has broadened the scope of ethical obligations towards animals and has laid the groundwork for significant legal and societal changes aimed at improving their welfare.

Jeremy Bentham's writings, more specifically a footnote appearing in the *Introduction to the Principles of Morals and Legislation*, have been canonized by the animal liberation movement two centuries later. This short text holds two intriguing aspects. First, in the main text briefly referring to animals, Bentham pointed out the legal status of animals as objects of property. When comparing humans and other animals, he noted that 'other animals, which, on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of *things*'.[2] Interestingly, the starting point of his commentary on animals is about a legal question pertaining to property rights. Second, the footnote represents

[1] In this chapter, the term 'animal law' is devoid of any ethical positioning or epistemological aspiration and is used to refer to the rules governing human-animal relations, including animal welfare, ownership and protection.

[2] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed JH Burns, HLA Hart (Clarendon Press 1996) 282.

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the first identifiable formulation of anti-speciesism and draws a parallel between slavery and animal exploitation:

> The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the whims of a tormentor (See Lewis XIVth's Code Noir). It may come one day to be recognized, that the number of legs, the pilosity of the skin, or the termination if the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate? What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse, or dog, is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they *reason*? Nor, Can they *talk*? But, Can they *suffer*?[3]

Bentham's famous citation has, to some extent, overshadowed the positions of other utilitarian thinkers on the issue of animal treatment.[4] This is, for instance, the case of John Stuart Mill, who emphasized the importance of the 'Greatest Happiness Principle' and stated that its 'ultimate end' is 'an existence exempt as far as possible from pain, and as rich as possible in enjoyments'.[5] He further argued that this principle should determine 'the rules and precepts for human conduct […] to all mankind; and not only to them, but so far as the nature of things admits, to the whole sentient creation'.[6] He previously clearly articulated the immorality of 'any practice [that] causes more pain to animals than it gives pleasure to man'.[7]

Neither Bentham nor Mill built a full-fledged utilitarian theory of animal justice. They only mentioned in passing the fate of animals and that they are worthy of being included in the utilitarian equation. Nevertheless, Bentham's philosophy had some influence on the development of the first anti-cruelty laws in England at the start of the 19th century.[8] Amid increasing concerns about the development of intensive industrial farming practices and the use of animals in scientific research, it was only two hundred years later with Peter Singer's seminal book *Animal Liberation*, first published in 1975, that the issue of the treatment of animals was brought to the forefront of philosophical discourse.

Singer explains why animals should be included in the circle of moral consideration. In his view, the ethical principle on which human equality rests is normative rather than descriptive; it 'is not a description of an alleged actual equality among humans: it is a prescription of how we should treat human beings'.[9] The principle of equality of human beings 'does not depend on intelligence, moral capacity [or] physical strength'.[10] It rests upon the acknowledgement

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3 ibid 282-283 fn b.

4 On Bentham, see also Johannes Kniess, 'Bentham on Animal Welfare' (2019) 27 British Journal for the History of Philosophy 556.

5 John Stuart Mill, *Utilitarianism – With Related Remarks from Mill's Other Writings* (Hackett 2017) (Ch II(10) 37 (originally published in 1863).

6 ibid.

7 John Stuart Mill, *Whewell on Moral Philosophy* (1852) (CW vol X) 187 (cited in ibid 52).

8 Roderick Frazier Nash, *The Rights of Nature – A History of Environmental Ethics* (The University of Wisconsin Press 1989) 25.

9 Peter Singer, *Animal Liberation* (Ecco 2002) 5.

10 ibid 4.

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and consideration of the interests of the individual.[11] Relying on Bentham's 'forward-looking passage',[12] Singer considers that, like humans, animals are living beings capable of suffering and experiencing enjoyment and happiness. Consequently, their interests, too, warrant equal consideration. This led Singer to develop the principle of 'equal consideration of interests'. Singer argues that akin to the act of prioritizing the interests of a particular ethnic or gender group – which would be deemed racist or sexist – favouring the interests of humans over animals constitutes what he refers to as 'speciesism'.[13] However, this equal consideration of interests does not require equal or identical treatment and may lead to different rights.[14] For example, unlike a human, a non-human animal could not be granted the right to vote because it would not comprehend its purpose.

1.2 Scope and Reach

According to utilitarians, sentience is the decisive criterion to determine that animals have a moral standing. Sentience is enough for animals to be considered moral subjects, but it does not provide a clear answer about what decisions should be made in a specific situation involving the treatment of an animal. Indeed, while sentience is a necessary condition for moral consideration, it has unclear boundaries. Moreover, sentience alone does not dictate the specific ethical decisions in scenarios involving animal treatment. Utilitarianism, with its varied nuances, lacks a singular formula for determining the correct treatment of animals.

There is first a question regarding where to delineate the boundaries of sentience, which is, according to Singer, 'the only defensible boundary of concern for the interests of others'.[15] The concept of sentience requires a scientific evaluation of an animal's ability to experience pain and pleasure. However, there are controversies about the limits of sentience and the possibility of non-sentient animals that would be disregarded from a utilitarian perspective.[16]

It is evident when examining the different fields of animal law that animal sentience plays a certain role, but it is not consistently taken into account across different branches of animal law.[17] Moreover, it is also noteworthy that assessing how animals should be treated also involves the incorporation, by a mirror effect, of how an individual perceives animal sentience.[18] It is sometimes also about imagining what we could empathetically infer another living being might experience.[19] By the way, Peter Singer did not reject this kind of intuitive

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[11] ibid 5.
[12] ibid 7.
[13] ibid 6, 213.
[14] ibid 2.
[15] ibid 8–9.
[16] Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things* (Oxford University Press, 2000) 50.
[17] For an overview, see, Régis Bismuth and Fabien Marchadier (eds), *Sensibilité animale – Perspectives juridiques* (CNRS Editions, 2015).
[18] Régis Bismuth and Fabien Marchadier, 'La sensibilité de (et vis-à-vis de) l'animal, grille de lecture du droit animalier?' in Régis Bismuth and Fabien Marchadier (eds), *Sensibilité animale – Perspectives juridiques* (CNRS Editions, 2015) 25.
[19] Tristan Garcia, *Nous, animaux et humains – Actualités de Jeremy Bentham* (François Bourin Editeur 2011) 11.

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approach when he stated that 'the basis of my belief that animals can feel pain is similar to the basis of my belief that children can feel pain'[20] and that for plants 'we cannot observe behaviour suggesting pain'.[21] Although utilitarianism aims to adopt a scientific approach, the inherent element of subjectivity inevitably affects the determination of what is considered acceptable treatment of animals.

Beyond these challenges, the utilitarian test is not merely a mathematical equation but also implies value judgments. The doctrine of utilitarianism presents numerous interpretations and even 'utilitarians differ as to what utility actually entails'.[22] Moreover, individual stances can evolve over time. Initially, Peter Singer advocated for 'preference utilitarianism', a concept aligning utility with the satisfaction of preferences. However, he later expressed growing scepticism about preference utilitarianism and started to consider 'hedonistic utilitarianism', which equates utility with pleasure, as a more defendable alternative.[23]

Under the 'principle of minimizing suffering',[24] utilitarians acknowledge that while animals' interests merit protection, there are situations where safeguarding a legitimate interest, whether human or non-human, may require inflicting harm on animals. However, this is permissible only to the extent that the benefits of protecting this legitimate interest significantly outweigh the harm caused. Some utilitarians consider that, as a matter of principle, in all cases, human life is more valuable than animal life.[25] Others might differ as to what constitutes 'a good life' for animals. Some will consider that the killing of replaceable animals is justifiable as long as it is done within the framework of animal-friendly farming practices,[26] while others may consider that their killing is not justifiable because they have a preference for the continuation of their own existence.[27]

Critics of Singer's consequentialist utilitarian approach, particularly those involved with animal rights theory, have pointed out that it could potentially justify animal exploitation if it results in a greater overall good. In other words, some consider that utilitarianism offers too many avenues for avoidance and 'this situation leaves animals extremely vulnerable to a range of harms'.[28] Tom Regan's animal rights theory, grounded in a deontological approach, counters this by asserting that animals, as 'subjects of a life', possess intrinsic value and rights that cannot be overridden. According to Regan, animals should not be treated merely as means to

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[20] Peter Singer, *Practical Ethics* (3rd edn, Cambridge University Press, 2011) 59.

[21] ibid 60.

[22] Alasdair Cochrane, *An Introduction to Animals and Political Theory* (Palgrave Macmillan 2010) 30.

[23] Peter Singer, 'Afterword' in Tatjana Višak and Robert Garner (eds), *The Ethics of Killing Animals* (Oxford University Press, 2016) 234.

[24] Singer, *Animal Liberation* (n 9) 21.

[25] Raymond G Frey, 'Utilitarianism and Animals' in Tom L Beauchamp and Raymond G Frey (eds), *The Oxford Handbook of Animal Ethics* (Oxford University Press, 2012) 177.

[26] See 'Why I Am Only a Demi-Vegetarian' in Richard M Hare, *Essays on Bioethics* (Clarendon Press 1993) 219. For a critique of the 'replaceabiliy argument', see, Nicolas Delon, 'Un Singer peut-il en remplacer un autre?' (2016) 32 Klesis 150. See also, Tatjana Visak and Robert Garner (eds), *The Ethics of Killing Animals* (Oxford University Press, 2016) 46.

[27] Nicolas Delon, 'La mort: Un mal non nécessaire, surtout pour les animaux heureux!' (2014) 2014 Revue Semestrielle de Droit Animalier 247.

[28] Cochrane (n 22) 45. See also, Gary L Francione, *Animals, Property, and the Law* (Temple University Press 1995) 6.

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an end, irrespective of the outcomes. This stance challenges utilitarian views that sometimes allow the use of animals for perceived greater benefits.[29]

1.3 From Utilitarian Theory to Animal Law

This chapter examines whether utilitarianism offers an interesting framework for understanding and deciphering animal law and some of its evolutions. It does not intend to evaluate the various proposals for regulatory reform put forward by utilitarians, for instance, for farm animals, animals used in scientific experiments, or animals used for recreational purposes.

For clarity, we do not intend to limit our understanding of animal law to merely regulatory provisions. In this regard, the proposals of utilitarians are particularly interesting in explaining why a narrow and positivist conception of animal law is inadequate. Indeed, while utilitarians have made proposals for legal reform regarding the use of animals, they have also put forward suggestions aimed at individuals. For example, Peter Singer proposes changing consumption habits when viable alternatives exist and adopting a vegetarian diet.[30] At first glance, advocating individual moral choices may seem only distantly related to what is understood by animal law. However, this would overlook the full range of normative tools that can facilitate the implementation of individual moral choices. It is essential to consider norms set by private operators, nudge tactics[31] or more hybrid forms of soft law such as animal welfare labels, which play a significant role in informing consumers.[32] Therefore, we will adopt a very broad perspective on what constitutes animal law, while maintaining a critical analysis of the various normative tools deployed. It is important to note that what follows provides a fragmented and impressionistic view of the development of animal law, and our focus has been on jurisdictions with which we are more familiar.

Although this chapter focuses on how utilitarianism offers an interesting framework for understanding animal law, it is also worth quickly mentioning that, more recently, new disciplines, for instance economics or behavioural science, have also embraced the utilitarian doctrine to formulate normative proposals in the field of animal protection. The cross-disciplinary application of utilitarian principles is exemplified in the Animal-Welfare Levy, as proposed by Romain Espinosa and Nicolas Treich. Their proposal, grounded in non-anthropocentric economics, advocates for a levy on meat consumption to address concerns for animal welfare. This levy functions similarly to a Pigouvian tax, aiming to internalize the external costs associated with the production of animals for meat consumption.[33] Espinosa and Treich's proposal showcases the practical application of utilitarian principles in economics, moving beyond theoretical discourse to influence policy decisions and legal frameworks concerning animal welfare.

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[29] Tom Regan, *The Case for Animal Rights* (University of California Press 1983) 206.

[30] Singer, *Animal Liberation* (n 9) 159.

[31] See Malik Bozzo-Rey, 'Nudge and Utilitarianism: A Matter of Preferences', in this book.

[32] See for instance in the global context, Anne Peters, 'Animals in International Law' (2020) 410 Recueil des Cours de l'Académie de Droit International de la Haye 95, 175.

[33] Romain Espinosa and Nicolas Treich, 'The Animal-Welfare Levy' (Toulouse School of Economics 2024). See also, F Bailey Norwood, and Jayson L Lusk, *Compassion, by the Pound: The Economics of Farm Animal Welfare* (Oxford University Press, 2011); Romain Espinosa, *Comment sauver les animaux? Une économie de la condition animale* (PUF 2021).

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2. MAIN AREAS OF IMPLEMENTATION AND CHALLENGES IN EFFECTIVENESS

In the realm of animal law, significant developments have emerged, prompting us to examine their resonance with the utilitarian doctrine. However, this exploration is no straightforward task. The rules governing animals vary dramatically based on their categorization: whether they are pets, animals used for food and goods production or for scientific research, recreational companions, wild creatures or invasive species.[34] Consider a seemingly innocuous rabbit – it could be subject to vastly different rules and treatments depending on which category it falls into.

Adding to the complexity, various constraints and interests come into play. Economic considerations, cultural norms and religious beliefs all shape the landscape of animal law. These multifaceted factors often hinder the development of a coherent utilitarian approach to animal welfare. Also, sometimes what appears as a utilitarian doctrine may merely serve as a veneer, masking the amoral justification for perpetuating the exploitation of animals.

2.1 Animals Used for Scientific Research

Utilitarians have given due consideration to the use of animals in scientific research. Moreover, in Peter Singer's *Animal Liberation*, the first chapter following the introduction does not discuss the treatment of animals in factory farms. Instead, as indicated by its title, 'Tools for Research',[35] it focuses on the use of animals in scientific research. This chapter reveals some disturbing practices, such as the infliction of intensive electric shocks, suffocation and administration of known toxic substances, causing prolonged pain to various animals (rats, dogs, rabbits, chimpanzees and the like). Many of these instances appear to be futile scientific experiments, at times driven by peculiar scientific curiosity, lacking clear or legitimate scientific objectives. It was unsurprising that a process of desensitization of animals was observed in that context, where they are referred to as items, tools or supplies. Singer also discussed how public outcry and the pressure from the animal welfare movement in the 1980s led scientists and pharmaceutical and cosmetics firms to explore alternative research methods.[36] Singer also sought to challenge the preconception that labelling research as 'medical' inherently carries a form of self-justification for its social necessity.[37] In this sense, clear principles must regulate the use of animals in scientific research and self-regulation alone is not sufficient. Some authors have sought to propose practical methodologies to implement Singer's utilitarian approach in the field of animal experimentation. This includes for instance the 'Non-Speciesist Utilitarian Test' proposed by Lori Gruen, according to which 'an experiment X would be justified if and only if: 1. of all the options open, X generates more pleasure or benefit than pain

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[34] This chapter will not address the specific situation of pest animals and invasive species, as this is not a dominant theme in utilitarian literature, and it is also an area where considerations of animal welfare are often overlooked in practice. The status of animals as pets will be briefly touched upon in the context of discussing animals used for recreational activities.

[35] Singer, *Animal Liberation* (n 9) 25.

[36] ibid 57.

[37] ibid 61.

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or cost on balance; and 2. The justification for experiment X does not depend on irrelevant species prejudice, that is, equal interests are considered equally no matter who has them'.[38]

The principles defined by William Russell and Rex Burch in their book *The Principles of Humane Experimental Technique*[39] – published in 1959 following work under the auspices of the Universities Federation for Animal Welfare (UFAW) – have become the most influential ethical guidelines designed to minimize animal use and suffering in scientific research.[40] In their book, Russell and Burch advocate for the establishment of a scientific ethics based on a utilitarian approach, that of the '3Rs' principles: Replacement, Reduction, and Refinement. Replacement involves substituting traditional animal models with alternative methods (human tissues and cells, computer models, and so on). Reduction focuses on strategies to decrease the number of animals used in experiments (by improving experimental design and analysis, sharing resources, and so on). Refinement implies modifying experimental and care procedures to lessen pain, distress or discomfort in animals used in research. The 3Rs model is applicable in various contexts to guide research conduct, including domestic regulations, ethical guidelines for researchers, education, and even editorial policies of scientific journals.[41]

It was only in the 1980s that the 3Rs model began to gain significance among legislators. Within the EU, its general philosophy is reflected in Directive 86/609 on the protection of animals used for experimental and other scientific purposes.[42] This instrument was adopted a few months after the conclusion of the Council of Europe's Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes.[43] The general objective of the directive, as explained in its preamble, was to implement a harmonization of the legislations of the member states to ensure 'that the number of animals used for experimental or other scientific purposes is reduced to a minimum, that such animals are adequately cared for, that no pain, suffering, distress or lasting harm are inflicted unnecessarily and ensure that, where unavoidable, these shall be kept to the minimum'.[44] The directive was designed, at least *prima facie*, on the 3Rs model: no experiment shall be performed if another scientifically satisfactory method of obtaining the result sought, not entailing the use of an animal, is reasonably and practicably available;[45] when an experiment has to be performed, there should be the use of 'the minimum numbers of animals';[46] and experimental methods expected to cause 'the

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[38] Lori Gruen, *Ethics and Animals – An Introduction* (Cambridge University Press, 2011) 119.

[39] William MS Russell and Rex L Burch, *The Principles of Humane Experimental Technique* (Methuen & Co 1959).

[40] Robert C Hubrecht and Elizabeth Carter, 'The 3Rs and Humane Experimental Technique: Implementing Change' (2019) 9 Animals 754. See also Bernard E Rollin, 'Animal Research, Animal Welfare, and the Three R's' (2010) 10 Journal of Philosophy, Science & Law 1.

[41] Nicola J Osborne, Daisy Payne and Michael L Newman, 'Journal Editorial Policies, Animal Welfare, and the 3Rs' (2009) 9 The American Journal of Bioethics 55.

[42] Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes [1986] OJ L 358/1.

[43] European Convention for the Protection of Vertebrate Animals used for Experimental and Other Scientific Purposes (18 March 1986) European Treaty Series No. 123.

[44] Directive 86/609 (n 42) Preamble para 6.

[45] ibid Article 7(2).

[46] ibid Article 7(3).

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least pain, suffering, distress or lasting harm and which are most likely to provide satisfactory results shall be selected'.[47]

The directive has been subject to several criticisms, some regarding the fact that it was not uniformly implemented, failing to ensure sufficient conditions for a level playing field and creating competitive distortions between member states. Others criticized it for not providing adequate animal welfare conditions or for only protecting 'non-human vertebrates',[48] thereby marginalizing invertebrates, and classifying animals based on their 'degree of neurophysiological sensitivity'.[49]

Before revising that directive, the EU expanded its regulatory framework regarding animal experimentation for the development of cosmetic products. The EU has adopted measures for a phasing-out of animal testing for cosmetic products and banning, among other things, animal testing of finished cosmetic products and of cosmetic ingredients[50] and also allowing producers to claim that no animal testing was carried out in relation to its development.[51] This development is notable from a utilitarian perspective because it shows that the EU distinguishes between different objectives for using animals. The use for cosmetic product development is deemed not to have sufficient legitimate interest.

The revision of the 1986 directive by Directive 2010/63 was undertaken with the ambition of better incorporating the 3Rs model.[52] It includes several provisions on improving animal welfare, rules applicable to facilities housing animals, enhanced ethical evaluation of projects and the development of alternative methods.[53] This directive is also interesting on a more specific point, highlighting how the utilitarian logic supposed to underlie it can also be tinged with other considerations. The directive indeed sets stricter rules for the use of non-human primates, and more specifically concerning great apes.[54] Great apes can only be used 'where a Member State has justifiable grounds for believing that action is essential for the preservation of the species or in relation to an unexpected outbreak of a life-threatening or debilitating clinical condition in human beings'.[55] The preamble of the directive refers to 'practical problems in terms of meeting their behavioural, environmental, and social needs in a laboratory environment',[56] which seems to follow a utilitarian logic. However, it also refers to the 'genetic proximity of non-human primates to human beings'[57] and the fact that great apes are among the 'closest species to human beings with the most advanced social and behav-

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47 ibid Article 7(4).

48 ibid Article 2(a).

49 ibid Article 7(3).

50 Article 18 of Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products [2009] OJ L 342/59.

51 Article 20 of Regulation 1223/2009 (n 50).

52 Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes [2010] OJ L 276/33.

53 I Anna S Olsson and others, 'Protecting Animals and Enabling Research in the European Union: An Overview of Development and Implementation of Directive 2010/63/EU' (2017) 57 ILAR Journal 347; Hubrecht and Carter (n 40) 5.

54 Article 8 of Directive 2010/63 (n 52).

55 Article 55(2) of Directive 2010/63 (n 52).

56 Directive 2010/63 (n 52), Recital 17.

57 ibid.

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ioural skills'.[58] From this, it emerges that the approach adopted by the directive is also tainted with anthropocentric considerations, as it adjusts the treatment accorded to an animal based on its proximity to humans, thus permitting discrimination between different animal species for reasons unrelated to utilitarian calculus. To some extent, European legislation specifically protecting great apes also falls within the movement aimed at granting personhood and recognizing fundamental rights for these animals (right to life, protection of individual liberty and prohibition of torture).[59]

2.2 Animals Used for Production

The production of food and some goods involves a wide range of activities, using numerous animals for different types of products. In food production, animals such as cattle, pigs, chickens, sheep, goats, fish and shellfish are primarily used for meat. Cows and goats also provide dairy products, while hens are used for egg production. In terms of goods, particularly accessories and clothing, animals such as cows, crocodiles, snakes, rabbits, minks, and foxes are utilized for their skins and furs. In these processes, animals are generally killed to obtain meat, leather or fur. Additionally, in the dairy and egg industries, most animals, including dairy cows and egg-laying hens, are eventually killed at the end of their productive lives. Moreover, egg production often involves the culling of male chicks, as they are considered unproductive. The rise and proliferation of factory farming have marked a pivotal shift in the treatment of animals under human control.[60] This industrialized approach to animal husbandry has significantly increased production efficiency but has also led to serious ethical concerns regarding the welfare of animals.

Unsurprisingly, Peter Singer's utilitarianism has led him to think that, given the rearing conditions (overcrowding, confinement, lack of natural behaviour and so on) that structurally inflict suffering on animals turned 'into machines',[61] paying attention to the legitimate interests of animals should result in the prohibition of factory farming and other intensive farming methods. However, as has already been pointed out,[62] there is disagreement among utilitarians as to the morally justifiable continuation of killing animals for human consumption. Some consider that it would be conceivably acceptable for replaceable beings 'not capable of having desires for the future'[63] provided the animals could lead a pleasant life. Others think that killing is not justifiable since animals have a preference for the continuation of their own existence.[64]

Considering the enormous economic impact of the various sectors within the food industry alone, implementing the solutions advocated by utilitarians regarding the end of factory farming or intensive animal rearing is not a viable political option. This is precisely why Peter Singer advocates for changes in individual behaviours (such as adopting vegetarian or vegan diets, or at least showing a preference for products produced in animal-friendly environments, such as free-range eggs), to influence the practices of the relevant industries.

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58 ibid Recital 18.
59 Paola Cavalieri, 'The Meaning of the Great Ape Project' (2015) 1 Politics and Animals 16.
60 Cochrane (n 22) 32.
61 Singer, *Animal Liberation* (n 9) 147.
62 See Section 1(b).
63 Singer, *Animal Liberation* (n 9) 228.
64 Delon (n 27).

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Several activities in which animals are used for production are subject to restrictions, particularly when they involve products for which alternatives exist and, most importantly, when they generate disproportionate animal suffering relative to the trivial nature of the products in question. The case of fur is particularly relevant. Several clothing brands, especially in the luxury industry, have committed in recent years to no longer producing fur-based products. Some countries have also embarked on this path. As early as 2003, the United Kingdom implemented a fur ban; it was followed by Austria in 2005. Several other countries have since followed suit, particularly in Europe from the early 2020s, including Italy and France.[65] Initiatives have also been taken to ban the sale of fur-based products, as seen in Israel in 2021 and in several cities in the United States, such as Los Angeles and San Francisco. It is worthwhile to nuance the utilitarian dimension of these regulatory changes. First, the acceleration of the fur ban from 2020 can also be explained less by a concern for animal welfare than by human health considerations, as several fur farms have contributed to the spread of Covid-19.[66] Also, while Israel was the first country to ban the sale of fur, the regulation nonetheless includes exceptions for the use of fur in 'scientific research, education or instruction, and for religious purposes or tradition',[67] allowing for the continued sale of shtreimels, fur hats traditionally worn by Orthodox Jewish men, and which represent the most significant share of fur sales in the country. As observed in other areas of animal exploitation, progress in animal welfare is sometimes justified by other reasons or undermined by exceptions, particularly those of a cultural or religious nature.

Regarding animals used for food production, the issue can be viewed from a different perspective. We could provide an overview of the various reforms aimed at improving the conditions of animals on farms, during transport, or at slaughter. However, it seems more appropriate to decipher the overall logic governing the consideration of the animal welfare imperative, which, despite appearances, does not stem from an authentically utilitarian approach.

Despite regulatory advancements, many private initiatives have led to actual improvements in farming practices. This market-based aspect of animal welfare should be viewed within the broader framework of 'agricultural exceptionalism'. This term is frequently used to refer to the many regulatory benefits, exceptions, exemptions and waivers that have shielded agricultural producers from laws typically applicable in various domains (such as labour regulations, environmental law, bankruptcy law, competition law and international trade law).[68] This exceptionalism, 'sustained by widely held views […] that farmers do us a service by providing

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[65] Article 50 of Loi No. 2021-1539 visant à lutter contre la maltraitance animale et conforter le lien entre les animaux et les hommes (30 November 2021).

[66] US International Trade Commission, 'Fur Real: Did the COVID-19 Pandemic Signal the End of the Mink Farm?' (2023) Executive Briefings on Trade; FAO, OIE and OMS, 'Le SARS-CoV-2 chez les animaux élevés pour leur fourrure' (2021) www.fao.org/3/cb3368fr/cb3368fr.pdf accessed 11 February 2024.

[67] Humane Society International, 'Israel Becomes First Country in the World to Introduce "Historic" Ban on Fur Sales' (9 June 2021) www.hsi.org/news-resources/israel-introduces-historic-ban-on-fur-sales/ accessed 11 February 2024.

[68] Charlotte E Blattner and Odile Amann, 'Agricultural Exceptionalism and Industrial Animal Food Production: Exploring the Human Rights Nexus' (2019) 15 Journal of Food Law & Policy 92, 102.

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the public with food',[69] has also influenced animal welfare legislation. There are indeed many producing countries that 'are characterized by animal protection laws that either explicitly or implicitly exempt farmed animals from their purview'.[70] A prime example of this is the main US federal law governing animal treatment, the Animal Welfare Act, which explicitly excludes 'farm animals'[71] from its coverage.

Although some jurisdictions display notable progress in animal welfare and have developed strategies in this regard,[72] the insufficient regulation of animal welfare through legislation has not adequately met consumers' demand for information about the treatment of animals in production processes. This gap has provided an opportunity for private entities within the food industry to independently adopt voluntary standards and labels.[73] Labelling schemes, which merit special consideration in the area of animal welfare, are regulatory frameworks designed to inform consumers about various aspects of a product.[74] These include its characteristics, properties, and qualities, as well as the processes and methods used in its production. Animal welfare labels are based on the concept of 'consumer empowerment' – a notion that is prominent in the discourse of EU institutions and a declared goal of EU policies regarding the harmonization of animal welfare.[75] Animal welfare labelling aims to address information asymmetries between producers and consumers, enabling the latter to make informed choices based on personal preferences. At first glance, there seems to be a form of synergy between how labelling works and the strategy advocated by Peter Singer for consumers to change their consumption habits when regulation is not satisfactory. The industry has developed its own animal welfare labels, or it has depended on those established by public institutions. In this context, the standards set by the World Organisation for Animal Health (also known as the OIE – Office International des Epizooties) warrant particular attention.[76]

Owing to their universal scope, the OIE's standards, particularly the Terrestrial Animal Health Code (TAHC),[77] have gained significant traction in the private sector. When devising their animal welfare strategies and labels, private actors explicitly rely on the 'Five Freedoms'

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[69] ibid.

[70] Jessica Eisen, 'Down on the Farm: Status, Exploitation, and Agricultural Exceptionalism' in Charlotte Blattner, Kendra Coulter and Will Kymlicka (eds), *Animal Labour and the Quest for Interspecies Justice* (Oxford University Press, 2019).

[71] 7 U.S.C. § 2132(g)(3).

[72] For the EU, see for instance, Peters (n 32) 236.

[73] Sarah J Morath, 'Private Governance and Animal Welfare' (2018) 9 George Washington Journal of Energy & Environmental Law 21; Régis Bismuth and others, 'La concurrence des normativités au coeur de la labellisation du bien-être animal' (2018) XXXII *Revue Internationale de Droit Économique* 369.

[74] For more details, see, Régis Bismuth, 'Private Regulation and Labelling Schemes of Animal Welfare' in Anne Peters, Kristen Stilt and Saskia Stucki (eds), *Oxford Handbook of Global Animal Law* (Oxford University Press, 2025) (forthcoming).

[75] European Commission, 'A Farm to Fork Strategy for a Fair, Healthy and Environmentally-Friendly Food System' (2020) COM(2020) 381 final 13.

[76] On the OIE, see Anne Peters, 'The Office International Des Epizooties (World Organization for Animal Health) and Its Regulation' in Anne Peters, Kristen Stilt and Saskia Stucki (eds), *Oxford Handbook of Global Animal Law* (Oxford University Press, 2025) (forthcoming).

[77] World Organisation for Animal Health, 'Terrestrial Animal Health Code (2021)' www.oie.int/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online-access/.

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that have been endorsed by the OIE's TAHC: freedom from hunger, thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behaviour.[78] However, these 'freedoms' are not interpreted as rights, and the dimension of animal welfare they promote presents significant ethical shortcomings. It is important not to confuse animal welfare with utilitarism (which incorporates a welfarist dimension).[79] The latter is based on values while the former is a multidisciplinary field (encompassing biology, neurobiology, veterinary medicine, immunology, psychology, cognitive sciences and so on) also subordinated to economic considerations. The approach to animal welfare promoted by the OIE through the Five Freedoms is mostly economic- and efficiency-driven. The OIE Terrestrial Animal Health Code even specifies that 'improvements in farm animal welfare can often improve productivity and food safety, and hence lead to economic benefits'.[80] It is also inspired by a zootechnician perspective (zootechnics being defined as the scientific art of maintaining and improving animals under domestication). Contrary to common belief, animal welfare in everyday practice is a critical aspect of factory farming, albeit with a technical and managerial dimension. This approach often sidesteps major ethical concerns and fails to address the fundamental questions of what constitutes a 'good life' for animals.[81] It focuses mainly on adapting animals to industrial conditions. Practices such as chicken debeaking, cattle dehorning or pig castration are painful but serve to minimize harm these animals might cause each other in factory farms (freedom from injury). Optimizing processes in slaughterhouses aims to reduce stress for livestock awaiting slaughter (freedom from fear and distress), while also preserving meat quality and economic value. Providing nest areas enclosed with plastic curtains allows laying hens to hide while laying eggs, attempting to mimic natural nesting behaviour (freedom to express normal patterns of behaviour).

In this context, although it cannot be denied that some private labels have significantly improved the condition of animals, the Five Freedoms endorsed by the OIE are less an international Bill of Rights for animals, and more a cover to perpetuate their exploitation on a large scale and make it more socially acceptable. This serves as further confirmation that animal welfare laws, standards, and labels are 'structurally constituted by the ambivalence of humanizing the inherently inhumane and violent institution of animal exploitation.'[82]

2.3 Animals Used for Recreational Activities

A multitude of animal species are used for recreational and entertainment purposes. From circuses and zoos to marine parks, horse riding, bullfighting, hunting, dog racing, and even as pets, animals are integral to various forms of human entertainment. The environments these animals are placed in often differ vastly from their natural habitats. In many of these

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78 ibid Article 7.1.2.

79 Cochrane (n 22) 30.

80 World Organisation for Animal Health (n 77) article 7.1.7.

81 David Fraser, *Understanding Animal Welfare – The Science in Its Cultural Context* (Wiley-Blackwell 2008) 41.

82 Saskia Stucki, '(Certified) Humane Violence? Animal Production, the Ambivalence of Humanizing the Inhumane, and What International Humanitarian Law Has to Do with It' in Anne Peters (ed), *Studies in Global Animal Law* (Springer 2020) 122.

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settings, animals are not able to engage in their natural behaviours due to confinement, training methods, or the very nature of the activities they are involved in. The extent to which animals experience pain or are killed also varies across these activities. In contexts like bullfighting and hunting, animals often endure significant pain and meet their deaths. In contrast, pets may live in more comfortable environments but can still face issues of improper care or breeding practices. Hence, it is not surprising that utilitarians have viewed these questionable activities as requiring a 'radical challenge'.[83]

Regulations and standards governing animal welfare in recreational activities differ significantly from one activity to another,[84] and from one country to another, making a uniform approach to animal welfare in these contexts challenging to achieve. Despite the disparity in regulations across different activities and countries, largely due to cultural differences, it is still possible to identify some trends that might be explained by utilitarian logic.

We are witnessing a gradual prohibition of certain recreational activities that involve keeping wild animals in captivity, in environments radically different from their natural habitats. Excluding zoos, which may implement measures to improve animal conditions, this particularly pertains to the use of wild animals in circuses (such as lions, tigers, elephants, bears and so on) and marine mammals in dolphinariums (such as dolphins and orcas). It is noteworthy that in some countries this movement started with local initiatives, where municipalities banned the use of wild animals (sometimes only specific ones) in travelling shows. New Jersey was the first state in the US to prohibit such a practice in 2018.[85] A statement by a senator from New Jersey, tainted with utilitarian thought, is particularly telling: '[t]hese beautiful creatures suffer from routine abuse and mistreatment by their handlers for the sake of entertainment. This by no means justifies the emotional and physical abuse animals are forced to endure.'[86] Similar bans on the use of wild animals in circuses have been adopted in European states, for instance in Austria, Belgium, Denmark, France, Ireland, the Netherlands and Portugal.[87] Some states have gone even further by prohibiting the presence of any animals in circuses. This includes Cyprus, Greece and Malta.[88]

The recent French legislation on this matter is particularly insightful in explaining how these seemingly utilitarian-inspired advancements regarding the use of animals for recreational purposes are necessarily limited by economic obstacles or cultural considerations. The French law, tellingly titled *Law to Combat Animal Abuse and Strengthen the Bond Between Animals*

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[83] Singer, *Animal Liberation* (n 9) 17 (referring in this context to 'areas of entertainment like circuses, rodeos, and zoos').

[84] This section does not address the use of animals in sporting activities. However, the following article is pertinent as it explores the issue from a utilitarian perspective: Madeleine LH Campbell, 'Ethical Justifications for the Use of Animals in Competitive Sport' (2023) 17 Sport, Ethics and Philosophy 403.

[85] State of New Jersey, 218th Legislature, Assembly No. 1923 (2018).

[86] State of New Jersey, 'Governor Murphy Signs "Nosey's Law," Outlawing the Use of Wild and Exotic Animals in Traveling Animal Acts' (14 December 2018) https://nj.gov/governor/news/news/562018/approved/20181214b.shtml accessed 11 February 2024.

[87] Eurogroup for Animals, 'Wild Animals in EU Circuses – Problems, Risks and Solutions' (2021) 16 www.eurogroupforanimals.org/files/eurogroupforanimals/2021-08/E4A-Circus_Report-09-08-2021.pdf accessed 11 February 2004.

[88] ibid.

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and Humans,[89] indeed envisions a range of measures to ensure a gradual prohibition of wild animal shows in travelling circuses, as well as dolphin and orca performances. It also plans for the establishment of refuges or sanctuaries to house captive wild animals. Animal performances in nightclubs or private parties are banned, and there will no longer be wild animals in variety shows or game shows on television. This same legislation also includes several provisions to protect domestic animals (such as a ban on selling dogs and cats in pet shops, the prohibition of online pet transfer offers and the ban on selling or giving pets to minors). While the preamble of the bill[90] referred to the concerns of the French people for animal welfare and even, surprisingly, cited the deontological perspective of Kant's Doctrine of Virtue – 'violent and cruel treatment of animals is […] intimately opposed to a human being's duty to himself' – the most cruel acts towards animals are not covered by this legislation. Several amendments had been proposed to ban bullfighting or certain cruel hunting practices (stag hunting, glue trapping and so on), but these faced strong political opposition.

The example of bullfighting, which benefits from an exemption in the French penal code from the offence of cruelty to animals when there is an 'uninterrupted local tradition',[91] is striking. It is indeed questionable to justify the different treatment between, on one hand, a ban on shows in circuses or marine parks where animal abuse is structurally a result of captivity conditions incompatible with the biological imperatives of the species involved and, on the other hand, bullfighting, a show open to the public and families, that intends to magnify the aesthetics of violence and suffering.[92] Even though its position is not grounded in the harm to sentient animals, it is still pertinent to reference the UN Committee on the Rights of the Child's recommendation to Spain that it should 'prohibit the participation of children under 18 years of age as bullfighters and as spectators in bullfighting events' to prevent the harmful effects of this practice on the youngest.[93]

When it comes to animals, the issue is not one of regulatory consistency but rather the possibility of evolving legislation on activities such as travelling circuses or marine parks, which are less economically powerful, have limited political support and cannot rely on a cultural exception.

3. CONCLUDING REMARKS: EVOLVING PARADIGMS OF ANIMAL LAW

Although there may be doubts that the developments concerning animal welfare, particularly since the start of this century, reflect a genuinely authentic, consistent and sincere utilitarian

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[89] Loi No. 2021-1539 visant à lutter contre la maltraitance animale et conforter le lien entre les animaux et les hommes (30 November 2021) (Translation by the author).

[90] Proposition de loi No. 3661 visant à renforcer la lutte contre la maltraitance animale, 15ème Législature (14 December 2020).

[91] Code pénal, Article 521-1.

[92] Régis Bismuth, 'The Universal Recognition of Animal Welfare and Its Dark Sides' in Jean d'Aspremont and Işıl Aral (eds), *International Law and Universality* (Oxford University Press, 2024) 194.

[93] UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Spain' (2018) CRC/C/ESP/CO/5-6.

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approach, the overview previously outlined nonetheless shows a fundamental trend in which the reflections of Peter Singer have been particularly influential. Animal law has mechanically mirrored this evolution, albeit more diffusely, in an environment where national regulations coexist and intertwine with international soft law, as well as private standards and labels. As noted above, one must not be naive and understand that some of these initiatives, under the guise of a generous idea of 'animal welfare', are approached from a zootechnical perspective that is more concerned with the efficiency and profitability of processes than with the individual fate of the animals.

Another aspect of this overview also highlights the geographies of animal protection. Initiatives arise from states and private operators, but also, in many cases, from territorial subdivisions of states (municipalities, provinces and so on), each representing responses to local social demands and often serving as the first steps towards more ambitious national legislation. This is especially the case for animals used in recreational activities, as opposed to those used in scientific research or for production, with the latter two primarily regulated at the state level.

The geographies of animal welfare also encompass state-to-state relations in a more transnational perspective. Animal protection is far from being uniform and coherent across jurisdictions, which vary as to the standards applicable to different species and different activities. This results in frictions that expose the inconsistencies, and even insincerity, of state positions. For example, when the European Union banned the importation of seal-based products due to 'citizen and consumer concerns about the animal welfare aspects of the killing and skinning of seals',[94] Canada and Norway challenged the EU regulation before WTO courts, criticizing the inconsistency of EU's approach to animal welfare, applying very stringent trade restrictive measures for seal products while being significantly more flexible with respect to slaughterhouses and wildlife hunts.[95] The risk of criticism for double standards in animal welfare concerns is likely to increase as national regulations primarily target foreign practices that are more easily deemed less acceptable and that are less prone to provoke political opposition. But as Singer pointed out, 'it is easy to take a stand about a remote issue [and] to protest about bullfighting in Spain, the eating of dogs in South Korea, or the slaughter of baby seals in Canada while continuing to eat eggs from hens who have spent their lives crammed into cages'.[96]

Beyond these frictions between states, the deficiencies of market-driven animal law and even the instrumentalization of animal law for other purposes (such as targeting the rights of minorities),[97] recent advancements in animal welfare have generally had more structural effects on the law extending far beyond mere improvements in practices. It is noteworthy that the recognition of animals as 'sentient beings' – even though they are still classified as products or objects of property[98] – has become a central focus and has been acknowledged

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[94] Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products [2009] OJ L286/36, Preamble para 5.

[95] For more details on this case, see Bismuth (n 92).

[96] Singer, *Animal Liberation* (n 9) 162.

[97] Alice Di Concetto, '"Desordem e Regresso" : Evolution de La jurisprudence constitutionnelle de La Cour suprême brésilienne en matière de protection de l'animal (1997–2017)' (2017) 2017–2 Revue Semestrielle de Droit Animalier 465.

[98] For an EU law perspective of this duality, Katy Sowery, 'Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) 55 Common Market Law Review 55.

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in recent years by an increasing number of major legal texts, inter alia, Portugal's Civil Code (2007), France's Civil Code (2015), Colombia's Civil Code (2016), Sweden's Animal Welfare Act (2018), Spain's Civil Code (2021) and the UK Animal Welfare (Sentience) Act (2022). In a similar vein, albeit on a smaller scale, following the initial precedents set by India (1976) and Brazil (1988), animals have started to appear in national constitutions, for instance in Germany (2002), Luxembourg (2007), Austria (2013), Egypt (2014) and Italy (2022).[99] The next frontiers concerning animals' legal personhood and fundamental rights are beginning to be eroded.[100] The recent 2022 ruling of the Ecuadorian Supreme Court is particularly telling in this context:

> Law in modern times has been characterized by a marked anthropocentrism, whereby the human being has been considered the center of all legal expression. This approach has been accompanied by an evident speciesism […] However, neither anthropocentrism nor speciesism are conclusive, finished and immovable approaches in law, and human beings have progressively admitted the need to legally protect animals […] [T]he recognition of animals as subjects of rights constitutes the most recent phase in the development of their legal protection, which is based on the recognition of animals as living beings with an intrinsic value that makes them holders of rights.[101]

Even though we are at the very early stages of what promises to be a lengthy process, ultimately, as Bentham long ago hoped in his famous footnote, '[t]he day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny'.[102]

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[99] Jessica Eisen, 'Animals in the Constitutional State' (2017) 15 International Journal of Constitutional Law 909.

[100] Saskia Stucki, 'Toward Hominid and Other Humanoid Rights: Are We Witnessing a Legal Revolution?' (*Verfassungsblog*, 30 December 2016) https://verfassungsblog.de/toward-hominid-and-other-humanoid-rights-are-we-witnessing-a-legal-revolution/ accessed 11 February 2024; Michelle C Pardo, 'Legal Personhood for Animals: Has Science Made Its Case?' (2023) 13 Animals 2339.

[101] Corte Constitucional del Ecuador, *Estrellita Monkey* (27 January 2022) Final Judgement No. 253-20-JH/22 https://aldf.org/wp-content/uploads/2023/01/Final-Judgment-Estrellita-w-Translation-Certification.pdf accessed 11 February 2024.

[102] Bentham (n 2) 282–3 n b.

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