

# **Enhancing the Protection of the Welfare of Animals in the Malaysian Legal System**

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## **Abstract**

This is an evaluative study on the protection of the welfare of animals in Malaysian law. It suggests that the animal welfare approach which argues for prevention of cruelty, application of stronger laws and promotion of humane treatment is the basic requirement on which the laws and policy must be based.

The study utilises both doctrinal and empirical legal research techniques. Interview data are used to complement doctrinal discussions to provide valuable insights in understanding the law and the practices around it. The study also provides possible suggestions designed to enhance the protection of the welfare of animals in Malaysia.

An examination of the legal protection afforded to animals by the law in three different periods: before the coming of the British, during British occupation and post-Malaysian Independents, reveals that the law protects animals for three main purposes. They are: protection from unnecessary cruelty, protection as the property of people and protection for conservational and environmental purposes.

However, the protection received by animals under the current animal protection regime is inadequate. There are many critics of current Malaysian law concerning the welfare of animals. The absence of clear guidelines in the legislation concerning animal welfare has resulted in animal welfare receiving inadequate protection.

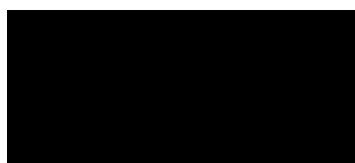
Using information from current developments in philosophy concerning animal welfare, with references to animal welfare science and international instruments, and comparing it with the domestic elements of animal protection, this study considers measures and possible ways to enhance protection of the welfare of animals in Malaysia.

The research suggests that Malaysia should consider incorporating references to scientific discoveries concerning animal sentience and the principles of Five Freedoms and Three Rs in legislation relating to animal welfare. It also suggests that education should play an important role in promoting kindness towards animals. Most importantly, the thesis urges the Malaysian government to expedite the tabling of the *Animal Welfare Bill 2012* (Malaysia) in parliament to prove the government's commitment to protecting the welfare of animals.

## **Student Declaration**

“I, Arif Fahmi Md Yusof, declare that the PhD thesis entitled ‘Enhancing the Protection of the Welfare of Animals in the Malaysian Legal System’ is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work”.

Signature:



Date: 20 March 2015

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I dedicate this work to all non-human animals who continue to provide great assistance and benefits to all humans.

## **List of Publications**

### **(a) Paper presentations**

1. Arif Yusof, 'Animals and the Law: A New Legal Frontier in Malaysia?' (Paper presented at the 7th UUM International Legal Conference (ILC 2013), Universiti Utara Malaysia, 14 November 2013).
2. Arif Yusof, 'Custom and Animal Law in Malaysia' (Paper presented at the International Conference on Law and Society II (ICLAS II), International Islamic University Malaysia, 9 October 2013).
3. Arif Yusof, 'Beyond Doctrinal Research: A Student's Experience in Researching Laws Relating to Animals in Malaysia' (Paper presented at the Sydney Law School Postgraduate Conference 2012, Sydney Law School, Australia, 1 November 2012).
4. Arif Yusof. 'An Overview of the Status of Animals in Current Philosophical Debate' (Paper presented at Diskusi Syariah dan Undang-Undang, Universiti Sains Islam Malaysia, 21 April 2011).

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2. Arif Yusof, 'Feast of Sacrifice: Treat Animals Humanely and Respect Others', *The Malaysian Insider*, 14 October 2013.
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4. Arif Yusof, 'A Victim of Muslims' Misunderstanding: The Dog', *The Malay Mail*, 31 July 2013.
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## **List of Selected Abbreviations**

AA	Animals Act 1953 (Malaysia)
AMC	Arguments from marginal cases
AWB	Animal Welfare Bill 2012 (Malaysia)
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973
CLA	Civil Law Act 1956 (Malaysia)
CLJ	Current Law Journal
COE	Council of Europe
DNWP	Department of Wildlife and National Parks
DVS	Department of Veterinary Services Malaysia
EC	European Community
EEC	European Economic Community
EIC	East India Company
EQA	Environmental Quality Act 1974 (Malaysia)
EU	European Union
FAWC	Farm Animal Welfare Council, United Kingdom
GAHP	Good Animal Husbandry Practice
GATT	General Agreement on Tariffs and Trade 1994
MLJ	Malayan Law Journal
MYR	Malaysian Ringgit

NGO	Non-governmental Organisation
OIE	World Organisation for Animal Health
SPCA	Society for the Prevention of Cruelty to Animals
UDAW	Universal Declaration of Animal Welfare
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
US	United States
US\$	United States Dollar
WCA	Wildlife Conservation Act 2010 (Malaysia)
WSPA	World Society for the Protection of the Animals
WTO	World Trade Organization

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*Buffalo-Fighting and Cock-Fighting (Prevention) Enactment 1935* (Kedah) (Unfederated Malay States)

*Cattle Enactment 1968 (Kelantan)* (Malaysia)

*Cattle Registration Enactment 1981 (Perak)* (Malaysia)

*Cattle Registration Enactment 1990 (Kedah)* (Malaysia)

*Charter of Justice 1807* (Straits Settlements)

*Charter of Justice 1826* (Straits Settlements)

*Charter of Justice 1855* (Straits Settlements)

*Civil Law Act 1956* (Malaysia)

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*Civil Law Ordinance 1878* (Straits Settlements)

*Code of Ethics and Guide to Professional Conduct for Veterinary Surgeons in Malaysia 1982* (Malaysia)

*Code of Ethics and Guide to Professional Conduct for Veterinary Surgeons 1992* (Malaysia)

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*Cruelty of Animals Act 1876 (England)*

*Cruelty to Animal Prevention Enactment 1904 (Federated Malay States)*

*Cruelty to Animal Prevention Enactment 1904 (Negeri Sembilan) (Federated Malay States)*

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*Registration of Cattle Enactment 1995 (Terengganu)* (Malaysia)

*Veterinary Surgeons Act 1974* (Malaysia)

*Wildlife Conservation Act 2010* (Malaysia)

# **Enhancing the Protection of the Welfare of Animals in the Malaysian Legal System**

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## **CHAPTER 1: OVERVIEW OF RESEARCH**

### **1.1 Introduction**

This thesis sets out two major broad aims: first, to determine the legal status of animals in Malaysia, and second, to suggest a set of guidelines to enhance the protection of the welfare of animals in the Malaysian legal system. In order to do this, this study has conducted a review of doctrinal sources and a contextual overview relating to animal welfare and protection in Malaysia. The literature review and the contextual overview have led the researcher to frame the research questions that address the research objectives as well as providing the research method undertaken to answer the following questions:

1. What is the status of animals in the current philosophical debate?
2. What are the cultural and religious perspectives in Malaysia towards the status of animals?
3. What is the status of animals in the existing Malaysian legal framework?
4. What is the relationship between the law and animal welfare in Malaysia?
5. What is the most effective way to protect the welfare of animals in Malaysia?

Chapter 2 (Research Methodology) explicates the research methods used to answer these questions. The research questions are answered comprehensively under specific chapters in the thesis. Chapter 3 (The Status of Animals) provides answers to the first research question. It explores the status of animals by referring to different views in philosophy and religion. To go further, Chapter 4 (Overview of Laws Relating to Animals in Malaysia) offers answers to the second research question by examining the development of laws relating to animals from the early Malay digests, during British occupancy and during the post-independence period. Chapter 5 (Legal Status of Animals in Malaysia) answers the third research question by arguing that animals enjoy limited legal status as the subjects of protection; as property, from unnecessary cruelty and for environmental and conservation purposes. This view is also supported by the

fieldwork findings contained in Chapter 7. Chapter 6 (Animal Welfare and International Law) provides answers to the fourth and fifth research questions, respectively. This chapter examines the relationship between animal welfare and the law, by referring to scientific findings which have influenced the development of several international legal instruments and recognised international animal welfare organisations. By referring to these scientific findings, and the provisions in related international instruments, an answer to the fifth research question is provided, particularly by reference to sets of guidelines emanating from international animal welfare organisations. These guidelines have enhanced and may continue to enhance the protection and welfare of animals in Malaysia. Chapter 7 (Fieldwork Findings) also provides insightful answers to the fifth research question. Chapter 8 (The Future of Animal Welfare Law in Malaysia) observes the elements of the animal welfare approach in animal protection laws in Malaysia and further provides an answer to the fifth research question by charting the future of animal welfare law in Malaysia.

The research questions are derived from the contextual overview of animal welfare protection in Malaysia. The incidents of animal cruelty, problems of enforcement and the non-effectiveness of some legal provisions mark the relatively poor treatment that animals receive in Malaysia. The next section presents the importance of the research by looking at the context from which the research questions were generated.

## **1.2 Contextual background**

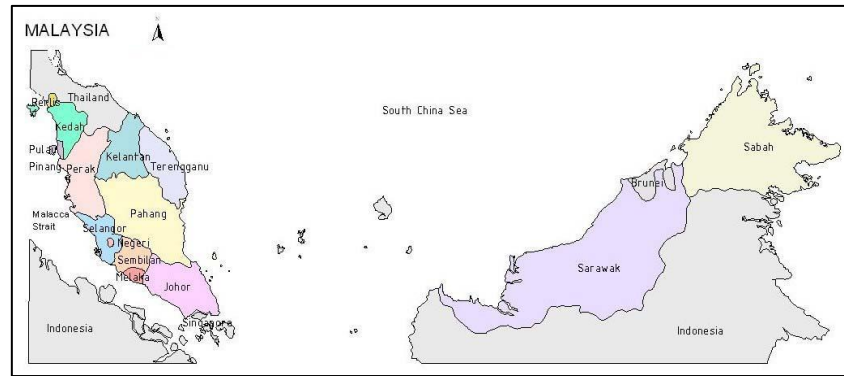
### **1.2.1 Animals in Malaysia**

Malaysia is situated in Southeast Asia. It consists of Peninsular Malaysia in the west, and the states of Sabah and Sarawak on the island of Borneo, in the east. The Peninsular is bordered by Thailand in the north, and the island of Singapore lies to the south. Its total coastline measures approximately 4,675 kilometres, which includes 2,068 kilometres for Peninsular Malaysia and 2,607 kilometres for East Malaysia.<sup>1</sup>

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<sup>1</sup> *Malaysia* (12 February 2015) Encyclopædia Britannica Online  
<<http://www.britannica.com/EBchecked/topic/359754/Malaysia>>





Map 1: Map of Malaysia

Malaysia's unique natural environment is home to a wide variety of animals, ranging from native to migrating species, and from wild to domestic animals.<sup>2</sup> Around 620 species of birds are native to Malaysia and many migrating species winter there.<sup>3</sup> Among the most famous are the hornbills, native to Sarawak. Other species of birds include egrets, herons, kingfishers, kites, mynahs and pheasants. One of the world's most endangered animals is also unique to this part of the world: the orangutan, found only in Sumatra and Borneo, is the only great ape living naturally outside Africa.<sup>4</sup> Other animal species of Malaysia include bears, crocodiles, elephants, leopards, monkeys, panthers and rhinoceroses. Borneo has over 160 species of snakes, including the venomous cobras, kraits and sea-snakes.<sup>5</sup>

Domestic or non-wild animals play an important economic role in Malaysia, particularly with regard to agricultural activity. Malaysia is actively involved in intensive and extensive farming of livestock animals such as buffalo, cattle, goats, sheep and swine (pigs). The total recorded livestock population in Malaysia was 1,792,666 for the year 2012.<sup>6</sup> In 2012, 1,502,354 livestock were slaughtered in Malaysia.<sup>7</sup> In the same year, 231,249,057 chickens were reared in Malaysia.<sup>8</sup>

Some domestic animals are kept as companions and as working animals. The most popular companion animals in Malaysia are cats and dogs. In 2007, the World Society for the Protection of Animals (WSPA) reported that there were 506,300 cats and

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> 'Malaysia: Livestock population' (Department of Veterinary Services Malaysia, 2012).

<sup>7</sup> 'Malaysia: Slaughtering of Livestock' (Department of Veterinary Service Malaysia, 2012).

<sup>8</sup> 'Selected Agricultural Indicators Malaysia' (Department of Statistics Malaysia, 2012) 32.

285,600 dogs which were companion animals for Malaysians.<sup>9</sup> Other animals such as rabbits, hamsters, goldfish, sugar gliders, snakes, geckos and tortoises are also kept by Malaysians as pets.<sup>10</sup>

### 1.2.2 The status of animals

There are long-standing claims that human interactions with animals need to be guided by morality and ethics. Human relations with animals have also been regulated by law. Human beings have always had a very close relationship with animals. They serve as food, clothing, vehicles and even companions. Animals are also used in the entertainment industry. The disciplines of psychology and medicine and the pharmaceutical and chemical industries use them for experiments. Human beings hunt and fish for pleasure. Hunter-gatherer societies also hunt for food and clothing.

There have been long and heated debates about the moral justifications for the use of animals.<sup>11</sup> Many debates are concerned whether the use of animals by humans is moral and, if so, what conduct should be permitted. Some think that humanity and justice have nothing to do with the humane treatment of animals.<sup>12</sup> Proponents of various theories justify their reasoning on bases which range from religion to culture, to the psychological and biological models of animal minds and even Darwinian theory concerning the evolution of humans. Generally, it is proposed that morality provides a

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<sup>9</sup> Amber Batson, 'Global Companion Animal Ownership and Trade: Project Summary, June 2008.' (World Society for the protection of Animals, 2008) <[http://www.wspa.org.uk/Images/Pet%20ownership%20and%20trade%20-%20Global%20report\\_tcm9-10875.pdf](http://www.wspa.org.uk/Images/Pet%20ownership%20and%20trade%20-%20Global%20report_tcm9-10875.pdf)> 3-5. The report found a total of 791,900 companion animals (dogs and cats) in 2007. However, no survey has been done by any Malaysian authority or agency in respect to the total population of companion animals.

<sup>10</sup> *Pets and Animals in Malaysia* (23 October 2013) Agloinfo Malaysia <<http://malaysia.angloinfo.com/family/pets/>>

<sup>11</sup> Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislations' in Paul A.B. Clarke and Andrew Linzey (eds), *Political Theory and Animal Rights* (Pluto Press, 1789) 13; Peter Carruthers, *The Animals Issue: Moral Theory in Practice* (Cambridge University Press, 1992); Nina E. Cohen, Frans W. A. Brom and Elsbeth N. Stassen, 'Fundamental Moral Attitudes to Animals and Their Role in Judgement: An Empirical Model to Describe Fundamental Moral Attitudes to Animals and Their Role in Judgement on the Culling of Healthy Animals During an Animal Disease Epidemic' (2009) 22 *J Agric Environ Ethics* 34; Gary L. Francione, 'Animal Welfare and the Moral Value of Nonhuman Animals' (2010) 6(1) *Law, Culture and Humanities* 2; Robert Garner, *Animals, Politics and Morality* (Manchester University Press, 2nd ed, 2004); Martha Nussbaum, 'The Moral Status of Animals' in Linda Kalof and Amy Fitzgerald (eds), *The Animals Reader: The Essential Classic and Contemporary Writings* (Berg Publishers, 2007); Mary Anne Warren, *Moral Status: Obligation to Persons and Other Living Things* (Oxford University Press, 2000).

<sup>12</sup> See for example, Carruthers, above n 11, 75, 84; and R.G. Frey, *Interests and Rights: The Case Against Animals* (Oxford University Press, 1980) 121, 157.

unifying theory and limits to the use of animals by humans.<sup>13</sup> It provides a framework for arguing that animals deserve humane treatment and protection from cruelty. There is extensive literature on the philosophical and ethical foundations of animal welfare law and policy worldwide. The legal status of animals may also be determined by these same moral foundations.<sup>14</sup>

### 1.2.3 Protection of the welfare of animals in Malaysia

In Malaysia, there are a number of statutes relating to animals. These include, at the federal level, the *Animals Act 1953* (Malaysia) and the *Wildlife Conservation Act 2010* (Malaysia) with the latter enacted to replace the *Protection of Wildlife Act 1972* (Malaysia). There are also specific laws to protect animals at the state level most of which govern farm animals. Examples are the *Cattle Registration Enactment 1996* (Perlis),<sup>15</sup> the *Control of Pig Farming Enactment 1992* (Perak)<sup>16</sup> and the *Poultry Farming Enactment 2005* (Kelantan).<sup>17</sup>

The *Animals Act* is meant to regulate certain defined animals kept in captivity or domesticated and kept under human control. This Act provides regulations to: (i) control and prevent disease in animals; (ii) control the movement of animals; (iii) control the slaughter of animals; (iv) prevent unnecessary cruelty to animals; and, (v) cover general issues relating to the general welfare and conservation of animals. The *Wildlife Conservation Act* is intended to regulate certain defined wild animals generally outside human control. It covers activities involving species of wildlife, animals which are derived from wildlife, hybrid species and invasive alien species.

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<sup>13</sup> Bentham, above n 11.

<sup>14</sup> Steven White, 'Exploring Differential Approaches to Animal Protection Law' in Steven White Peter Sankoff (ed), *Animal Law in Australasia* (Federation Press, 2009) 80.

<sup>15</sup> The same enactment can be seen in other states: the *Cattle Registration Enactment 1990* (Kedah), the *Cattle Registration Enactment 1981* (Perak), the *Control of Cattle Enactment 1971* (Selangor), the *Cattle Enactment 1968* (Kelantan), the *Registration of Cattle Enactment 1995* (Terengganu) and the *Control of Cattle Enactment 2001* (Pahang).

<sup>16</sup> The same enactment can be seen in other states in Malaysia: the *Rearing of Pigs Enactment 1987* (Perlis), the *Control of Pig Farming Enactment 1991* (Selangor), the *Control of Rearing of Pigs Enactment 1980* (N. Sembilan), the *Rearing of Pigs Enactment 1980* (Melaka), the *Rearing of Pigs Enactment 1975* (Johor), the *Rearing of Pigs Enactment 1976* (Terengganu) and the *Control of Pig Farming Enactment 1998* (Pahang).

<sup>17</sup> The same act can be seen in other states in Malaysia: the *Poultry Farming Enactment 2005* (Perak), the *Control and Licensing of Poultry Farming and Poultry Related Activities Enactment 1996* (N.Sembilan), the *Control and Licensing of Poultry Farming Enactment 1997* (Johor) and the *Poultry Farming Enactment 2005* (Pahang).

There are many critics of the current legal framework involving animals.<sup>18</sup> They argue that the *Animals Act* is inadequate to protect the welfare of animals. They contrast the poor state of the law with the laws in other Commonwealth countries, for example, Australia,<sup>19</sup> New Zealand<sup>20</sup> and the United Kingdom.<sup>21</sup> These jurisdictions have specifically designed statutes for the special purpose of either the protection of animals or providing for animal welfare. The absence of a clear description of the welfare of animals in Malaysian legislation on animals results in confusion and ambiguity when it comes to protecting the welfare of animals. The scope of the protection against cruelty is limited. There are situations that do not fall under the laws at all, for instance, the use of animals in experimentation and providing acceptable places for shelter. The laws also treat animals similarly. However, in fact, animals vary considerably in kind and in need. The legal framework protecting animals in many countries recognises that different categories of animals require different standards of protection. This is not the case in Malaysia.

A comparison of the existing law in Malaysia against the standard of the Five Freedoms proposed by the Universal Declaration of Animal Welfare also reveals the improvements required in the present law.<sup>22</sup> The Five Freedoms are: (i) freedom from hunger, thirst and malnutrition; (ii) freedom from fear and distress; (iii) freedom from physical and thermal discomfort; (iv) freedom from pain, injury and disease; and (v) freedom to express normal patterns of behaviour.<sup>23</sup>

There are other limitations contributing to the inadequacy of existing laws in protecting animals in Malaysia. The possible penalties are very low. For the offence of cruelty against an animal, the *Animals Act* sets a maximum fine of MYR200 (US\$61). This is

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<sup>18</sup> Jeswan Kaur, 'Human Cruelty and the Betrayal of an Animal's Trust' (2010) *Free Malaysia Today* <freemalaysiatoday.com>; M Bavani, 'Animal Cruelty Laws Need More Bite', *The Star* (Malaysia), 19 April 2010 <<http://thestar.com.my/metro/story.asp?file=/2010/4/19/central/6079740&sec=central>>; SM Mohd Idris, 'Animal Welfare in Research Labs Questioned', *The Star* (Kuala Lumpur), 20 April 2010; S.S. Yoga, 'Suffering Silence', *The Star* (Kuala Lumpur), 28 June 201; S.S. Yoga, 'Regulations Required', *The Star* (Kuala Lumpur), 28 June 2010.

<sup>19</sup> *Prevention of Cruelty to Animals Act 1986* (Victoria): other states in Australia also have different Acts with specific regard to the prevention of cruelty to animals.

<sup>20</sup> *Animal Welfare Act 1999* (New Zealand).

<sup>21</sup> *Animal Welfare Act 2006* (United Kingdom).

<sup>22</sup> A proposal for a declaration of animal welfare arising from the Manila Conference on Animal Welfare (March 2003) and the Costa Rica Steering Committee Meeting (November 2005) for Ministerial Conference consideration; see <[www.udaw.org](http://www.udaw.org)>

<sup>23</sup> *Five Freedoms for Animal Welfare* <<http://www.fawc.org.uk/freedoms.htm>>

considered inadequate and ineffective in preventing cruelty to animals.<sup>24</sup> However, Malaysian Parliament has recently amended the penalty for animal cruelty offences in March 2013 to provide for a maximum fine of MYR50,000 (US\$15,290) and one year's imprisonment.<sup>25</sup> Another problem is the enforcement of the laws. In 2009, an animal welfare organisation contended that 657 animal cruelty cases were reported to the Department of Veterinary Services, Malaysia, but no one was prosecuted.<sup>26</sup> Furthermore, there is a lack of specific regulation as to the use of animals in scientific research. This was highlighted when the state government of Malacca proposed to set up an animal testing laboratory. This was opposed by animal rights activists in Malaysia.<sup>27</sup> They argued that animals used in research are treated in detrimental ways in the absence of specific laws pertaining to animal experimentation.<sup>28</sup>

Malaysia also faces problems in protecting its wildlife. Poaching, smuggling and illegal trade involving wildlife has threatened animals, such as tigers and other endangered species, to the brink of extinction.<sup>29</sup> There is criticism of the limited actions taken to enforce the law. It is claimed to be flawed by bureaucratic procrastination.<sup>30</sup> It is argued that stronger efforts should be made to patrol forest reserves, protect species and remove snares and poachers from forest reserves.<sup>31</sup> Asian countries, including Malaysia, are claimed to be the hub of dealers in the transnational pet trade.<sup>32</sup> Birds and turtles are allegedly traded on a massive scale but there is little effort made to deter such activities.<sup>33</sup>

The societal behaviour towards animals in Malaysia is also problematic. Kaur pointed out that although religious and cultural beliefs in Malaysia promote the kind treatment

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<sup>24</sup> Section 44 (1) *Animals Act 1953* (Malaysia).

<sup>25</sup> *Animals (Amendment) Act 2013* (Malaysia), s 38. The section reads as follows: Subsection 44(1) of the principal Act is amended by substituting for the words "shall be guilty of an offence of cruelty and shall be liable to a fine of two hundred ringgit or to imprisonment for a term of six months or to both" the words "commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both".

<sup>26</sup> Bavani, above n 18.

<sup>27</sup> Darshini Kandasamy, 'Malacca Still Mulling over Animal Test Lab Plan', *The Malay Mail* (Kuala Lumpur), 26 April 2010 <<http://www.mmail.com.my/content/34578-malacca-still-mulling-over-animal-test-lab-plan>>

<sup>28</sup> Idris, above n; Yoga, above n 18.

<sup>29</sup> SM Idris, 'Greater Effort Needed against Wildlife Trafficking', *The Star* (Kuala Lumpur), 24 January 2011.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Sean Whyte, 'Malaysian Remains a Hub for the Illegal Wildlife Trade', *Free Malaysia Today* (Kuala Lumpur), 8 November 2011.

of animals, this does not appear to reflect the ways in which people behave.<sup>34</sup> He cited the high number of cases reported to the Department of Veterinary Services and the Society for the Protection of Animals.<sup>35</sup>

Some unreported cases that Malaysian newspapers covered may illustrate the irregular and unsystematic treatment of animal mistreatment in Malaysia.<sup>36</sup> In 2005, a dog owner neglectfully left his dog, resulting in its severe ill health, and was fined MYR100.<sup>37</sup> In 2011, a woman was reported to have tortured and stomped on her three kittens, killing them. The court found her guilty and fined her MYR400.<sup>38</sup> In another unreported case, a hawker cruelly poured boiling water on a stray dog and was sentenced to one day's jail and fined MYR200.<sup>39</sup>

In the only case reported in the digests on animal cruelty law in Malaysia, *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor*,<sup>40</sup> the owner of cat hotel irresponsibly left 150 cats unattended during the Hari Raya Aidilfitri holidays,<sup>41</sup> causing severe starvation and dehydration. The High Court fined the owner MYR6,000 and imposed three months' imprisonment.<sup>42</sup> At the end of January 2013, a maid who killed her employer's dog was sentenced to one year's imprisonment.<sup>43</sup>

The Pulau Ketam incident earlier in 2009 revealed the trapping of hundreds of stray dogs in an uninhabitable island of mangrove swamp by inhabitants of a village with the

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<sup>34</sup> Kaur, above n 18.

<sup>35</sup> Ibi; *Malaysian Society for the Prevention of Cruelty to Animals (SPCA)* <<http://www.sPCA.org.my>>

<sup>36</sup> Chin Mui Yoon, 'Horror of Horrors', *The Star* (Kuala Lumpur), 3 October 2011 <<http://www.thestar.com.my/story.aspx?file=%2F2011%2F10%2F3%2Flifefocus%2F9592903>>

<sup>37</sup> Chin Mui Yoon, 'RM100 Fine for Dog Abuse', *The Star* (Kuala Lumpur), 18 October 2005 <<http://www.thestar.com.my/Story.aspx?file=%2F2005%2F10%2F18%2Fcourts%2F12347380&sec=courts>>. See also Shoba, *Remembering Sheena* <<http://remembersheena.blogspot.com>>

<sup>38</sup> 'Woman Fined RM400 for Abusing Three Kittens', *The Star* (Kuala Lumpur), 28 July 2011

<sup>39</sup> 'Hawker Jailed, Fined for Scalding Stray Dog', *The Malaysian Insider* 28 May 2013 <<http://www.themalaysianinsider.com/malaysia/article/hawker-jailed-fined-for-scalding-stray-dog>>

<sup>40</sup> *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70.

<sup>41</sup> In English, this is known as the Festival of Breaking the Fast. One of the Muslim celebrations in Malaysia, it marks the end of Ramadhan, the Islamic holy month of fasting. Aidilfitri is declared as public holidays for two days in Malaysia.

<sup>42</sup> Terence Toh, 'Jail Term on Petnode Owners Lauded', *The Star* (Kuala Lumpur), 25 October 2012 <[http://www.thestar.com.my/News/Nation/2012/10/25/Jail-term-on-Petnode-owners-lauded\\_1.aspx](http://www.thestar.com.my/News/Nation/2012/10/25/Jail-term-on-Petnode-owners-lauded_1.aspx)>

<sup>43</sup> 'Maid Jailed for Killing Dog', *The Star* (Kuala Lumpur), 26 January 2013 <<http://www.thestar.com.my/News/Nation/2013/01/26/Maid-jailed-for-killing-dog.aspx>>

encouragement of their local councillor.<sup>44</sup> Hundreds of dogs died due to starvation. No person was charged in this case.

Nevertheless, there is currently an effort to revise the *Animals Act* in line with the aim to give greater protection to the welfare of the animals in Malaysia. The government has established a committee to look into the existing law and specifically the *Animals Act*.<sup>45</sup> Non-governmental organisations (NGOs) have also been invited to participate in the process. A draft of the new animal welfare legislation has undergone public survey and is queued to be tabled in Parliament.<sup>46</sup> The recently enacted *Wildlife Conservation Act* has also extended greater protection to and better treatment of wildlife. This may reflect a change in the views of Malaysian society about the legal status of animals.

#### 1.2.4 Previous works on protection of the welfare of animals

Whereas there is a large body of literature available from animal welfare science, the legal literature remains quite limited. So far, there is no specific study at a Master's or PhD level relating to animals and the law in the Malaysian jurisdiction. As this study observes, the only studies in Malaysia are those carried out by Abdul Aziz Hussin,<sup>47</sup> K Parames<sup>48</sup> and Alvin W-L See.<sup>49</sup>

Hussin's work, published in 1980, generally explored the legal responsibility of humans towards animals. This work described the relationship between animals and the law in various academic legal subjects. The author examined the responsibilities of humans towards animals such as negligence and nuisance which may arise under the law of tort. He also discussed the offences which could occur from the use or abuse of animals under criminal law and the legal responsibility of humans to protect wildlife. Parames in his article published by the Malaysian Bar Council investigated the extent to which Malaysian law protects animals. He argued that Malaysian law has limitations

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<sup>44</sup> Shoba Mano, 'The Height of Animal Cruelty', *The Star* (Kuala Lumpur), 30 May 2009 <<http://www.thestar.com.my/story.aspx?file=%2F2009%2F5%2F30%2Flifefocus%2F3980146&sec=lifefocus>>

<sup>45</sup> Suresh R, 'Ensure There is Enough Bite to Curb Animal Abuse', *The Star* (Kuala Lumpur), 23 November 2011; C'hng Chin Yeow, 'Ray of Hope for Animal Welfare Bill', *The Star* (Kuala Lumpur), 25 November 2010.

<sup>46</sup> *Animal Welfare Bill 2012* (Malaysia).

<sup>47</sup> Abdul Aziz Hussin, *Tanggungjawab Manusia terhadap Haiwan di sisi Undang-Undang (Responsibilities of Humans Towards Animals in the Law)* (Dewan Bahasa dan Pustaka, 1990).

<sup>48</sup> K. Parames, 'Cruelty to Animals: Do the Legislations Sufficiently Protect Them' (2006) 35(2) *The Journal of Malaysian Bar (INSAF)*.

<sup>49</sup> Alvin See WL, 'Animal Protection Laws of Singapore and Malaysia' (2013) *Singapore Journal of Legal Studies* 125. See also, Alvin WL See, 'Animal Welfare and Prevention of Cruelty: Proposed Amendments to the Animals Act 1953' (Law Reform Committee Malaysia, 2012).

when it comes to protecting animals because the penalties for cruelty to animals are minimal. See's work is a doctrinal study providing an overview of laws relating to the protection of animals in Singapore and Malaysia. By examining the laws and particularly those relating to animal cruelty, he proposes various suggestions to improve animal protection laws in these two countries.

This study attempts to address this gap in knowledge by examining the law relating to animals from a different approach. Using various philosophical and religious perspectives, the historical development of Malaysian law, animal welfare science and some aspects of international law, the study aims to argue for a legal framework which provides an animal welfare-focused approach. This approach is designed to provide suggestions for the welfare of animals in the Malaysian legal system and how they can best be protected. It is a multidisciplinary approach. On the one hand, it relies on legal materials from doctrinal and legal research. On the other hand, it relies on non-doctrinal sources by considering the views and opinions which emanated from the fieldwork undertaken as part of this research. Further details concerning the approach taken in this study are explained in Chapter 2 (Research Methodology).

### **1.3 Objectives of the research, theoretical framework and research questions**

#### **1.3.1 Objectives of the research**

The objectives of the research are as follows:

1. To examine theoretical justifications relating to the rights and interests of animals;
2. To analyse Malaysian laws on animals to identify the status of animals under the law, and the extent, scope and adequacy of their legal protection;
3. To explore Malaysian religious and cultural perspectives towards animals and their protection;
4. To explore recent developments in philosophy concerning animal welfare;
5. To explore recent developments in the sciences concerning the intelligence and sentience of animals;



6. To examine relevant international law instruments and the role of selected international organisations in animal protection;
7. To analyse the existing Malaysian law against contemporary theories relating to animal rights, and selected international law instruments; and
8. To recommend appropriate changes to Malaysian law.

#### 1.3.2 Theoretical framework

The theoretical framework for this study accepts the proposition in animal welfare theory that animals should be treated humanely and that their cruel treatment should be prevented. This can be seen in many legal instruments permitting the human use of animals but, at the same time, seeking to ensure the well-being of animals. Part of the framework involves the use of philosophical, moral and cultural ideas derived from the published literature concerning the legal rights, entitlements and interests of animals. Other parts of the framework draw on Malaysian law, selected international law instruments and the policies which underlie them. These are analysed using legal interpretative methodologies to determine the legal status of animals in the Malaysian legal system.

#### 1.4 Outline of chapters

This study is divided into nine chapters. Chapter 1, the current chapter, provides an overview of the research. It presents the contextual background of the issue, the purpose of the research, the research questions, an outline of the chapters and the significant contribution of the research. Chapter 2 presents the research methodology that this study has applied incorporating both doctrinal and non-doctrinal approaches. As the nature of animal welfare is multidisciplinary, incorporating various elements of philosophy, animal science, public policies and law, this study maintained the necessary multidisciplinary approach dictated by the subject. This study has gone beyond doctrinal research. It firstly utilised library-based research by exposing ideas from philosophy, animal welfare and animal rights debates, the sciences and the historical development of animal welfare theory. It then went further to analyse the relationship between those ideas and the development of law particularly involving animal protection in Malaysia. It next grasped aspects of the theoretical approach by considering an animal welfare approach to justify protection of the welfare of animals. Taking into consideration the fact that the treatment of animals and the perspectives of

humans towards animals are different between societies and jurisdictions, this research employed the interview method to further investigate the actual scenario with regard to the legal status of animals in the Malaysian jurisdiction. Incorporating the data derived from literature and fieldwork, this study also utilised a reform-oriented approach which later offered suggestions and recommendations designed to enhance the protection of the welfare of animals in Malaysia.

Chapter 3 focuses on a theoretical discussion of the status of animals from philosophical perspectives. It first examined three different philosophical views concerning the status of animals, namely: (i) that animals have no moral status; (ii) that animals have certain moral status, but are inferior to humans; and (iii) that animals are morally equal to humans. The examination of these three views suggested that attitudes towards animals are very much influenced by the surrounding philosophical and religious environment at a particular time and place. This study has argued that philosophy, culture and religions serve to provide justifications for how humans should treat animals on a day-to-day basis. The animal welfare approach is one of the instruments and a view that provides justifications for achieving better protection for animals. An animal welfare approach which seeks to prevent cruelty and promote the humane treatment of animals is achievable. It is more pragmatic and less extreme when it comes to protecting the welfare of animals, than other approaches and certainly more acceptable in the Malaysian context.

Chapter 4 and Chapter 5 deal specifically with Malaysian law, explicating the laws relating to the status of animals in the Malaysian legal system. Chapter 4 explores the development of laws relating to animals in Malaysia in three stages. Firstly, it reviews the provisions in Malay customary law concerning animals before British colonisation. Secondly, it investigates the law relating to animals during the British period and, lastly, it scrutinises further development of animal law legislation after independence. Chapter 5 moves on to analyse the legal status of animals, considering the development of laws in Malaysia in Malay customary law and in recent times. The study found that animals in Malaysia have legal status as follows: (i) they are protected as property; (ii) they are protected from unnecessary cruelty; and (iii) they are protected for environmental and conservation purposes. This is in line with an animal welfare approach, which argues for the humane treatment of animals and the prevention of gratuitous and avoidable cruelty.

Chapter 6 examines the relationship between animal welfare and the law in Malaysia. It first peruses the nature of animal welfare that was originally science-based but which later developed into a policy-based issue. It reviews how the scientific findings on animal welfare could lead a particular government to introduce law and policy related to protection of animals. Chapter 6 also looks further into relevant international law instruments and international organisations which influenced the policy of animal welfare in the Malaysian jurisdiction.

As this thesis incorporates data from fieldwork, Chapter 7 provides the fieldwork findings from the interviews which supported and supplemented the arguments of previous sections of the thesis. Chapter 8 provides an essential part of the study. It charts the future of animal welfare law in Malaysia. By examining the elements of the animal welfare approach in Malaysia and comparing them with the nature of animal welfare science, selected international law instruments and policies of international organisations relating to animals as presented in Chapter 6, this chapter proposes a standard set of guidelines for policies and legislation relating to animal welfare in Malaysia.

Lastly, Chapter 9 highlights the findings of the research. It considers the animal welfare approach which should be a framework for improving and enhancing the protection of the welfare of animals in the Malaysian legal system.

## **1.5 Contribution to knowledge and statement of significance**

### **1.5.1 Academic contribution**

The research is significant in the Malaysian context. While it is framed within the context of legal analysis, it extends the current jurisprudential knowledge and justifications for the protection of animal welfare in Malaysia. This study expands the analysis of the relationships between current philosophical debates and cultural perspectives on the law relating to animals in Malaysia. It also adds to the knowledge and theories about the standards of welfare and entitlements which should be accorded to animals in the Malaysian legal system. This type of research has not been previously undertaken in the Malaysian context and thus it will fill a gap in the academic literature and discussions on animal law in Malaysia.

### 1.5.2 Practical contribution

The findings of this study address the standards of welfare and entitlements which should be accorded to animals in the legal framework in Malaysia. It makes a practical contribution to the legal policies and legislation relating to the status of animals. Furthermore, the findings should be significant to law reform and legislative bodies seeking to improve the laws dealing with animals. This could improve the treatment and welfare of animals in Malaysia. The findings may also result in insights helpful to other jurisdictions in a similar situation to Malaysia.

## 1.6 Conclusion

Animal law, as a legal subject, is considered as a new discipline generally but in particular in the Malaysian context. As this research observes, there is a paucity of literature concerning animal rights law in Malaysia. Indeed, no research has been undertaken concerning animal welfare law at a postgraduate level in Malaysia. In addition, there has only been one case with regard to animal cruelty reported in the High Court in Malaysia.<sup>50</sup> As a result, there are many issues relating to animals and the law which need more research. This study aims to fill the gap by contributing new knowledge to the legal fraternity specifically in Malaysia and generally to other jurisdictions in a similar situation to that of Malaysia. This thesis therefore contributes significantly, firstly, by providing new knowledge concerning the development of legal studies in Malaysia relating to animals, and secondly, by initiating further discussion in the areas of animal welfare law in Malaysia.

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<sup>50</sup> *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70.

## CHAPTER 2: RESEARCH METHODOLOGY

### 2.1 Introduction

This chapter outlines the research methodology used in this thesis. It describes the approaches adopted in gathering and interpreting data. It also describes the methods of data analysis and justifies the multiple approaches employed.

Gray defines research as an investigation for a specific problem, for which the researcher must provide a solution in a systematic and organised manner.<sup>1</sup> This study then develops appropriate techniques for data collection and data processing based on the research questions identified.<sup>2</sup>

The theoretical framework of this research is an animal welfare model. The humane treatment of animals is evident in many legal instruments permitting the human use of animals, but at the same time seeking to ensure their well-being. Part of the framework for this model evolved from the application of contemporary philosophical, moral and cultural ideas which are here used to examine the rights, entitlements and interests of animals in the 21<sup>st</sup> century. Other parts of the research framework employ a doctrinal and law reform research method by referring to recent scientific knowledge concerning the intelligence and sentience of animals, Malaysian law, international law and the laws of similar jurisdictions. Emanating from this model are guidelines for the humane treatment of animals which can be used by policy makers or government as part of its legislative function.

Doctrinal research in this study involved reference to and analysis of primary and secondary material to answer the question of what constitutes the law. Theoretical research aimed to provide a knowledge basis for the protection of animals which may suit the Malaysian legal system. The objective of reform-oriented research is to suggest a proposed legal mechanism which is designed to enhance the welfare of animals in the Malaysian legal system. This is achieved by analysing the relevant international law and empirical data collections as well as through conducting multiple interviews in Malaysia of those associated with the care or protection of animals.

In short, the study utilises both non-empirical and empirical legal research techniques. Non-empirical research focused on library-based research and the empirical legal

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<sup>1</sup> David E. Gray, *Doing Research in the Real World* (Sage Publication, 2nd ed, 2009), 2.

<sup>2</sup> Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3rd ed, 2010), 2.

study considered the application of law based on wider social and political contexts.<sup>3</sup> The study discusses these approaches in detail.

## **2.2 Categories of legal research**

Regarding the nature of legal research, the Australian Law Deans' submission divides non-empirical research into three categories: doctrinal, reform-oriented and theoretical legal research. Doctrinal legal research refers to library-based research.<sup>4</sup> It offers a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and may predict future developments. Reform-oriented research seeks to recommend the changes needed for improvement in the law by assessing the adequacy and sufficiency of the existing legal rules in a particular system. Theoretical research looks for an advanced understanding of the conceptual bases of legal principles. It also looks further to the combined effects of a range of rules and procedures that touch on a particular area of activity.<sup>5</sup>

Based on the above divisions of legal research, this study encompasses all of the categories, doctrinal, reform-oriented and theoretical. Each category then answers and responds to the research questions identified. A variety of approaches is in use in each category.

## **2.3 Theoretical research**

The theoretical approach is used in order to understand the position of the relevant animal ethical perspectives based on the theoretical framework of the humane treatment of animals. The theory offers a foundation from which to assess and evaluate the existing law. It also provides a possible standard by which to assess the legal protection of animals under Malaysian law. This theoretical framework is discussed in Chapter 3.

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<sup>3</sup> Michael Pendleton, 'Non-Empirical Discovery in Legal Scholarship - Choosing, Researching and Writing a Traditional Scholarly Article' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press Ltd, 2007) 159; John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 881.

<sup>4</sup> Submission of Australian Law Deans (April 1986) to the CTEC Assessment Committee for the Discipline of Law published in Dennis Pearce, Enid Campbell and Don Harding, *Australian Law School: A Discipline Assessment for the Commonwealth Tertiary Education Commission, vol. III* (Canberra: Australian Government Publishing Service, 1987) vol. 2, para. 9.15 (Pearce Committee Report) in Pendleton, above n 3, 159.

<sup>5</sup> Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Method for Law* (Edinburgh University Press Ltd, 2007) 16,19.

## 2.4 Doctrinal research

Doctrinal legal research aims to ask what constitutes the law in a particular area. It centres on reading and analysis of primary and secondary materials. It supplies the technique for finding the law and ascertaining the principles of legal interpretation and analysis. In brief, it necessitates extensive background reading which leads to the identification of primary and secondary sources of law. It also provides the process for synthesising all the issues in context to arrive at the conclusion about what constitutes the law.<sup>6</sup>

### 2.4.1 Primary sources of law

#### *(a) Legislation*

Legislative authorities are the bodies which enact the law. In Malaysia, there are two bodies which have authority to enact the law as provided by the Federal Constitution: Parliament at the federal level; and the State Legislative Assembly at the state level.<sup>7</sup> The Federal Constitution also further defines the distribution of subject matter to be legislated between the federal and state authorities.<sup>8</sup>

Malaysian legislation is comprised of:

1. The Federal Constitution
2. State Constitutions of each of the 13 states of Malaysia
3. Federal Acts of Parliament
4. State Enactments
5. Subsidiary legislation under Federal Acts of Parliament and State Enactments.

#### *(b) Case law*

Case law is based entirely on judicial decisions. Access to case law is via the various law reports. There are currently two leading law reports in Malaysia. They are the Malayan Law Journal (MLJ) and, the Current Law Journal (CLJ).<sup>9</sup> However in Malaysia, it should be noted that not all cases are reported. The cases reported are only from superior courts which decide more important legal questions and enunciate legal

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<sup>6</sup> Ibid, 41-2.

<sup>7</sup> N. N. Edzan, 'Malaysian Legal Sources: Print' (July 2000) 5(1) *Malaysian Journal of Library & Information Science* 19, 20.

<sup>8</sup> Ibid, 20.

<sup>9</sup> Ibid, 22-24.

principles.<sup>10</sup> These laws are developed from judicial decisions and statutory interpretation and are sources of law.

*(i) Judicial decisions*

In this research, a number of relevant judicial decisions are analysed in accordance with interpretive principles of the common law in order to derive general principles of law applicable to the issue at hand. In general, the study first acknowledges and summarises the authorities. It then derives an overall principle from the authorities. This also involves the process of selecting and weighing materials taking into account the hierarchy and authority of the rule maker, or the principles.<sup>11</sup>

Unlike statute, precedents normally comprise more than one judgement. Together they form a body of common law. In *Broome v Cassell*,<sup>12</sup> Lord Reid remarked that:

... it is not the function of ... any judges to frame definitions or to lay down hard and fast rules. It is their function to enunciate principles and much they say is intended to be illustrative or explanatory and not be definitive. When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it.

Because a series of cases can be more persuasive and binding on a judge than a single case, it is common in legal reasoning to interpret a series or a group of precedents rather than isolated cases.<sup>13</sup>

*(ii) Statutory interpretation*

Texts on statutory interpretation normally refer to both statutory and common law tools of construction. The relevant statutory tools include the Interpretation Statute<sup>14</sup> and provisions, and material intrinsic<sup>15</sup> and extrinsic<sup>16</sup> to particular statutes.

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<sup>10</sup> Ibid, 23.

<sup>11</sup> Dobinson and Johns, above n 5, 21, 32.

<sup>12</sup> [1972] AC 1027.

<sup>13</sup> William Twining and David Miers, *How to Do Things with Rules* (Cambridge University Press, 2010).

<sup>14</sup> *Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989)* (Interpretation Act) is interpretation legislation that applies to all statutes in Peninsular Malaysia including subsidiary legislation. The *Federal Constitution*, art 160(1) of the Constitution makes reference to the Interpretation and General Clauses Ordinance 1948 which has been consolidated into the Interpretation Act. S 66 of the Interpretation Act provides that it applies to every written law defined in the Act which is defined to include the Federal Constitution. Some expressions in the Federal Constitution are given meaning by article 160(2) of the Constitution itself.

<sup>15</sup> Eg preamble and marginal notes. This is different from the position in England and most common law jurisdictions. Marginal notes are regarded as part and parcel of a statute in Malaysia and they can be used in the interpretation of the relevant provisions or merely as a



In brief, rules of statutory interpretation include the literal rule which promotes the use of the natural and ordinary meaning of words. In the case where the words are 'precise and unambiguous or clear, plain and certain', they are to deserve their 'grammatical and ordinary meaning',<sup>17</sup> or their 'natural and ordinary sense'.<sup>18</sup> The meaning must not only depend on a particular word, 'but of a sentence, or a clause as a whole'.<sup>19</sup> However, in the case where a particular word in the statute is regarded as ambiguous and the literal meaning is considered absurd, the golden rule or mischief rule may be applied. This rule looks at the purpose of the statute and the 'mischief' that the legislature was intended to remedy so as to avoid an absurd meaning.<sup>20</sup> Meanwhile, the purposive approach looks at the intention of the legislature from reading or close examination of the statute as a whole.<sup>21</sup>

### *(iii) Complexities and limitations of legal interpretation*

Despite diverse rules and principles that assist the interpretation of assorted sources of law, it should be accepted that the discipline of legal interpretation itself is a composite process. Atiyah pointed out that 'the law does seem to be a seamless web, a vast network of interconnected rules of common law or case law, and of statute law'.<sup>22</sup> In numerous areas, the statute law and common law are intertwined and may work in fusion or in the form of a partnership. The courts serve to interpret statutory provisions so as to construct a body of principles which govern future cases. There are also statutes that grant courts the ability to exercise discretion in accordance with case law technique to adjudicate conflicts or disputes as they think just and equitable. Llewellyn

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brief guide to the content of the section. The preamble can only be used to ascertain legislative facts, ie the purpose and object of a statute when the words in the statute are uncertain when applied to the subject matter under query. (*Re Application of Tan Boon Liat* [1976] 2 MLJ 83, 85).

<sup>16</sup> Eg, records of parliamentary debate, report of a committee related to legislation or amendment of legislation, explanatory statements accompanying a bill. (*Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345).

<sup>17</sup> Gibbs CJ in *Cooper Brookes Pty Ltd v Federal Commissioner of Taxation* [1981] 147 CLR 297, 305 (Australian High Court).

<sup>18</sup> Cussen J in *Kon Fatt Kiew v PP* [1935] MLJ 239, 240.

<sup>19</sup> Ibid. See also, *Chong Sin Sen v Janaki Chellamuthu* [1997] 2 CLJ 699, 709.

<sup>20</sup> Wu Min Aun, *Malaysian Legal System* (Pearson Malaysia, 2005), 284.

<sup>21</sup> S 17A of the *Interpretation Acts* provides that a construction that would promote the purpose or object of an Act shall be preferred to a construction that would not promote that purpose or object in the interpretation of a provision; *ibid*, 287.

<sup>22</sup> P. S. Atiyah, 'Common Law and Statute Law' (1985) 48(1) *Modern Law Review* 1, 3.

noticed that for almost every canon of construction, there exists a contradictory canon.<sup>23</sup>

It is also noted that there is no exclusive mode and precise way of reading one case or more cases. Llewellyn suggested that there are possibly different factors that shape the selection process: the current tradition in the manner of judgement and the current temper of the court has led to what is conceived as the accepted and corrected style for handling precedent.<sup>24</sup> Most importantly, he argued, the situation as the judge figures it, impacts on a court's choice of techniques for reading or interpreting and then applying the authorities. Occasionally, elements of 'uprightness', 'conscience', 'judicial responsibility' and 'motive' permit judges to ascertain the technique which is felt correct in the particular situation.<sup>25</sup>

The nature of common law rules can be undetermined. Judges do not always regard themselves as rigorously confined by the actual words used in the explicit formulation of rules in binding precedents. The words may be given considerable weight but the judges may redevelop the rules and the meaning of the words and construe them widely or narrowly.

The derivation of *ratio decidendi* nowadays occurs within a growing body of statute law. Twining and Miers suggested that this operates as a constraint on subsequent interpretation. This is because the statute provides a more clearly identifiable 'anchorage' for interpretation and argument than do the texts of judicial opinion.<sup>26</sup> This is the case in Malaysia where legislation progressively holds predominant place over the common law.

*Ratio decidendi* from a court of similar rank<sup>27</sup> forms a basis of the common law, that body of law emerging from cases as they are decided by judges. The doctrine of *stare decisis* states that a decision made by a court in one case is binding on other courts in

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<sup>23</sup>Karl N. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Constructed' (1949-1950) 3 *Vanderbilt Law Review* 395, 401-6.

<sup>24</sup> *Ibid*, 395-99.

<sup>25</sup> *Ibid*, 398.

<sup>26</sup> Twining and Miers, above n 13.

<sup>27</sup> For the hierarchy of courts in Malaysia and discussion of some basic rules, see, eg, Sharifah Suhanah Syed Ahmad, *Malaysian Legal System* (Malayan Law Journal, 2007), 147-54. Briefly, courts are bound to follow the previous decisions of courts which are higher in cases which are similar to those previously decided cases. The binding precedent applies to all future cases which have liked facts.

later cases involving similar facts.<sup>28</sup> There are, however, conflicting definitions of the ratio for a single case. On this, Julius Stone explained:

Two main methods of finding the ratio of a case are currently regarded as permissible and proper: one which seeks the holding on the “material facts” of the preceding case, the other which seeks the rule propounded by the precedent court as the basis for its decision. In the material facts version, the *ratio decidendi* is that reason which “explains” (or is “the basis” of, or is “necessary to explain”) the holding by the precedent court on “the material facts” as identified by the precedent court. In the rule-propounded version, the ratio decidendi is that reason which is propounded by the court as “the basis” of (or as “explaining”, or as necessary) for “explaining” its decision.<sup>29</sup>

This process gives power and options to the judge. More formalist judges will appeal to the second rule, acceding to the grounds applied by the judge in the precedent, more than the first rule, constructing the material facts in the precedent and bringing forth a rule which reflects the results in the precedent.

In regard to interpretation and the application of rules, there are respective explanations of the normative theory of judicial reasoning suggested by scholars. Robert Summers, for instance, accords priority to substantive reasons, which include goal and rightness reasons.<sup>30</sup> Ronald Dworkin, on the other hand, contends that decisions should be based on principles, not policies which prescribe goals.<sup>31</sup>

In Malaysia, it has been argued that the judiciary is not a co-equal arm of the government hand-in-hand with the other two organs of the government<sup>32</sup> as is the case in other common law jurisdictions including Australia, India and the United Kingdom. This may have negative ramifications on the position of the common law vis-à-vis the statutory laws. The capacity of the courts to make law was even seriously attacked<sup>33</sup>

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<sup>28</sup> Phil Harris, *An Introduction to Law* (Cambridge University Press, 2006), 199.

<sup>29</sup> Julius Stone, *Precedent and law dynamics of common law growth*, (Sydney, Butterworths 1985) 123.

<sup>30</sup> Robert Summers, 'Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification' (1978) (63) *Cornell Law Review* 716.

<sup>31</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 94.

<sup>32</sup> The legislative and the executive. See, eg, Andrew Harding, *Law, Government and the Constitution in Malaysia* (Malayan Law Journal, 1996), 135-6; Faridah Jalil, 'The Judiciary and the Constitution' in Abdul Razak Baginda (ed), *Governing Malaysia* (Malaysian Strategic Research Centre, 2009) 185, 218.

<sup>33</sup> Prime Minister Dato' Seri Dr Mahathir bin Mohamad, 'Malaysia, Dewan Rakyat, Parliamentary Debates, vol. 2, no. 9, col. 1585' (18 March 1988), cited in Jalil, above n 34, 219. Constitution Amendment 1988 Act (A704) deleted phrase 'judicial power' in art 121(1). In the speech, the court was regarded as having made or applied law which is not actually required by statute, thereby contradicting or defying the statute law. It was intended by the amendment to restrict the judicial power to introduce into the statute law and Constitution concepts which do not expressly appear in them and to deprive the judiciary of a plenary judicial power of the

and its power was held to be confined within the federal law.<sup>34</sup> Nevertheless, there is no denying the fact that the common law and statutory law in the legal system are related to one another within a philosophy of law.<sup>35</sup> Both function as part of developing bodies of law within the Malaysian legal system.

Both lawyers and judges have significant functions in ascertaining the state of law applicable to a certain matter. Judicial decisions are important for determining the meaning of a statutory provision in its application to a particular condition. They are also vital in apprehending how a particular statute is to be accommodated within the existing body of law, that is, common law and statute law. The consequent meaning of the provision so determined will become precedent which will constitute part of the law.<sup>36</sup>

The same could also be seen among judges in Malaysia in the construction of the Constitution. Using the doctrinal legal technique, a comprehensive literature review is carried out in order to undertake an analysis of all relevant legislation, judicial decisions and government policies concerning the humane treatment of animals. The policy by the government and that of relevant organisations is important as it may explain the way in which the law may be applied.<sup>37</sup> The aim is to arrive at certain conclusions or inferences based on what is found.

### *(c) Other sources*

Art 160(2) of the Malaysian Federal Constitution defines law to include written law, the common law in so far as it is in operation in the Federation, and any custom or usage having the force of law in the Federation. Therefore, it includes other sources such as common law, custom and international law.

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Federation. See, further discussion in: Richard S. K. Foo, 'Malaysia - Death of a Separate Constitutional Judicial Power' (2010) *Singapore Journal of Legal Studies* 227; A. L. R. Joseph, 'The Doctrine of Separation of Powers Survives in Malaysia' (2007) *Singapore Journal of Legal Studies* 380.

<sup>34</sup> A majority of judges in *PP v Kok Wah Kuan* [2008] 1 MLJ 1 (Federal Court) held that the judicial powers of the courts were now solely determined by the jurisdiction and powers conferred on them by federal law; the judicial power of the Federation had become irrelevant. The Court also effectively held that the separation of powers doctrine itself was not an integral part of the Constitution [17]. Richard Malanjum dissented on this point. This case reversed the Court of Appeal ruling of the same matter, and overruled another Court of Appeal ruling on the point: *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah* [1998] 3 MLJ 289, 307-8.

<sup>35</sup> Wu Min Aun, 'The Malaysian Judiciary: Erosion of Confidence' (1999) 1(2) *Australian Journal of Asian Law*, 128.

<sup>36</sup> *Ibid.*

<sup>37</sup> Dobinson and John, above n 5, 25.

*(i) Common law*

Judges in Malaysia hold a different view about the scope of the common law to that in other jurisdictions using the adversary system. Augustine Paul J restricted the common law to the English common law and rules of equity as provided by section 3 and 5 of the Civil Law Act (CLA).<sup>38</sup> He argued that the application of common law imported through the CLA after the cut-off dates would be developed by the Malaysian courts and could be modified by statute. This position does not favour the other approach that considers the law as not limited to a specific collection of rules, but a system which incorporates the fundamental rules of natural justice that had formed part and parcel of the common law of the country.

For Gopal Sri Ram, the word 'law' in art 160(2) is non-exhaustive and open-ended and includes unwritten principles including a system of law that is fair and just and includes common law.<sup>39</sup> The different views on the scope of law signify the influence of a conflicting stance of naturalism and positivism in shaping the attitude of judges in legal interpretation.

*(ii) Custom*

In the context of the history of the adversary system, Bederman suggested that custom also serves as a source of English law, and applies as a binding rule of law which arises from a constant uniformity of conduct in the community or locality.<sup>40</sup> Hence, as provided by the Federal Constitution, the Malay custom may also have legal effects, as a source of law, at least in the Malay community. The role of Malay custom as a source of law in regulating animal welfare is further discussed in Chapter 4 (4.2.1–4.2.2).

*(iii) International law*

Malaysian courts are generally dismissive towards arguments based on international law, in particular, international human rights law.<sup>41</sup> Nevertheless, the international

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<sup>38</sup> *Danaharta Urus v Kekatong* (2004) 2 MLJ 257, 268 (Federal Court, Malaysia).

<sup>39</sup> *Kekatong v Danaharta Urus* [2003] 3 MLJ 1 (Court of Appeal, Malaysia).

<sup>40</sup> David J Bederman, *Custom as a source of law* (Cambridge University Press, 2010) 28-31.

<sup>41</sup> See, eg, *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356; *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Ors* [2002] 4 MLJ 449, FC (Malaysia). For discussion of this matter, see, eg, Farid Suffian Shuaib, 'The Status of International Law in the Malaysian Municipal Legal System: Creeping Monism in Legal Discourse?' (2008) 16 *IIUM Law Journal* 181; Shad Saleem Faruqi, 'Human Rights, International Law and Municipal Courts' (Paper presented at the Human Rights Colloquium for the Judiciary, 2009)

position on human rights has been relied on by judges to support interpretation of the local law that is positive towards the protection of fundamental liberties including the matter of customary land rights cases, albeit indirectly through cases in other common law jurisdictions. Treaties signed by the executive are not effective within the jurisdiction unless the Parliament enacts legislation. Therefore, non-binding resolutions such as the Universal Declaration on Human Rights (UDHR) and the draft of the Universal Declaration of Animal Welfare (UDAW) have no legal force in national law unless they embody customary international law that is applicable through the doctrine of incorporation.<sup>42</sup>

#### 2.4.2 Secondary sources of law

Secondary sources of law provide a background that assists in the analysis of the primary sources. They consist of, among others, reports by parliamentary committees, parliamentary inquiries, consultants, law reform and NGOs, government statements of policy, commentaries of law,<sup>43</sup> and news databases and internet sites of relevant organisations. These then provide a critical appraisal of the existing research literature, theoretical and empirical, which relates to the topic. This is to demonstrate the nature and limitation of the law and, at the same time, to consider the problems currently impacting on the law and policy underpinning the existing law.<sup>44</sup> To generate overall principles, this study re-examines, synthesises and summarises the literature from the secondary sources of law in Malaysia.<sup>45</sup>

### 2.5 Law reform research

In evaluating and examining the laws affecting the humane treatment of animals, reform-oriented research utilises several methods, namely, the comparative approach, the empirical approach and literature analysis. The objective is to analyse the need for reform and to suggest an appropriate manner in which the law relating to the humane

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<[http://www.suhakam.org.my/c/document\\_library/get\\_file?p\\_l\\_id=35723&folderId=69478&name=DLFE-6202.pdf](http://www.suhakam.org.my/c/document_library/get_file?p_l_id=35723&folderId=69478&name=DLFE-6202.pdf)>

<sup>42</sup> See, eg, Abdul Ghafur @ Khin Maung Sein Hamid, 'Judicial Application of International Law in Malaysia: A Critical Analysis' (2005) 1 *Asia-Pacific Yearbook of International Humanitarian Law Quarterly Review*, The 1996; Shuaib, above n 43.

<sup>43</sup> Examples of secondary sources of law may range from scholarly and professional journal or periodical articles, conference papers, textbooks, newsletters, circulars to speeches by key figures within the relevant institutions.

<sup>44</sup> Hutchinson, above n 2, 37; Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 1, 4.

<sup>45</sup> Dobinson and Johns, above n 5, 25-6, 33.

treatment of animals in Malaysia can be amended so as to further enhance the protection of animals in the Malaysian legal system.

#### 2.5.1 Comparative approach

The comparative approach is a useful method with which to assess the laws of home jurisdictions. This study employs this approach for two main purposes: firstly, to examine the principles laid down by international instruments which are relevant to the Malaysian context, and secondly, to look for practical approaches which provide better protection for animals.

Zweigert and Kotz describe comparative law as 'an intellectual activity with law as its object and comparison as its process'.<sup>46</sup> Comparative research is part of a non-doctrinal approach which allows an extra dimension to the sources of domestic law from other international jurisdictions.<sup>47</sup>

##### *(a) International law as a source of law*

International and transnational law can form a source of appropriate standards. International law encompasses a system of customary law, progressively supplemented by rules and principles which are agreed upon in treaties signed by two or more countries. International law is referred to as *soft law*. Such law is not intended to generate, or by itself is not capable of generating, legal rules but may, nevertheless, develop certain legal effects which fall under the soft law category. This category includes declarations, non-legally binding international agreements, resolutions and guidelines adopted by international organisations or assemblies of states. These materials may:

1. Provide evidence of state practice and the *opinio juris* required to establish a rule of customary international law;
2. Provide assistance in the interpretation and application of conventional and customary law whose precise requirements remain unclear; and

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<sup>46</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir trans, Oxford University Press, 1998), 2.

<sup>47</sup> Hutchinson, above n 2, 117.

3. Indicate the likely future course of the development of international law (*lex ferenda*). The materials may provide a foundation upon which states eventually conclude treaties.<sup>48</sup>

International law has progressively played a spectacular role in reforming and shaping domestic or municipal law in the process of legislative drafting and judicial decisions. In the development of animal welfare, for instance, the Malaysian government ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES) and codified it in the form of the *International Trade in Endangered Species Act 2008*.<sup>49</sup> Malaysia is also a member country of the World Organisation of Animal Health (OIE), which recommended a standard set of guidelines for animal welfare protection through two instruments: the Terrestrial Code, and the Aquatic Code. Furthermore, Malaysia is also a signatory party to the draft of the Universal Declaration of Animal Welfare (UDAW), which is currently under consideration to become a binding international legal instrument for the protection of the welfare of animals.

The existence of international law and other alternative communities of judgement also give additional perspectives that are available for the municipal court. These assist the court to arrive at better decisions, even against its own community.<sup>50</sup> Comparing and considering judgements from diverse jurisdictions makes for stronger, more considered decisions, even if the end result is the same.<sup>51</sup> The increasing number of cases worldwide in which judges are applying international law at a domestic level (which scholars have referred to as 'transjudicialism') is associated with the recognition of a global standard of good.<sup>52</sup>

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<sup>48</sup> Stephen Hall, 'Researching International Law' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 181, 203.

<sup>49</sup> *International Trade in Endangered Species Act 2008* (Malaysian Act No. 686). Malaysia acceded the CITES on 20 October 1977 and ratified it on 18 January 1978. It was legislated and published in the gazette on 14 February 2008 after receiving the Royal Assent on 5 February 2008.

<sup>50</sup> Karen Knop, 'Here and There: International Law in Domestic Court' (1999-2000) 32 *Journal of International Law and Politics* 501, 532 citing Jennifer Nedelsky, *Embodied Diversity and the Challenges to Law*, 42 McGill LJ 91 (1997).

<sup>51</sup> Justice L'Heureux-Dubé of the Supreme Court of Canada: (Justice L'Heureux-Dubé of the Supreme Court of Canada – Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Relinquist Court*, 34 Tulsa LJ 15, (1998) cited in Knop, above n 50, 532.

<sup>52</sup> Knop, above n 50, 532.



The extent of international law's role in shaping the Malaysian law with regard to animal welfare and humane treatment of animals is discussed in Chapter 6 and Chapter 8.

### 2.5.2 Empirical approach: Interview

In a law reform study, it is important to understand the law and its practice. Therefore, this study employs an empirical research method to look broadly into social and political contexts to which the relevant laws apply. Unlike traditional legal research, this approach involves aspects of social research and looks beyond a library-based study in order to answer legal questions. The research thus investigates the reality of the law and its practice. The aim is to understand how laws operate and what effects they have.<sup>53</sup> It identifies those involved 'on the ground' as the repository of knowledge in any reform or change process.<sup>54</sup> Julius Getman suggested, 'empirical study has the potential to illuminate the workings of the legal system, to reveal its shortcomings, problems, successes and illusions, in a way that no amount of library research or subtle thinking can match.'<sup>55</sup>

One of the important characteristics of empirical research is the prominent consideration given to the consumer of legal services and participants in the legal system, not limited to legal practitioners and professionals. McCrudden considered that consumer perspectives and the perspectives of other participants have their own validity. This means that these can be a useful corrective both to some rule-based accounts and can add to the voice of the professional practitioner.<sup>56</sup> The study adopts an interview approach as its empirical method. The data obtained through the interviews are supplementary to the other sources of data.

The interview as a means of data collection is regarded as capable of collecting information and perspectives of the 'participants' in the system to assess the problem and evaluate the policy. This is an important tool to develop detailed descriptions incorporating multiple perspectives and linking inter-subjectivities, that is, to give opportunities to grasp situations from the inside. It is a perfect tool to enable the

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<sup>53</sup> Baldwin and Davis, above n 3, 881.

<sup>54</sup> Hutchinson, above n 2, 23.

<sup>55</sup> Getman J, 'Contributions of empirical data to legal research' 1985 35 *Journal of Legal Education* 489 cited in Hutchinson, above n 2, 99.

<sup>56</sup> Hutchinson, above n 2, 36 citing McCrudden C, 'Legal Research and Social Science' (2006) 122 (Oct) *Law Quarterly Review* 632.

researcher to learn a great deal about any event or development to which he or she was not privy.<sup>57</sup>

The information gathered from interviews is part of the process that informs, assesses and evaluates any proposed legal reforms. The purpose is to gain a better understanding of the implementation and practice of the law and policy as it relates to the welfare of animals. This process seeks to identify the perspectives and expectations of the informants including those members of the legal elites who are influential in law making. It also looks for obstacles to and advantages of humane treatment of animals in international law, and in the formal law of the national legal system. This includes gathering suggestions as to how the proposed reform should be planned, identifying the resources that will be needed, the people who should be involved and any dangers that should be avoided.<sup>58</sup>

*(a) Preparation of interview schedule/questions and ethics approval*

An open-ended interview schedule was prepared to capture primary data from individual interviewees. Open-ended questions allow the interviewee a wide choice of possible answers.<sup>59</sup> The questions in the schedule relate to the research questions. The interview schedule is contained in Appendix A.

In the interview schedule, respective divisions each address different research questions. The questions were structured based on the research questions. Based on this structure, the analysis of the interview data was undertaken.

In conducting empirical data collection, this research observed an ethical procedure as approved by the Victoria University Human Resource Committee. Research ethics encompass a set of moral principles or norms which are used in order to preserve ethical relationships with others.<sup>60</sup> The ethical regulations that were followed came from the *Code of Conduct of Research 1995, Victoria University*<sup>61</sup> and the *National*

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<sup>57</sup> Robert Wiess, *Learning From Strangers: The Art and Method of Qualitative Interview Studies* (The Free Press, 1994), 9-10; Jaber F. Gubrium and James A. Holstein, *Handbook of Interview Research: Context and Method* (Sage Publication, 2001); 8-9.

<sup>58</sup> Cavana R.Y., B.L. Delahaye and U. Sekaran, *Applied Business Research: Qualitative and Quantitative Methods* (John Wiley & Son, 2001), 150.

<sup>59</sup> Ibid, 142.

<sup>60</sup> Gray, above n 1, 69.

<sup>61</sup> The copy is available at <[http://www.vu.edu.au/sites/default/files/research/pdfs/TERMS%20OF%20REFERENCE\\_revision\\_1005.pdf](http://www.vu.edu.au/sites/default/files/research/pdfs/TERMS%20OF%20REFERENCE_revision_1005.pdf)>

*Statement on Ethical Conduct in Human Research 2007*.<sup>62</sup> Specifically, the researcher set out to comply with the following principles and procedures:

1. Respect for the participants in the process and writing of research. Respect and consideration given to the beliefs, customs, heritage, cultural values and the local laws.
2. Informed consent. Each participant should be informed of the objectives and scope of the research before the interview is conducted. The copy of the consent form is in Appendix C.
3. The freedom of the participant. The participant has the right not to answer any questions or to withdraw at any time without giving reasons. If so, the information given, if any, will not be used in the research.
4. Non-identification of participants. All data and information obtained during interviews must be kept strictly confidential. No identifying information is to be used in the thesis. Any publication of the research must ensure that the identification of respondents, or organisations to which they belong, must not be disclosed.
5. Secure storage of data. The principal investigator is responsible for the security and confidentiality of any data. During the course of research, the transcript of the interviews must be stored by the student researcher in an identified locked cabinet. The conversation recorded in the form of audio files, or as transcribed files, must be stored by the researcher on a university computer with a password protection system.
6. Restricted access of data. Only the researcher and the supervisor can have access to the data.

*(b) Sampling and selection of interviewees*

The interviews were conducted in Malaysia from 5 May 2011 to 29 August 2011. The total number of individuals interviewed was 38. Appendix D provides a description of interviewees. The individuals were from three general categories: public sector, private sector and NGOs, including animal welfare organisations. The research utilised several

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<sup>62</sup> The copy is available at <[http://www.nhmrc.gov.au/publications/ethics/2007\\_humans/contents.htm](http://www.nhmrc.gov.au/publications/ethics/2007_humans/contents.htm)>

methods of sampling in order to identify and locate the prospective interviewees across different categories. Firstly, it used a purposive sampling method, also known as judgement sampling.<sup>63</sup> This method was chosen in view of the large number of interest groups involved in animal welfare. This is a non-probability sampling design where the elements in the population interviewed have no probabilities attached to them being chosen as sample subjects.<sup>64</sup> The sampling method was confined to specific types of people within the three categories of people who could provide the information required in the research questions. The following table describes the interviewees according to their categories.

Table 1: List of interviewees according to categories

Sector	Department	Interviewee
Category A: Public	Department of Veterinary Services	Senior Enforcement Officer: INT025, INT026  Enforcement Officer: INT027  Senior Legal Officer: INT029, INT030  Senior Veterinary Officer: INT036
	Department of Wildlife and National Parks	Senior Wildlife Officer: INT006, INT019  Senior Legal Officer: INT007  Senior Enforcement Officer: INT008, INT009
	Judges	High Court Judge: INT037  Session Court Judge: INT023

<sup>63</sup> Ibid, 263.

<sup>64</sup> Ibid, 262.

	Attorney General's Department	Senior Legal Officer: INT029, INT030, INT007
	Government policy and law makers	Senior Administrative Officer: INT006, INT025  Administrative Officer: INT020, INT021, INT022
Category B: Private	Lawyers representing animal welfare cases	Advocate & Solicitor: INT016, INT017, INT031, INT033
	Malaysian National Zoo	Animal Welfare and Ethics Committee: INT001
	Veterinarian	Veterinary surgeon: INT001, INT038
	Researchers	Researchers in various matters relating to animals (animal and religions, laboratory animals, veterinary medicine, animal conservation, animal welfare science): INT001, INT009, INT017, INT024, INT032, INT038.
Category C: Non-governmental organisation	Society for the Prevention of Cruelty to Animals (SPCA)	SPCA representative: INT010, INT011, INT012, INT013, INT014

	Representatives from other animal welfare groups	Other animal welfare representative: INT002, INT003, INT004, INT005, INT015, INT016, INT018, INT028, INT031
	Representatives from religious groups	Muslim: INT038, INT002  Christian: INT034, INT035, INT005  Hindu: INT033, INT031  Buddhist: INT028
	Malaysian Bar Council	Member: INT031, INT033

The people interviewed were identified based on their position within the relevant institutions in the categories selected. The identification process was also undertaken through information given on the institutions' websites or other mass media. In some situations, especially involving relevant NGOs and animal welfare activists, contacts were made through email or telephone, asking for information on the most suitable people to participate in the study. Based on the recommendations given, an online search was conducted to determine the relevance of the persons recommended. For public and private institutions, the administrative head of institutions normally nominated the interviewees. Permission of the heads of the institutions<sup>65</sup> was important and necessary in order to interview officials in the public sectors. For this, approvals were obtained from the Economic Planning Unit, Malaysian Prime Minister's Department and other government departments such as the Office of the Chief Judge of Malaya, the Department of Veterinary Services and the Department of Wildlife and National Parks. The copies of the approval letters are contained in Appendix E1-E4. Arrangements to meet officials of public departments could be made only after the approvals had been granted.

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<sup>65</sup> Within social science literature, they are known as gatekeepers.

A snowball strategy was also employed to contact the prospective interviewees. This strategy maximises the prospect of obtaining participants who are difficult to locate or of identifying the most relevant people or experts within the categories specified.<sup>66</sup> During interviews, or through informal conversation, the interviewees were asked to recommend other individuals to be sampled. Invitations to participate were sought personally with the potential informants by telephone or mail. A copy of the standard letter is included in Appendix B. When participants agreed to be interviewed, appointments to meet were then made.

In the process, some categories of research participants, namely, people from environmental organisations and politicians were difficult to reach. Many refused or did not respond to the invitations. Fortunately, however, the study was able to interview at least one participant to represent each of these categories.

#### *(c) Conduct of the interviews*

Interviews were conducted mostly at the office of the interviewees or any place that the interviewee preferred. Some interviews were conducted at food courts. The length of the interviews ranged from 30 minutes to two hours depending on the time constraints of the interviewees. With the interviewees' permission, most interviews were recorded by an audio recorder. Ten interviewees requested that the record be made by hand to be written up immediately afterwards. These interview transcripts were later given back to the interviewees by email for verification. Three respondents answered the interview questions by email. Cross-checking of data was also done during the interview session itself.

The questions asked in the interview schedule permitted some variations to allow for the particular knowledge and experience of interviewees. Some questions in the planned schedule were not asked of some interviewees for reason of relevance. In some cases, time constraints precluded asking all the questions in the interview schedule.

#### *(d) Transcribing and data analysis*

The audio-recorded interviews were converted into text data by way of transcriptions. The transcription process started during the time period of the fieldwork itself. However, a substantial number of interviews were transcribed within a month after the completion

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<sup>66</sup> Ibid, 150.

of the fieldwork owing to the time taken to transcribe them. The text data and the interview notes taken by hand were analysed. The manner in which the interview data was handled is subsequently described in detail.

The main criterion in choosing a method with which to analyse data collected through an interview is the purpose of the interview itself.<sup>67</sup> The aim of the interview in this study was to look for certain information in response to the different research questions in the interview schedule.

The interview is one of the key methods particularly used in social research and is a qualitative research method. Qualitative research is concerned with non-statistical methods of inquiry and analysis of social phenomena. The qualitative method provides a variety of approaches to analyse the interview data. Most of the analysis approaches suggested are for open or semi-structured interview questions. Mason outlined three possible approaches.<sup>68</sup> First, a literal approach is an analysis process that focuses on, for example, the exact use of particular language or grammatical structure. Second, an interpretive approach is concerned with making sense of the research participants' accounts, so that the researcher can attempt to interpret their meaning. Last, the reflexive approach attempts to focus attention on the researcher and her or his contribution to the data creation and analysis process.<sup>69</sup> In terms of the analysis of interview data, this research took the interpretive approach. This was done in order to understand the law, its reality and practice, as seen and experienced by the participant respondents in relation to the Malaysian legal system.

#### *(i) Suggested guidelines in organisation of data*

Several basic features were incorporated in order to analyse the interview data collected. The three important steps involved in this thesis were: data exploration, data organisation or structuration, and making sense of the data.

The first step was data exploration which aims to obtain an overview of the data as a whole. Creswell suggested exploring the general sense of data by reading all the transcripts several times. He advised the researcher to highlight any ideas, points or

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<sup>67</sup> Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (Sage, 2009), 191.

<sup>68</sup> Jennifer Mason, *Qualitative Researching* (Sage, 1996).

<sup>69</sup> Elaine Welsh, 'Dealing with Data: Using NVivo in the Qualitative Data Analysis Process' (2002) 3(2) *Forum Qualitative Sozialforschung / Forum: Qualitative Social Research* [1] citing Mason, above n 68.



concepts that occurred during the reading.<sup>70</sup> This assists the process of sorting and categorisation of data.

The second step concerns organisation, categorisation or sorting of data. Most researchers will organise the data as an early process in data analysis.<sup>71</sup> This is done by coding text and breaking it down into more manageable chunks.<sup>72</sup> The purpose is to construct meaningful patterns of facts<sup>73</sup> by looking for structures in the data. Different pieces of data are compared in order to find similarities, differences or linkages between them. Traditionally, the process is done through cut and pasting, or even by using scissors to break the data into pieces and grouping these into different categories. Several parts and their connections are analysed to form a meaningful picture.<sup>74</sup>

This process is also known as coding. In the coding process, text passages are related to categories that the researcher had either previously developed or which he or she develops ad hoc.<sup>75</sup> In other words, segments of texts are tagged and similar text segments are sorted with similar content into separate categories.<sup>76</sup> Coding leads to categorisation which is a more systematic conceptualisation of a statement.<sup>77</sup>

In this thesis, the categories of the data were already developed prior to the interview process. In qualitative research, this process is referred to as a 'template approach' where the text segments are applied to categories developed based on prior research and theoretical perspectives.<sup>78</sup> Gibb labelled this type of coding exercise as 'concept-driven coding', that is, using codes that have been developed in advance by the researcher through the literature review process.<sup>79</sup>

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<sup>70</sup> John W. Creswell, *Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research* (Pearson, Fourth ed, 2008), 244.

<sup>71</sup> Welsh, above n 69, [2] citing Tina Miller, *Exploration of First Time Motherhood: Narratives of Transition* (University of Warwick, 2000).

<sup>72</sup> Creswell, above n 70, 244.

<sup>73</sup> D. L. Jorgenson, *Participant Observation: A Methodology for Human Studies* (Sage, 1989) cited in Udo Kelle, 'Computer-Assisted Analysis of Qualitative Data' (1997) *Discussion paper series of the LSE Methodology Institute* <<http://www2.lse.ac.uk/methodologyInstitute/pdf/QualPapers/UKELLE.pdf>>, 5.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Barbara DiCicco-Bloom and Benjamin F Crabtree, 'The Qualitative Research Interview' (2006) 40 *Medical Education* 314, 318.

<sup>77</sup> Kvale and Brinkman, above n 67, 202.

<sup>78</sup> DiCicco-Bloom and Crabtree, above n 76, 318.

<sup>79</sup> G. Gibbs, *Analyzing Qualitative Data* (Sage, 2007) cited in Kvale and Brinkmann, above n 67, 202.

The process of breaking down the data according to the divisions defined in the interview schedule allows for an easier and more manageable interpretation of data and helps relate it to specific research questions. The codes are then written on paper as a list to be examined for redundancy and may merge into broad themes to form a preliminary organising scheme. New codes may emerge when reading through the transcripts. The specific quotes in the transcript that support the codes are highlighted with different colours. The unitisation of data is suggested by Erlandson et al, that is, considering a section or the entire answer to one question to assist with categorisation.<sup>80</sup>

### *(ii) Using NVivo in organisation of data, and its critics*

For the purpose of data organisation, various computer-based data analysis software packages were suggested, one of which was *NVivo*. *NVivo* supports the process of categorising and comparing text segments by offering "code-and-retrieve" facilities. In this program, documents can be imported directly from a word processing package. Texts or segments may be coded directly. At the same time, the texts separated from the original documents may be easily retrieved whenever necessary for validation or cross-checking. It is also possible to write memos about particular aspects of documents and make a link to relevant pieces of texts in different documents.<sup>81</sup> The searching facility also allows greater efficiency. It helps to save time and can assist the management of large samples.<sup>82</sup> The use of software packages can make the research process more systematic and explicit, and therefore more transparent and rigorous.<sup>83</sup> Time can be reduced in data management to allow more space for creative and analytical tasks.<sup>84</sup> In addition, the use of computer-assisted data analysis software may overcome human error in manual methods in searching for simple information in the whole data set.

Another feature that was central to the decision making which chose the *NVivo* software was that it was provided by the university library, was relatively easy to learn

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<sup>80</sup> D. A. Erlandson et al, *Doing Naturalistic Inquiry: A Guide to Methods* (Sage, 1993).

<sup>81</sup> Welsh, above n 69 [3].

<sup>82</sup> Udo. Kelle and H. Laurie, 'Computer Use in Qualitative Research and Issues of Validity' in Udo Kelle (ed), *Computer-aided Qualitative Data Analysis. Theory, Methods and Practice* (Sage, 1995).

<sup>83</sup> P. Conrad and S. Reinartz, 'Qualitative Computing: Approaches and Issues' (1984) 7 *Qualitative Sociology* 34, cited in Kelle, above n 83, 17.

<sup>84</sup> R. M. Lee and N. G. Fielding, 'User's Experiences of Qualitative Data Analysis Software' in Udo Kelle (ed), *Computer-Aided Qualitative Data Analysis. Theory, Methods and Practice* (Sage, 1995).

and has built-in tutorials within the system. However, it has been suggested that researchers should recognise the value of both manual and electronic tools in managing and analysing data and, at the same time, take advantage of both.<sup>85</sup> Software does not analyse data but it can be a tremendous aid in data management and the analysis process.<sup>86</sup> Many researchers use data analysis software mainly as an organising tool of data.<sup>87</sup> It replaces the manual method of 'cutting and pasting' different pieces of text relevant to a single category onto pieces of paper and filing them in a pocket file. However, to make sense of the relationship between different codes and memos written electronically, it has been suggested that this be done manually.<sup>88</sup> In the process, many other characteristics may be noted, including clusters of interviewees having a similar response or other characteristics such as gender and ethnicity.

However, some writers have challenged the process of coding by using computer-assisted data analysis software. One issue raised by Gilbert is the 'coding trap' – an issue of being too close to the data. It was suggested that researchers develop strategies to provide analytical distance.<sup>89</sup> The process of exploration and having a list of codes and categorisation before taking the data to the computer may reduce the risk.

Another criticism in the use of this software is related to the perception that the software is based on grounded theory approaches to data analysis. The grounded theory approach is a popular qualitative method proposed by Glaser and Strauss during which an inquirer generates a general explanation (a theory) of a process, action or interaction shaped by the views of a large number of participants.<sup>90</sup> In contrast with the general presumption in scientific and sociology inquiry, grounded theorists hold that theories should be "grounded" in data from the field, especially in the actions, interactions and social processes of people. Nonetheless, coding is a key aspect of different approaches under qualitative research including content analysis and

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<sup>85</sup> Welsh, above n 69, [12]; Kvale and Brinkmann, above n 67, 198-9.

<sup>86</sup> DiCicco-Bloom and Crabtree, above n 76, 318-9.

<sup>87</sup> Beverly A. Smith and Sharlene Hesse-Biber, 'Users' Experiences with Qualitative Data Analysis Software: Neither Frankenstein's Monster Nor Muse' (1996) 14(4) *Social Science Computer Review* 423 in Welsh, above n 69, [9].

<sup>88</sup> Welsh, above n 69, [9]; Kvale and Brinkmann, above n 67, 198-9.

<sup>89</sup> L. Gilbert, 'Going the Distance: "Closeness" in Qualitative Data Analysis Software' (2002) 55(3) *The International Journal of Social Research Methodology* 215.

<sup>90</sup> They elaborated on their ideas through several books from 1978: Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory* (1967) to 1998.

computer-assisted analyses of interview texts as well as grounded theory. The *NVivo* package has a theory-building capacity apart from the basic features of many computer-assisted data analysis software including retrieving and coding data. Taking a grounded theory approach to data analysis means allowing the data to 'speak for themselves' rather than approaching the data within, for example, existing theoretical frameworks.<sup>91</sup> However, Kelle suggested that the manufacturers have jumped on the 'grounded theory bandwagon' in that it is "an established brand name" and that many researchers claim to be using grounded theory when in fact they are applying a 'coding paradigm' which is neither inductive nor deductive, but a mixture of both.<sup>92</sup> Whilst the '*memoing*' tools in *NVivo* do push the researcher to draw theory from the data, it is not necessary to follow the grounded theory guidelines when using this software.<sup>93</sup> In fact, Lee and Fielding found in empirical studies that 70% of a sample of qualitative studies performed with the help of computers showed no explicit relation to grounded theory.<sup>94</sup> Furthermore, in using *NVivo*, theory building is not the aim of the study. This answers many of the critics against *NVivo* who see it as instrument of grounded theory.

Another problem with computer-assisted data analysis is that the researcher may be overwhelmed by the sheer volume of information that becomes available. This will depend on the sample size.<sup>95</sup>

It is important to also be aware that there are limitations imposed when the sample size is small. However, Kelle noted that a simple increase in sample size alone does not necessarily imply that the research findings will be more valid. In qualitative research, a large sample is usually not regarded as valuable in itself. However, multiple comparisons between purposefully selected cases are crucial for a qualitative study to identify patterns and to develop categories. An increase in sample size may therefore add greater breadth to the scope of the analysis.<sup>96</sup> On the other hand, the potential benefits of a larger sample size may be outweighed by the extra costs in time and effort required for data preparation and data entry.<sup>97</sup>

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<sup>91</sup> Welsh, above n 69, [5].

<sup>92</sup> Kelle above n 82.

<sup>93</sup> Welsh, above n 69.

<sup>94</sup> Lee and Fielding, above n 86, Kelle, above n 84, 18.

<sup>95</sup> *Ibid*, 16.

<sup>96</sup> *Ibid*, 16.

<sup>97</sup> *Ibid*, 16.

The last step is making sense of the data is to develop a typology based on the research questions in the study.

*(iii) Use of NVivo in this research*

First, all 38 interview transcripts were transcribed with the transcripts then entered into NVivo. In accordance with the research questions, the themes were categorised. Initially, data were coded through the creation of 50 free nodes. The researcher later revised and categorised the nodes in accordance with topic areas related to the themes (research questions). Coding provides insights helpful to the organisation of data and facilitates fruitful interpretation. The following table describes the themes and the nodes which the researcher utilised to analyse the fieldwork data.

Table 2: Themes and nodes of NVivo

Theme/Research Questions (RQ)	Nodes
RQ1: The status of animals (philosophical, cultural and religious debate)	Animal welfare Animal rights Animal interests
RQ2: Cultural and religious perspectives in Malaysia towards the status of animals	Cultural Religion Custom Human attitudes
RQ3: Relationship between the law and animal welfare in Malaysia	Government policy Factors determining the law relating to animals Consultation with experts
RQ4: Status of animals under existing Malaysian policy and legal framework	Animals and the law Legal status Protection as property Protection from cruelty

	Protection for environmental reasons Adequacy of law
RQ5: The most effective way to protect the welfare of animals	International law Judicial decision Scientific discovery Standard of protection Education

The summary of findings from the fieldwork is presented in Chapter 7 of this thesis.

## 2.6 Validity and reliability

For the purpose of verifying the data, this study used triangulation in order to establish an objective opinion on contentious or disputed issues. The common purpose of data triangulation is for cross-checking data from multiple sources to search for irregularities and differences.<sup>98</sup> Cohen and Manion indicated three types of verification:

1. researcher–subject corroboration which involves cross-checking the meaning of data between the researcher and the respondents. This cross-checking may occur during data gathering or after interpretation of the raw data has been made, for confirmation of accurate reporting;
2. confirmation from other sources about specific issues or events identified; and
3. two or more methods of data collection are used and the resultant interpretations are compared.<sup>99</sup>

This study utilises all three of these types of verification in order to avoid researcher bias and to ensure accuracy in the interpretation of data and reporting.

The use of different methods provides the opportunity for methodological triangulation to test the validity of results. This involves the use of more than one method or source of data in the study so that findings may be cross-checked.<sup>100</sup>

<sup>98</sup> Cavana, above n 58, 135.

<sup>99</sup> Ibid, 136.

<sup>100</sup> Hutchinson, above n 2, 128.

Multiple methodological techniques offer complementary information. This may lead to a stronger evidence base for the argument in the research and more confidence in the result. The usage of theoretical, doctrinal and reform-oriented analysis of law, comparative approaches and interviews was undertaken to construct a broader picture of the issue at hand. Each technique employed addressed a different aspect of the phenomenon as well as providing some overlap. True triangulation takes place when various methods are used to investigate the same research question.<sup>101</sup> The following chart illustrates the methods adopted:

Table 3: Methodologies adopted in answering research questions

No	Research questions	Research methods			
		Literature review	Doctrinal and reform-oriented legal research	Comparative legal research	Interview
1	<i>What is the status of animals in current philosophical, cultural and religious debate?</i>	√			√
2	<i>What are the cultural and religious perspectives in Malaysia towards the status of animals?</i>	√	√		√
3	<i>What is the relationship between the law and animal welfare in Malaysia?</i>	√		√	√
4	<i>What is the status of animals under the existing Malaysian legal framework?</i>	√		√	√
5	<i>What is the most effective way to protect the welfare of animals in Malaysia?</i>	√	√	√	√

<sup>101</sup> Ibid.

## **2.7 Conclusion**

To conclude, the research methodology outlined above provides a basis and justification for the conduct of the research in a manner that has been well established in the study of law and its social context. The methodology has been specifically designed based on the research questions identified at the outset of the study.



## CHAPTER 3: THE STATUS OF ANIMALS

### 3.1 Introduction

There is considerable difficulty in determining the status and place of animals in human society because this depends on the perceptions and practices of people and societies, and these always vary both within and between societies. Nevertheless, the debate concerning the status of animals continues and the important question remains: are animals worthy of moral and legal consideration? This chapter argues that philosophy, economics, culture and religions serve to provide justifications or explanations of how and why humans should treat animals humanely in their daily lives. Different perspectives are evidenced in the writings of philosophers, the teachings of various religions and the views encouraged and promoted within differing societies. This chapter discusses the historical evolution of these views but focuses particularly on recent developments in the philosophy of animal rights and how these developments could be used to mould and refine Malaysian law.

Western philosophers have been discussing the relationship between humans and animals since the time of the early Greeks.<sup>1</sup> However, the philosophical debate at that period was limited to the general differences between humans and animals, and how humans should treat animals. What followed the Greeks was an extensive debate over the status of animals among contemporary philosophers. That debate focused on the context and moral significance of animals and what status humans should accord them.<sup>2</sup> Therefore, that debate centred on the attitudes of humans towards animals and their treatment of them.<sup>3</sup> It marked the birth of various theories about animal treatment and the protection of animals which, in turn, determined the status of animals in human lives. This study argues that the beliefs of humans which have greatest influence arise from their cultural, religious and economic surroundings. These serve to determine and justify human attitudes towards animals. The justifications for animal treatment reflect the ideological views and beliefs of a particular people, society, institution or state at any particular time.

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<sup>1</sup> Amy Fitzgerald Linda Kalof, 'Introduction (Section 1)' in Amy Fitzgerald Linda Kalof (ed), *Animals Reader: The Essential Classic and Contemporary Writings* (Berg, 2007) 4.

<sup>2</sup> Martha Nussbaum, 'The Moral Status of Animals' in Linda Kalof and Amy Fitzgerald (eds), *The Animals Reader: The Essential Classic and Contemporary Writings* (Berg Publishers, 2007) 15; L Gruen, *The Moral Status of Animals* <<http://plato.stanford.edu/entries/moral-animal/>>

<sup>3</sup> Gruen, above n 2.

Cohen identified several important factors in justifying and determining the attitudes of humans towards animals in general. They include notions of the hierarchy and value of animals.<sup>4</sup> In the general hierarchy, human beings take the first position, followed by animals, and plants are last. The value of animals is determined by their possession of the organic life of living beings<sup>5</sup>, inherent values and the subject of life,<sup>6</sup> sentience,<sup>7</sup> capacity to experience well-being,<sup>8</sup> rationality<sup>9</sup> and the relationship between humans and animals.<sup>10</sup> These factors serve as justifications and benchmarks which later influence the philosophical debates between different theories about and approaches to animal protection. The next section discusses the divisions between philosophers in their views of animals.

### 3.2 Moral status of animals

Philosophers can be divided into three different groups over the moral status of animals:<sup>11</sup> firstly, there are philosophers for whom animals have no moral status; secondly, those for whom animals possess some moral status, but are inferior to human beings; and thirdly, those for whom there is moral equality between human beings and animals.

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<sup>4</sup> Nina E. Cohen, Frans W. A. Brom and Elsbeth N. Stassen, 'Fundamental Moral Attitudes to Animals and Their Role in Judgement: An Empirical Model to Describe Fundamental Moral Attitudes to Animals and Their Role in Judgement on the Culling of Healthy Animals During an Animal Disease Epidemic' (2009) 22 *J Agric Environ Ethics* 341 at 343.

<sup>5</sup> Mary Anne Warren, *Moral Status: Obligation to Persons and Other Living Things* (Oxford University Press, 1997) 168.

<sup>6</sup> Tom Regan, *The Case for Animal Rights* (University of California Press, 1983) 243.

<sup>7</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislations* (Printed for W. Pickering etc ed, 1823) 236.

<sup>8</sup> Appleby and Sandoe, 'Philosophical Debate on the Nature of Well-being: Implication for Animal Welfare' (2002) 11 *Animal Welfare* 283.

<sup>9</sup> Peter Carruthers, *The Animals Issue: Moral Theory in Practice* (Cambridge University Press, 1992); Roger Scruton, *Animal Rights and Wrongs* (Metro Books, 2000) 41, 59.

<sup>10</sup> Elizabeth Anderson, 'Animal Rights and the Values of Nonhuman Life' in Cass R. Sunstein and Martha C. Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 277.

<sup>11</sup> Several authors classify the moral status of animals. For example, see Scott Wilson, 'Animals and Ethics' (2010) *Encyclopedia of Philosophy* <<http://www.iep.utm.edu/anim-eth/#SH2a>> 28 February 2012; Robert Garner, *Animals, Politics and Morality* (Manchester University Press, 2nd ed, 2004) 14-15; Robert Garner, 'Animal Rights, Political Theory and the Liberal Tradition' (2002) 8(1) *Contemporary Politics* 7,8.; Margit Livingston, 'Desecrating the Ark: Animal Abuse and the Law's Role in Prevention' (2001) 87 *IOWA Law Review* 1, 5-7.

### 3.2.1 Animals have no moral status

This view can be traced to early philosophical and religious writings. This view argues that humans have only indirect duties<sup>12</sup> towards animals.<sup>13</sup> Wilson suggested that religious conviction, philosophical theories of the nature of the world and the proper place of its inhabitants are justifications for denying moral status to animals.<sup>14</sup> Therefore, it is contended that the status of animals is justified by the superiority of human beings owing to the nature of the world. Cohen identified this as the hierarchy factor which also shaped the attitudes of humans towards animals.<sup>15</sup> It is in line with Aristotle who classified beings according to the hierarchy of life: humans, animals and plants.<sup>16</sup> Aristotle believed that only humans possess moral status<sup>17</sup> and therefore they take precedence over animals.<sup>18</sup> Beauchamp suggested that this view has been used to add weight to those who argue for the supremacy and rightful dominion of humans over animals.<sup>19</sup>

#### (a) *World and religious views*

Aristotle was of the view that the capacities and abilities possessed by a being determines its level in the natural order.<sup>20</sup> In this regard, he argued that human beings are superior because they have capacity for using reason to guide their conduct, which animals lack merely relying on instinct.<sup>21</sup> Therefore, it is natural and expedient that animals serve the needs of human beings.<sup>22</sup> Aristotle's idea then influenced other philosophers like St Augustine and St Thomas Aquinas who justified the treatment of animals from religious perspectives.<sup>23</sup>

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<sup>12</sup> Humans do not have direct duties to animals. Humans owe no moral obligation to animals. Therefore, what humans do to animals does not matter to them directly, but to other humans. Animals are morally significant to humans if they can benefit humans.

<sup>13</sup> Wilson, above n 11; Garner, above n 11.

<sup>14</sup> Ibid.

<sup>15</sup> Cohen also identified other factor in determining the status of animals, ie, the value of animals themselves. This will be discussed in other section of this chapter.

<sup>16</sup> Aristotle, 'The History of Animals' in Amy Fitzgerald Linda Kalof (ed), *The Animals Reader: The Essential Classic and Contemporary Writings* (Berg, 2007) 6.

<sup>17</sup> Livingston, above n 11.

<sup>18</sup> Simon Brooman and Debbie Legge, *Law Relating to Animals* (Cavendish Publishing Limited, 1997) 6.

<sup>19</sup> Tom Beauchamp, *The Human Use of Animals: Case Studies in Ethical Choice* (Oxford University Press, Second ed, 2008), 15.

<sup>20</sup> Wilson, above n 11.

<sup>21</sup> Ibid.

<sup>22</sup> Peter Singer, 'All Animals Are Equal' in Tom Regan and Peter Singer (eds), *Animal Rights and Human Obligation* (Prentice-Hall, 1989) 4-5.

<sup>23</sup> Ibid.

The early writing of the Judaeo-Christian religious tradition argued for the concept of human dominion and superiority over animals.<sup>24</sup> These excerpts from the Hebrew Bible were used to justify human dominion over animals:

God said, "Now we will make humans, and they will be like us. We will let them rule the fish, the birds, and all other living creatures." So God created humans to be like himself; he made men and women. God gave them his blessing and said: Have a lot of children! Fill the earth with people and bring it under your control. Rule over the fish in the ocean, the birds in the sky, and every animal on the earth.<sup>25</sup>

God granted Noah dominion over all animals and plants:

God said to Noah and his sons: I am giving you my blessing. Have a lot of children and grandchildren, so people will live everywhere on this earth. 2 All animals, birds, reptiles, and fish will be afraid of you. I have placed them under your control, 3 and I have given them to you for food. From now on, you may eat them, as well as the green plants that you have always eaten.<sup>26</sup>

Jesus was also recorded as indicating in the New Testament that human beings are more valuable than birds or sparrows:

Look at the birds in the sky! They don't plant or harvest. They don't even store grain in barns. Yet your Father in heaven takes care of them. Aren't you worth more than birds?<sup>27</sup>

So don't be afraid! You are worth much more than many sparrows.<sup>28</sup>

Generally, these writings point to the dominion of humans over animals and sanction the use of animals for human purposes. Indeed, Livingston argued that these religious writings can be used to subject animals to any use, including abuse.<sup>29</sup> Livingston cited St Augustine who regarded the killing of animals as part of human dominion.<sup>30</sup> St Augustine was also of the view that humans have no duty towards animals. He argued that Jesus allowed the 2,000 Gadarene swine to drown in a river.<sup>31</sup> He also insisted that Jesus himself argued that to refrain from killing animals and to refrain from the destruction of plants was the height of superstition.<sup>32</sup> In the same account, Beauchamp suggested that, based on the passage cited from the Bible, animals have been treated as not having any moral or legal standing or status whatsoever.<sup>33</sup>

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<sup>24</sup> Brooman and Legge, above n 11, 2.

<sup>25</sup> Genesis, 1: 26-28 (translation).

<sup>26</sup> Genesis, 9: 2-3.

<sup>27</sup> Matthew, 6: 26.

<sup>28</sup> Matthew, 10: 31.

<sup>29</sup> Livingston, above n 11, 11.

<sup>30</sup> Ibid.

<sup>31</sup> Peter Singer, *Animal Liberation* (Ecco Press, 2000) 192.

<sup>32</sup> Ibid.

<sup>33</sup> Beauchamp, above n 19, 15.

The thoughts of Aristotle and St Augustine were followed by those of St Thomas Aquinas in the 13<sup>th</sup> century who argued for the right of humans to treat animals as slaves. He believed that all creatures of God on earth are made for the full benefit of humans.<sup>34</sup> He described humans as the intellectual species with the right to do as it pleases with animals. For St Thomas Aquinas, humans are the only beings that are rational and capable of self-determination and therefore deserve concern “for their own sake”.<sup>35</sup> Animals cannot direct their own actions and are merely instruments, and exist for the sake of people who use them, not for their own sake.<sup>36</sup>

These religious thoughts then led to the belief that animals are subordinate and inferior to human beings. The superior qualities of human beings such as rationality, self-awareness and language abilities, combined with the seemingly divine licence given to humans to rule the animal world, led a number of early Western philosophers to justify an almost unrestricted dominion over animals.<sup>37</sup> Broome and Legge also argued that for at least 2,000 years or more, in Western philosophy, this theological approach has underpinned and marked the basis for philosophers when justifying the human treatment of animals.<sup>38</sup>

Gary Steiner has argued that religious authority in the 19<sup>th</sup> century was also reluctant to recognise the moral status of animals. During the reign of Pius IX (1846–1878), the Vatican strongly opposed the establishment of a Society for the Prevention of Cruelty to Animals in Rome.<sup>39</sup> Steiner also wrote that English Jesuit Joseph Rackaby was of the view that human beings have no duties at all to animals.<sup>40</sup>

On a world view perspective, Wilson suggested that another reason for discounting the interests of animals arose from their position in the food chain.<sup>41</sup> The explanation is very simple. The fact that humans regularly consume animals as their food is evidence that humans are higher in the food chain. Therefore, it is natural for humans to use

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<sup>34</sup> St Thomas Aquinas, 'Summa Contra Gentiles' in Pegis A (ed), *Basic Writings of Saint Thomas Aquinas* (Random House, 1945) 220.

<sup>35</sup> Singer, above n 22, 6-12.

<sup>36</sup> Ibid.

<sup>37</sup> Livingston, above n 11, 11.

<sup>38</sup> Broome and Legge, above n 18, 6.

<sup>39</sup> Gary Steiner, *Anthropocentrism and Its Discontents: The Moral Status of Animals in the History of Western Philosophy* (University of Pittsburgh Press, 2005) 114.

<sup>40</sup> Ibid.

<sup>41</sup> Wilson, above n 11.

animals to fulfil their needs and interests. Wilson suggested that this practice is natural and therefore does not require any further moral consideration.<sup>42</sup>

*(b) Philosophical views*

While early religious convictions and beliefs, as indicated by Aristotle, deny any moral standing to animals based on human dominion and superiority, Western philosophers based their views on the values and characteristics which differentiate between humans and animals. Values such as sentience, rationality, autonomy, interest and moral agency are among other justifications for denying moral standing to animals. Therefore, the duty of humans towards animals is *indirect* and only relevant if the animals can benefit humans.

*(i) Traditional views*

Denying that animals are sentient beings is one of the reasons to deny them moral status. In earlier times, writing during the scientific revolution in the 17<sup>th</sup> century, Descartes considered animals as similar to machines. To Descartes, animals have no ability to feel pain and exhibit the same qualities as machines due to an absence of intellect.<sup>43</sup> For Descartes, animals are not rational and, in addition, they lack consciousness.<sup>44</sup>

Kant believed that only humans are rational and autonomous and that it is natural for rational and autonomous beings to use non-rational beings as they see fit. For Kant, the properties of rationality and autonomy that human beings have and animals lack justify a very strong moral status for humans, at the same time denying animals any kind of moral status at all.<sup>45</sup>

Garner argued that the view that humans have no moral duties to animals was common in earlier times but does not hold much weight these days.<sup>46</sup> However, he noted that there are at least some contemporary writings which still defend this classical view.<sup>47</sup> The next section discusses contemporary views of this position.

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<sup>42</sup> Ibid.

<sup>43</sup> Rene Descartes, 'Discourse V' in J Veitch (ed), *Rene Descartes: A Discourse on Method* (Dent, 1912) 43.

<sup>44</sup> Ibid.

<sup>45</sup> Wilson, above n 11.

<sup>46</sup> Robert Garner, *Animal Ethics* (Polity Press, 2005) 24.

<sup>47</sup> Ibid.

(ii) Contemporary views

Carruthers argued that animals are not conscious.<sup>48</sup> He denied that animals have conscious awareness of their pain. Therefore, humans have only *indirect* duties to animals. Frey, while accepting that animals are sentient and have the ability to feel pain, denied that they are morally worthy.<sup>49</sup> Frey argued that for beings to be morally significant, they must have interests, which are dependent on desire and corresponding belief which animals totally lack.<sup>50</sup>

On the other hand, other philosophers have argued that for a being to be morally significant is for it to be a moral agent. Narveson<sup>51</sup> and Kant<sup>52</sup> held that only those beings capable of recognising right from wrong and participating in moral agreement can be regarded as moral agents. Since animals are not moral agents, they are unable to possess any moral status. Relying on the argument of moral agency, John Rawls excluded animals from the sphere of justice. The theory of justice espoused by Rawls is limited only to the relationship between persons and does not include animals and the rest of nature.<sup>53</sup> Rawls also argued that equal basic rights under the principle of justice only involve persons. Therefore, according to Rawls, animals may have some protection, but their status is not that of human beings.<sup>54</sup> Nevertheless, Rowlands argued that Rawls' version of contractarianism, if specifically analysed, can extend to include the interests of animals, which he termed as reversed contractarianism.<sup>55</sup>

The arguments that animals are non-sentient, irrational, non-autonomous, lacking interests and unable to possess qualities of moral agency have led philosophers to consider that animals have no moral standing. These convictions and beliefs have demonstrated that humans only have *indirect* duties to animals and animals have no

<sup>48</sup> Carruthers, above n 9, 75, 184.

<sup>49</sup> R.G. Frey, *Interests and Rights: The Case Against Animals* (Oxford University Press, 1980) 121, 157.

<sup>50</sup> Ibid.

<sup>51</sup> Jan Narveson, 'On a Case for Animal Rights' (1987) 70(1) *Monist* 21.

<sup>52</sup> I. Kant and M.J. Gregor, *The Metaphysics of Morals*, Cambridge Texts in the History of Philosophy (Cambridge University Press, 2003) 175.

<sup>53</sup> John Rawls, *A Theory of Justice* (Oxford University Press, Revised ed, 1999) 15, 448. However, Rawls does not further detail what comprises the rest of nature. This study suggests that the rest of nature would include other non-living beings such as forests, oceans, rivers and so-called 'natural objects' in the environment – indeed the environment as a whole as augmented by Christopher Stone. See Christopher Stone, 'Should Trees Have Legal Standing? - Towards Legal Rights for Natural Objects' (1972) 45 *Southern Californian Law Review* 450, 456.

<sup>54</sup> Rawls, above n 53, 441.

<sup>55</sup> Mark Rowlands, 'Contractarianism and Animal Rights' (1997) 14(3) *Journal of Applied Philosophy* 235.

moral significance in the human community. The literature regarded this attitude as an indirect theory, which suggested that the action of doing harm to animals is not directly relevant to the moral assessment of the harmful act. What is directly relevant for moral assessment is the fact that animals are related in important ways to humans. For example, it can be argued that torturing a cat is not a wrongful action to the cat, but rather to the owner of the cat or anybody who is affected by that action.

Wilson suggested that if indirect theories are correct, humans are not required to take into account the interest of animals as directly relevant to the assessment of their actions when they are deciding how and when to act.<sup>56</sup> However, it can be suggested that the proponents of *indirect* duties still require humans to consider how their actions will affect animals.<sup>57</sup> Restrictions regarding the proper treatment of animals might be generated from indirect theories. Kant, Rawls and Carruthers argued that there can be more extensive indirect duties to animals. These duties extend not simply to the duty to refrain from harming the property of others but to the duty not to offend or be cruel to animal lovers.<sup>58</sup> For example, even though Kant regarded human duties towards animals as merely *indirect* duties to humanity, he was also concerned with the appropriate treatment of animals as he argued:

Our duties towards animals are merely indirect duties towards humanity. Animal nature has analogies to human nature, and by doing our duties to animals in respect of the manifestation of human nature, we indirectly do our duty to humanity ... we can judge the heart of a man by his treatment of animals.<sup>59</sup>

Rawls, in excluding animals from his theory of justice, nevertheless, still considered that harmful action to animals can be against human compassion as he stressed:

Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacities for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case.<sup>60</sup>

Carruthers, despite denying any moral status to animals, also made a similar point concerning the appropriate treatment of animals based on indirect duties. He wrote:

Such acts [as torturing a cat for fun] are wrong because they are cruel. They betray an indifference to suffering that may manifest itself ... with that person's dealings

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<sup>56</sup> Garner, above n 11; Wilson, above n 11.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Tom Regan and Peter Singer, *Animal Rights and Human Obligation* (Prentice-Hall, 1989) 23-4.

<sup>60</sup> Rawls, above n 53, 448.



with other rational agents. So although the action may not infringe any rights ... it remains wrong independently of its effect on any animal lover.<sup>61</sup>

Despite denying any moral status to animals based on their lack of particular characteristics, these authors considered it important to not harm animals because to do so would impact adversely on the way humans treated each other.

Even though indirect duties implicitly promote good treatment of animals, Garner observed that relying on this principle is a poor substitute, since the degree to which animals are protected by indirect duty is always contingent upon their benefit to humans. In a similar account, Wilson suggested that under indirect theories, animals do not warrant our moral concern on their own, but may warrant concern only in so far as they are appropriately related to human beings. Once human benefit is not furthered then protecting animals ceases to be an object of moral concern. It therefore provided a very fragile basis for animal protection.<sup>62</sup>

To conclude this section, the views of this group resemble the views advanced by those who argue for the absence of moral status of animals from the perspective of human beings. The religious argument of human dominion and supremacy justified the status of animals. Because animals lack many qualities of human beings, they are dispensable and serve only as a means to an end for humans. Even though this indirect duties' view is still to a certain extent considerate of animal interests, it is not for the interests of animals per se, but for other human interests.

### 3.2.2 Animals possess some moral status, but are inferior to human beings

Unlike the first view which does not consider that animals are morally worthy, this view regards animals as having some direct moral status. However, this status is not morally equivalent to that of humans. In the event of conflicting interests between humans and animals, the interests of humans prevail. Garner observed that the majority of contemporary philosophers hold this view and accept that animals have an interest and have a right not to suffer but this can be overridden to promote the greater benefit of humans who are autonomous agents.<sup>63</sup>

Wilson also suggested that most people accept an account of the proper moral status of animals according to which the interests of animals count directly in the assessment

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<sup>61</sup> Carruthers, above n 9, 153-4.

<sup>62</sup> Garner, above n 46, 43.

<sup>63</sup> Ibid, 15.

of actions that affect them, but do not count for as much as the interests of human beings.<sup>64</sup> Wilson regarded this as a *direct* but unequal theory.<sup>65</sup> Therefore, it is recognition that animals have some moral standing, but do not have as much moral standing as humans.<sup>66</sup>

(a) *Religious views*

Unlike the traditional religious views which are reluctant to consider the moral standing of animals, contemporary religious writings gradually evolved towards a more protective stance towards animals.<sup>67</sup> This move started in the 17<sup>th</sup> century. However, these writings still advance the view of human superiority but, at the same time, they condemn needless cruelty and brutality towards animals.

In the Christian perspective, Livingston suggested that God's commandment to the good Christian, to love his or her neighbour, is an indication that humans should treat animals similarly.<sup>68</sup> This view then leads contemporary Christian theologians to promote kindness to animals as one of the principles of Christianity. Such a view can be supported by quoting a proverb in the Bible: 'A righteous man regards the life of his beast; but the tender mercies of the wicked are cruel'.<sup>69</sup>

A contemporary Christian scholar, Andrew Linzey, argued that God loved His entire creation, including animals, and has endowed animals with feelings and the ability to experience happiness. As a result, mankind, in imitation of the divine, should treat animals with kindness and care; to do otherwise was considered a violation of God's will.<sup>70</sup>

The Jewish tradition like Christian writings recognised the relationship between human beings and animals. According to the Talmud, humans need animals for certain purposes (food, clothing and so forth) and are permitted to work them and even kill them to serve these purposes.<sup>71</sup> At the same time, however, the Jewish law forbids

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<sup>64</sup> Wilson, above n 11.

<sup>65</sup> Ibid.

<sup>66</sup> Garner, above n 46, 15.

<sup>67</sup> Livingston, above n 11, 14.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid. See Proverb 12:10, *Bible-Book List* New International Version (NIV Bible) <<http://www.biblegateway.com/versions/New-International-Version-NIV-Bible/>>.

<sup>70</sup> Andrew Linzey, *Animal Theology* (SCM Press Ltd., 1994) 3.

<sup>71</sup> Livingston, above n 11, 14.

unnecessary acts of cruelty against animals, such as wanton destruction of animals or the subjection of them to pain and suffering that serves no human need.<sup>72</sup>

The Talmud also imposes certain duties on mankind towards animals – for example, the duty to help another's donkey stand when it has fallen under a heavy load. By means of the rabbinical principle of analogy, this duty has become the basis for the Talmudic duty to relieve the suffering of all living beings.<sup>73</sup>

While maintaining the dominion of humans, the religious philosophies extend their concern to animals. They afforded at least some moral standing to animals. Contemporary religious philosophies granted that status based on the ability of animals to suffer. Most of the animal rights movements also propose that this 'sentience' attribute gives moral standing to animals. It is the sentience characteristic which marks the standing of beings. Beings, irrespective of whether they are humans or animals, have this capacity to suffer pain and enjoy happiness. However, this view generally gives preference to human interests which always prevail in the case of conflicting interests with animals.

#### *(b) Philosophical views*

While the philosophers in the first group argued that animals are worthless beings and do not have moral status because they are not sentient, this second group of philosophers has a different view. The proponents of this position claim that most animals are sentient<sup>74</sup> and therefore they have direct moral status. Thus, humans also have direct duties to ensure that animals do not suffer. This view promoted humane treatment of animals and is often associated with the animal welfare position.<sup>75</sup> Proponents of this position argue that humans are still superior even though they acknowledge the moral worth of animals.<sup>76</sup> Garner suggested that the personhood

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Sentience refers to the capacity to experience episodes of positively or negatively valenced awareness. Examples of positively valenced episodes of awareness are pleasure, joy, elation and contentment. Examples of negatively valenced episodes of awareness are pain, suffering, depression and anxiety.

<sup>75</sup> The animal welfare position is one of the approaches or 'camps' where the idea of the animal protection movement is based on humane treatment of animals. It is also known as the welfarist approach. The opponent of this right is the animal rights position. This will be dealt with in the next section of this chapter.

<sup>76</sup> Despite having some moral status, animals are not equal to human beings for several reasons as discussed by Wilson: (i) only human beings have rights; (ii) only human beings are rational, autonomous and self-conscious; (iii) only human beings can act morally; and (iv) only human beings are part of the moral community. For details, see Wilson, above n 11.

argument, which marks the different mental characteristics between humans and animals, is the basis of argument for this orthodox view.<sup>77</sup> Wilson also suggested that the mental characteristics of personhood which philosophers argue in order to differentiate between humans and animals include such characteristics as rationality, consciousness and self-awareness.<sup>78</sup>

Generally, this stance argues that only human beings have personhood. Animals are not persons and deserve a lower status than humans. However, one should ask: what are the characteristics of personhood which make humans superior to animals? Is there empirical evidence which supports the view that some animals are rational, conscious and self-aware?

Kant, for example, argued that cognitive abilities such as autonomy and moral agency are attributes of personhood criteria.<sup>79</sup> In a similar view, Locke confined personhood to a thinking intelligent being who can reason, reflect and consider itself as itself, as the same thinking thing, at different times and places.<sup>80</sup> Daniel Dennet also suggested the characteristics of personhood as follows: rationality, behaving intentionally, being perceived as behaving rationally and intentionally, the ability to perceive others as rational and intentional, self-consciousness and having the ability to communicate verbally.<sup>81</sup> These philosophers base the characteristics of personhood on the cognitive and mental abilities which only humans generally possess. Arguments on these points then evidence the lower status and moral standing of animals in this category of personhood.

Others may question whether attributes such as rationality, autonomy and mental abilities, could be reasons for personhood. In general, most human beings possess these characteristics. However, at the same time, some argue that we also have groups of human beings who do not meet the criteria of personhood. This is known as the argument from marginal cases (AMC).<sup>82</sup> The AMC challenges the orthodox position

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<sup>77</sup> Garner, above n 46, 44.

<sup>78</sup> Wilson, above n 11.

<sup>79</sup> Immanuel Kant, *Metaphysic of Morals* (Bobbs Merrill, 1965) 52, 93.

<sup>80</sup> Stephen Holland, *Bioethics: A Philosophical Introduction* (Polity Press, 2003) 15.

<sup>81</sup> Daniel Dennet, 'Conditions of Personhood' in Amelie Rorty (ed), *The Identities of Persons* (University of California Press, 1976) 175-197.

<sup>82</sup> Argument from marginal cases is a philosophical argument regarding the moral status of animals. Its proponents hold that if members of society such as infants, the senile, the comatose and the cognitively disabled have direct moral status, animals also have direct moral status, since there is no known morally relevant ability that those marginal-case humans have that animals lack.

which is yet ready to regard the interests of animals as of the same worth as human beings. A summary of the AMC follows:

- (i) Members of species other than humans have important interests, given their sentience, such as an interest in avoiding pain and suffering, and in interest in seeking pleasure;
- (ii) Some humans, such as infants or the severely intellectually impaired (the so-called 'marginal cases') lack fully developed human capacities (such as self-consciousness, purposiveness, etc), only possessing interests comparable to members of some species other than humans;
- (iii) Even in the absence of fully developed, distinctive human capacities, such 'marginal' humans enjoy certain rights and demand equal consideration; and
- (iv) If some sentient animals have similar capacities to these humans, why should their interests not also be regarded as being deserving of equal consideration?<sup>83</sup>

The AMC argued that some children such as babies and infants, and retarded persons may lack rationality and autonomy and possess limited mental and cognitive abilities. However, despite lacking these attributes, the marginal person still enjoys rights and can claim equal consideration. Therefore, if some animals have similar capacities as marginal humans, it is argued that the interests of these animals should also be duly considered. Therefore, the AMC raises a doubt whether the personhood criterion can be used to determine the status of beings, particularly the differences between humans and animals.

To address this issue, Pluhar, for example, proposed six categories of persons as follows.<sup>84</sup>

- (i) full-fledged persons – includes those who are highly autonomous and linguistically sophisticated who are capable of moral agency and able to act on principle;
- (ii) persons lower on the autonomy scale of self-conscious beings who have little or no autonomy;
- (iii) merely conscious beings;

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<sup>83</sup> Steven White, 'Exploring Different Philosophical Approaches to Animal Protection Law' in Peter Sankof and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 84.

<sup>84</sup> Evelyn Pluhar, *Beyond Prejudice: The Moral Significance of Human and Non-Human Animals* (Duke University Press, 1995) 2-6.

- (iv) living beings with no capacity for consciousness; and
- (v) natural objects or systems.

Hence, Pluhar's categories of persons may suggest that only human beings could fulfil the criteria of a full-fledged person who has a variety of cognitive abilities, including rationality, creativity, intelligence and language use. Warnock also suggested that it is a common belief that persons have to be regarded as human.<sup>85</sup>

However, as suggested previously, not all human beings are full-fledged persons. There are groups of human beings who may fall under the third category ranking from the intellectually disabled and children who are self-conscious beings to those who have little or no autonomy compared to the category of full-fledged or lower persons.

Evidence demonstrates that at least some animals possess cognitive abilities similar to humans. For instance, researchers Patterson and Gordon observed the mental abilities of a gorilla named Koko for over 20 years and wrote:<sup>86</sup>

She communicates in sign language, using a vocabulary of over 1,000 words. She also understands spoken English, and often carries on 'bilingual conversations, responding in signs to questions asked in English. She demonstrates clear self-awareness by engaging in self-directed behaviours in front of a mirror, such as making faces or examining her teeth, and by her appropriate use of self-descriptive language. She lies to avoid the consequences of her own misbehaviour, and anticipates others' responses to her actions. She engages in imaginary play, both alone and with others. She has produced paintings and drawings, which are representational. She remembers and can talk about past events in her life ...

She laughs at her own jokes and those of others. She cries when hurt or left alone, screams when frightened or angered. She talks about her feelings ... She grieves for those she has lost ... She can talk about what happens when one dies ... She displays a wonderful gentleness with kittens and other small animals. She has even expressed empathy for others seen only in pictures.

It is also scientifically recognised that other animals like chimpanzees, dolphins, elephants and African grey parrots demonstrate significant cognitive abilities. Studies show that chimpanzees have the ability to use tools for specific purposes, for example, to find food.<sup>87</sup> One African grey parrot named Alex was able to label objects by name,

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<sup>85</sup> Mary Warnock, *An Intelligent Person's Guide to Ethics* (Duckworth, 1998) 54.

<sup>86</sup> Francine Patterson and Wendy Gordon, 'The Case for the Personhood of Gorillas' in Paola Cavalieri and Peter Singer (eds), *Great Ape Project: Equality Beyond Humanity* (Fourth Estate Publishing, 1993) 58.

<sup>87</sup> J. Goodall and H. van Lawick, *In the Shadow of Man* (Houghton Mifflin, 2000) 239.

colour, shape and matter.<sup>88</sup> Elephants have been known to perform simple arithmetic,<sup>89</sup> and rhesus monkeys can also count.<sup>90</sup>

With reference to Pluhar's classification of persons, in which category should we put Koko, the gorilla, Alex, the African grey parrot, and other animals that demonstrate several cognitive abilities? It is suggested that their characteristics seem to fit a category of nearly full-fledged person or at least similar or better than a group of human beings who have limited characteristics of personhood.

Therefore, based on this evidence, even though the standing of animals is inferior compared to human beings in the argument of personhood, some animals are still 'persons' under Pluhar's categories of personhood. In addition, the separation between the term 'personhood' and 'human beings' as Warnock suggested, is considerable.<sup>91</sup> This separation could support Pluhar's categories of persons and it leaves the possibility that not all humans might be persons and not only humans can be persons.<sup>92</sup>

Hence, Garner suggested that the personhood argument is only a justification derived from the moral orthodoxy argument. It represents the claim that because humans have greater cognitive abilities, constituting personhood, than animals, humans are morally superior and their interests should always take precedence.<sup>93</sup>

The moral orthodoxy argument which depends on the personhood argument seems to have two different consequences for its proponents. It may justify the status of animals as inferior beings because they lack the qualities of personhood. At the same time, it may also serve to accept that other human beings who have limited qualities of personhood are not qualified as persons in the absence of personhood characteristics. Hence, the superiority of human beings as a justification of personhood for humans and not animals seems to be a flawed philosophical argument. Being a human does not necessarily mean being classified as having personhood. The AMC suggested that infants and intellectually disabled people do not qualify as persons. Therefore, what are

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<sup>88</sup> Irene Pepperberg, *The Alex Studies: Cognitive and Communicative Abilities of Grey Parrots* (Harvard University Press, 1999) 321.

<sup>89</sup> Naoko Irie-Sugimoto et al, 'Relative Quantity Judgment by Asian Elephants (*Elephas maximus*)' (2009) 12(1) (2009/01/01) *Animal Cognition* 193.

<sup>90</sup> Elizabeth M. Brannon and Herbert S. Terrace, 'Ordering of the Numerosities 1 to 9 by Monkeys' (1998) 282(5389) *Science* 746.

<sup>91</sup> Warnock, above n 85, 54.

<sup>92</sup> Garner, above n 46, 65.

<sup>93</sup> Ibid, 16.

the characteristics, features or properties of human beings which make them superior to animals? Of course, a justification for the orthodox view is the property of 'being human' which differentiates humans and animals and, therefore, 'being human' is evidence of human superiority over animals.<sup>94</sup> Some holders of this view have argued that no philosophical argument is needed to prove this position of 'being human' as taking precedence over animals in the case of a conflict of interests. This widely accepted proposition is nevertheless challenged by the third group of contemporary philosophers who offer an egalitarian view of equal consideration for humans and animals. The next section will analyse the challenge to this orthodox view.

### 3.2.3 Animals are morally equal to humans

Contemporary writings are starting to challenge the orthodox view which dominates the attitudes of humans in their treatment of animals. As discussed earlier in this research, the majority of contemporary philosophers are of the view that animals deserve moral standing. However, this is not the same as the status accorded to humans. Humans are still viewed as superior beings and their interests are considered more important than those of animals. Nevertheless, contemporary philosophers still consider that it is important to treat animals humanely.

Radford lists several factors which lead contemporary writers to undermine the long-standing orthodox tradition including scientific discovery, religious diversity, new moral theories and the growing denunciation of cruelty.<sup>95</sup> Cao argued that contemporary writings on environmental philosophy and animal ethics critically question the common orthodoxy, that animals are morally inferior beings.<sup>96</sup> These views are expressed in various different philosophical thoughts concerning the moral status of animals.<sup>97</sup> This research will consider two prominent arguments which extend moral equality to animals: utilitarian and rights-based theories. This research will also consider other theories and approaches which offer alternatives to utilitarian and rights-based arguments, namely, revised contractarianism and capabilities approaches.

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<sup>94</sup> Wilson, above n 11.

<sup>95</sup> Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 19-28.

<sup>96</sup> Deborah Cao, Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Lawbook Co, 2010) 5.

<sup>97</sup> There are various philosophical thoughts dealing with the treatment of animals. This chapter will limit the discussion to the following approaches: utilitarianism, rights-based theories, revised contractarian theory and capabilities approach.



### (a) Utilitarianism

Utilitarianism is a theory of normative ethics which holds the view that the proper course of action is the one that maximises overall 'happiness'.<sup>98</sup> The founder of this theory, Jeremy Bentham, stated that: "[e]ach to count for one and none for more than one".<sup>99</sup> His theory underpins the writings of much contemporary philosophy which accords animals an equal moral status to humans.

The most prominent scholar for this school of thought is Peter Singer who wrote his *Animal Liberation* in 1975.<sup>100</sup> Singer regarded himself as a preference utilitarian, one who requires the aggregation of interests and preferences of each sentient being affected by the proposed conduct.

Based on the basic principle of equality, Singer claimed that equality should be extended to other beings including animals. According to Singer, the basic principle of equality does not require equal or identical treatment; it requires equal consideration.<sup>101</sup>

Singer argued that this principle of equal consideration should also be extended to animals by arguing that the interests of all beings, including animals, are equally important and when there is a moral conflict of interest, all beings must be equally considered.<sup>102</sup> Having interests is the nature of all beings: being sentient is the prerequisite to those interests.<sup>103</sup> Therefore, all sentient beings must be treated equally irrespective of their species.

For Singer, in order to implement the principle of equal consideration of interests in the practical sphere, we must be able to determine the interests of the beings who will be affected by our actions, and we must give similar interests similar weights. Singer provided an example where our actions will affect and determine the interests of other beings in the case of meat eating. Although human beings satisfy their interests by eating meat, Singer argued that the interests of animals in avoiding this unimaginable pain and suffering are greater than our interests in eating food that tastes good.<sup>104</sup>

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<sup>98</sup> Gaverick Matheny, 'Utilitarianism and Animals' in Peter Singer (ed), *In Defense of Animals* (Blackwell Publishing Ltd, 2006) 14.

<sup>99</sup> Singer, above n 31, 5.

<sup>100</sup> The book was first published in 1975 and is now available in a 2002 edition.

<sup>101</sup> Singer, above n 31, 2.

<sup>102</sup> Singer, above n 22, 148; Singer, above n 31, 5.

<sup>103</sup> Singer, above n 31, 5.

<sup>104</sup> Peter Singer, *Practical Ethics* (Cambridge University Press, 1995) 7, 100.

Hence, we must consider our actions which, in turn, will consequently affect other beings, specifically animals.

He further argued that equal consideration for different beings may lead to different treatment and different rights. The consideration given to children in ensuring their well-being by giving them a proper education is different from the consideration given to animals in ensuring that there is sufficient food and space for them to run freely.<sup>105</sup>

Singer developed the idea of the treatment of animals from Bentham's utilitarian philosophy which emphasises the capacity to suffer and feel pain. Bentham in 'An Introduction to the Principles of Morals and Legislation' wrote about the treatment of animals:

The day may come when the rest of the animal creation may acquire those rights which never could have been with-holden 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 caprice of a tormentor. It may one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the 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 they were otherwise, what would it avail? The question is not, Can they reason? Nor Can they talk? But, Can they suffer?<sup>106</sup>

From the above extract, Singer claimed that the capacity for pain and pleasure is a prerequisite for a being to have interests.<sup>107</sup> Therefore any being including animals who could suffer pain has the right to equal consideration.

Singer introduced the principle of equal consideration of interest as a basic element to show that all beings including humans and animals should have equal interests, and therefore both share the same interests.<sup>108</sup> Singer also pointed out that the failure of humans to consider that animals can suffer means that we are guilty of "speciesism" which is a prejudice, attitude or bias in favour of the interest of our own species against that of other species.<sup>109</sup>

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<sup>105</sup> Singer, above n 31, 5.

<sup>106</sup> Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislations' in Paul A.B. Clarke and Andrew Linzey (eds), *Political Theory and Animal Rights* (Pluto Press, 1789) 1387.

<sup>107</sup> Singer, above n 31, 7.

<sup>108</sup> Ibid, 5.

<sup>109</sup> Ibid, 5.

To support his view that animals are equal to humans in suffering pain, Singer quoted a statement by Lord Brain, a neurologist who argued that animals have nervous systems like humans whereby they can feel pain. He added that the impulses, emotions and feelings which are located in the human diencephalon or interbrain are also well developed in many other species of animals, especially mammals and birds.<sup>110</sup> Furthermore, Lord Brain asserted:

I personally can see no reason for conceding mind to my fellow man and denying it to animals ... I at least cannot doubt that the interests and activities of animals are correlated with awareness and feeling in the same way as my own ...<sup>111</sup>

To further prove the similarities between animals and humans, Singer also referred to the work of Richard Serjeant in his book *The Spectrum of Pain* (1969). Serjeant found that every particle of factual evidence supports the contention that the higher mammalian vertebrates experience pain sensation at least as acutely as our own.<sup>112</sup> To say that animals feel less because they are lower animals is an absurdity; it can easily be shown that many of their senses are far more acute than humans, for instance, the visual acuity in certain birds, hearing in most wild animals and touch in others.<sup>113</sup> Moreover, Serjeant confirmed that the nervous system of animals is almost identical to humans and their reactions to pain are remarkably similar.

To further demonstrate the ability of animals to feel pain as humans do, Singer referred to the view of the Committee on Cruelty to Wild Animals 1951 (Britain). The Committee provided findings and asserted that it had formed the view that the physiological, and more particularly the anatomical, evidence fully justified and reinforced the common-sense belief that animals feel pain.<sup>114</sup>

Therefore, according to Singer, equivalent human and animal interests ought to be considered equally.<sup>115</sup> All things need to be equal. This necessarily meant that animals' preference to avoid pain should be treated equally with the preference of humans.

Even though Singer holds the view of equality between humans and animals, and that it might be wrong to kill animals, he has admitted that human lives are more important than animal lives and the latter can be sacrificed for the former. Therefore, animal

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<sup>110</sup> Ibid, 12.

<sup>111</sup> Ibid, 12.

<sup>112</sup> Ibid, 13.

<sup>113</sup> Ibid, 13.

<sup>114</sup> Ibid, 13.

<sup>115</sup> Singer, above n 31, 22.

experimentation which could benefit humans is considered appropriate under the utilitarian perspective.<sup>116</sup> Singer is also of the view that painless death is morally unproblematic for a being without a sense of itself as a distinct identity with a knowledge of having a past and a future. Singer further explained that to kill a being like a fish with instant death and without first causing pain and distress may not raise any ethical issue at all.<sup>117</sup>

Bruce listed at least three common criticisms of Singer's utilitarian views. Firstly, it is difficult to draw boundaries between beings that are sentient and beings that are not.<sup>118</sup> Whilst it may be a general proposition that all animals are sentient and have the capacity to suffer pain, there should be boundaries because not all animals are equal.

Secondly, it is difficult to quantify interests under Singer's utilitarianism. It is argued that interests in the form of the pleasure and pain faced by animals when compared with those of humans are difficult to determine and measure.

Thirdly, Singer's views are considered 'anthropocentric' and still tend to favour humans when it comes to competing interests. This view does not guarantee the protection of any preferences that animals might have, only that such preferences will be taken into account in determining a course of action. And in most cases, the preferences of humans will be determinative. Humans' benefit still outweighs animals' interests in many cases under the utilitarian view.<sup>119</sup>

#### *(b) Rights-based theories*

Conversely, some philosophers have found that the utilitarian theory proposed by Singer is only suitable for defending and protecting animals rather than giving them equal status. As a result, several philosophers have argued for a more satisfactory theory in reforming the status of animals. Among them is Tom Regan who initiated the rights-based theory, arguing that animals should not only be protected and defended, but they have to be recognised as having rights. Regan submitted that both humans and animals are subjects of a life and therefore are rights bearers.<sup>120</sup>

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<sup>116</sup> Ibid, 80-81.

<sup>117</sup> Ibid.

<sup>118</sup> Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworth, 2012) 52.

<sup>119</sup> Gary Steiner, 'Cosmic Holism and Obligations Toward Animals: A Challenge to Classical Liberalism' (2007) 2(1) *Journal of Animal Law & Ethics* 1, 8.

<sup>120</sup> Regan, above n 6, 5.

Regan started his argument by emphasising that human lives are valuable for and by themselves, irrespective of capacity, wealth or intelligence. He argued that all individuals have an inherent value:

All who have inherent value have it equally, regardless of their sex, religion, birthplace, and so on. Similarly to be discarded as irrelevant are one's talents, skills, intelligence, wealth, personality and pathology, and whether one is loved and admired or despised and loathed. The genius and the retarded, the prince and the pauper, the brain surgeon and the fruit vendor. Mother Teresa and the most unscrupulous used-car salesman – all have inherent value as human beings, all possess it equally, and all have an equal right to be treated with respect, to be treated in ways that do not reduce them to the status of things, as resources for others.<sup>121</sup>

Therefore, life has inherent value and life is sacred. Regan introduced the 'respect principle' that we are to treat those individuals who have inherent value in ways which respect their inherent value. In line with this 'respect principle', Regan also proposes the 'harm principle' where we owe duties not to harm all individual beings that possess the ability to suffer pain and in which a failure to show respect to the other's independent value or to harm them is to violate the individual's rights.<sup>122</sup>

Based on the inherent value proposition, Regan considered it should also be extended by humans to animals. He argued:

Animals, it is true, lack many of the abilities humans possess. They can't read, do higher mathematics or build a bookcase. Neither can many human beings, however, and yet we don't (and shouldn't) say that they (these humans) therefore have less inherent value, less of a right to be treated with respect, than do others. It is the similarities between those human beings who most clearly, most non-controversially have such value (the people reading this, for example), not our differences, that matter most. And the really crucial, the basic similarity is simply this: we are each of us experiencing subject of life, a conscious creature having an individual welfare that has importance to us whatever our usefulness to others. We want and prefer things, believe and feel things, recall and expect things. And all these dimensions of our life, including our pleasure and pain, our enjoyment and suffering, our satisfaction and frustration, our continued existence or our untimely death – all make a difference to the quality of our life as lived, as experienced, by us as individuals. As the same is true of those animals that concern us (the ones that are eaten and trapped, for example,) they too must be viewed as the experiencing subjects of a life, with inherent value of their own.<sup>123</sup>

With regard to rights in general, Regan begins his argument by asking whether or not humans have rights. If humans have rights, what are the characteristics attributed to those rights? For Regan, humans are rational autonomous agents, and human rights

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<sup>121</sup> Ibid, 21.

<sup>122</sup> Tom Regan, 'The Rights of Human and Other Animals' in Linda Kalof and Amy Fitzgerald (eds), *The Animals Reader: The Essential Classic and Contemporary Writings* (Berg, 2007 ed, 1997) 21.

<sup>123</sup> Regan, above n 6, 22.

are based on their possession of certain cognitive abilities.<sup>124</sup> He further argued that certain animals like at least primates also possess these abilities including counting, using tools and possessing problem-solving abilities.<sup>125</sup> Thus, animals should have the same moral rights as humans.

Apart from that, Regan also considered that animals are moral patients.<sup>126</sup> In opposing Rawls' exclusion of animals in his theory of justice, Regan includes animals in his theory of rights. Regan argued that moral patients who cannot do what is either right or wrong and are unable to assert their rights still arguably have rights. Regan included disabled humans and animals as moral patients. Even though they are unable to assert their rights, in contrast with other moral agents, they in fact share the similar 'preference interest' as do ordinary humans. For Regan, animals are also able to exercise a form of consciousness that finds expression in certain behaviours designed to fulfil their preferences for pleasure and the avoidance of suffering.<sup>127</sup> Regan further argued that as with humans, animals also share 'welfare interests', a way of behaving that benefits them independently of their preferences for or against such behaviours.<sup>128</sup>

Regan suggested that our treatment of animals cannot be based simply on individual feelings, attitudes or personal preferences, but is a matter of justice.<sup>129</sup> A duty to treat animals respectfully is not just an act of kindness, but is an act of justice.<sup>130</sup> Consequently, animals should be treated with respect as a matter of strict justice.

Cao indicated that the practical consequence of this rights approach held by Regan opposes all forms of exploitation of animals, advocating the abolition of all animal uses including the eating of animals, the use of their fur, the use of animals in experiments and other animal industries.<sup>131</sup>

There are critics of this view. Generally, proponents of rights theories basically rely on the argument that rights are necessary in order to ensure that humans, possessed of certain characteristics, flourish. Regan, for example, simply extended the rights theory to animals on the grounds that they are similarly the kind of beings who require rights in order to flourish. Nevertheless, other philosophers like Rowlands, for example, have

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<sup>124</sup> Regan, above n 6, 26.

<sup>125</sup> Ibid.

<sup>126</sup> Regan, above n 152.

<sup>127</sup> Ibid, 7, 151.

<sup>128</sup> Ibid, 152.

<sup>129</sup> Ibid 6, 248.

<sup>130</sup> Ibid, 248.

<sup>131</sup> Cao, Sharman and White, above n 96, 12.

argued that the judgement of flourishing is subjective and needs far more justification and further explanation.<sup>132</sup>

Waldron also suggested that the rights-based theory in human reality is too abstract and neglects local variations and the importance of tradition.<sup>133</sup> In applying this criticism to Regan's theory, Benton doubted whether this rights theory may adequately reflect the moral status of animals because universal rights are unlikely to suit the different needs of animals under different circumstances.<sup>134</sup>

Garner argued that despite extending rights to animals, Regan was of the view that human life is more valuable than animal life.<sup>135</sup> Regan believed that if there is a choice between saving a human life and an animal life, human life is more worth saving. He provided the 'life boat scenario' where there are four humans and a dog in an overcrowded boat and the way to survive is to throw one life overboard. Regan argued that the dog should be thrown overboard on the grounds that the death of the dog, although a harm, is not comparable to the harm of a human's death. Steiner regarded Regan's view of sacrificing animals in an emergency 'life boat scenario' as evidence of the anthropocentric view that human interests take precedence over those of animals.<sup>136</sup>

In situations in which human beings are still asking and determining their rights, and the conflicts concerning rights are yet to be resolved in any human community, one should ask, whether we are ready to extend this concept to animals.<sup>137</sup>

### *(c) Revised contractarian theory*

As previously discussed in the earlier part of this chapter, Rawls' contractarian theory excluded animals from his theory of justice. Rawls however stressed that even though the duty towards animals is outside the sphere of justice, there is still a duty of compassion and humanity that humans should accord animals so that they are not treated cruelly. One of the reasons Rawls gave in setting aside the interests of animals in the theory of justice is that the principle of justice required that equal basic rights be assigned to all persons who have the capacity to possess moral personality and, for

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<sup>132</sup> M Rowlands, *Animal Rights: A Philosophical Defense* (Macmillan, 1998) 48.

<sup>133</sup> J Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Right of Man* (Methuen, 1987) 167.

<sup>134</sup> T Benton, *Natural Relations: Ecology, Social Justice and Animal Rights* (Verso, 1993) 91.

<sup>135</sup> Garner, above n 46, 75.

<sup>136</sup> Steiner, above n 119, 7.

<sup>137</sup> Interview data: INT016.

that reason, they should have access to basic justice.<sup>138</sup> The other reason why contractarianism denied moral status to animals is that animals are assumed to be non-rational agents, and the contractarian approach only considered the rational agent to have moral status in its scope of justice.<sup>139</sup> Therefore, because animals lack moral personality and moral agency, they are excluded from access to justice. Rowlands referred to this argument as the *orthodox contractarian argument with respect to animals* (OCAWA) and offered a modified version of contractarianism which is more animal-friendly.<sup>140</sup>

Rowlands defended Rawls' theory of justice as continuing to be powerful and argued for its expansion to the interests of animals. Rowlands did not deny that animals are non-rational agents under a contractarian approach. However, he argued that there is nothing in contractarianism per se that requires the contract to be restricted to rational agents. It may cover non-rational agents, including animals:

The fact that the framers of the contract must be conceived as rational agents does not entail that the recipients of the contract, that is, the individuals protected by the principles of morality embodied in the contract, must be rational agents. In fact, I shall argue, when contractarianism is properly understood, quite the opposite conclusion turns out to be true. If a contractarian position is consistently applied, the recipients of protection offered by the contract must include not only rational, but also non-rational, agents.<sup>141</sup>

Rowlands' reversed contractarian approach seems to offer better treatment for animals than the original version. However, the argument of a non-restrictive approach to the participants of justice including non-rational agents is not plausible enough to expand it to animals' interests. The direct exclusion of animals under the contractarian principle of justice evidences the limits of the theory of justice in relation to animals as Rawls argued:

Last of all, we should recall here the limits of a theory of justice. Not only are many aspects of morality left aside, but no account is given of right conduct in regard to animals and the rest of nature.<sup>142</sup>

Moreover, the inclusion of animals in the sphere of justice as Rowland suggested, by expanding it to animals, resembles the point which Regan argued in his rights-based

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<sup>138</sup> Rawls, above n 53, 442, 443.

<sup>139</sup> Carruthers, above n 9, 98.

<sup>140</sup> Rowlands, above n 55, 237.

<sup>141</sup> Ibid, 236.

<sup>142</sup> Rawls, above n 53, 448.



theory when he criticised Rawls' theory of justice. Regan has already suggested the expansion of justice towards animals by using the term 'moral patients' for animals.<sup>143</sup>

Nevertheless, this revised approach evidences that most contemporary philosophers generally are seeking to ensure better protection towards animals. This could be done by revising or expanding this approach to suit the general view of the public at large.

#### *(d) Capabilities approach*

Another theory which offered an alternative to utilitarian and rights-based theories is a capabilities approach. The philosopher, Martha Nussbaum, developed this theory based on the notion of human dignity and human flourishing.<sup>144</sup> This approach originally dealt with injustice to human beings and she further extends it to deal with injustice to animals.

The basic idea of this approach concerns the dignity of a human and the ability to flourish. Nussbaum argued that the capabilities approach justifies basic political entitlements and supports the view that human beings should have a chance to flourish in their own ways, provided they do not harm others.<sup>145</sup> Therefore, Nussbaum considered that any restrictions and limitations on human beings flourishing shows disrespect to all. She argued:

Failure to educate women, failure to provide adequate health care, failures to extend the freedom of speech and conscience to all citizens as causing a kind of premature death, the death of a form of flourishing that has been judged to be worthy of respect and wonder.<sup>146</sup>

The capabilities approach, as developed to date for humans, looks at the world and asks how to ensure that justice be done to all. Nussbaum argued that this approach looks at the whole of the human world and not just at people roughly equal to

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<sup>143</sup> Regan, above n 6, 152.

<sup>144</sup> Amartya Sen, winner of a Nobel Prize in economic sciences, played an important role in developing the capabilities approach. Nussbaum co-authored with Sen a book "Quality of Life" in 1993. See Amartya Sen and Martha Nussbaum, *Quality of Life* (Oxford University Press, 1993). Nussbaum then further developed this capabilities approach to deal with injustice to women, disabled people and non-human animals. See Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000); Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006).

<sup>145</sup> Martha Nussbaum, 'Beyond Compassion and Humanity: Justice to Non-Human Animals' in Sunstein Cass (ed), *Animal Rights: Current Debate and New Directions* (Oxford University Press, 2004) 305.

<sup>146</sup> Ibid.

themselves. Thus, it is flexible enough to extend the approach to human–animal relations.<sup>147</sup>

By extending this approach to non-human animals, Nussbaum suggested that no animals should be cut off from the chance of a flourishing life and that all animals should enjoy certain positive opportunities to flourish.<sup>148</sup> Nussbaum further argued that the capabilities approach provides a better theoretical guidance to the question of animal entitlements, as it is capable of recognising a wide range of types of animal dignity, and of the corresponding needs for flourishing.<sup>149</sup>

Nussbaum argued beyond compassion and humanity with regard to duties to animals as was suggested by Rawls in his theory of justice which excludes animals from the sphere of justice. Rawls himself believed that cruelty to animals is wrong but conceded that it is impossible to extend the contract doctrine to animals:

Certainly it is wrong to be cruel to animals ... The capacities for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way.<sup>150</sup>

Thus, Nussbaum suggested that the capabilities approach offers an extension to contractarian theory to contain direct obligations of justice to animals, and is able to recognise that animals have entitlements to justice, and are not just objects of human compassion, as Rawls proposed.<sup>151</sup> For Nussbaum, the sphere of justice is the sphere of basic entitlements. It is not only wrong to be cruel, but animals have rights and moral entitlements to not be treated in that way.

Unlike the utilitarian approach which aggregates the goods of different lives and types of lives as Singer argues, Nussbaum asserted that the capabilities approach asserts that no beings can be used or sacrificed as a means to the end of others or of a society as a whole. For Nussbaum, every animal has a different form of life and a different end and is not subject to the aggregation of the goods of others.<sup>152</sup> However, Nussbaum, at

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<sup>147</sup> Ibid.

<sup>148</sup> Ibid, 307.

<sup>149</sup> Ibid, 300.

<sup>150</sup> Rawls, above n 53, 448.

<sup>151</sup> Nussbaum, above n 145, 307.

<sup>152</sup> Ibid.

the same time, agreed that the sentence which marks the utilitarian theory in protecting animals should be considered as a condition of the entitlement to justice.<sup>153</sup>

Nussbaum developed 10 capabilities and argued that all beings including animals should have the same entitlement to express these capabilities. The items for these capabilities are: life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reasons, affiliation with other species, play and control over one's environment.<sup>154</sup>

Even though the capabilities approach is quite flexible in considering the moral status of animals based on their capabilities, problems may exist particularly in determining the capabilities of different species of animals. It is quite complicated for the public at large to identify the complex capabilities of animals, and their moral status may then depend on the current scientific knowledge concerning animal biology and behaviours.<sup>155</sup>

### **3.3 Animal protection camps: Animal welfare and animal rights**

Philosophers who wish to provide protection for animals are generally divided into two different groups which stand for 'animal welfare' or 'animal rights', respectively. Animal welfare or animal welfarism is the view that humans can use, or benefit from, animals, provided care of the welfare of animals is provided.<sup>156</sup> In contrast, animal rights advocates oppose any and all human uses of animals. Although they differ in policies on animal protection, both agree in their opposition to animal exploitation.<sup>157</sup> The major disagreement between them is 'animal treatment' and 'animal use'. Animal welfarists are concerned with how animals are to be treated, whereas animal rightists argue for the complete abolition of animal use.<sup>158</sup> Therefore, for animal rightists, concern for the humane treatment of animals is not an issue when animals are not used at all.

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<sup>153</sup> Ibid, 309.

<sup>154</sup> Nussbaum, above n 144, 392-401.

<sup>155</sup> David Glasgow, 'The Law of the Jungle: Advocating for Animals in Australia' (2008) 13(1) *Deakin Law Review* 181, 193.

<sup>156</sup> Cass R Sunstein, 'What are Animal Rights?' in Martha C. Nussbaum and Cass R. Sunstein (eds), *Current Debates and New Directions* (Oxford University Press, 2004) 5; Joan E. Schaffner, *An Introduction to Animals and the Law* (Palgrave Macmillan, 2011) 171.

<sup>157</sup> Ellen P. Goodman, 'A Review of Animal Rights: Current Debates and New Directions (Cass R Sustein & Martha C. Nussbaum eds., Oxford University Press 2004)' (2006) 79 *Animal Ethics and the Law* 1291, 1297.

<sup>158</sup> Gary Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010).

### 3.3.1 Animal welfare

Animal welfare seeks to prevent cruelty and promotes the humane treatment of animals.<sup>159</sup> It is concerned with the humane regulation of animal use<sup>160</sup> and argues for stronger laws to assure the well-being of animals in order to reduce their suffering.<sup>161</sup> Animal welfarists do not seek to abolish the human use of animals for food, sport, entertainment, recreation and science but to argue for humane treatment in those activities.<sup>162</sup>

This group is likely to oppose the confinement associated with intensive animal farms where animals are kept in very small and overcrowded cages on the grounds that it is unnecessary. However, they have no problem with the farming of animals for their meat in itself. Their main aim is to stop unnecessary suffering in the use of animals.<sup>163</sup>

Francione suggested that there are two kinds of animal welfarists, traditional and new welfarists. The traditional animal welfare approach, as argued by Francione, started from the 19<sup>th</sup> century during the time of Bentham who was the first to argue for the humane treatment of animals. Bentham and other welfarists held that humans can use animals provided that they treat them humanely. This traditional animal welfare approach has been the feature of animal protection legislation with its roots in 'humane treatment'. Francione further classified the new welfarists as a group which has a similar objective shared with animal rightists, but which uses the animal welfare approach for its strategy. The new welfarists argue for improvements in animal regulation, particularly for 'humane treatment' in the use of animals. For the new welfarists, in reality, the abolition of animal use could only be achieved in stages, by reforming, strengthening and improving policy/regulation with regard to animal use. Garner preferred to call this group *animal protectionism* rather than new welfarism.<sup>164</sup>

This position is held by leading animal protection groups such as the Royal Society for the Prevention of Cruelty to Animals (RSPCA), the Royal Society for the Prevention of Cruelty to Animals Australia (RSPCA Australia), the Royal New Zealand Society for the Prevention of Cruelty to Animals (RNZSPCA), the American Society for the Prevention

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<sup>159</sup> Sunstein, above n 5.

<sup>160</sup> Glasgow, above n 5, at 186.

<sup>161</sup> Sunstein, above n 5.

<sup>162</sup> Marc Bekoff (ed), *Encyclopedia of Animal Rights and Animal Welfare* (Greenwood Press, 1998) 45, 231.

<sup>163</sup> Glasgow, above n 155, 186.

<sup>164</sup> Francione and Garner, above n 158, 104.

of Cruelty to Animals (ASPCA), the Animal Legal Defense Fund (ALDF), the Animal Welfare Institute (AWI), the World Society for the Protection of Animals (WSPA) and others.<sup>165</sup>

Garner outlined criticism of the animal welfare group's position. Their opponents, the animal rights group, argued that the concept of unnecessary suffering is insufficiently precise and always makes animal well-being subservient to human interests.<sup>166</sup> Darien Ibrahim argued that what comprised necessary and unnecessary suffering is determined by reference to human benefits and interests, and therefore animals are still exploited by humans to serve their interests.<sup>167</sup>

The animal welfare position, which became the basis of the general anti-cruelty statutes of the majority of countries in the world, is labelled as weak and ineffective. Francione argued that most animals are still subject to abuse because the statutes are based on animal welfare perspectives.<sup>168</sup>

Most of the statutes regard animals as property. Animal welfare tends not to have a problem with the proprietary status of animals. As for the rights group, the proprietary status of animals makes it impossible to achieve equal consideration of interests and later inhibits the most basic protection of animals.<sup>169</sup> In defence of animal welfare, Garner argued that animals, being property, are still better protected under legislation, which can be constantly reformed and improved from time to time.<sup>170</sup>

### 3.3.2 Animal rights

Animal rights advocates may be seen as taking a more extreme stance. They oppose any and all human uses of animals.<sup>171</sup> They seek to abolish the proprietary status of animals, insisting that only by according legal personhood to animals can their interests be adequately protected. They assert that human utilisation of animals in the laboratory, on the farm or in the wild are wrong in principle, and should be abolished in

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<sup>165</sup> L.W. Sumner, 'Animal Welfare and Animal Rights' (1988) 13 *The Journal of Medicine and Philosophy* 159.

<sup>166</sup> Robert Garner, 'Animal Welfare and Political Defense' (2006) 1 *Journal of Animal Law & Ethics* 161, 167.

<sup>167</sup> Darien M. Ibrahim, 'The Anticruelty Statute: A Study in Animal Welfare' (2006) 1 *Journal of Animal Law & Ethics* 175, 182.

<sup>168</sup> Gary Francione, 'Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals' (1993-1994) 46 *Rutgers Law Journal* 721.

<sup>169</sup> Ibid.

<sup>170</sup> Garner, above n 166, 163.

<sup>171</sup> Sunstein, above n 5.

practice.<sup>172</sup> They argue that animals have rights to not be exploited for human benefit. They consider that the animal welfare theory has significant limitations in fully protecting animals that can result in ill-treatment and continuous harm to animals.

Their leading philosopher is Professor Gary L Francione. He maintained that animals have an interest in continuing their existence and have a right to not be treated as property and that humans cannot justify animal use, however 'humanely' they treat animals.<sup>173</sup> Francione considered that animal welfarism does not work in protecting animal interests, as it encourages and supports animal exploitation by regulating the humane treatment of animals and their use. Francione stressed that animal welfarism, by its policy/legal reform strategy, only promotes systematic exploitation of animal use by animal industries.<sup>174</sup> He emphasised that only an animal rights position, aimed at the abolition of animal use, can stop animal exploitation by promoting ethical veganism.<sup>175</sup>

Garner regarded the animal rightists' exclusive focus on vegan education as an impractical strategy.<sup>176</sup> For Garner, the abolition of animal use is an unlikely stance for any policy or law to entertain because animals are economic national resources.<sup>177</sup>

Goodman noted that animal rights represent well-developed theories but they are not dominant when compared with animal welfare theories.<sup>178</sup> The animal welfare approach is considered to be more pragmatic, more broadly supported and more moderate.<sup>179</sup> Many of the goals of animal welfare groups receive popular support.<sup>180</sup> Schaffner observed that most of the current laws concerning animals follow this approach.<sup>181</sup> Lovvorn is also of the view that many animal rights supporters use a welfarist approach in their campaign strategies, based on the belief that a rights approach seems to be unachievable in the short term compared to the animal welfare approach.<sup>182</sup>

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<sup>172</sup> above n 168, 167.

<sup>173</sup> Francione and Garner, above n 158, 175.

<sup>174</sup> Ibid, 48.

<sup>175</sup> Ibid, 62.

<sup>176</sup> Ibid, 214.

<sup>177</sup> Ibid, 141.

<sup>178</sup> Goodman, above n 157, 1293.

<sup>179</sup> Sumner, above n 165, 163.

<sup>180</sup> Sunstein, above n 5.

<sup>181</sup> Schaffner, above n 156.

<sup>182</sup> Jonathan R. Lovvorn, 'Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform' (2006) 12 *Animal Law* 133.

As the rights approach is quite extreme and lacks the consensus practice of the majority of people in the world who still believe that animals can benefit human life, many prefer an animal welfare approach.<sup>183</sup>

### 3.3.3 Other approaches

Apart from animal welfare and animal rights positions, there are other approaches explored in the literature. It is beyond the scope of this study to discuss these in detail. Nevertheless, it is worthwhile to provide a brief critique of virtue ethics, communitarianism and care ethics.<sup>184</sup>

Virtue ethics suggest the characteristics that humans should cultivate in order to live a good life, rather than the obligations that humans have or rules that they should follow in their behaviour.<sup>185</sup> Therefore, virtue ethics consider what a virtuous person will do to animals. A virtuous person will see animal experimentation as involving wrongful action not because it violates animal rights, but because it is not consistent with the character of a virtuous person. Therefore, this approach is not concerned with the interests of animals directly; rather, it focuses on the ethical considerations of what humans should do, or should abstain from doing or performing as far as any action which affects the interests of animals is concerned.

Communitarianism emphasises a shared conception of the good life promoted by the state, which includes respect for the interests of animals. However, the concept of the good life of communitarianism depends on the beliefs of a particular community in a particular place at a particular time. In this case, respect for animals depends on the beliefs of one community and these may differ in other communities. In respect to other communities and their treatment of animals, this may affirm the practice of others even though the practice is against the interests of animals.<sup>186</sup> The non-universalist approach which communitarianism promotes may not be considered suitable for those animal advocates who aim for the universal protection of animals.

Arguments from care ethics which has been developed based on eco-feminism suggest that both animal welfare and animal rights positions rely too much on abstract characteristics such as rationality, logical consistency, universality and fairness which

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<sup>183</sup> Interview data: INT002

<sup>184</sup> Robert Garner, 'Political Ideologies and the Moral Status of Animals' (2003) 8(2) *Journal of Political Ideologies* 234, 238.

<sup>185</sup> Cao, Sharman and White, above n 13.

<sup>186</sup> Garner, above n 184, 238.

refer in particular to the male gender in their theories. This approach argues that the characteristics that animal welfare and animal rights offer are a replication of human characteristics which are used to justify human moral superiority over animals.<sup>187</sup> Therefore, this approach suggests rejecting these abstract theories in favour of a more contextualised approach based on compassion.<sup>188</sup>

In short, approaches from virtue ethics, communitarianism and care ethics advance alternatives to welfare and rights positions towards better protection for animals. Even though the welfare and rights positions are established positions and are much more influential compared to other approaches, they may still need to be reformed in order to fit and suit the needs of different cultures and moral systems. That is what is offered by other approaches.

### **3.4 Conclusion**

Generally, people are concerned with animals and about their welfare. Almost every system of the world, moral, economic, legal, social and religious, provides an avenue for animal issues and argues for the avoidance of unnecessary pain being caused to animals. This chapter showed the development of views in philosophy and religion in determining and justifying the status of animals. The different views that philosophers hold indicate their attitudes towards animals which are very much influenced and justified by the surrounding philosophical and religious environment at a particular time and place.

As this chapter previously discussed, the earlier proposition that animals have no moral worth in human society has derived much influence from the philosophical views of Aristotle, who proposed the hierarchical view of beings according to the natural order of ranking in the world; human beings, animals and plants. Humans are the superior beings and can benefit from their inferiors, particularly animals. Moreover, cultural and religious doctrine, in particular Christianity, played a major role in suggesting the human dominion over other species. In the West, at least, this theological doctrine of human dominion has shaped the attitude of humans in dealing with animals. This research suggests that the human attitude of denying the moral worth of animals in earlier times was derived from, firstly, the philosophical belief of the rank of nature in which human beings take precedence over animals, and secondly, the religious

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<sup>187</sup> Ibid, 241.

<sup>188</sup> Glasgow, above n 155, 188.



doctrine which justified human dominion over animals. These views have infiltrated into human lives as a kind of practice or culture. The occurrence of animal abuse and vivisection without anaesthetic are examples of the impacts of cultural and religious belief on animal treatment in earlier times. Nevertheless, this position does not itself promote the ill-treatment of animals and still regards animal cruelty as wrong, based on compassion and humanity. However, this duty of compassion and humanity has only *indirect* effects on animals. The duty to not inflict pain and cause suffering to animals is only relevant if it affects other people who are in turn affected by such pain and suffering.

During the 17<sup>th</sup> century, attitudes began to change. Religious doctrine started to provide some limitation to the concept of divine revelation and human dominion over animals. Philosophical ideas began to question the practice of inflicting pain and suffering, animal abuse and cruelty to animals, in various aspects of human life. Based on animal sentience, philosophers commenced critiques over the practice of animal vivisection without anaesthetic. The birth of the animal protection movement under monarchical patronage in the United Kingdom, known as the Royal Society for the Prevention of Cruelty to Animals (RSPCA) marked a significant change in the attitude of citizens in that country towards animals. However, despite acknowledging the moral worth of animals, this second phase still regarded humans as superior beings. If there was any conflict between the interests of human beings and animals, the interests of humans prevailed. The argument concerning the characteristics of personhood which animals are lacking such as rationality and moral agency, justified the dominance of human interests. However, the personhood argument which underpins this dominance invited doubts at least from the AMC. The AMC interrogated the validity of the personhood argument, and demanded the exclusion of several marginalised people who lack the personhood characteristics such as infants and some mentally or intellectually disabled persons. The AMC further argued that if marginalised people are to be included in the enjoyment of rights and entitlements, so should animals.

The non-readiness of the orthodox view to consider animal interests, when in conflict with human interests, has led to the birth of egalitarian approaches. This is marked by the equal consideration of interest and inherent value arguments which considered the conflicting interests between humans and animals. In this regard, Singer's utilitarian view suggested that the interests of humans and those of animals should be considered equally. Singer argued that basic equality does not require identical

treatment, rather it requires equal consideration. Therefore, according to Singer, humans should think about the consequence of their actions before doing any act, and particularly consider whether any particular act will affect the interests of others. Equal consideration must be given, for example, in the case of meat eating, to the taste of delicious meats and to the suffering of animals which are killed for their meat.

Similarly Regan's rights-based approach argued that animals like humans have inherent value, and are therefore rights bearers. Even though animals are not moral agents who are autonomous in the social contract, they are moral patients who still have rights and are the beneficiaries of justice. Regan introduced the respect principle in which the inherent value of all beings is considered and animals are included as possessing inherent value. As a result, they deserve respect from others. Under the harm principle, every human has a duty not to harm others, including animals, which, as a result, have the right not to be harmed.

However, both leading theories in this approach, utilitarian and rights-based, are still anthropocentric in their views: they prioritise human interests over those of animals. In expanding Rawls' contractarianism, Rowlands suggested that there is nothing in contractarianism which required the social contract to include rational agents only. Therefore, it may cover non-rational agents, including animals, in the sphere of justice. This argument is in line with Regan's rights-based theory which refers to animals as moral patients, having rights as recipients of justice. Nussbaum's capabilities approach seems to modify the contractarian approach by extending Rawls' principle of justice to animals. She argued that every being including animals should have the opportunity to flourish during life in their own way. Thus, humans must respect the capabilities of animals to enjoy their entitlements and these cannot be sacrificed to benefit others.

Therefore, the different stages of how humans have perceived animals provide evidence of the justifications of their attitude towards animals. During the first stage, justifications for animal treatment were based on early religious and philosophical views. During the second stage, the traditional philosophical and religious views were reinterpreted in the context of a philosophical and social movement particularly in the West. In recent times, the findings from science and technology in animal research steered human attitudes beyond orthodox views towards more contemporary theories such as Singer's utilitarianism, Regan's rights-based theory, Rowland's reversed contractarianism and Nussbaum's capabilities approach. These approaches marked a

significant change in social and philosophical attitudes towards animals and their place in the scheme of things.

The two leading animal protection camps, animal welfare and animal rights, proved to be the instruments for achieving better protection for animals. Both are derived from humans' justification on which is based their respective ideologies. The animal welfare position is an avenue for those who choose moderate action to fight for animal welfare within the system and within current regulation. On the other hand, the animal rights camp insists on the more extreme position of abolishing all uses of animals in human life. Animal welfarists may regard the utilisation of animals for human purposes as important in ensuring their welfare. In contrast, animal rightists may decline any use of animals for human benefit. The use of animals from the animal rightists' perspective is exploitation.

This chapter has argued that philosophy, culture and religions serve to provide justifications for how humans should treat animals on a day-to-day basis. The different perspectives of philosophical, cultural and religious views evidence the various justifications for animal treatment in a human society. These perspectives infiltrate into human practice which, in turn, leads to common practice or practices within any given society. The common practices in dealing with animals will later influence the society in how it justifies animal protection. These justifications then indicate the status of animals in a society. In applying this argument, the next chapter will illustrate how the common view of society may later justify the laws and regulations concerning the treatment of animals, particularly in the Malaysian context.

## **CHAPTER 4: OVERVIEW OF LAWS RELATING TO ANIMALS IN MALAYSIA**

### **4.1 Introduction**

Malaysia consists of two regions, Peninsular Malaysia and Malaysian Borneo. It comprises 13 states and three federal territories, with a total population of approximately 27.5 million.<sup>1</sup> The Malaysian nation has a long history. It originally comprised the Malay Peninsula, which historians sometimes referred to as the Malay state of Malacca. Due to its strategic geographical and economic location, from 1511 to 1957, Malacca was conquered and ruled by several European countries, namely, the Portuguese, the British and the Dutch.

In addition to Malacca, other independent Malayan states, including Perak, Pahang, Selangor and Negeri Sembilan were put under one federation in 1895 known as the Federated Malay States. Other Malay states were under Siamese protection including Kedah, Kelantan, Terengganu and Perlis, which combined with the state of Johor and were formed as the Unfederated Malay States by the British government in 1909. Previously before that time, Penang, Malacca and Singapore had already become colonies of the British government under the Straits Settlement in 1826.

In 1946, the British government intended to unite all Malay states under one administration to be known as the Malayan Union, which comprised all Federated and Unfederated States, and two former states of the Straits Settlements, Penang and Malacca. However, due to considerable opposition by the people of the Malay states, the Malayan Union was abrogated, and replaced by the Federation of Malaya in 1948. Later in 1957, the Federation of Malaya achieved its independence from the British. In 1963, the Borneo states, Sabah and Sarawak together with Singapore joined the Federation of Malaya, and commemorated the formation of Malaysia on 16 September 1963. However, in 1965, Singapore left Malaysia to be a separate country. From 1965 until now, Malaysia has been comprised of 13 states: Perak, Selangor, Pahang, Negeri Sembilan, Johor, Kedah, Kelantan, Terengganu, Perlis, Melaka (Malacca), Pulau Pinang (Penang), Sabah and Sarawak, and three federal territories: Kuala Lumpur, Labuan and Putrajaya.

Some discussion on Malaysian history serves two purposes particularly for this chapter. Firstly, it outlines in general terms the historical background of Malaysia which

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<sup>1</sup> Department of Statistics Malaysia, 'Population Projections Malaysia 2010-2040' (2012)

influenced the development of the general legal and administrative policy of Malaysia as a country. Secondly, it assists in investigating the background of the law in Malaysia with regard to animal matters starting from the customary practice of the people before the coming of colonial countries, that is, the Portuguese, the Dutch and the British, during the rule of the colonial period, after independence and then until recent times. It is pertinent for this study to discuss the uniqueness of the historical background of Malaysia and its legal systems. This has been divided into three separate stages: first, the period before the coming of the British; second, the period of British occupation; and, third, the period after independence. The legal system which was originally custom-based on the Malay *adat*, blended with the influence of Islamic and English law. The combination and overlapping of these systems have made it a unique system.

This chapter considers the provisions of customs and Malay digests relating to animals particularly in the *Laws of Malacca, Ninety-Nine Laws of Perak and Laws of Kedah*. It also looks into the influence of English law which affected animals during British occupation in the Malay states and Straits Settlements. It goes further to discuss the reception of English law in Malaysia after independence which affected and supplemented the law regulating animal matters. The legislative power of federal and state bodies in making law pertaining to animals is also discussed. This chapter also details the nature of laws relating to animals in Malaysia particularly in regulating animal products and animal control, setting up the liability of animal owners in criminal and civil claims and, most importantly, in protecting and enhancing the welfare of animals. This is achieved by exploring those Malaysian laws which directly and indirectly affect animal matters.

#### **4.2 Historical background before the coming of the British**

Historically, the Malay states were subrogated to four colonial countries, from 1511 to 1957, or for 461 years. The first colonisation crusade started in 1511 when the empire of the Malay state known as Malacca between the 15<sup>th</sup> and 16<sup>th</sup> centuries was conquered by the Portuguese. The Portuguese centred their settlement in Malacca until 1641. In 1641, the Dutch then took over the control of Malacca from the Portuguese and held it until 1795. The British then took temporary possession of Malacca until 1801. The Dutch again took control from 1801 to 1807 and from 1818 to 1824. The Dutch then surrendered Malacca to the British in 1824. The British then controlled Malacca and all states of the Malay Peninsula until 1942, before intervention by the Japanese Army. The Japanese held Malaya to 1945 when they surrendered it to

the British. The British then continually held Malaya until it was granted independence in 1957. This section will observe the historical background of the law and customary practice of the people of the Malay states before the rule of the colonial period.

#### 4.2.1 Malay custom (*adat*)

People in the Malay states followed their own custom in their daily life, which is known as *adat*. It is unknown from whence the word *adat* derives. Within the Malay perspective, researchers and scholars often refer to the word *adat* as being derived from the Arabic word *adah* which originally and literally means customary practice.<sup>2</sup> This research presumes that reference by scholars to the Arabic word *adah* is, perhaps, due to their observation of the religion of Islam which had already started to influence the Malay community from the 13<sup>th</sup> century, in various aspects of life, including terms used in the local language.

Mohd Anuar Ramli suggested that the word *adat* also refers to the word *awad* in Arabic terminology which means continued action.<sup>3</sup> In addition, he indicated that the word *adat* is synonymous with another Arabic word *al-Daydan* which, in turn, refers to routine action.<sup>4</sup> Hence, any rational human actions which are routinely and conveniently performed are regarded as *adat*.<sup>5</sup> Thus, in this context, *adat* generally refers to the way of life of a community, in particular, the Malay community.<sup>6</sup>

It is suggested that *adat* in Malay culture is the set of cultural norms, values, customs and practices found among specific ethnic groups in Malaysia, Indonesia and the southern Philippines.<sup>7</sup> As custom is generally considered as a way of life in the Malay community, it could refer to various specific categories: actions and routine conduct in daily life; law and legal rules in the community; special custom (*adat istiadat*)

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<sup>2</sup> Othman Ishak, 'Urf and Customs as Being Practised among the Malay Community' (1986) 33(3) *Arabica* 352.

<sup>3</sup> Mohd Anuar Ramli, 'Instrumen 'Urf dan Adat Melayu sebagai Asas Penetapan Hukum Semasa di Malaysia (*Instrument of 'Urf and Malay Adat as the Basis of Islamic Contemporary Rules in Malaysia*)' (2006) 17 *Jurnal Pengajian Melayu (Journal of Malay Studies)* 253.

<sup>4</sup> Ibid, citing Muhammad b. Mukrim b. Manzur, *Lisan al-'Arab* (Dar Sadir, 1990) 316.

<sup>5</sup> Ramli, above n 3, citing Muhammad Rawwas Qal'ahji et al., *Mu'jam Lughat al-Fuqaha'* (Dar al-Nafais, 1996) 269.

<sup>6</sup> Ramli, above n 3.

<sup>7</sup> Encyclopædia Britannica, *Adat* (12 February 2015) Encyclopædia Britannica Online <<<http://www.britannica.com/EBchecked/topic/5336/adat>>.>

ceremonies such as marriage, birth, death and belief; and any community system such as a community institution.<sup>8</sup>

Hence, Malay *adat* is a custom of the Malay community which governs various aspects of their life, and which they practise in their daily lives. A Malay scholar, Mohd Din Ali, suggested that *adat* in its traditional Malay usage is not limited to its literal meaning of mere habit, usage and tradition of Malay people.<sup>9</sup> He argued that the *adat* or Malay custom is the institution whose laws and usages regulated the social, political and constitutional pattern of the government of the day.<sup>10</sup> For him, these laws are expressed in maxims of great antiquity and respect.<sup>11</sup> Thus, the Malay people also regard *adat* as a source of law which will be dealt with in the next section.

#### 4.2.2 Malay customary law (*Adat* law)

*Adat* or custom may also have legal effects, as a source of law, at least in the Malay community. In the context of the history of the adversary system, Bederman suggested that custom also serves as a source of English law, and applies as a binding rule of law which arises from a constant uniformity of conduct in the community or locality.<sup>12</sup> Custom may also include the set of local traditional laws and dispute resolution systems by which a society is or was regulated.<sup>13</sup> Therefore, this research suggests that the Malay *adat* or custom which was practised by the Malay community functions as a source of law, which gives legal effect to certain practices, known as Malay customary law (*adat* law).

Art 160 (2) Federal Constitution (Malaysia) also includes custom or usage as having the force of law in its definition of law.<sup>14</sup> In *Sahrip v Mitchell & Anor*,<sup>15</sup> the court also regarded custom which was established through long usage, and which had the common consent of a community, as an accepted norm or law of the place. Thus, *adat* law or Malay customary law is undeniably a source of law.

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<sup>8</sup> Ramli, above n 3.

<sup>9</sup> Mohd Din bin Ali, 'Malay Customary Law/Family' (1963) II(4) *Intisari* 34.

<sup>10</sup> *Ibid.*

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

<sup>12</sup> David J Bederman, *Custom as a source of law* (Cambridge University Press, 2010) 28-31.

<sup>13</sup> Britannica, above n 7.

<sup>14</sup> *Federal Constitution* (Malaysia) art 160 (2). "Law" includes written law, the common law in so far as it is in operation in the Federation or in any part thereof, and any custom or usage having the force of law in the federation or any part thereof.

<sup>15</sup> *Sahrip v Mitchell & Anor* (1877) Leic. Reports 466 (Benson Maxwell J.).

Minattur suggested that Malay customary law or Malay *adat* connoted rules of etiquette and the ceremonies prescribed for a particular occasion and those customs which have legal consequences.<sup>16</sup> In analysing whether *adat* or custom may have legal consequences, he further drew on an argument of several jurists who held that custom does have such consequences.<sup>17</sup> For instance, to include custom in a definition of law, Roy defined law as a body of rules of human conduct, either prescribed by long-established usage and customs, or laid down by a paramount political power.<sup>18</sup> In a similar application, Elias suggested that the law of a given community is the body of rules which are recognised as obligatory by its members.<sup>19</sup>

Although custom is unwritten, it still has legal consequences in the Malay community. As Marsden observed:

There is no word in the language of the island which properly and strictly signifies law; nor is there any person or class of persons among the *Rejangs* regularly invested with legislative power. They are governed in their various disputes, by a set of long established customs (*adat*) handed down to them from their ancestors, the authority of which is founded on usage and general consent. The Chiefs, in pronouncing their decision, are not, heard to say, 'so the law directs' but 'such is the custom'.<sup>20</sup>

History shows that inhabitants in the Malay states practised their own customs before the coming of colonial countries. Buss-Tjen described the situation of the people of Malacca who practised their *adat* when it was founded by Parameswara:

At the time of its foundation by Parameswara in 1402, Malacca was a little village inhabited by fishermen and pirates. It seems safe to presume that so far as law was administered, this was done by village elders who applied Malay *adat* law with perhaps a sprinkling of Hindu elements.<sup>21</sup>

At least two types of *adats* or customs were practised in the Malay states, known as *Adat Perpatih* and *Adat Temengung*, respectively. *Adat Perpatih* is matrilineal in nature and is practised by Malays in Negeri Sembilan and Naning, a part of Malacca.<sup>22</sup> Other parts of the Malay states followed a patriarchal-based custom, *Adat Temenggung*.<sup>23</sup> Winstedt referred to the *Adat Temenggung* as the Law of the Minister

<sup>16</sup> Joseph Minattur, 'The Nature of Malay Customary Law' (1964) 6 *Malaya Law Review* 327.

<sup>17</sup> Ibid, 327-328.

<sup>18</sup> Ibid, 327, citing S Roy, *Customs and Customary Law in British India*, 4.

<sup>19</sup> Ibid, 328, quoting TO Elias, *The Nature of African Customary Law*, (Manchester, 1956) 53.

<sup>20</sup> Ibid, 328, citing William Marsden, *The History of Sumatra*, (3rd Ed, 1811) 217.

<sup>21</sup> P.P. Buss-Tjen, 'Malay Law' (1958) 7(2) *The American Journal of Comparative Law* 248.

<sup>22</sup> Minattur, above n 16, 328.

<sup>23</sup> Ibid. See also Buss-Tjen, above n 256. Buss-Tjen writes: the law prevailing in the Malay states before British intervention was: *adat perpatih* in most areas of Negri Sembilan, and *adat temenggong* in the other parts of the Peninsula, with local variations.



for War and Police, which evolved for the mixed population of ports.<sup>24</sup> According to Windstedt, at the first stage, this law bore Hindu influences and was largely introduced from India, and was later modified by Islamic law with local variations.<sup>25</sup> Windstedt also referred to *Adat Perpatih* as the Law of Prime Ministers.<sup>26</sup>

#### 4.2.3 Islamic law

History marks the coming of Islam to the Malay states, firstly, in Malacca in the 14<sup>th</sup> century by means of trade with the Arabs.<sup>27</sup> In the early 15<sup>th</sup> century, when the Malacca Sultanate was created, its founder Parameswara converted to Islam, and was known as Iskandar Shah.<sup>28</sup> Since then, the Malay states which were derived culturally and politically from the Malacca Sultanate, have linked themselves with Islamic tradition, attempting to base their laws and government on Islamic principles and Malay custom.<sup>29</sup>

Islam is one of the religions of the Abrahamic tradition. Its believers are known as Muslims and believe in the one true God, Allah, who revealed His revelation known as the Quran, which became the basis of Islamic law, to an Arab Prophet, Muhammad.<sup>30</sup> There are five sources of Islamic law, in determining rules and regulations as follows:<sup>31</sup>

1. Quran<sup>32</sup>
2. Hadith (Traditions/Sayings of the Prophet Muhammad)
3. Ijma (Consensus of Companions of the Prophet)
4. Qiyas (inference by analogy)
5. Ijtihad (Exercise of judgement based on the above sources).

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<sup>24</sup> R. O. Windstedt, 'Old Malay Digests and Malay Customary Law' (1945) 1(April) *Journal of the Royal Asiatic Society of Great Britain and Ireland* 17.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Andrew Harding, 'Islamic Law in Malaysia' (1995) 2 *Y.B. Islamic & Middle E.L* 61.

<sup>28</sup> Ibid, 62.

<sup>29</sup> Ibid, 62.

<sup>30</sup> Richard C Foltz, *Animals in Islamic Tradition and Muslim Cultures* (Oneworld Publication, 2006) 11.

<sup>31</sup> Basheer Ahmad Masri, *Animal Welfare in Islam* (The Islamic Foundation, 2007) 26.

<sup>32</sup> For the purpose of this thesis, the texts and translations of Quran are based on the work by Abdullah Yusuf Ali, *The Holy Qur'an: Text and Translation* (Islamic Book Trust, 2007).

However, it is beyond the scope of this research to discuss in detail the sources of Islamic law in determining the rules. The next section will briefly explore the extent of Islamic law in animal protection.

*(a) Provisions of Islamic law relating to animals*

The first source of Islamic law, the Quran, has six chapters, named after animals: the Cow (chapter 2), the Cattle (chapter 6), the Bee (chapter 16), the Ant (chapter 28), the Spider (chapter 29) and the Elephant (chapter 105).<sup>33</sup> The Quran also mentions other species of animals like camels, horses, mules, donkeys, sheep, monkeys, dogs, pigs, snakes, worms, mosquitoes and flies.<sup>34</sup>

Islam is the religion of mercy. It promotes kindness towards animals and is opposed to cruelty to them. Many provisions in the Quran and the Traditions of the Prophet indicate the importance of being kind to animals. These occasions provide the principle of animal welfare in Islamic law:

*(i) Limitation of human use of animals*

Even though Islam permits the use of animals for food, clothing and transportation to satisfy human needs and interests, it reminds Muslims to use their power over animals in an acceptable manner, and not to exceed the necessary limits in using animals. The Quran provides:

Surely Allah does not love those who exceed the limits.<sup>35</sup>

Islam therefore demands that Muslims utilise animals wisely and humanely. Islam does not allow the excessive use of animals which could lead to unnecessary cruelty.

*(ii) Equality between humans and animals*

One of the verses in the Quran articulates the entitlement of animals to be viewed as equal to humans. The Quran says:

There is not an animal in the earth, nor a flying creature on two wings, but they are communities like you.<sup>36</sup>

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<sup>33</sup> Foltz, above n 30, 11.

<sup>34</sup> Ibid, 11.

<sup>35</sup> Quran, Chapter 5: 87.

<sup>36</sup> Quran, Chapter 6: 38.

Hence, Islam requires its believers to treat animals with respect, as there is no difference between humans and animals in terms of God's creatures.

*(iii) Promoting of kindness towards animals*

The Prophet Muhammad reminded his Companions to take the interests of animals into consideration. In one of the traditions, it was narrated that:

A man was walking on a road when he became very thirsty. He found a well and went into it and drank and came out. At the same time, there was a dog panting and eating earth out of thirst. The man said, "This dog has become as thirsty as I was". He went down into the well and filled his shoe and then held it in his mouth until he climbed out and gave the dog water to drink. Allah thanked him for it and forgave him for his sins. The Companion asked the Prophet Muhammad, "Messenger of Allah, do we have a reward for taking care of animals?" The Prophet answered, "There is a reward for compassion shown to every living thing."<sup>37</sup>

The reward for compassion shown to animals in this tradition evidences the importance of the humane treatment of animals in Islam.

*(iv) Prevention of cruelty*

The Prophet also told the Companions to prevent animal cruelty by not torturing and killing animals for fun. In one of the Hadith, the Prophet said:

A woman was doomed to hell because she imprisoned a cat. She did not give the cat food or drink nor did she free the cat to look for the food by itself.<sup>38</sup>

The punishment for cruelty was to be put in the hell that this tradition provides, and serves as a deterrent for Muslims to avoid cruelty to animals.

*(v) Animal slaughtering with mercy*

As to slaughtering animals for food, the Prophet reminded his Companions to be merciful in slaughtering, as he said:

Verily Allah has enjoined goodness to everything, so when you kill, kill in a good way and when you slaughter, slaughter in a good way. So every one of you should sharpen his knife, and let the slaughtered animal die comfortably.<sup>39</sup>

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<sup>37</sup> Muwatta: Hadith 49:10:23, quoted in Foltz, above n 19.

<sup>38</sup> Bukhari: Hadith 3: 553.

<sup>39</sup> Bukhari: Hadith 21: 4810.

This tradition puts responsibility directly on Muslims to treat animals humanely when slaughtering them. It covers the humane killing methods designed to ensure that animals die very quickly during the slaughtering process to ease their pain.

These elements provided by Islamic law infiltrated into Malay custom when Islam spread its teaching to Malacca during the 14<sup>th</sup> century. It successfully influenced the provisions in the Malay digests which provide rules and regulations relating to the conduct of humans towards animals. The next section will discuss various Malay digests which serve as legal instruments particularly in providing protections for animals.

#### 4.2.4 The Malay digests

Generally, most of the *adats* are in unwritten form. However, there are records showing that various parts are written in the form of digests or codes. Buss-Tjen listed written digests under *Adat Perpateh* to include *A Digest of Customary Law from Sungai Ujong*, *A Minangkabau Legal Digest from Perak* and *a Digest Law of Kuala Pilah*.<sup>40</sup> Numerous rules and digests could be found under *Adat Temenggung*: one of them was the well-known and popular *Laws of Malacca* which also contained the maritime rules.<sup>41</sup> Other digests under *Adat Temenggung* were the *Laws of Pahang*, *Laws of Perak*, *Laws of Kedah* and *Laws of Selangor*.<sup>42</sup> History also records that digests in the states of Pahang, Perak, Kedah and Brunei were adopted and in general use as other versions of the *Laws of Malacca*.<sup>43</sup>

The earlier versions of the digests under Malay customary law were under Hindu influence. The Indian traders had started their businesses on the Malayan Peninsula at the beginning of the 7<sup>th</sup> century and they had already established their first settlement by then. Between the 7<sup>th</sup> and 14<sup>th</sup> centuries, Indian culture had already influenced the Malayan way of life, introducing Hinduism, Indian law and language, and a new governmental system for native tribal organisations as well as a system of kingship.<sup>44</sup>

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<sup>40</sup> Buss-Tjen, above n 21, 259.

<sup>41</sup> Ibid. The law with regard to maritime matters in Malacca is also known as the Maritime Laws of Malacca, a continuation of Laws of Malacca. See also Winstedt, above n 24, 20-25.

<sup>42</sup> Buss-Tjen, above n 21, 259.

<sup>43</sup> National Library of Malaysia, 'Hukum Kanun Melaka (Laws of Malacca): Nomination Concerning Malaysia, Submitted to UNESCO for Memory of the World Register.' (National Library, 2003) 4.

<sup>44</sup> Buss-Tjen, above n 21, 248.

When Islam spread into Malacca between the 13<sup>th</sup> and 14<sup>th</sup> centuries, it started to influence the *adat* law.<sup>45</sup> It gradually infiltrated into the life of the Malay community in Malacca, and with the conversion of the first Sultan (King) of Malacca as a Muslim, it steadily influenced the administrative policy of the Malacca Sultanate.<sup>46</sup> The earlier version of the *Laws of Malacca*, which was previously based on Hindu influence, was then adapted to the rule of Islamic law.<sup>47</sup> On this point, Winstedt argued that the latest version of the *Laws of Malacca* compiled in 1523 contained full relics of indigenous custom and borrowings from the period of Hinduism, which were modelled on the textbooks of Muslim canon law and contained many of its provisions.<sup>48</sup> This was also true for the digests in other Malay states which based their provisions on the *Laws of Malacca*.<sup>49</sup>

However, Wilkinson reminded us that the so-called laws of the Malay states such as the *Laws of Malacca* and the *Maritime Law of Malacca* were never actually enacted by any legislative authority.<sup>50</sup> Wilkinson regarded the laws of the Malay states as mere digests of Malay law, which may describe a truthful picture or set of facts, but not the actual law.<sup>51</sup> The laws were formerly the daily practices of the Malay people which became common or popular custom, which were unwritten. Then, the Malay authority compiled these practices and put them in written form and declared them to be the law. The enforcement of this law may, to a certain extent, have operated only in the closed boundaries of the Sultan or King of the Malay community. Nevertheless, the existence of these written digests is evidence of an instrument for the administration of justice in Malay traditional society, particularly in its great period between the 15<sup>th</sup> and 16<sup>th</sup> centuries.

#### 4.2.5 Provisions relating to animals

There are numerous provisions in the digests of Malay customary law with regard to animals. This research refers to the provisions of several digests, namely, the *Laws of Malacca*, the *Laws of Kedah*, *Ninety-Nine Laws of Perak* and the *Johor Code* which

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<sup>45</sup> Ibid, 264.

<sup>46</sup> Ibid, 248.

<sup>47</sup> Winstedt, above n 18.

<sup>48</sup> Ibid, 17.

<sup>49</sup> Among states which adopted the Laws of Malacca were Perak, Pahang, Kedah, Brunei and Selangor.

<sup>50</sup> R.J. Wilkinson, 'Law. Part I. Introductory Sketch' (Federated Malay States Government Press, 1922) 3-4.

<sup>51</sup> Ibid.

became the sources of law of the Malay states during the 15<sup>th</sup> and 16<sup>th</sup> centuries. During this period, for instance, the *Laws of Malacca* became the source of law of the Malacca Sultanate. The *Laws of Malacca* was most likely first compiled during the time of Sultan Muhammad Shah, the third ruler of Malacca (1424–1444) and was completed during the time of Sultan Muzaffar Shah (1450–1458). This was considered to be the golden period of the Malacca Sultanate.<sup>52</sup>

In addition to the *Laws of Malacca*, there were other Malay digests which provide rules on animals with which this research is concerned. They are the *Port Laws of Kedah*, the *Laws of Dato' Sri Paduka Tuan* (Kedah), *Ninety-Nine Laws of Perak* and the *Johor Code*. This study classifies the provisions in the digests of Malay customary laws with regard to animals into four categories: animal theft; inflicting injury to animals; responsibilities and liabilities of the animal owner; and punishment for animals.

For the purpose of this research, reference to the provisions of the *Laws of Malacca*, *Ninety-Nine Laws of Perak* and the *Johor Code* are taken from Liaw Yock Fang in *Undang-Undang Melaka (The Laws of Malacca)*<sup>53</sup> and Ahmad Mustaffa Babjee in *History, Development and Prospects of the Animal Industry and Veterinary Services in Malaysia*.<sup>54</sup> The *Laws of Kedah 1667* and the *Port Law of Kedah 1650* are referred from RO Winstedt's 'Kedah Laws'.<sup>55</sup>

#### (a) Animal theft

The customary legal digests regard animal theft as a criminal offence. The *Laws of Malacca* provide monetary fines for theft. Chapter 11.4 of the *Laws of Malacca* provided:

Concerning a man who steals a buffalo, a cow or goat; if he steals them from their pens, he shall be fined 1¼ tahl<sup>56</sup> and shall be required by the judge to pay a suitable price for the buffalo, cow or goat stolen. If he steals (cattle) in an open field, the fine is ten emas<sup>57</sup> and in addition, he must pay the price of the animals.<sup>58</sup>

<sup>52</sup> Malaysia, above n 5.

<sup>53</sup> Liaw Yock Fang, *Undang-Undang Melaka (The Laws of Malacca)* (Martinus Nijhoff, 1976).

<sup>54</sup> Ahmad Mustaffa Babjee (ed), *History, Development and Prospects of the Animal Industry and Veterinary Services in Malaysia* (Department of veterinary Services Malaysia, 1994)

<sup>55</sup> R.O. Winstedt, 'Kedah Laws' (1928) VI(II) *Journal of the Malayan Branch of Royal Asiatic Society* 1.

<sup>56</sup> Malay customary valuation of property for gold currency.

<sup>57</sup> Malay customary valuation for gold money.

<sup>58</sup> *Laws of Malacca* (Malacca) chapter 11.4. The *Johor Code* also provides the same provision.

However, the *Laws of Kedah* provide a unique punishment for animal thieves. The offender would be publicly denounced:

Buffalo thieves shall have the head of the beast hung from their necks and be taken around by a crier with a gong, and cry out, "I am a buffalo-thief! Behold me!"<sup>59</sup>

*(b) Inflicting injury on animals*

Malay custom also regarded animal killing or any act which could inflict injury to animals as not an offence towards the animals themselves, but rather an offence to the person who owned the animal or animals. Punishment for the offence depended on the status of the owner of the animal, namely, those of the high class (leaders and officials of the state) and those classified as ordinary persons. For example, the *Laws of Malacca* and the *Johor Code* provided that if someone killed or inflicted injury to an animal which was owned by any officer of the state, the person concerned shall become the slave of the said officer:

If a man stabs a buffalo belonging to the Chief Minister, the Police-Chief of a high dignitary or the Treasurer or the Harbour-master, he has to become a slave (of the owner). Such is the law.<sup>60</sup>

However, if the owner of the animal was an ordinary person, he did not have to become a slave, but had to pay an adequate price for the animal killed and furthermore should be subject to monetary fines.<sup>61</sup>

*(c) Responsibilities and liabilities of animal owners*

The digests also provide for the responsibilities and liabilities of animal owners.<sup>62</sup> The custom required that animal owners must tie up their animals properly at night.<sup>63</sup> The landowner was also responsible for fencing his or her land so as to avoid harm which may be caused by animals entering the land of others. Furthermore, the owner of animals was responsible for ensuring that their animals did not harm others. Where they did, the owner would be liable for negligence and would have to make monetary compensation.

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<sup>59</sup> *Port Laws of Kedah 1650* (Kedah) chapter 27.

<sup>60</sup> *Laws of Malacca* (Malacca) chapter 21.2. The *Johor Code* also provides a similar provision.

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

<sup>62</sup> *Ibid.*, chapter 43.

<sup>63</sup> Babjee, above n 58, 225.

The liabilities of animal owners in the digests included failure to pen animals at night. The animal owner must also not tether his or her animal or animals in any unsuitable place.

All cultivators should fence (their fields) properly and make ditches around them. If a buffalo or an ox or a goat enters (the field), you are not to stab it. At night, the owner of buffaloes or oxen should not let (the animals) stray about. If (an animal) is allowed to stray and it enters someone else's garden or rice-fields, whether irrigated or not; if it is stabbed to death by the owner of the garden or the rice-field, the owner of the buffalo or ox has to suffer the loss.<sup>64</sup>

The owner must not tether his buffalo in any unsuitable place.<sup>65</sup>

The animal owner could also be liable for the injury suffered by persons which is caused by his or her animals. The *Ninety-Nine Laws of Perak*, for example, provided for the liabilities of the animal owner in the case where his or her animals inflicted injury or killed a person. The owner of a dog which bit a person would be liable to pay the cost of medicine to the aggrieved person and was also subject to a monetary fine.<sup>66</sup> The owner of an elephant which killed somebody would be liable to pay the funeral expenses for the dead person and should also be fined.<sup>67</sup> The same liability is also applied to the owner of a buffalo, where the buffalo killed a person, where the owner should pay the funeral expenses of the deceased and should also be fined.<sup>68</sup> The *Laws of Malacca* also provided that the owner who tethered his animals in an unsuitable place such as in a public pathway, which caused the animals to harm others, should be fined.<sup>69</sup>

The digests also put the liability on the animal owner if the animals harmed the property of others. The *Laws of Kedah 1667*, for instance, required the animal owner to send his buffalo to a special place particularly during the time when the rice is planted. It was a duty of an animal owner who did not send his or her animals to a special place to ensure that his or her animals did not to eat the rice. Furthermore, the owner was liable and should pay a fine if his or her animals broke a fence surrounding the rice paddies.<sup>70</sup> The *Ninety-Nine Laws of Perak* also placed the responsibility of animals like lions and elephants on the owner to ensure that those animals were kept at a distance

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<sup>64</sup> *Laws of Malacca* (Malacca) chapter 43.3.

<sup>65</sup> *Ibid*, chapter 21.2.

<sup>66</sup> *Ninety Nine Laws of Perak* (Perak) chapter 69.

<sup>67</sup> *Ibid*, chapter 70.

<sup>68</sup> *Ibid*, chapter 71.

<sup>69</sup> Chapter 21.2 of the *Laws of Malacca*, quoted in Fang, above n 58.

<sup>70</sup> Chapter 5 of the *Laws of Kedah 1667*, quoted in Winstedt, above n 59, 8.



of at least three miles from the village. If the lion, the elephant or any large animals damaged another person's crop, the owner would be liable to pay damages.<sup>71</sup>

*(d) Punishment for animals*

While the animal owner was liable for the acts of animals which inflicted injury or killed others, the animals themselves suffered greater consequences. It is the traditional Malay custom to confiscate animals which cause harm to others. For example, the dog which bit and caused personal injury had to be killed.<sup>72</sup> The elephant also received the same treatment if it killed a person.<sup>73</sup> Domesticated animals like cattle, particularly buffalo, which caused the death of a person must be slaughtered in order to furnish meat for the funeral feast of the deceased.<sup>74</sup>

### **4.3 Period of British occupation**

#### **4.3.1 British influence**

The British embarked on their empire in the Malay Peninsula through their occupation of the Straits Settlements, including Penang, Singapore and Malacca. The Straits Settlements were initially part of the Malay states: Penang was a part of Kedah, Malacca was independent and part of the great empire of Malay states during the 15<sup>th</sup> and 16<sup>th</sup> centuries, and Singapore was a part of Johor. The British occupation started in Penang, in 1786, when Francis Light and his armoury of the East India Company (EIC) discovered an island belonging to the Sultan of Kedah.<sup>75</sup> Later, in 1819, the British acquired Singapore from the Sultan of Johor.<sup>76</sup> In 1824, the British took possession of Malacca from Holland.<sup>77</sup> After that, the British extended their rule to include the other Malay states.

Glos argued that it was a tradition of the British to introduce English law as the law of the land in all British possessions, including the Straits Settlements.<sup>78</sup> Therefore, in 1807, King George III granted the First Charter of Justice to the EIC to administer justice by establishing a Court of Judicature which was to exercise all the jurisdiction of

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<sup>71</sup> Chapter 45 of Ninety-Nine Laws of Perak, quoted in Babjee, above n 58, 225.

<sup>72</sup> Chapter 69 of Ninety-Nine Laws of Perak, *ibid*, 226.

<sup>73</sup> Chapter 70 of Ninety-Nine Laws of Perak, *ibid*.

<sup>74</sup> Chapter 71 of Ninety-Nine Laws of Perak, *ibid*.

<sup>75</sup> George E Glos, 'The Administrative Structure and Legal System of Malaysia' (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 1965) 100.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Ibid*, 101.

the English Courts of Law and Chancery, as far as circumstances would admit.<sup>79</sup> At the same time, the court was also to exercise jurisdiction as an Ecclesiastical Court, so far as the several religions, manners and customs of the inhabitants would admit.<sup>80</sup> In 1826, King George VI granted the Second Charter of Justice, to extend the jurisdiction of the first charter, to the new members of the Settlements, Singapore and Malacca.<sup>81</sup> In 1855, the Third Charter of Justice was granted to reorganise the court system and the administration of justice in the Straits Settlements.<sup>82</sup>

Glos also suggested that the British possessions of the Malay Peninsula initially comprised a small part of the Malay Peninsula which was limited to three settlements (Penang, Malacca and Singapore), but later expanded to the whole Peninsula.<sup>83</sup> Unlike the British occupation in the Straits Settlements, which was acquired by way of possession, the influence of the British in other Malay states was started at the request of the Malay leaders themselves, in seeking protection from the British government due to the chaos and general disorder in those Malay states.<sup>84</sup>

In 1874, Perak was the first Malay state to have British protection when it signed the Pangkor Treaty which enabled a British officer to advise the Sultan of Perak in all state administrative matters other than matters relating to religion and the customs of the Malays. The move was followed by Selangor in 1875 which later in 1887 came under British protection, and in 1889 British protection was extended to Negeri Sembilan.<sup>85</sup> In exchange for British protection, the Rulers of these states no longer had absolute power over state administrative matters, and had to refer to the British administrative officer who advised the Ruler on all matters except those pertaining to religion and the customs of the Malays.<sup>86</sup> In 1895, all these states were put into a federation which was to be known as the Federated Malay States, under a Treaty of Federation 1895. Under this Treaty, all Rulers of those four states agreed to receive a British Resident-General as the head of all public administration.<sup>87</sup>

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<sup>79</sup> Ahmad Ibrahim, *Malaysian Legal History* (University of Malaya, 1970) 33; see also Glos, above n 78, 101.

<sup>80</sup> Ibrahim, above n 79, 101.

<sup>81</sup> Ibid; Glos, above n 78, 110.

<sup>82</sup> Ibrahim, above n 79, 33; Glos, above n 78, 110.

<sup>83</sup> Glos, above n 78, 101.

<sup>84</sup> Ibid, 110.

<sup>85</sup> Ibid, 78, 110.

<sup>86</sup> Ibid, 111.

<sup>87</sup> Ibid.

The British gradually increased their influence in the remaining Malay states in the Peninsula which were under Siamese protection. In 1909, the Kingdom of Thailand surrendered the four states of the Malay Peninsula to the British through the Anglo-Siamese Treaty of 1909. These four Malay states which became known as the Unfederated Malay States then signed an agreement with the British to accept a British Advisor in their respective states. This person would advise the Ruler in all administrative matters except those matters relating to religion and the customs of the Malays.<sup>88</sup> Johor, the only independent Malay state which had no influence from other foreign states, also accepted a British Advisor in 1914.<sup>89</sup>

During the Second World War, Japan invaded and occupied the Malay states from 1942 to 1945. After the Japanese surrender in September 1945, the British government took over the administration of Malaya in April 1946. It moved to weld all the Malay states into one country under one administration, known as the Malayan Union. Due to the establishment of the Malayan Union which also included two states of the Straits Settlements, Penang and Malacca, the Straits Settlements came to an end, and Singapore became a separate British colony on 1 April 1946.<sup>90</sup> Even though several Rulers of Malay states had signed the agreement of the Malayan Union, which ceded full jurisdiction to the British government, the Malayan Union was abrogated due to considerable opposition by the Malay people, who insisted on having an independent administration.<sup>91</sup> The ensuing discussion and negotiation between Malay representatives and the British government resulted in the establishment of the Federation of Malaya on 1 February 1948, which was self-governed, but not independent.<sup>92</sup> On 31 August 1957, the British government granted full independence to the Federation of Malaya.

Therefore, this research suggests that, at least from 1930, the British already influenced the administration of all Malay states as their Rulers agreed to accept a British officer in their respective states who would advise the Ruler in all state administration except on religion and the customs of the Malays. This research also suggests that the British Advisor would refer to English law and policy in advising the Rulers of the Malay states in administrative matters. Hence, it is suggested in this

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<sup>88</sup> Ibid, 113. Agreement between British and the Unfederated Malay States. Terengganu (22 April 1910), Kelantan (22 October 1910), Kedah (1 November 1923) and Perlis (28 April 1930).

<sup>89</sup> Ibid, 114. Agreement between British and the Sultan of Johor (12 May 1914).

<sup>90</sup> Ibid, 115.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

research that the general advice of a British Advisor was indirectly influenced by English law and policy, and the legislation which was based on English statutes was directly influenced by English law and policy.

*(a) The Straits Settlements*

As discussed previously, the Straits Settlements which comprised Penang, Singapore and Malacca, which were formerly part of the Malay Peninsula, were possessions or protectorates of the British. Those states were originally under the administration of Rulers of the Malay states. In the administration of justice, the first Charter of Justice 1807 was first introduced to Penang; then, the Second of Charter of Justice 1826 extended the jurisdiction of the 1807 Charter to Singapore and Malacca; and, later, the Third Charter of Justice 1855 confirmed the jurisdiction of the court of judicature.

An important consideration of this research concerns the First Charter of Justice which outlined the objectives and purposes of the administration of justice in countries which the British controlled. The second and third charters of justice were extensions of the first charter. The 1807 Charter was granted by the Crown to establish a court of judicature in Penang (later extended to Singapore and Malacca via the 1824 Charter). This court had the jurisdiction and powers of the Superior Courts of England and its several justices, judges and Barons thereof so far as circumstances would admit, and also those of an Ecclesiastical Court, so far as the several religions, manners and customs of the inhabitants would admit.

The court applied English law with necessary modifications to suit the needs of the settlements.<sup>93</sup> Even though there was controversy as to which law had to be applied in the Straits Settlements, which previously were part of Malay states which applied Islamic law, in particular, Kedah and Johor, the Privy Council in *Ong Cheng Neo v Yeap Cheah Neo & Ors*,<sup>94</sup> held that:

... In either view the law of England must be taken to be the law of the land in so far as it is applicable to the circumstances of the place and modified in its application by these circumstances

Therefore, the English law was the law of the Straits Settlements with necessary modifications as to its application.

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<sup>93</sup> Ibid, 109.

<sup>94</sup> *Ong Cheng Neo v Yeap Cheah Neo & Ors* (1872) 1 Ky. 326

Before legislating the animal ordinance in the Straits Settlements in 1902, the applicable statute to be applied is unknown. This research assumes that two types of laws may apply in the case relating to animals. Firstly, in the absence of English law or when the English law was yet to be referred by the judges, the *adat* law or custom of the Malays would be applicable. For example, *Kedah Port Laws 1640* and the *Laws of Kedah 1667* would apply to Penang, the *Laws of Malacca* would apply to Malacca and the *Johor Code* would apply to Singapore. Secondly, due to the establishment of the *Charter of Justice* and the *Civil Law Ordinance 1878* (Straits Settlements), the law to which the judge would refer is the law that was administered in England at a corresponding period.<sup>95</sup> Therefore, the law relating to animals may include the *Prevention of Cruelty to Animals Act 1849* (England) and the *Cruelty of Animal Acts 1876* (England) with necessary modifications to suit the needs of the settlements.

In 1902, the government of the Straits Settlements legislated a specific law concerning animal cruelty, known as the *Cruelty to Animals Ordinance 1902* (Straits Settlements).<sup>96</sup> This ordinance specified the acts which could be classified as being cruel to animals including beating, ill-treating, torturing, over-riding or over-loading or causing or procuring animals to be beaten, with a maximum fine not exceeding one hundred dollars and imprisonment for three months.<sup>97</sup> The ordinance also prohibited the use of animals in fighting and provided the penalty of a fine not exceeding one hundred dollars and imprisonment for up to six weeks.<sup>98</sup> The use of unfit animals as beasts of burden was also regarded as an offence with a maximum penalty not exceeding one hundred dollars and imprisonment of up to three months.<sup>99</sup> The ordinance also provided for rewards for informers in animal cruelty cases. This was designed to facilitate the prosecution of those participating in cock fighting as well as other forms of animal combat.<sup>100</sup>

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<sup>95</sup> Glos, above n 78.

<sup>96</sup> Law of the Straits Settlements 1901-1907 (Volume II), Ordinance 77 of 1902 (27<sup>th</sup> June 1902), 73-75.

<sup>97</sup> *Animal Ordinance 1902* (Straits Settlements) s 7.

<sup>98</sup> *Ibid*, s 8.

<sup>99</sup> *Ibid*, s 9.

<sup>100</sup> *Ibid* s 10. For instance, notices are put in local newspapers calling on the public to report improper treatment of animals in Singapore. See, Superintendent P.C.A., 'Prevention to Cruelty to Animals', *New Straits Times* (Singapore), 6 July 1903; Superintendent P.C.A., 'Prevention of cruelty to Animals', *New Straits Times* (Singapore), 5 April 1902; <http://newspapers.nl.sg/Digitised/Article.aspx?articleid=straitstimes19020405.2.2.2>

(b) *Malay States*

Through the *Treaty of Federation 1895*, the British government placed the states of Perak, Selangor, Pahang and Negeri Sembilan into a single federation to be known as the Federated Malay States. The effect of the 1895 Treaty was that the states had to accept a British Resident-General as the head of all administrative matters, advising the Rulers of the Malay states in all matters, except with regard to religion and the customs of the respective states.

The British administered the other states that were not included in the Federated Malay States by the *Anglo Siamese Treaty 1909*. Under this treaty, the Thai Kingdom surrendered four states under her protection to the British: Kedah, Kelantan, Terengganu and Perlis. These states, including Johor, which were known as the Unfederated Malay States, then agreed to accept a British Advisor in all their state administrative matters.

The law was enacted by legislation. The principles of English law were introduced by the English, particularly the English-educated judiciary, in all matters which were not provided for in the local laws in the Malay states.<sup>101</sup> The British Residents and Advisors in the Malay states adopted English law in regulating important business transactions and state affairs, which led to the introduction of a large portion of English law in the Malay states at that time.<sup>102</sup>

The influence of English law in the Malay states was further enhanced by the *Civil Law Act 1937* (Federated Malay States), which introduced the English common law of equity to the Federated Malay States with minor modifications:

Save in so far as other provision has been or may hereafter be made by any written law in force in the Federated Malay States, the common law of England, and the rules of equity, as administered in England at the commencement of this Enactment (12 March 1937), other than any modification of such law or any such rules enacted by statute, shall be in force in the Federated Malay States; provided always that the said common law and rules of equity shall be in force in the Federated Malay States so far only as the circumstances of the Federated Malay States and its inhabitants permit and subject to such qualifications as local circumstances render necessary.<sup>103</sup>

The application of this enactment was extended to all other states in 1951 through the *Civil Law Extension Ordinance 1951* (Federation of Malaya):

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<sup>101</sup> Ibrahim, above n 79, 25.

<sup>102</sup> Glos, above n 78, 116.

<sup>103</sup> *Civil Law Enactment 1937* (Federated Malay States) s 2 (i).

Section 2 of the Civil Law Enactment 1937 of the Federated Malay States is hereby extended to apply to the states of Johor, Kedah, Kelantan, Perlis and Terengganu and, with the modification set out in the Schedule to this Ordinance shall have effect in all the Malay States.<sup>104</sup>

It is important to note that statute law in the Malay states was still based on the religious practices and customs of the inhabitants, even though the laws were heavily influenced by English statutes, which the British Residents and Advisors in the particular states referred to as authoritative.<sup>105</sup> For example, the digests of Malay customary law such as *the Laws of Malacca*, *the Ninety-Nine Laws of Perak*, *Laws of Kedah* and the *Johor Code*, among others, which were compiled before the coming of the British were largely concerned with buffaloes which were at that time the most popular cattle which the Malays owned and used as working animals. Many provisions in the Malay digests provide for the resolution of disputes concerning buffaloes. In acknowledging the importance of buffaloes, the *Buffaloes Enactment 1899* was enacted. The enactment concerned the control of buffaloes and put the responsibilities and liabilities on the buffalo owners in case of damages or harm caused by their animals. The regulation concerning buffaloes is still maintained in recent times in Malaysia by the *Control of Cattle Enactment* which all states of Malaysia currently enforce.

The first law in the Malay states concerning the protection of animals was legislated in 1904 in all Federated Malay States. It was known as the *Cruelty to Animal Prevention Enactment 1904*.<sup>106</sup> This law was amended in 1910 to consolidate a new enactment for all Federated Malay States and became the *Cruelty to Animal Prevention Enactment 1910* (Federated Malay States).<sup>107</sup> This enactment of the Federated Malay States resembles the *Cruelty to Animals Ordinance 1902* (Straits Settlements), which outlined with some modifications similar types of cruelty to animals and awarded financial incentives to any informer.<sup>108</sup>

The Unfederated Malay States also had their legislation relating to animals. The provisions in the legislation of the Unfederated Malay States resemble the provisions in

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<sup>104</sup> *Civil Law Extension Ordinance 1951*(Federation of Malaya) s 2.

<sup>105</sup> Glos, above n 78, 117.

<sup>106</sup> The Acts concerning animal cruelty prevention in the Federated Malay States are: the *Cruelty to Animal Prevention Enactment 1904* (Perak), the *Cruelty to Animal Prevention Enactment 1904* (Selangor), the *Cruelty to Animal Prevention Enactment 1904* (Pahang) and the *Cruelty to Animal Prevention Enactment 1904* (Negeri Sembilan).

<sup>107</sup> Federated Malay States Enactment No 6/1910: enacted on 1 November 1910; enforced on 5 December 1910.

<sup>108</sup> *Cruelty to Animal Prevention Enactment 1910* (Federated Malay States) s 6.

the Federated Malay States. These can be found, for instance, in: the *Prevention of Cruelty Enactment 1912* (Kedah),<sup>109</sup> the *Cruelty to Animal Prevention Enactment 1912* (Perlis),<sup>110</sup> the *Prevention of Cruelty to Animals Enactment 1930* (Kelantan)<sup>111</sup> and the *Prevention of Cruelty to Animals Enactment 1937* (Terengganu).<sup>112</sup> To control the organisation of animal combat and elements of gambling in animal fighting, the states of Kedah and Kelantan also enacted separate legislation regulating animal fighting and animal amusement. They are: the *Buffalo-Fighting and Cock-Fighting (Prevention) Enactment 1935* (Kedah)<sup>113</sup> and the *Gambling and Prohibited Amusement 1930* (Kelantan).<sup>114</sup>

These enactments specified the act or acts which could be classified as cruelty to animals. These included beating, ill-treating, torturing, over-riding or over-loading or causing or procuring animals to be beaten, ill-treated, over-driven, or over loaded, or failure to supply sufficient food or water for animals in confinement or in the course of transport. A maximum fine not exceeding one hundred dollars and imprisonment for three months was applicable.<sup>115</sup> The ordinance also included a penalty for any person who carried or caused to be carried any animal in a cruel manner. The penalty was a fine not exceeding one hundred dollars and imprisonment for a period of up for three months.<sup>116</sup> The use of unfit animals in labour was also regarded as an offence for a maximum penalty of a fine not exceeding one hundred dollars and imprisonment for up to three months.<sup>117</sup> The ordinance also provided awards for informers in animal cruelty cases. This was designed to enhance public participation in fighting animal cruelty cases.<sup>118</sup>

#### 4.4 Period after independence

##### 4.4.1 Reception of English law

As noted previously in this chapter, English common law and rules of equity were applied in the Straits Settlements by virtue of the three Charters of Justice. These were

<sup>109</sup> Kedah Enactment No. 83 of 1912.

<sup>110</sup> Perlis Enactment No. 2 of 1912.

<sup>111</sup> Kelantan Enactment No. 27 of 1930.

<sup>112</sup> Terengganu Enactment No. 64 of 1937.

<sup>113</sup> Kedah Enactment No. 30 of 1935.

<sup>114</sup> Kelantan Enactment No. 30 of 1930.

<sup>115</sup> *Cruelty to Animal Prevention Enactment 1910* (Federated Malay States) s 7.

<sup>116</sup> *Ibid*, s 5.

<sup>117</sup> *Ibid*, s 6.

<sup>118</sup> *Ibid*, s 14.



enacted before independence. They further applied to Federated Malay States and Unfederated Malay States, by the *Civil Law Enactment 1937* (Federated Malay States) and the *Civil Law (Extension) Ordinance 1951* (Federation of Malaya). By virtue of the *Civil Law Act 1956* (Federation of Malaya), the law was further applied to Malacca and Penang, which later joined the Federation of Malaya in 1948. After independence and the admission of the Borneo states to Malaysia in 1963, the *Civil Law Act 1956* (Malaysia) was amended to extend the application of English law to Sabah and Sarawak.<sup>119</sup>

Therefore, after independence, the *Civil Law Act 1956* (Malaysia) provided for the extension of English common law and rules of equity to Malaysia. In that regard, the court in West Malaysia would only apply the English common law and rules of equity as administered in England before or on 7 April 1956.<sup>120</sup> The court in Sabah and Sarawak, also, would only apply the English common law and rules of equity together with the statutes of general application as administered in England before or on 1 December 1951 (Sabah)<sup>121</sup> and 12 December 1948 (Sarawak).<sup>122</sup> However, the application of English common law, rules of equity and the statutes of general application, could only be applied if there was a lacuna in the Malaysian law and in circumstances permitted by the respective inhabitants of Malaysia.<sup>123</sup> The rules of equity would also prevail in cases of conflict with reference to the same matter.<sup>124</sup>

As Malaysia achieved independence on 31 August 1957, this thesis observes that it maintained the laws relating to animals which were enacted during British occupation.

Before independence, various laws relating to animals were in operation in two different jurisdictions: the Straits Settlements and the Malay states. The law in the Straits Settlements was *Animal Ordinance 1902*. As the Malay states comprised Federated Malay States and Unfederated Malay States, there were different laws relating to animals. There was a piece of legislation in common for Federated Malay States, namely the *Cruelty to Animal Prevention Enactment 1910* (Federated Malay

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<sup>119</sup> *Civil Law Act 1956* (Malaysia) (Amended 1972).

<sup>120</sup> *Ibid*, s 3 (i) (a).

<sup>121</sup> *Ibid*, s 3 (i) (b).

<sup>122</sup> *Ibid*, s 3 (i) (c).

<sup>123</sup> *Ibid*, proviso of s 3 (i).

<sup>124</sup> *Ibid*, s 3 (ii).

States). At the same time, each respective state of the Unfederated Malay States enacted its own legislation<sup>125</sup> (see Chapter 4.3.1 (b)).

Before independence in 1957, these laws were under the jurisdiction of the Veterinary Services of the respective administrations of the Straits Settlements and the Malay states. However, in 1934, the headquarters of the Department of Veterinary Services was transferred from Singapore to Kuala Lumpur. From then, the British government restructured the Department of Veterinary Services under the management of the Director of Veterinary Research and Veterinary Advisor.<sup>126</sup>

In 1953, the Department of Veterinary Services undertook an effort to enact the Animals Ordinance, consolidating all laws relating to animals which were previously under the respective territories and states to become a piece of federal legislation. This ordinance was enacted on 30 April 1953 to be known as the *Animals Ordinance 1953*.<sup>127</sup> This law has undergone several amendments and improvements and was recently revised on 16 March 2006. This became the latest version of law to be in operation in Malaysia and is cited as the *Animals Act 1953*.<sup>128</sup>

As there were many critics to this revised Act which is alleged to maintain the old approach towards protection of animals, the Malaysian government has considered amending it and enacting a new law to be called the '*Animal Welfare Bill 2012*'. However, as of February 2014, the bill has yet to be tabled in Parliament.

#### 4.4.2 Legislative power

Malaysia has a federal system of governance which means that its laws, including those that affect animals, are made at both federal and state levels or are concurrently legislated by Federal Parliament and the respective State Legislative Assembly. The Ninth Schedule of the Federal Constitution details those areas of the law which are the exclusive mandate of the federal government and those areas of the law in which both federal and state governments can make laws concurrently.<sup>129</sup>

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<sup>125</sup> *Prevention of Cruelty Enactment 1912* (Kedah), *Cruelty to Animal Prevention Enactment 1912* (Perlis), *Prevention of Cruelty to Animals Enactment 1930* (Kelantan) and *Prevention of Cruelty to Animals Enactment 1937* (Terengganu).

<sup>126</sup> M.N. Mohd Noor et al, 'The Organisation of the Department of Veterinary Services in Malaysia' (2003) 22(2) *Rev. sci. tech. Off. int. Epiz* 486-487.

<sup>127</sup> Malayan Ordinance No 17 of 1953.

<sup>128</sup> Malaysian Act 647 of 2006.

<sup>129</sup> *Federal Constitution* (Malaysia) Ninth Schedule. List I-Federal List (art 74, 77), List II-State List (art 95B (1) (a)) and List III-Concurrent List (art 95B (1) (b)).

List III of the Ninth Schedule of the Federal Constitution enumerates matters upon which the federal or the state government may legislate, but in the event of conflict between the state and the federal government, the Act of Federal Parliament prevails. Under item (3) and (4) of the Concurrent List of the Ninth Schedule, both federal and state arms of government have the power to pass laws relating to the protection of wild animals and wild birds, animal husbandry, prevention of cruelty to animals, veterinary services and animal quarantine.<sup>130</sup>

Consequently, the Parliament or State Legislative Assembly may legislate law on animal matters. This can be seen in Malaysia with regard to the enactment of the *Animals Act 1953*, *Wildlife Conservation Act 2010* and *Veterinary Surgeons Act 1974* legislated by the Parliament.

At the same time, the Legislative Assembly of the states can also pass laws relating to animals in their respective states. Among the enactments are the *Control of Cattle Enactment 1971* (Selangor),<sup>131</sup> the *Control of Pig Farming Enactment 1991* (Selangor)<sup>132</sup> and the *Poultry Farming Enactment 2007* (Selangor).<sup>133</sup>

#### 4.4.3 Animals and the law

There has always been a very close relationship between humans and animals. Throughout the centuries, humans have used and confined animals for food and clothing, employed them as working assistants and as a mode of transportation, transacted them as business and economic commodities, and enjoyed their companionship. Owing to the importance of animals in human life, the law has provided mechanisms to control and limit these kinds of relationships.<sup>134</sup> Thus, Waisman et al

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<sup>130</sup> Ibid, List III. See also Ahmad Ibrahim and Ahilemah Jones, *The Malaysian Legal System* (Dewan Bahasa dan Pustaka, 1995) 150-151.

<sup>131</sup> The same enactment can be seen in other states in Malaysia: the *Cattle Registration Enactment 1990* (Kedah), the *Cattle Registration Enactment 1981* (Perak), the *Control of Cattle Enactment 1971* (Selangor), the *Cattle Enactment 1968* (Kelantan), the *Registration of Cattle Enactment 1995* (Terengganu) and the *Control of Cattle Enactment 2001* (Pahang).

<sup>132</sup> The same enactment can be seen in other states in Malaysia: the *Rearing of Pigs Enactment 1987* (Perlis), the *Control of Pig Farming Enactment 1991* (Selangor), the *Control of Rearing of Pigs Enactment 1980* (N. Sembilan), the *Rearing of Pigs Enactment 1980* (Melaka), the *Rearing of Pigs Enactment 1975* (Johor), the *Rearing of Pigs Enactment 1976* (Terengganu) and the *Control of Pig Farming Enactment 1998* (Pahang).

<sup>133</sup> The same act can be seen in other states in Malaysia: the *Poultry Farming Enactment 2005* (Perak), the *Control and Licensing of Poultry Farming and Poultry Related Activities Enactment 1996* (N. Sembilan), the *Control and Licensing of Poultry Farming Enactment 1997* (Johor) and the *Poultry Farming Enactment 2005* (Pahang).

<sup>134</sup> Deborah Cao, Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Lawbook Co, 2010) 95.

suggest that animal law is a kind of legal doctrine in which the legal, social or biological nature of non-human animals is an important factor.<sup>135</sup>

This area of law is quite diverse and cuts across every substantive area of law including property, tort, contract, criminal, family and trusts; all jurisdictional boundaries – federal, state and international; and every source of law – constitutional, statutory, regulatory and common law.<sup>136</sup> Hence, this study submits that any laws, rules and regulations which directly or indirectly involve animals may be confined under the umbrella of animal law.

#### 4.4.4 Nature of animal law in Malaysia

This study argues that the laws do not regulate animals specifically, but rather directly regulate the conduct of humans towards animals. Literally, the term ‘animal law’ itself is confused because there is no single law specifically regulating animal conduct. Suitable phrases which may describe the correlation between animals and the law may be ‘animals and the law’ or ‘laws relating to animals’. However the term ‘animal law’ itself is used generally to provide an understanding and classification of the laws which affect animals and which describe the relationship between animals and the law. Therefore, for the purpose of this study, animal law means any law, rule or regulation which directly or indirectly involves animals.

The nature of animal law in Malaysia can be seen from three aspects. First, several laws are enacted in relation to animal products and animal control. These include the laws which regulate the use of animals for human benefit, for example, the *National Feed Act 2009* (Malaysia) which aims to promote healthy and safe feed for animals, and for human food and usage. Several laws in the states also intend to promote public health and safety and to prevent public nuisance by controlling animal management and rearing practice, for instance, the Control of Cattle Enactment, the Control of Pig Farming Enactment and the Poultry Farming Enactment.

Second, there are laws which regulate the responsibilities of animal owners and persons who are in charge of animals. These laws aim to protect people from injury which may be caused by animals. This can be seen in the *Minority Offences Act 1955* (Malaysia) which established the liability of animal owners to supervise such animals

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<sup>135</sup> S.S. Waisman, B.A. Wagman and P.D. Frasch, *Animal Law: Cases and Materials* (Carolina Academic Press, 2nd ed, 2002) xvii.

<sup>136</sup> Joan E. Schaffner, *An Introduction to Animals and the Law* (Palgrave Macmillan, 2011) 5.

so as to prevent them causing hurt or injury and nuisance to other persons and the public. To prevent public disorder, the *Penal Code* (Malaysia), for instance, criminalises the use of animals which cause hurt or injury to others.

Third, there are laws which are specifically designed for animal protection and animal welfare, on which this study has concentrated. The *Animals Act 1953* (Malaysia) and the *Wildlife Conservation Act 2010* (Malaysia) are mechanisms which are designed to protect and conserve animals for their better welfare. The *Animal Welfare Bill 2012* (Malaysia), which has yet to be tabled in Parliament, is aimed at enhancing the better protection and welfare of animals in Malaysia. The next section will briefly discuss the Malaysian federal and state laws relating to animals.

#### **4.5 Laws relating to animals**

##### **4.5.1 Federal laws**

###### **(a) *Animals Act 1953* (Malaysia)**

The most important statute which governs the relations between humans and animals is the *Animals Act 1953* (Malaysia).<sup>137</sup> It was first enacted in 1953 as an ordinance, formerly known as the *Animals Ordinance 1953* (Federation of Malaya).<sup>138</sup> Since then, it has undergone various amendments, until its most recent amendment on March 2006. The main objective of this law is to prevent the spread of animal diseases in Malaysia, which may represent a threat to human health. The statute is also aimed at controlling the movement of animals and methods of animal slaughter, preventing cruelty to animals, and providing measures pertaining to the general welfare, conservation and improvement of animals in Peninsular Malaysia.<sup>139</sup>

The *Animals Act 1953* (Malaysia) regulates the importation and exportation of animals and birds, by providing a licensing regime.<sup>140</sup> Animals are subject to examination before importation and exportation.<sup>141</sup> For the control of disease, the veterinary officer may exercise his or her expert opinion and destroy the injured animals or birds, which he or she deems to be unfit for import and export movement.<sup>142</sup>

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<sup>137</sup> Laws of Malaysia, Act No. 647, of 2006.

<sup>138</sup> Malaya Ordinance, No. 17, of 1953.

<sup>139</sup> *Animals Act 1953* (Malaysia) Preamble.

<sup>140</sup> *Ibid*, ss 6, 14.

<sup>141</sup> *Ibid*, ss 7, 16.

<sup>142</sup> *Ibid*, ss 11, 17.

For preventing the spread of disease, the Act requires the examination of animals or birds suspected of disease,<sup>143</sup> and provides for the destruction of animals suspected of carrying any disease.<sup>144</sup> The animals or birds suspected of having disease together with their articles or stables must be disinfected or disposed of.<sup>145</sup> The Act provides for the disinfection of clothing and vehicles which have had contact with suspected animals or birds with disease.<sup>146</sup> To combat dog-related rabies, the Act requires that dogs be licensed and vaccinated.<sup>147</sup> Any dog suspected of being infected with rabies can be detained and/or destroyed.<sup>148</sup>

The Act also makes animal cruelty a criminal offence with a prescribed monetary penalty of up to MYR200 (US\$61), or six months' imprisonment, or both.<sup>149</sup> It prescribes the power of veterinary authorities, police officers and the Town Board or Municipal Officers to prosecute cruelty offences.<sup>150</sup> The court for animal-related offences is the Magistrates Court.<sup>151</sup> The Act also provides rewards to informers in cases of animal cruelty or disease.<sup>152</sup>

In respect to the conservation of livestock, the veterinary authority may prohibit the movement or slaughtering of cattle or any other animal species.<sup>153</sup> For the protection and safety of livestock, the Act requires that animals, particularly bulls, be sterilised.<sup>154</sup> The power to make law and policy under the Act is given to the Minister of Agro-Based Industry through the Department of Veterinary Services.<sup>155</sup>

*(b) Wildlife Conservation Act 2010 (Malaysia)*

The *Wildlife Conservation Act 2010* (Malaysia) was published in the Malaysian Gazette on 4 November 2011, after being granted Royal Assent on 21 October 2012. The *Wildlife Conservation Act 2010* (Malaysia) repealed the previous *Protection of Wildlife Act 1972* (Malaysia). The Act is intended to regulate certain defined wild animals which

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<sup>143</sup> Ibid, s 18.

<sup>144</sup> Ibid, s 19.

<sup>145</sup> Ibid, ss 24–5.

<sup>146</sup> Ibid, ss 26–7.

<sup>147</sup> Ibid, ss 38, 42.

<sup>148</sup> Ibid, ss 40–41.

<sup>149</sup> Ibid, s 44.

<sup>150</sup> Ibid, ss 45–47.

<sup>151</sup> Ibid, s 47.

<sup>152</sup> Ibid, s 50.

<sup>153</sup> Ibid, s 51.

<sup>154</sup> Ibid, s 55.

<sup>155</sup> Ibid, s 86.

are generally outside human control. It provides for the control of activities involving wildlife species, wildlife derivatives, hybrid species and invasive alien species.

The Act regulates activities connected with wildlife such as hunting, the business of dealing in animals, taxidermy, operating zoos, wildlife exhibitions and conducting research or study on any protected wildlife, by the issuing of licences,<sup>156</sup> permits<sup>157</sup> and special permits.<sup>158</sup> The Act provides penalties for offences relating to licensing,<sup>159</sup> permits<sup>160</sup> and special permits.<sup>161</sup> The Act also establishes the responsibilities of holders of licences, permits and special permits to keep records particularly of those activities involving wildlife in which they are engaged.<sup>162</sup>

To protect the habitat of wildlife, the state authority may declare places to be wildlife reserves and wildlife sanctuaries.<sup>163</sup> The state may also protect the declared area of wildlife reserve and sanctuaries by restricting entrance<sup>164</sup> and control any activities that can be conducted in the declared area.<sup>165</sup> The Act also makes cruelty to wildlife a criminal offence and provides a penalty of up to MYR30,000 (US\$9,160) or two years' imprisonment or both.<sup>166</sup>

Even though activities involving wildlife require licences, permits or special permits, there are certain exceptions,<sup>167</sup> for instance, indigenous Malays may hunt certain wildlife for their own consumption.<sup>168</sup> A Wildlife Officer or any person may also hunt or kill wildlife in circumstances where it may be a threat or pose a danger to human beings.<sup>169</sup> In addition, a Wildlife Officer or any person may kill wildlife if it damages property whether that property is in the form of crops, fruit trees, domestic animals or growing timber.<sup>170</sup>

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<sup>156</sup> *Wildlife Conservation Act 2010* (Malaysia) s 9.

<sup>157</sup> *Ibid*, s 10.

<sup>158</sup> *Ibid*, s 11.

<sup>159</sup> *Ibid*, ss 60–65.

<sup>160</sup> *Ibid*, ss 66–67.

<sup>161</sup> *Ibid*, ss 68–73.

<sup>162</sup> *Ibid*, ss 36–46 (part IV).

<sup>163</sup> *Ibid*, s 47.

<sup>164</sup> *Ibid*, s 47.

<sup>165</sup> *Ibid*, s 48.

<sup>166</sup> *Ibid*, s 81.

<sup>167</sup> *Ibid*, part VI.

<sup>168</sup> *Ibid*, s 51.

<sup>169</sup> *Ibid*, ss 52, 55.

<sup>170</sup> *Ibid*, s 54.

The Act also provides Wildlife Officers with enforcement powers, such as the power to investigate and prosecute offences under the Act.<sup>171</sup> The enforcement agency of this Act is the Department of Wildlife and National Parks under the Ministry of Natural Resources and Environment.

*(c) Animal Welfare Bill 2012 (Malaysia)*

Due to the rise of public concern and a growing awareness concerning animal welfare, the Malaysian government is now in the process of passing a new law to repeal the *Animals Act 1953* (Malaysia). Animal welfare groups and the public started to lobby for the new law, as the coverage of animal welfare and animal interests in the *Animals Act 1953* (Malaysia) is far from satisfactory, particularly with regard to punishments for animal cruelty which are considered inadequate, especially if those punishments are designed to deter persons from being cruel to animals in future.

The process of passing the Animal Welfare Bill marks the new approach of legislating in the area of animal welfare. Compared to other statutes, this is the first Bill in Malaysia where public opinion has been gathered and considered, when framing a new piece of legislation. A survey was started on 27 June 2012. It ran for two weeks and was designed to elicit public opinion on the promotion of animal welfare, prevention of harm to animals, animal distress, and appropriate offences and punishments for offences relating to animal welfare.

On 9 August 2012, the Department of Veterinary Services which is in charge of the law released the full draft of the proposed *Animal Welfare Bill 2012* (Malaysia) for further comment by the public until 31 August 2012. In general, the Bill is designed to establish the Animal Welfare Board, to promote the well-being and responsible ownership of animals, and to make provisions about animal welfare and for connected purposes and for matters connected to it.

The Bill proposes several important provisions which are designed to improve the current *Animals Act 1953* (Malaysia). The establishment of the Animal Welfare Board is among the significant moves designed to administer, enforce and ensure the effective implementation of the forthcoming Act and, most importantly, to advise the Minister in

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<sup>171</sup> Ibid, part VIII.



matters relating to animal welfare, prevention of harm and unnecessary killing, and the promotion of animal welfare and well-being.<sup>172</sup>

The Bill extends licensing and registration to particular activities involving animal matters in at least 15 areas and includes in its remit animal welfare organisations, zoos and animal parks, institutions involved in experimental work with animals, and animal abattoirs.<sup>173</sup>

The Bill provides for the promotion of animal welfare by prescribing the duties of animal owners to ensure the welfare of animals.<sup>174</sup> The duties are extended to any person who uses animals in research, teaching and experimentation.<sup>175</sup> There is a requirement designed to ensure that animals are safe during transportation.<sup>176</sup> The Bill also sets the minimum age of 12 years old for a person to buy a pet, unless he or she is accompanied by an adult.<sup>177</sup>

To prevent harm to animals, the Bill proscribes acts which could lead to cruel conduct<sup>178</sup> with certain exceptions such as food consumption and veterinary procedures which may be conducted for the benefits of animals and human beings.<sup>179</sup> Administration of poison which could injure animals is also an offence under the Bill. The Bill also makes any act related to animal fighting a criminal offence.<sup>180</sup>

The Bill provides for the appointment of two new positions in the public service, namely the Animal Welfare Officer<sup>181</sup> and the Voluntary Animal Welfare Assistant.<sup>182</sup> It provides these officers with administrative and enforcement powers.<sup>183</sup>

There is a significant effort in the Bill to deter offences relating to animals by introducing severe penalties compared to the current *Animals Act 1953* (Malaysia). A fine of MYR100,000 (US\$30,540) but not less than MYR30,000 (US\$9,160) and up to three years' imprisonment, or both, are applicable for any offence involving animal experimentation, animal cruelty, the killing of animals, animal poisoning and animal

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<sup>172</sup> *Animal Welfare Bill 2012* (Malaysia) s 5 (1)(a)–(f).

<sup>173</sup> *Ibid*, s 9 (7) (a)–(p).

<sup>174</sup> *Ibid*, s 24.

<sup>175</sup> *Ibid*, s 25.

<sup>176</sup> *Ibid*, s 27.

<sup>177</sup> *Ibid*, s 28.

<sup>178</sup> *Ibid*, s 29.

<sup>179</sup> *Ibid*, ss 30–31.

<sup>180</sup> *Ibid*, s 33.

<sup>181</sup> *Ibid*, s 35.

<sup>182</sup> *Ibid*, s 36.

<sup>183</sup> *Ibid*, ss 38–51 (Part VII).

fighting.<sup>184</sup> For offences involving licensing or registration, a duty is imposed on responsible animal owners for the safe transportation of animals. Failure to exercise that duty of care may make the offender liable to a monetary penalty of up to MYR75,000 (US\$22,900) but not less than MYR15,000 (US\$4,580) and imprisonment for up to two years, or both.<sup>185</sup>

The Animal Welfare Bill is scheduled to be tabled during the next sitting of Parliament. However, due to the low priority of animal welfare law, it may take Parliament some time to reach and then consider it.<sup>186</sup>

*(d) Other laws affecting animals*

*(i) Veterinary Surgeons Act 1974 (Malaysia)*

The veterinary profession is the profession which has the most personal contact with animals. The Veterinary Surgeons Act was enacted in 1974 to provide for the registration and practice of veterinary surgeons.<sup>187</sup> It established the Malaysian Veterinary Council to ensure and enhance the quality of veterinary practice and to regulate the practice and utilisation of veterinary medicines,<sup>188</sup> and the profession itself.<sup>189</sup> The Act regulates the registration and the practice of veterinary services. It also determines those persons who are entitled to be registered as veterinary surgeons. The Council also advises the Minister as to the suitability of veterinary degrees and determines those persons who are entitled to register as veterinary surgeons.

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<sup>184</sup> Ibid, s 54(1).

<sup>185</sup> Ibid, s 54(2).

<sup>186</sup> Interview data.

<sup>187</sup> The preamble of the *Veterinary Surgeons Act 1974* (Malaysia) reads as follows:

An Act to make provision for the registration and practice of veterinary surgeons and for national purposes to provide for certain provisions with regard to a period of service in the public services after registration; and to make provision for purposes connected with the aforesaid matters.

<sup>188</sup> Ibid, s 2. Interpretation of 'practice of veterinary medicine':

to diagnose, treat, correct, change, relieve or prevent animal disease, deformity, defect, injury or other physical or mental conditions; including the prescription, administration or application of any drug, medicine, biologics, apparatus, anaesthetic or other therapeutic or diagnostic substance or technique, and the use of any manual or mechanical procedure for artificial insemination, for testing for pregnancy, or for correcting sterility, or infertility, or to render advice or recommendation with regard to any of the above, or do any other act recognised to be a duty of a veterinary surgeon.

The Act grants the Malaysian Veterinary Council disciplinary jurisdiction over all veterinary surgeons who are registered under the Act.<sup>190</sup> It empowers the Council to make regulations designed to further the purposes and objectives of the Act.<sup>191</sup> Therefore, pursuant to the Act, the Malaysian Veterinary Council in 1982 issued a *Code of Ethics and Guide to Professional Conduct for Veterinary Surgeons* in Malaysia.<sup>192</sup>

Veterinary surgeons are therefore responsible for the care of all animals entrusted to them. They can never refuse to attend to an animal nor can they cease to attend to an animal without good cause. This rule of conduct specifies the professional duties of veterinary surgeons towards animals. It is designed to ensure that the welfare of animals is properly maintained by skilled professionals.

#### *(ii) Penal Code (Malaysia)*

The *Penal Code* (Malaysia) is an act stipulating criminal offences in Malaysia.<sup>193</sup> While the *Animals Act 1953* (Malaysia) classifies animal cruelty as one of the criminal offences of an offender towards animals, the *Penal Code* specifies that animals are the property of a person and are protected against criminal conduct in the case of theft<sup>194</sup>, mischief<sup>195</sup> and robbery. In many of the provisions of the *Penal Code* (Malaysia), animals are also regarded as instruments which can be used as a means of committing criminal offences such as in the case of animals used to voluntarily cause hurt<sup>196</sup> or grievous hurt.<sup>197</sup> Chapter 5 of this study will extensively discuss the status of animals as property and as instruments to commit criminal offences.

#### *(iii) Feed Act 2009 (Malaysia)*

There is a close relationship between animal and human health. As animals serve as human food, in particular, poultry products, Malaysia enacted the *Feed Act 2009* (Malaysia) to ensure animal feed quality. The Act established the Feed Board which is responsible for regulating feed quality by controlling the importation, manufacture, sale

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<sup>189</sup> Ibid, s 3.

<sup>190</sup> Ibid, s 29.

<sup>191</sup> Ibid, s 39.

<sup>192</sup> *Code of Ethics and Guide to Professional Conduct for Veterinary Surgeons in Malaysia* (Malaysia) 1982 Second Printing (1992).

<sup>193</sup> *Penal Code* (Malaysia) preamble.

<sup>194</sup> Ibid, s 378.

<sup>195</sup> Ibid, ss 427–430.

<sup>196</sup> Ibid, s 324.

<sup>197</sup> Ibid, s 325.

and use of feed and feed additives. The Feed Board must ensure that the feed satisfies the nutritional requirements of animals, is safe for animals and is not contaminated. The Board must also ensure that animals and animal products are safe for human consumption and other usage.<sup>198</sup>

The World Organisation for Animal Health (OIE) provides for correlations between animal and human health.<sup>199</sup> Various animal diseases can be a risk to consumer health through the use of animals as part of the food chain. Therefore, standards of animal welfare and animal management practices such as feeding, housing and husbandry can affect the spread of disease.<sup>200</sup> Thus, animal welfare and animal management practices should be of paramount consideration and be designed to ensure human safety and health.

#### *(iv) International Trade in Endangered Species Act 2008*

Many species including animals are part of the trade in food products, exotic leather goods and medicines. With regard to animals, human exploitation of natural resources causes habitat loss and can result in the extinction of animal species. To avoid species extinction and habitat loss particularly as this relates to endangered species, the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) was initiated in the 1960s. It was first opened for signature on 3 March 1973 at Washington DC. To date, some 175 countries have signed the CITES.<sup>201</sup>

As a member country, Malaysia deposited her instrument of accession on 20 October 1977 and, therefore, entered the Convention on 18 January 1978.<sup>202</sup> As a result, in 2008, Malaysia enacted the *International Trade in Endangered Species Act 2008* to implement the CITES and to provide regulations connected therewith.<sup>203</sup>

The Act established several authorities with enumerated powers and several functions for the protection of endangered species.<sup>204</sup> It also lists schedules<sup>205</sup> of species which

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<sup>198</sup> *Feed Act 2009* (Malaysia) preamble.

<sup>199</sup> World Organisation for Animal Health (OIE), *Animal Production Food Safety* (11 September 2012) <<http://www.oie.int/food-safety/food-safety-key-themes/>>

<sup>200</sup> European Food Safety Authority (EFSA), *Animal Health* (11 July 2012) <<http://www.efsa.europa.eu/en/topics/topic/animalhealth.htm>>

<sup>201</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Member Countries* (22 September 2012) <<http://www.cites.org/eng/disc/parties/index.php>>

<sup>202</sup> *International Trade in Endangered Species Act 2008* (Malaysia) preamble.

<sup>203</sup> *Ibid*, preamble.

<sup>204</sup> *Ibid*, part II.

<sup>205</sup> *Ibid*, part III.

can be traded and those which cannot be traded in Malaysia and provides regulation in terms of permits, licences and registration of the trade for those animals which can be traded.<sup>206</sup> The Act also deals with enforcement, seizure and arrest of those in the trade for the purpose of protecting endangered species including animals facing extinction arising from loss of their habitat.<sup>207</sup>

(v) *Fisheries Act 1985 (Malaysia)*

Malaysian law also protects aquatic animals. In 1985, Malaysia enacted the Fisheries Act which is designed to regulate fishing activities in Malaysian fisheries' waters. It also includes provisions for the conservation, management and development of maritime and estuarine fishing and fisheries.<sup>208</sup> The Act extends protection to turtles and riverine fishing in Malaysia.<sup>209</sup>

The Act regulates fisheries' activities by prohibiting fishing with explosives, poisons or pollutants, or any apparatus which utilises an electric current, or the use of any prohibited gear for the purpose of killing, stunning, disabling or catching fish, or in any other way rendering such fish more easily caught.<sup>210</sup>

In commenting on the prohibition concerning the use of explosives, poisons, etc in fishing, Hussin argues that such prohibitions were concerned with the conservation of aquatic animals for use by future generations, and to protect humans from the consumption of fish which might be contaminated with explosive substances and poisonous materials but, more importantly, to protect aquatic animals from such cruel conduct.<sup>211</sup>

(vi) *Environmental Quality Act 1974 (Malaysia)*

Both humans and animals share the earth and both ideally should have rights to enjoy an environment which is free from pollution. For the purpose of ensuring the quality of the environment, the *Environmental Quality Act 1974 (Malaysia)* was enacted. The Act

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<sup>206</sup> Ibid, part IV.

<sup>207</sup> Ibid, part V.

<sup>208</sup> *Fisheries Act 1985 (Malaysia)* preamble.

<sup>209</sup> Ibid, preamble.

<sup>210</sup> Ibid, s 26(1)(a).

<sup>211</sup> Abdul Aziz Hussin, *Tanggungjawab Manusia terhadap Haiwan di sisi Undang-Undang (Responsibilities of Humans Towards Animals in the Law)* (Dewan Bahasa dan Pustaka, 1990) 53,

was specifically designed to prevent, abate and control pollution for the better enhancement of the environment.<sup>212</sup>

The Act aimed to control any pollution which may cause a condition which is hazardous to public health, safety or welfare, or to animals, birds, wildlife, fish or aquatic life or plants.<sup>213</sup> The Act regulates the activities which may cause pollution which is detrimental to public health such as soil pollution,<sup>214</sup> water pollution<sup>215</sup> and open burning.<sup>216</sup>

*(vii) Minority Offences Act 1955 (Malaysia)*

The *Minority Offences Act 1955* (Malaysia) contains several provisions relating to animals particularly the liability of an animal owner or any person in charge of an animal or animals. For example, the owner of a dog which causes injury to any person is liable for the actions of the dog, and is liable to compensate the injured person.<sup>217</sup> However, any person may also be liable if he or she without lawful excuse encourages or urges any dog or animal to attack, worry or create fear in any person or animal.<sup>218</sup>

The owner of animals is also liable if he or she allows such animals to stray onto a public road or any private property.<sup>219</sup> The animal owner is also liable if animals cause damage to property. The Act limits the movement of animals such as horses, cattle, sheep, goats or pigs. These must not be led or driven on any public road between the hours of sunset and sunrise unless such animals are in charge of at least one adult person carrying a light visible within a reasonable distance both in the direction in which such animals are being led or driven as well as in the opposite direction.<sup>220</sup>

An animal owner is liable if he or she leads or rides any animals which could obstruct persons or traffic moving on the road.<sup>221</sup> They are also liable if they ride or drive animals in a manner so rash or negligently as to indicate a want of due regard for the

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<sup>212</sup> *Environmental Quality Act 1974* (Malaysia) preamble.

<sup>213</sup> *Ibid*, s 2(1).

<sup>214</sup> *Ibid*, s 24.

<sup>215</sup> *Ibid*, ss 25–26.

<sup>216</sup> *Ibid*, s 29A.

<sup>217</sup> *Minority Offences Act 1955* (Malaysia) s 7.

<sup>218</sup> *Ibid*, s 8.

<sup>219</sup> *Ibid*, s 9.

<sup>220</sup> *Ibid*, s 10 (1).

<sup>221</sup> *Ibid*, s 11 (a).

safety of others.<sup>222</sup> Failure to take proper steps to keep animals under proper control is also an offence under the Act.<sup>223</sup>

#### 4.5.2 State laws

Apart from federal laws, a state can make laws relating to animals. Most of the laws relating to animals in the states of Malaysia regulate farmed animals: they include the Control of Cattle Enactment, Control of Pig Farming Enactment and Poultry Farming Enactment.

##### *(i) Control of Cattle Enactment*<sup>224</sup>

In order to avoid public nuisance, and preserve public health and safety, the state may control the location where cattle may be reared or kept.<sup>225</sup> The state enactment defines cattle to include cows, oxen, buffaloes, sheep, goats and pigs of any age, sex or type.<sup>226</sup> The state may declare restricted areas. It can prohibit cattle from being reared or kept in particular locations, and regulate the design of buildings in which cattle are kept.<sup>227</sup> For example, one cannot rear and keep cattle nearby to public offices like schools and government buildings. This is designed to preserve public health and safety and to avoid public nuisance.

There are similar enactments to the Control of Cattle Enactment in the states of Malaysia, which contain similar provisions.<sup>228</sup>

##### *(ii) Control of Pig Farming Enactment*<sup>229</sup>

There is a specific law for pig farming in all states of Malaysia for the control of pig farming, namely, the Control of Pig Farming Enactment.<sup>230</sup> This enactment aims to control and regulate pig farming and to provide for matters related thereto (preamble). This stringent control of pig farming is based on two reasons. Firstly, it is generally to

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<sup>222</sup> Ibid, s 10 (c).

<sup>223</sup> Ibid, s 10 (d).

<sup>224</sup> As an example, this study uses the enactment from the *Control of Cattle Enactment 1971* (Selangor) (Malaysia). The same provisions can be seen in the enactments which regulate the control of cattle in other states in Malaysia.

<sup>225</sup> *Control of Cattle Enactment (Selangor) 1971* (Malaysia) s 3.

<sup>226</sup> Ibid, s 2. Interpretation of cattle.

<sup>227</sup> Ibid, s 4 (1).

<sup>228</sup> List of all Control of Cattle Enactments for all states.

<sup>229</sup> As an example, this study uses the enactment from the *Control of Pig Farming Enactment 1991* (Selangor) (Malaysia). The same provisions can be seen in the enactments which regulate the control of pig farming in other states in Malaysia.

<sup>230</sup> All the states have the similar enactments.

preserve public health and safety, and to avoid public nuisance. Secondly, it may be imposed for cultural or religious reasons as the majority of Malays are Muslims who are sensitive to pigs, as Islam regards pigs as unhygienic and unfit to be consumed.

The state may designate any area in the state as a pig farming area<sup>231</sup> and as a pig buffer zone<sup>232</sup> exclusively for pig farming activities. The state also requires pig farming activities to be licensed.<sup>233</sup> No licence can be issued unless the applicant submits the layout plan and design for the construction of the pig farm including the boundaries of the pig farm and the facilities for the control of pig waste discharge or its disposal.<sup>234</sup> The licence should be displayed and produced upon inspection of the authority.<sup>235</sup> To maintain the licence, pig farmers also must submit a biannual report to the authority.<sup>236</sup>

### *(iii) Poultry Farming Enactment<sup>237</sup>*

Other than farming activities which involve cattle, states in Malaysia also regulate poultry farming. The Poultry Farming Enactment was enacted to control poultry farming in the states. Control includes the rearing of broilers, the rearing of layer poultry, the rearing of breeding poultry and the operating of a hatchery.<sup>238</sup> The enactment aims to regulate poultry-related activities such as the processing of poultry and poultry waste such as poultry droppings, wasted feed, eggshells and other parts of poultry which are not generally consumed by humans.<sup>239</sup>

The enactment requires poultry farming to be licensed.<sup>240</sup> An application for a licence to operate a poultry farm may be refused if the poultry farm may cause a health hazard to the public,<sup>241</sup> or hazard to any public property,<sup>242</sup> or is likely to pollute the environment in the area where it is proposed to be sited.<sup>243</sup>

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<sup>231</sup> *Control of Pig Farming Enactment (Selangor) 1991* (Malaysia) s 6 (1).

<sup>232</sup> *Ibid*, s 6 (2).

<sup>233</sup> *Ibid*, s 8 (1).

<sup>234</sup> *Ibid*, s 11.

<sup>235</sup> *Ibid*, s 12.

<sup>236</sup> *Ibid*, s 14.

<sup>237</sup> As an example, this study takes the enactment from the *Poultry Farming Enactment 2007* (Selangor) (Malaysia). The same provisions can be seen in the enactments which regulate poultry farming in other states in Malaysia.

<sup>238</sup> *Poultry Farming Enactment (Selangor) 2007* (Malaysia) s 2. Interpretation of poultry farming.

<sup>239</sup> *Ibid*, s 2. Interpretation of poultry-related activities.

<sup>240</sup> *Ibid*, s 6 (1).

<sup>241</sup> *Ibid*, s 8 (2) (a).

<sup>242</sup> *Ibid*, s 8 (2) (b).

<sup>243</sup> *Ibid*, s 8 (2) (c).



To protect public health, the enactment makes the act of discharging poultry waste or poultry waste water into rivers, streams, drains, irrigation canals or any place which is not gazetted as a water disposal area as offences.<sup>244</sup> It is also an offence to allow breeding of flies, insects or pests which can cause a health hazard or a public nuisance.<sup>245</sup> Using any banned drug or using any drug in any manner which may cause a hazard to the public in the process of poultry farming is also an offence under the enactment.<sup>246</sup>

#### 4.6 Conclusion

History provides evidence of the development of law and policy of any country. Malaysia is no exception. A mixture of legal influences shades the development of Malaysian law. Originating as customary practice (*adat*), incorporating several aspects or influences from Hindu and Islamic law, and later adapting the principles of English law, demonstrates that the nature of Malaysian law is a flexible legal system. Nevertheless, its flexibility is nuanced by cultural and domestic elements which, in turn, limit or adapt foreign influences. For instance, section 3 of the *Civil Law Act 1956* (Malaysia) serves as mechanism to limit the application of English law in Malaysia.

This chapter generally examined the several stages of development of Malaysian law, beginning before the coming of the colonial area, during the British period, and post-independence until recent times. In particular, it emphasises the laws relating to animals within each stage.

The Malay people practise their own custom known as *adat*. Malay *adat* is of two types both of which are unwritten: *Adat Temenggung* and *Adat Perpateh*. Generally, *adat* is a custom of the Malay community which governs the various aspects of their daily lives. As custom serves as a source of law in English law, so does the Malay *adat* in Malaysian law. Therefore, the custom of Malays which has legal effect is known as *adat* law. Several popular *adat* which have legal effect were compiled and put in writing by authorities in digests or codes. The *Laws of Malacca* was one of the earlier Malay digests in written form. Other Malay states like Perak, Pahang, Kedah and Selangor then adopted the *Laws of Malacca* to be the digest of their respective states. The Malay digests exclusively provide rules on animal matters particularly with regards to

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<sup>244</sup> Ibid, s 16 (a)–(c).

<sup>245</sup> Ibid, s 18 (1).

<sup>246</sup> Ibid, s 19.

animal theft, inflicting injury to animals, the responsibility of animal owners and their punishment for infractions of the code.

The Portuguese and Dutch did not interfere to any great extent with the customary practices of the Malay people. They left the people of the Malay states to practise their own legal and administrative affairs. Except in the Straits Settlements, the British did the same in the earlier stage of their rule in the Malay Peninsula. However, the British commenced their interest in the administrative affairs of the Malay states, on the request of the Malay leaders themselves who sought protection from the British government due to the chaos and general disorder in those Malay states. The Pangkor Treaty in 1874 was a turning point which marked the enhanced role of the British Resident as the head of administrative affairs in the state of Perak. However, the British Resident did not regulate the religion and customary practices of the Malays, with this responsibility vested in the Sultan (King) of Perak. This extension of the British Resident's powers was extended to other Malay states and, in 1930, all Malay states agreed to accept a British officer as the head of administrative affairs, except as regards the customs of the Malay population and in religious matters. Therefore, the control of Malay states by the British Resident in administrative matters represented a mechanism by which English law, legislation and policy indirectly influenced customary Malay law.

With regard to the law relating to animals, the British authority in the Straits Settlements enacted the *Cruelty to Animals Ordinance 1902* (Straits Settlements). In the Federated Malay States, the British introduced the *Cruelty to Animal Prevention Enactment 1910* (Federated Malay States). Later, the Parliament of the Federation of Malaya enacted the *Animals Ordinance 1953* which has undergone various amendments until recently amended in 2006 and is now known as the *Animals Act 1953* (Malaysia).

The Federal Constitution (Malaysia) vests the power to legislate on animal matters in both the Parliament and Legislative Assembly of the states. The nature of the law relating to animals in Malaysia has been targeted to cover various aspects: firstly, regulating animal products and animal control; secondly, the establishment of the liability of animal owners in criminal and civil claims; and thirdly, protecting and enhancing the welfare of animals.

In short, this chapter has argued that Malaysian law has long recognised animals as being a legal subject. The provisions relating to animals in the Malay digests, which

were originally extracted from Malay custom, provided evidence that animals require legal consideration both in their own right and because, if inappropriately regulated, they may infringe the rights of humans. The influence of various extraneous elements, such as the influence of Hindu and Islamic law and the colonial interference in Malaysian law, has affected the law relating to animals. These mark the development of law regulating animal matters particularly the role of law in protecting and enhancing the welfare of animals in Malaysia. The level of protection of the welfare of animals later indicates the legal status of animals in a particular system of law. This is what the next chapter will explore, in determining the legal status of animals in Malaysia.

## CHAPTER 5: LEGAL STATUS OF ANIMALS IN MALAYSIA

### 5.1 Introduction

The treatment of animals reflects their perceived status in any human society at any given time. The way animals are classified and treated by law is a manifestation of their legal status at that time. As a result, the legal status of animals in any society is highly dependent on how that society perceives the importance of animals to their daily lives. And, of course, the beliefs of society are determined by various factors such as religion, culture and common practices. This study suggests that the legal status of animals in Malaysia at any time is a product of all these determinants.

In Malaysia, animals have always played an important role: as a result, they have a very close relationship with the Malay community. Lim suggests that fowls and water buffalo were the closest friends of the paddy farmers.<sup>1</sup> Cocks acted like an alarm clock in the early morning before the sun rose, whereas hens provided eggs.<sup>2</sup> Water buffaloes were also important as they were “partners in the paddy fields”, and helped the farmer to cultivate their fields.<sup>3</sup> The Malays kept birds and cats as pets for their instrumental value. Other livestock such as cows and poultry were deserving of special shelter at their homes.<sup>4</sup> The treatment which animals receive from humans evidences the attitudes and common practices of Malays in recognising animals as having instrumental and physical value, which customary law acknowledges and, as a result, protects them from cruelty and preserves them from exploitation for the benefit of future generations.

The customary law then recorded the common practice of Malays in dealing with animals through various digests which then became the sources of law in the Malay states before the coming of foreign colonial powers such as the Portuguese, the Dutch and the British between 1511 and 1786. During the British intervention, Malay customs were still accorded consideration in various judgements presided over by English judges in the Malay states. Legislation in the Malay states during the British period still took into account Malay customs relating to animals as a basis for the formulation of

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<sup>1</sup> Lim Kim Hui, 'How Malay Proverbs Encode and Evaluate Emotion? A Paremiological Analysis' (2010) 28(1) *Sari - International Journal of the Malay World and Civilisation* 57.

<sup>2</sup> Ibid, 62.

<sup>3</sup> Ibid.

<sup>4</sup> R.O. Winstedt, 'Life and Customs. Part II. The Circumstances of Malay Life' (Government of Federated Malay States, 1925) 6-7.

principles in enacted legislation. Indeed, Malay custom and the influence of English law have formed a cornerstone in the evolution of Malaysian law as it relates to animals.

This chapter generally considers the legal position of animals in Malaysia. It first examines whether animals deserve legal status by analysing the origin of the legal status of animals, which involves the concept of rights. By applying constructive and positive approaches to the concept of rights, this study suggests that animals have rights which are accorded limited legal protection. This study also suggests that Malaysian law protects animals for three main purposes: protection as property, protection from unnecessary cruelty, and protection for conservation and environmental purposes. The following discussion provides the framework for the legal status of animals in Malaysia.

## **5.2 Legal status**

### **5.2.1 Background**

Law is built upon the moral beliefs of the members of a society. Before we can talk about the legal status of animals, there must be first a consideration of the moral status of animals.<sup>5</sup> In moral philosophy, to have moral status is to deserve protection afforded by the basic norms of morality.<sup>6</sup> Therefore, the basic moral question is: “which individual and groups are entitled to the protections afforded by morality?”<sup>7</sup> Are animals entitled to the protections afforded by morality? As status refers to the rank or position of an individual within a society,<sup>8</sup> the fact that animals exist in the world community, evidences their need for moral protection and consideration.

Furthermore, as discussed in Chapter 3, there are three different positions as to the moral consideration of animals: first, animals have no moral status; second, animals have some moral status, but are inferior to humans; and third, animals are morally equal to humans. At least, with certain exceptions,<sup>9</sup> few, if any, hold the first position that animals have no moral status. This research argues that the majority opinion<sup>10</sup>

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<sup>5</sup> David Favre, *Animal Law: Welfare, Interests, and Rights* (Wolters Kluwer Law & Business, 2011) 392.

<sup>6</sup> Tom Beauchamp, *The Human Use of Animals: Case Studies in Ethical Choice* (Oxford University Press, Second ed, 2008) 15.

<sup>7</sup> Ibid, 15.

<sup>8</sup> Timothy Darvill, *The Concise Oxford Dictionary of Archaeology* (Oxford University Press, 2nd ed, 2009).

<sup>9</sup> Robert Garner, *Animal Ethics* (Polity Press, 2005) 14.

<sup>10</sup> Ibid, 14-23. There are three opinions on whether animals deserve moral status. The first group holds that animals have no moral status. The second group holds that animals have

holds that animals do have moral status. Based on this view, this research suggests that the moral belief of members of society is that animals possess moral status. This moral belief of society, hence, motivates the consideration of the legal position of animals.

What is legal status? In general, it indicates the standing of an entity or issue in the eyes of the law.<sup>11</sup> In other words, it refers to a person's legal standing or capacity.<sup>12</sup> The term derives from Roman law, which referred to a person's freedom, citizenship and family rights.<sup>13</sup> Therefore, by referring to these definitions, the legal status of animals refers to the standing and capacity of animals in the eyes of the law. Beauchamp suggests that in a *strong sense*, the terms status or standing are used to identify those who have rights or the functional equivalent of rights. In that context, to Beauchamp the legal system does not recognise the rights of animals.<sup>14</sup> However, in a *weak sense*, if status and standing merely refer to any status, grade or rank of moral importance, animals undeniably have moral status in the eyes of the law.

For the purpose of this research, it is suggested that the legal status of animals refers to the *weak sense*, to justify the position and moral importance of animals. This approach and reference to any status or rank seems non-controversial today, and is likely to be accepted generally by human society, although it may be difficult to argue this before a court of law.

In determining the legal status of animals, legal jurists have different positions as to the origin of the status of animals under legal consideration. As the moral belief steers the development of law, the origin of the legal status of animals is likely to be based on moral philosophy which refers to varieties of animal ability and capacity: sentience,<sup>15</sup>

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some moral status but are inferior to humans. The third group holds that animals have moral status and challenges the moral orthodoxy that is offered by the second group.

<sup>11</sup> BusinessDictionary.com, *Legal Status* <<http://www.businessdictionary.com/definition/legal-status.html>>

<sup>12</sup> Jonathan Law and Elizabeth A Martin, *A Dictionary of Law* (Oxford University Press, 7th ed, 2009).

<sup>13</sup> Ibid.

<sup>14</sup> Beauchamp, above n 6, 16. However, it is suggested that animals have no standing or status at least in English and American legal systems. See also, Cass R Sunstein, 'What are Animal Rights?' in Martha C. Nussbaum and Cass R. Sunstein (eds), *Current Debates and New Directions* (Oxford University Press, 2004) 6; Gary L Francione, *Animals, Property and the Law* (Temple University Press, 1995) 114.

<sup>15</sup> Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislations' in Paul A.B. Clarke and Andrew Linzey (eds), *Political Theory and Animal Rights* (Pluto Press, 1789) 13; Peter Singer, *Practical Ethics* (Cambridge University Press, 1995) 92.

capacity to experience well-being,<sup>16</sup> inherent value and subject of life,<sup>17</sup> and rationality.<sup>18</sup> Other than that, as discussed in Chapter 3, religious and cultural beliefs also contribute to the shaping and development of law in considering animals as a legal issue. This research proposes that these moral, religious and cultural beliefs which become a common view of society may justify the laws and regulations concerning the treatment of animals and, as a result, determine the status of animals in a legal system.

In determining the origins of the legal status of animals, this research submits that there are two major concepts which underpin the legal position of animals: rights and welfare. Both play important roles in considering animals as a legal subject in a legal system. The notions of rights and welfare also lead the way of the animal rights movements which fight for the protection of animals by applying different approaches. Animal rights activists contend that animals have rights to not be exploited by humans in any way, for food, clothing, entertainment, research, etc. They argue for the abolition of all human uses of animals. Animal welfare proponents maintain that humans may use animals, but argue for stronger laws for the protection of the well-being of animals.<sup>19</sup> The next section of discussion will focus on how these two concepts determine the status of animals in the legal system generally, and in the Malaysian legal system, in particular.

### 5.2.2 Rights of animals

Discussion of legal status is primarily based on the notion of rights, an issue about which the legal fraternity has debated for a very long time. As to the relationship between animals and humans, philosophers are yet to adopt a consensus stance as to whether animals can have rights. Even in discussing the basic concept of rights, philosophers are struggling to define 'moral rights' and have the same difficulty in determining whether 'rights' exist at all.<sup>20</sup> This research study notes the undecided position in defining and justifying the term 'rights' in its basic concept and this, in turn, later influences the term 'rights' as applied to animals, viz 'animal rights'. In this regard,

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<sup>16</sup> Appleby and Sandoe, 'Philosophical Debate on the Nature of Well-being: Implication for Animal Welfare' (2002) 11 *Animal Welfare* 283.

<sup>17</sup> Tom Regan, *The Case for Animal Rights* (University of California Press, 1983) 248.

<sup>18</sup> Peter Carruthers, *The Animals Issue: Moral Theory in Practice* (Cambridge University Press, 1992) 78; Roger Scruton, *Animal Rights and Wrongs* (Metro Books, 2000) 111.

<sup>19</sup> For the discussion between the animal rights and animal welfare positions, see Gary Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010).

<sup>20</sup> Simon Brooman and Debbie Legge, *Law Relating to Animals* (Cavendish Publishing Limited, 1997) 79.

Waldau suggests that the lack of or non-consensus as to the definition is rooted in the manner of emphasising which animals are important enough to merit concern from humans.<sup>21</sup>

Immanuel Kant in his definition of rights suggests that rights cannot be attributed unless the subject of those rights has the will or capacity to enforce them, and to attach a duty to another not to infringe those rights.<sup>22</sup> In other word, rights are only granted to those who are able to fulfil the 'social contract', to claim the rights and fulfil the corresponding duty to others.<sup>23</sup> If the definition of rights refers to this requirement, animals absolutely cannot have rights. Animals have no duty towards others, are incapable of fulfilling a duty to others and, more importantly, they have no capacity or will to claim rights. Because animals have no autonomy and are incapable of exercising their will in relation to duties, the claim for animal rights has been criticised.<sup>24</sup>

When the term 'rights' is used, people tend to understand it as rights relating to humans. The term 'human rights' is clearly understood as encompassing the right to education, the right to property, the right to freedom, etc. Problems arise when those rights are applied to animals in using the term 'animal rights'. Human rights may not be relevant to animals such as the right to vote and the right to education. The correlation of the two is likely to cause confusion and add little to the discussion about what rights might be accorded to animals, if any.

With reference to Kant's definition of rights and the equation of human and animal rights, animals are absolutely without rights for two main reasons: absence of will and capacity to enforce the duty; and human attributes which could not be ascribed to animals. At the same time, Galvin argues that the notion of legal rights is hardly a far-fetched one, as there is no universally accepted definition of 'legal rights' or its origin.<sup>25</sup> Other writers, including Jamieson, also share this view.<sup>26</sup> According to Galvin, being the object or beneficiary of a law does not necessarily create a legal right for animals to specific treatment by law at the behest of a beneficiary.<sup>27</sup> Hence, even though animals

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<sup>21</sup> Paul Waldau, *Animal Rights: What Everyone Needs To Know* (Oxford University Press, 2011) 3.

<sup>22</sup> Broome and Legge, above n 20, 79.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid, 80.

<sup>25</sup> Roger Galvin, 'What Rights for Animals?: A Modest Proposal' (1985) 2 *Pace Environmental Law Review* 245, 247.

<sup>26</sup> Philip Jamieson, 'The Legal Status of Animals under Animal Welfare Law' (1992) (February) *Environmental and Planning Law Journal* 20.

<sup>27</sup> Galvin, above n 25, 247.



have been the subject matter of litigation, they have no rights which may be asserted in court in the quest for justice for themselves and their kind.<sup>28</sup>

Galvin suggests a working definition of a legal right as follows:

- (a) A legal right is recognised as such by the law and thereby protected from destruction or infringement.
- (b) The entity holding the right can seek legal protection on its behalf.
- (c) The assertion of the right should protect the entity from injury.
- (d) The relief the law provides should directly compensate or benefit the holder of the right.
- (e) Incapacity on the part of the holder of the right does not preclude a representative from protecting the best interest of the holder of the right.<sup>29</sup>

Galvin's framework for legal rights makes no difference for animals, at least in the legal system. To qualify as the holder of rights, animals should seek legal protection on their own behalf which in itself is quite imaginary. Even though Galvin suggests that, in the absence of capacity to institute a legal claim, a representative could be appointed, this is still irresolvable because in most cases the notion of a representative for animals is still a foreign one for a court of law.

To ensure justice for animals, in protecting them from harm and suffering, Galvin identifies the fundamental basic rights that should be afforded to animals as follows:<sup>30</sup>

- (a) All animals have a right to live out their lives according to and in harmony with their nature, instincts and intelligence.
- (b) All animals have a right to live in a habitat ecologically sufficient for normal existence.
- (c) All animals have a right to be free from exploitation.

To overcome the problem created by the term 'rights' and its unsuitability when discussing the welfare of animals, some philosophers avoid the word 'rights' and offer other terms which are less controversial and may suit animals better. Peter Singer, for example, offers the term 'interest' as fundamental to his theory of 'equal consideration of interests'. This theory can be applied when considering the interests and

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<sup>28</sup> Ibid, 248.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

entitlements of animals.<sup>31</sup> Favre also favours the term 'animal interests' rather than 'animal rights'.<sup>32</sup> He suggests that if we could enhance the interests of animals within the legal system, the rights will come into existence in the natural course of events.<sup>33</sup> In the same direction, Brooman and Legge also consider that animals may be best described as having interests rather than rights.<sup>34</sup> Wise does not favour the term 'interests' because, in comparison with rights, interests, if they exist, are not required to be respected.<sup>35</sup> Not everyone prefers the idea of interests as an alternative to the notion of rights. For instance, Fienberg argues that the law already gives rights to animals where the legal system has authorised the state to prosecute for animal cruelty, without animals being possessors of rights.<sup>36</sup> When it comes to using animals for scientific experimentation, rights are already attributed to animals by law, where there is no corresponding duty needed on the part of animals, as a claim could be made by another on behalf of animals.<sup>37</sup>

Therefore, to strike a balance between the 'rights' and 'interests' of animals, this study proposes the definition of the term 'rights' to be understood by using a positive approach. As Sunstein suggests, if we understand 'rights' to involve legal protection against harm, then many animals already have rights, and this idea of animal rights is not terribly controversial.<sup>38</sup> Similarly, Tannenbaum also argues that animal legislation creates legal duties and therefore accords legal rights to animals.<sup>39</sup> The proponents of animal welfare also would prefer the expression 'animal rights', as providing animals with 'rights' which in itself signals that animals must be afforded protection against suffering.<sup>40</sup>

For others, such as Christopher Stone, the granting of 'legal rights' to animals involves animals being granted legal standing. This can only be done if three criteria are

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<sup>31</sup> Peter Singer, *Animal Liberation* (Ecco Press, 2000) 7.

<sup>32</sup> David Favre, 'Integrating Animal Interests into Our Legal System' (2004) 10 *Animal Law Journal* 87, 88.

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

<sup>34</sup> Brooman and Legge, above n 20, 81.

<sup>35</sup> Steven Wise, 'The Legal Thinghood of Nonhuman Animals' (1996) 23(2) *Boston College Environmental Affairs Law Review* 471, 472.

<sup>36</sup> Brooman and Legge, above n 20.

<sup>37</sup> *Ibid.*

<sup>38</sup> Sunstein, above n 14, 5. See also Sunstein Cass, 'The Rights of Animals' (2003) 70 *Chicago Law Review* 387, 389.

<sup>39</sup> Waldau, above n 21, 114.

<sup>40</sup> Sunstein, above n 14, 5; Cass, above n 38, 389.

fulfilled:<sup>41</sup> first, animals must be legal persons capable of instituting legal proceedings; second, animals must sustain injuries which must be legally considered; and third, animals must be entitled to legal relief which is run directly to their benefit.<sup>42</sup>

Favre regards the assertion that animals have no rights within the legal system involves looking at the term 'rights' from a very narrow approach, based on the premise that animals should become a plaintiff before they can possess legal rights.<sup>43</sup> This approach seems to restrict the answer to yes or no which does oppose the reality of the legal world which is arguably open-ended in nature.<sup>44</sup> Using a constructive approach to widen the definition of legal rights for animals, Favre suggests three different types of legal rights:<sup>45</sup>

- (a) Weak legal rights – animal interests are acknowledged within the legal system but only the state may assert or protect them.
- (b) Strong legal rights – interests acknowledged within the legal system which can be asserted by non-governmental humans on behalf of animals.
- (c) Preferred legal rights – interests acknowledged within the legal system which can be asserted directly by the animals possessing the interest in question.

Therefore, this study suggests viewing the legal rights of animals by using positive and constructive approaches, which the society may easily understand as protection from harm and suffering. It is quite plausible to define animal rights as 'interests' and 'protection' rather than advocating for a legal personhood argument, enabling animals to sue on their own behalf, which may be too controversial and implausible for any society to accept at this juncture. As Favre suggests, the rights of animals will come into existence if we can enhance the interest of animals within any legal system.<sup>46</sup> This

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<sup>41</sup> Christopher Stone, 'Should Trees Have Legal Standing?-Towards Legal Rights for Natural Objects' (1972) 45 *Southern Californian Law Review* 450, 458. See also Bernard Rollin, 'Animal Ethics and Legal Status' in Marc Hauser, Fiery Cushman and Matthew Kamen (eds), *People, Property, or Pets?* (Purdue University Press, 2006) 33, 35.

<sup>42</sup> Discussion on whether animals fulfil requirements to have legal rights is based on Stone's criteria in different jurisdictions. See Jamieson, above n 26, 21 (Australia); Anita Dichter, 'Legal Definitions of Cruelty and Animal Rights' (1978-1979) 7 *Boston College Environmental Affairs Law Review* 147, 148 (US).

<sup>43</sup> Favre, above n 5, 414.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid, 415.

<sup>46</sup> Favre, above n 32, 88.

also translates the argument by Rollin as he writes that once animals enjoy legal protection, such rights cannot be evaded or avoided.<sup>47</sup>

To sum up this section, this study submits that the term 'animal rights' or 'legal rights of animals' offers three different meanings, depending on the usage of the term: first, animal rights which refer to classical definitions of rights based on the will and capacity to enforce rights and to attach a duty to another not to infringe those rights. Within this definition, animals have no rights at all because they lack the will and ability to enter the social contract as suggested by the term.

Second, the approach which is employed by animal rights advocates refers to the rights of animals to have legal standing in the eyes of the law and to be capable of instituting legal proceedings on the individual's behalf. This study suggests that this approach is unfeasible in the short term as no legal system or country in the world would regard animals as being legal entities which are capable of instituting legal proceedings in a court of law.

Third, 'legal rights' is viewed as a term which refers to an interest in being protected from harm and suffering. This makes the term 'animal rights' less controversial, non-complicated, non-extreme and reachable. Almost everyone agrees with the proposition that people should not be able to torture animals or to engage in acts of cruelty to them.<sup>48</sup> This is the position which this study advocates in order to enhance the protection and welfare of animals in Malaysia. The next section elaborates the extent to which the Malaysian legal framework and policy considers animals. This study suggests that animals enjoy certain status and entitlement under Malaysian law: to be protected as property, to be protected from unnecessary cruelty and to be protected for environmental and conservation purposes.

### **5.3 Protection as property**

#### **5.3.1 Justification of animals as human property**

Animals are classified as property under the law. The origin of property in law can be traced back to Ancient Roman law. Justinian's Institutes, the basis of Ancient Roman law, classify the treatment of several issues under the law, ranging from persons,

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<sup>47</sup> Rollin, above n 41, 35.

<sup>48</sup> Sunstein, above n 14, 6.

things, succession to deceased persons, obligations and actions.<sup>49</sup> The concern of this study is the distinction between person (*persona*) and things (*res*) which is provided by the Ancient Roman law. Roman law defines 'person' to include all men possessing a reasonable will and, as a result, only a person has rights.<sup>50</sup> Animals are regarded as 'things (*res*)', which are the object of the rights of a person.<sup>51</sup>

Cao suggests that animals as things were capable of being owned by humans as property under Roman law.<sup>52</sup> For instance, the concept of acquiring things through possession, and gaining rights over those things under Roman law, included catching, keeping and using wild animals.<sup>53</sup> The status of animals as property is clearly stipulated under Justinian's Institutes as follows:

Wild beasts, birds, fish and all animals, which live either in the sea, the air, or on the earth, so soon as they are taken by any one, immediately become by law of nations the property of the captor; for natural reasons gives to the first occupant which had no previous owner. And it is immaterial whether a man takes wild beast or birds upon his own ground, or on that of another. Of course anyone who enters the ground of another for the sake of hunting and fowling may be prohibited by the proprietor, if he perceives his intention of entering. Whatever of this kind you take is regarded as your property, so long as it remains in your power, but when it has escaped and recovered its natural liberty, it ceases to be yours, and again becomes the property of him who captures it.<sup>54</sup>

The Roman law also differentiated between wild and domestic animals, namely, *mansuetae naturae* (domestic by nature) and *ferae naturae* (wild by nature). This distinction remains in English law and all countries which inherited the English legal system including Malaysia which has adopted it. For instance, Halsbury's Law of Malaysia classifies animals into two categories:

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<sup>49</sup> Thomas Collet Sandars, *The Institutes of Justinian; with English Introduction, Translation and Notes* (John W. Parker and Son, West Strand., 1853) 33. Arrangement of sections of Justinian's Institutes: s 38 reads:

The Institutes of Justinian, after a few general observations of the nature, the divisions, and the sources of law, proceed to treat, first of persons, then of things, then of successions to deceased persons, then of obligations, and lastly of actions.

<sup>50</sup> Ibid, 35, s 41. However, the Roman law does not regard all men as persons. Slaves, for instance, were not in a position to exercise their reason and will, and the Roman law, therefore, refused to treat them as persons.

<sup>51</sup> Ibid, 45, s 54. Wise also suggests that all the beings that Romans thought lacked free will were classified as things. This included not only animals, but also women, children, slaves and the insane. See Steven Wise, 'Animal Rights: One Step at a Time' in Cass R. Sunstein and Martha C. Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 32.

<sup>52</sup> Deborah Cao, Katrina Sharman and Steven White, *Animal Law in Australia and New Zealand* (Lawbook Co, 2010) 65.

<sup>53</sup> Sandars, above n 49, 53.

<sup>54</sup> Ibid, 181.

For the purpose of liability in tort, animals are grouped into two categories, namely (1) animals of a dangerous species, *ferae naturae*; and (2) animals not falling into dangerous species, *mansuetae naturae*.<sup>55</sup>

The provisions of Roman law highly influenced and impacted on the common law of England. This can be seen from the provisions originating from Justinian's Institutes which regard animals as things and property of the person, and differentiates between wild and domestic animals. These provisions, which later became general principles in English law, evidence how the Roman law found its way into English law.<sup>56</sup>

Blackstone in his *Commentary on the Laws of England* identifies the status of animals as the property of persons as deriving from Roman law and the Old Testament.<sup>57</sup> Blackstone argued that when God gives dominion to humans over the earth and all things therein including animals, this necessarily justifies humans possessing and owning them as property as an immediate gift from Him.<sup>58</sup> Blackstone also argued that Roman law had regarded animals as property when it acknowledged the individual's taking of animals.<sup>59</sup> Hence, Blackstone justifies the treatment of animals as property which is in line with both divine revelation and Roman law, which the common law followed logically.<sup>60</sup> Wise argues that since then, the status of animals as property in English common law has continued to follow Roman law.<sup>61</sup>

As a result of the British occupation of Malaysia for over a hundred years, English law influenced the development of the legal system in Malaysia. Therefore, this study suggests that the status of animals as property in English law as rooted in Roman law also applies to Malaysia. The next section of this study will analyse whether Malay customary law treats animals as property similarly to English law.

### 5.3.2 Malay customary law

There is no direct provision in the Malay *adat* and its digests with regard to animals as property. This study assumes that there are at least two justifications which evidence the status of animals as property in Malay customary law. First, animals are objects of human ownership under Malay custom. Animals are often commodities which are subject to acquisition, transfer and theft. This gives rise to various rights and liabilities.

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<sup>55</sup> *Halsbury's Laws of Malaysia*, para [80.553] Classes of animals, 501.

<sup>56</sup> Cao, Sharman and White, above n 52, 70.

<sup>57</sup> Wise, above n 525.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, 527.

<sup>61</sup> *Ibid.*, 528.

Second, there are many provisions in the Malay digests concerning the monetary and economic value of animals, particularly in resolving disputes in the community. Having economic and instrumental value reflects the status of animals as property. Hence, this study argues that the existence of many provisions acknowledging that animals have economic value in monetary terms attaches to animals the attribute of being human property.

In line with this argument, this study suggests that Malay custom considers animals, first, as valuable property of any person who owns them, and second, provides mechanisms for their protection as the property of persons. This can be seen in provisions relating to animal theft and the infliction of injury to animals.

For instance, chapter 11.4 of the *Laws of Malacca* values animals in terms of monetary value in the case of animal theft. Apart from the monetary penalty that the offender needs to pay in the event of theft, an offender may also have to pay compensation for the loss of animals which is assessed using the animals' market price.<sup>62</sup>

Concerning a man who steals a buffalo, a cow or goat; if he steals them from their pens, he shall be fined 1¼ tahl and shall be required by the judge to pay a suitable price for the buffalo, cow or goat stolen. If he steals (cattle) in an open field, the fine is ten emas and in addition, he must pay the price of the animals.

In the case of injury to animals, the person who causes harm to animals has to pay compensation to the owner, in accordance with the animals' value. For example, if a person injures any animal or animals which belong to another person, then adequate compensation must be paid.<sup>63</sup> The same also applies to persons who borrow animals: if the animals are killed or lost, then compensation must be paid to the owner.<sup>64</sup>

Animals enjoy protection as property of the Malays who own them. As property, they are to be well-kept and deserve proper care and human protection. Moreover, *adat* regulates responsibilities and liabilities of animal owners to ensure the safe custody of their animals, as well as ensuring that those animals do not harm other people or things.

As part of the property of the Malay community, animals deserve a special place or shelter at their owner's house compound, as recorded by Windstedt:

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<sup>62</sup> *Laws of Malacca* (Malacca) chapter 11.4.

<sup>63</sup> *Ibid*, chapter 21.2.

<sup>64</sup> *Ibid*, chapter 15.7.

The pet-bird will be caged and hung by the roofed hose-ladder, or in the verandah, or on the top of a post ... Buffaloes and cows have their separate stalls ... As for the space under the house, it is generally devoted to an olla podrida of filthiness. Sometimes a cow or a pony is tied to the house post. All the small livestock inhabit the shady recesses; the poultry confined at night on an enclosed shelf under creels.<sup>65</sup>

As property, animals were also protected by Malay customary law from being harmed or stolen. For instance, many provisions in the Malay digests provide a monetary penalty and criminal punishment for animal theft to protect animals as the property of a person.

But if the articles stolen are agricultural products, the thief must not be killed; if the property includes a boat or cattle, he has only to pay a fine or compensation.<sup>66</sup>

The *Laws of Malacca* and the *Johor Code* provide that if someone kills or inflicts injury to animals owned by any officer of the state, the person shall become the slave of the said officer:

If a man stabs a buffalo belonging to the Chief Minister, the Police-Chief of a high dignitary or the Treasurer or the Harbour-master, he has to become a slave (of the owner). Such is the law.<sup>67</sup>

The *Laws of Kedah* provide a unique punishment for animal thieves. The offender would be publicly denounced:

Buffalo thieves shall have the head of the beast hung from their necks and be taken around by a crier with a gong, and cry out, "I am a buffalo-thief! Behold me!"<sup>68</sup>

The punishment provided by the Malay digests evidences the extent of the protection of animals as human property to not be harmed by others. It also operates as a deterrent to others to not inflict harm to animals.

### 5.3.3 Malaysian law

Inheriting principles of English law, in particular, English common law, Malaysian law follows the position of English common law in determining animals as property. The common law tradition has long regarded the idea of a person's legal right to own and control property as sacrosanct.<sup>69</sup> The right to own property is commonly understood

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<sup>65</sup> Winstedt, above n 4, 7-8.

<sup>66</sup> *Laws of Malacca* (Malacca) chapter 11.3-11.4.

<sup>67</sup> Ibid, chapter 21.2. The *Johor Code* also provides a similar provision.

<sup>68</sup> *Port Laws of Kedah 1650* (Kedah), chapter 27.

<sup>69</sup> Rebecca Huss, 'Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals' (2002) 86 *Marquette Law Review* 47, 68.



as a natural right, not one which must be created by the law.<sup>70</sup> However, in the context of animals, the common law analyses property rights in different contexts, as moveable property, and focuses on the classification of whether animals are domestic or wild in determining the owner's property rights.<sup>71</sup> Abdul Aziz Hussin suggests that Malaysian law considers that when persons own animals, they are their property, and therefore if an offence is done to the animals, the law presumes that it is an offence against the property of those persons who own the animals.<sup>72</sup>

Malaysian statutory law regards animals as goods or property. For instance the *Customs Act 1967* (Malaysia) includes animals in the definition of 'goods'. Section 2 defines goods to include animals, birds, fish, plants and all kinds of moveable property.<sup>73</sup> The *Consumer Protection Act 1999* (Malaysia) also defines goods to include animals. 'Goods' means goods which are primarily purchased, used or consumed for personal, domestic or household purposes, and includes among others; animals, including fish.<sup>74</sup>

Since the law regards animals as property, enabling them to be treated in a similar way to other forms of property, this gives rise to possessory rights and liabilities. In determining liability in torts, *Halsbury's Laws of Malaysia* follows English law, classifying animals into two categories: animals of dangerous species (*ferae naturae*) and animals not falling into dangerous species (*mansuetae naturae*).<sup>75</sup>

In a claim in tort under the doctrine of negligence, in *Jaswant Singh v Central Electricity Board & Anor*,<sup>76</sup> the court awarded a sum of MYR2,210 for the loss of buffaloes, which the defendants had caused. The court acknowledged the buffaloes to be the property of plaintiffs and the defendants were liable in causing the death of those buffaloes. The defendants were required to pay the value of the buffaloes to the plaintiff.

The *Penal Code* (Malaysia) also specifies animals as the property of a person with this protected against criminal conduct in the case of theft.<sup>77</sup> The Penal Code specifically

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid, 69.

<sup>72</sup> Abdul Aziz Hussin, *Tanggungjawab Manusia terhadap Haiwan di sisi Undang-Undang (Responsibilities of Humans Towards Animals in the Law)* (Dewan Bahasa dan Pustaka, 1990) 45.

<sup>73</sup> *Customs Act 1967* (Malaysia), s 2.

<sup>74</sup> *Consumer Protection Act 1999* (Malaysia), s 2.

<sup>75</sup> *Halsbury's Laws of Malaysia*, 501.

<sup>76</sup> *Jaswant Singh v Central Electricity Board & Anor* (1967) 1 MLJ 272 (Gill J).

<sup>77</sup> *Penal Code* (Malaysia), s 22, s 378.

classifies animals under moveable property which is to include corporeal property of every description other than land and things attached to the earth, or permanently fastened to anything which is attached to the earth.<sup>78</sup>

Section 378 of the *Penal Code* (Malaysia) defines theft as intending to take dishonestly any moveable property out of the possession of any person without that person's consent or move that property in order to bring about such taking. It further explains the act of moving an animal as a kind of *taking* of another's property:

*Explanation 4*—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which in consequence of the motion so caused is moved by that animal.

The Penal Code also illustrates examples of moving animals as property to be considered as theft:

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

Hence, the *Penal Code* (Malaysia) clearly regards animals as moveable property of persons and protects them by criminalising the act of theft.

## 5.4 Protection from gratuitous cruelty

### 5.4.1 Justification of protection from gratuitous cruelty

As discussed in Chapter 3, before the notions of animal welfare and compassion towards animals were generally advanced, humans regarded animals as non-sentient and not able to feel pleasure or pain. Radford recorded that in England, many amusements centred on animals ranging from hunting, horse racing, bull-baiting to fighting.<sup>79</sup> Cruelty to animals was commonly accepted as concomitant with human entertainment: bulls were thrown or forced to jump off the town bridge into the river; dogs were made to fight each other; and cocks were either used for fighting or had sticks and stones thrown at them until they died.<sup>80</sup>

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<sup>78</sup> Ibid. Definition of property.

<sup>79</sup> Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 18.

<sup>80</sup> Ibid, 18-19.

The recognition that animals had the capacity to experience pleasure and pain led directly to the growing denunciation of cruelty to them.<sup>81</sup> Many religious scholars interpreted religious scriptures to promote kindness and condemn cruelty and brutality to animals.<sup>82</sup> Philosophical ideas also began to question the practice of inflicting pain and suffering to animals, particularly from those philosophers who argued that animals are sentient beings.<sup>83</sup>

The notions of cruelty and suffering are pivotal in the development of animal rights movements and consequent legislation. Many supporters of animal rights movements based their arguments on Bentham's work, *Principles of Morals and Legislation*. Bentham argued that neither species nor race can provide a valid reason to deprive an animal of a decent life:

The day may come when the rest of the animal creation may acquire those rights which never could have been [withheld] from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognised that the number of the legs, the villosity of the skin, or the termination of the [pelvic bone] are reasons equally insufficient for abandoning a sensitive being to the same fate. 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?'<sup>84</sup>

Bentham's work motivated the animal rights movement to lobby for the better protection of animals from suffering and cruelty. In England, there were several attempts to introduce Bills to prevent cruelty and suffering to animals. The first was on 3 April 1800, when a Scottish MP, Sir William Pulteney introduced a Bill into the House of Commons to prohibit bullfighting, which was a popular form of entertainment in England at that time but the Bill was never enacted.<sup>85</sup> A further attempt by Pulteney in 1802 also failed.<sup>86</sup> The next attempt was in 1809. In that year, Thomas Erskine introduced a Bill to the House of Lords which was designed to prevent malicious and wanton cruelty to animals. This Bill successfully passed through the House of Lords with several amendments, but was lost in the House of Commons.

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<sup>81</sup> Ibid, 26.

<sup>82</sup> Margit Livingston, 'Desecrating the Ark: Animal Abuse and the Law's Role in Prevention' (2001) 87 *IOWA Law Review* 1, 14.

<sup>83</sup> Radford, above n 79, 26-8.

<sup>84</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislations* (Printed for W. Pickering etc ed, 1823) 235-6.

<sup>85</sup> Radford, above n 79, 34-5.

<sup>86</sup> Ibid, 35.

A further attempt in 1821 was initiated by Richard Martin, with the assistance of Thomas Erskine and John Lawrence. They introduced a Bill to prevent the ill-treatment of horses and other animals by third parties, but the Bill did not pass.<sup>87</sup> However, Martin reintroduced the Bill on 24 May 1822, and it was successfully passed in both houses and received the Royal Assent on 21 June 1822 to become 'An Act to prevent cruelty to animals', the *Cruel Treatment of Cattle Act 1822* (England), which later came to be known as Martin's Act.<sup>88</sup> Martin's Act 1822 was perhaps the first legislation concerning animal cruelty in the world.

At least in England, Martin's Act 1822 was further developed to inculcate protection against cruelty and suffering to other types of wild animals and birds, and animals used for experimentation.<sup>89</sup> As England extended its colonisation to other states, including the Malay Peninsula, the laws relating to animals in England such as the *Prevention of Cruelty to Animals Act 1849* (England) and *Cruelty of Animals Act 1876* (England) were referred to, with necessary modifications to suit the conditions on the Malay Peninsula. These changes were implemented from the early stages of colonisation.<sup>90</sup>

#### 5.4.2 Malay customary law

Malay custom or *adat* has been greatly influenced by Islamic law. Most provisions in the Malay digests are based on Islamic law with certain modifications to suit Malay customs. This study suggests that Islamic law influenced Malay customary law in protecting animals from cruelty and was based on Islamic law sources.

Many argue that the practice of the Prophet Muhammad in promoting kindness contributed significantly to a view that cruelty to animals should be eschewed. In one of the hadith (sayings), the Prophet Muhammad told his companions about a woman who would be sent to hell for having locked up a cat, not feeding it, nor even releasing it so that it could feed itself.<sup>91</sup> In another hadith, the Prophet Muhammad also told his

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<sup>87</sup> Ibid, 38-9.

<sup>88</sup> Ibid, 39.

<sup>89</sup> Ibid, 61-71. The development in England in protecting animals from cruelty could be seen in the legislation after Martin's Act, for instance, Pease's Act 1835, the Prevention of Cruelty to Animals Act 1849 and the Cruelty to Animals Act 1876.

<sup>90</sup> In 1902, the Straits Settlements government legislated a specific law concerning animal cruelty, known as *Cruelty to Animals Ordinance 1902* (Straits Settlements). This was later followed by the legislation of the *Cruelty to Animal Prevention Enactment 1910* (Federated Malay States).

<sup>91</sup> Hadith narrated by Abdullah ibn Umar. Bukhari, 4:337, quoted in Basheer Ahmad Masri, *Animal Welfare in Islam* (The Islamic Foundation, 2007) 46.

Companions of a serf who was blessed by Allah for saving the life of a dog by giving it water to drink thus quenching its thirst.<sup>92</sup>

The sayings of the Prophet then contributed to Malay custom which regarded animal cruelty such as cock fighting as a sin against God as provided in the *Laws of Dato' Sri Paduka Tuan 1667* and the *Port Laws of Kedah 1650*:

Thieves, robbers, cock-fighters, opium smugglers, gamblers, worshippers of trees and rocks, drunkards, all these sin against Allah ...<sup>93</sup>

Cockfighting was also regarded as a criminal offence, where the cockfighters could be arrested and imprisoned:

In former times, it was the duty of Temenggung to build prisons, to arrest thieves, robbers, smugglers, opium smokers, cock-fighters and gamblers.<sup>94</sup>

The influence of Islamic law in promoting kindness to animals led inexorably to the traditional Malay community caring for animals. For example, it is reported that the brother of the Sultan of Malacca named Raja Zainal, who had a horse of which he was extremely fond, had it stabled next to his sleeping apartment. He had emptied a lower room for that purpose, and twice or thrice in a night he would go and see his horse.<sup>95</sup>

Despite their close relation to and care for animals, some Malays also used them for amusement. Regardless of any prohibition against animal cruelty in Islamic law, some Malays were nevertheless excited by both cockfighting and bullfighting, both of which may inflict unnecessary cruelty to animals.<sup>96</sup> It is suggested that the Malays at one time were passionate about animal fighting, particularly cockfighting and bullfighting.<sup>97</sup> Poems were dedicated to this kind of amusement, and rules were made with regard to the fighting.<sup>98</sup> To avoid disputes which could arise from bullfighting, the Sultan of Kelantan, for instance, promulgated the Rules on Bull Fighting in the year 1903. There

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<sup>92</sup> Ibid, Hadith narrated by Abu Harayrah. Muslim, Volume 4, Hadith 2244.

<sup>93</sup> R.O. Winstedt, 'Kedah Laws' (1928) VI(II) *Journal of the Malayan Branch of Royal Asiatic Society* 1, 8.

<sup>94</sup> Ibid, 10.

<sup>95</sup> Winstedt, above n 4, 8.

<sup>96</sup> Hugh Clifford, *In Court and Kampong: Being Tales and Sketches of Native Life in the Malay Peninsula* (Grant Richards, 1897) 46.

<sup>97</sup> T.J. Newbold, *Political and Statistical Account of the British Settlements in the Straits of Malacca* (John Murray, Albermale Street, 1839) 179.

<sup>98</sup> Ibid. Newbold wrote: The Malays are passionately addicted to buffalo and cock-fighting; whole poems are devoted to enthusiastic descriptions of these 'sports of princes' and laws laid down for the latter as minute as those of the Hoyleian Code.

were 19 such rules.<sup>99</sup> These animal combats served as part of entertainment during leisure time, as a kind of competition, sometimes with elements of gambling, and as an event for special occasions or celebrations.<sup>100</sup> Bullfighting and cockfighting were not the only animal combats in which traditional Malays were involved. Wilkinson and Clifford also suggest that fighting involved certain kinds of fish.<sup>101</sup>

In commenting on the attitude of Malays towards animal cruelty in cockfighting, Clifford suggests that the Malays at that time were not ready to understand the theory that human beings owe a duty to animals, as the idea of animal cruelty could only be explained in domestic language using long and roundabout sentences.<sup>102</sup> Clifford refers to the use of the 'long and roundabout sentence' which is a common feature of the literature of traditional Malays which used idiom and flowery language to disseminate information.

However, Clifford is also of the view that the passions of some Malays for animal fighting were not shared by all Malays. Many Malays at that time, particularly on the East Coast, were against animal combat:

In spite of the stupid callousness with regard to pain inflicted on animals, of which this is an instance, the Malays are not as a race cruel in the sports wherein animals take a part, and, on the East Coast especially, little objection can be raised, save by the most straitlaced and sentimental, to the manner in which both cock and bull-fights are conducted. Many, of course, hold that it is morally wrong to cause any animals to do battle one with another, and this is also the teaching of the Muhammadan religion (Islam).<sup>103</sup>

This study suggests that the fact that the Malays of the East Coast disapproved of animal fighting reflects prevailing religious and cultural precepts, particularly the Islamic influence on Malay customary law. The views of those on the East Coast are reflected

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<sup>99</sup> Ahmad Mustaffa Babjee (ed), *History, Development and Prospects of the Animal Industry and Veterinary Services in Malaysia* (Department of veterinary Services Malaysia, 1994) 222, quoted Mohd Osman Taib, *Kesusasteraan Melayu Lama* (Federal Publication, 1965).

<sup>100</sup> R.J. Wilkinson, 'Life and Customs. Part III. Malay Amusements' (Government of the Federated Malay States, 1925) 54, 69. Wilkinson details the occasions on which cockfighting and bullfighting were demonstrated to include the installation of the new King or the new prince of the Malay States.

<sup>101</sup> Ibid 100, 64. See also Clifford, above n 96, 52. In explaining fish fighting in the Malay community, Clifford writes 'I have said that all birds fight more or less, but birds are not alone in this. The little wide-mouthed, goggled-eyed fishes, which Malay ladies keep in bottles and old kerosene tins, fight like demons.'

<sup>102</sup> Clifford, above n 96, 47. Hugh Clifford was the British Colonial Administrator who served in Malaya from 1883-1930. He was the British Resident of the State of Pahang when he wrote this book. His last position in Malaya was Governor of the Straits Settlements and British High Commissioner in Malaya from 1927-1930.

<sup>103</sup> Ibid.

elsewhere. This kind of animal fighting was made illegal in the northern part of the Malay states, as one of the sinful acts against the God, as provided in the *Laws of Dato' Sri Paduka Tuan 1667* and the *Port Laws of Kedah 1650*.<sup>104</sup> This proves that the notion of animal welfare had long ago infiltrated into Malay customary law, particularly in promoting kindness to animals and protecting them from cruelty.

However, in contrast with the spirit of the Malay *adat* and the Islamic influence which both promote the welfare of animals, cases of cruelty occasionally happened due to a lack of proper understanding of Islamic principles. Winstedt, for instance, provides an occasion of dog abuse by Sultan Abdul Ghaffar of Pahang, who he described as a pious Muslim.<sup>105</sup> This conduct was perhaps based on a misunderstanding of the duties of Muslims flowing from Islamic rules which dealt with certain animals. These rules only prohibited the consumption of dogs for food. Despite the prohibition of consuming certain animals, Islam encourages Muslims to treat all animals including dogs with tender and proper care.<sup>106</sup>

#### 5.4.3 Malaysian law

This study argues that most of the animal protection legislation in the world primarily aims at preventing harm and cruelty to animals. History proves that the first animal protection legislation was drafted specifically to combat animal cruelty.<sup>107</sup> It is also worth noting that a majority of the common law countries have their statutes specifically designed for anti-cruelty purposes. Moreover, it is also a long-established legal position for most species of animals to be protected from unnecessary cruelty.<sup>108</sup>

Malaysia is no exception. The two main animal-related laws; the *Animals Act 1953* and the *Wildlife Conservation Act 2010*, provide specific chapters on the prevention of cruelty to animals. Both acts criminalise animal cruelty by proscribing the activities which lead to the offence, instituting prosecution procedures and fixing penalties for

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<sup>104</sup> Chapter 27 of the Port Laws of Kedah and Chapter 1 of the Laws of Dato' Sri Paduka Tuan, quoted in Winstedt, above n 59, 5-7.

<sup>105</sup> R. O. Winstedt, 'Old Malay Digests and Malay Customary Law' (1945) 1(April) *Journal of the Royal Asiatic Society of Great Britain and Ireland* 17, 20.

<sup>106</sup> There are many sayings of Prophet Muhammad which encourage Muslims to treat animals with care. One saying of the Prophet reports that the man receives a reward from Allah to enter paradise for giving drinks to a dog (hadith narrated by Abdullah ibn Umar. Bukhari, 4:337), and the other who tortures a cat is to suffer in the hellfire (hadith narrated by Abdullah ibn Umar. Bukhari, 4:337).

<sup>107</sup> An Act to prevent cruelty to animals, the *Cruel Treatment of Cattle Act 1822* (England), (Martin's Act).

<sup>108</sup> Steven White, 'Legislating for Animal Welfare: Making the Interest of Animal Count' (2003) 28(6) (December 2003) *Alternative Law Journal* 277.

offences. These Acts also mandate that animal owners must ensure that animals are supervised and protected from unnecessary cruelty.<sup>109</sup>

*(a) Animals Act 1953*

Part IV of this Act provides for the prevention of cruelty to animals. Section 44 (1) lists the types of conduct which could lead a person or persons to be found guilty of the offence of animal cruelty as follows.<sup>110</sup>

- (a) cruelly beats, kicks, ill-treats, over-rides, over-drives, over-loads, tortures, infuriates or terrifies any animals; or
- (b) causes or procures or, being the owner, permits any animal to be so used; or
- (c) being in charge of any animal in confinement or in course of transport from one place to another neglects to supply such animal with sufficient food and water; or
- (d) by wantonly or unreasonably doing or omitting to do any act, causes any unnecessary pain or suffering, or being the owner, permits any necessary pain or suffering to any animals; or
- (e) causes, procures or being the owner, permits to be confined, conveyed, lifted or carried any animal in such manner or position as to subject it to unnecessary pain or suffering; or
- (f) employs or causes or procures or, being the owner, permits to be employed in any work or labour, any animal which in consequence of any disease, infirmity, wound or sore, or otherwise is unfit to be so employed;
- (g) causes, procures or assists at the fighting or baiting of any animal, or keeps, uses, manages, or acts or assists in the management of any premises or place for the purpose, or partly for the purpose, of fighting or baiting any animal, or permits any premises or place to be so kept, managed or used, or receives or causes or procures any person to receive, money for the admission of any person to such premises or place.

The Animals Act makes cruelty an offence by every person including the person who owns the animals or the person who is in charge of the animals. The Act does not limit the cruelty offence to the commission of the act but also extends it to an act of omission. Therefore, the owner who fails to exercise reasonable care and supervision

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<sup>109</sup> *Animals Act 1953* (Malaysia), s 44 (2); *Wildlife Conservation Act 2010* (Malaysia), s 86 (1).

<sup>110</sup> *Animals Act 1953* (Malaysia), s 44 (1)–(g).



in respect of protection of animals from cruelty might also be liable for cruelty offence.<sup>111</sup>

However, the Animals Act makes exceptions for some acts or omissions which may lead to animal cruelty. These include the killing, or preparation for killing, of animals for human consumption as long as the conduct does not inflict unnecessary suffering to animals. Therefore, the slaughtering of animals for food is allowed, unless it is accompanied by unnecessary pain to animals.<sup>112</sup>

The Animals Act also exempts animal wrestling from the animal cruelty offence if the Minister is satisfied that the wrestling is beneficial to the breed and no cruelty to animals will arise from the wrestling.<sup>113</sup>

*(b) Wildlife Conservation Act 2010 (WCA)*

The WCA also addresses the issue of cruelty to wildlife and provides it as an offence in the Act. The Act defines cruelty to include any of the following activities:<sup>114</sup>

- (a) beats, kicks, infuriates, terrifies, tortures, declaws or defangs any wildlife;
- (b) neglects to supply sufficient food or water to any wildlife which he houses, confines or breeds;
- (c) keeps, houses, confines or breeds any wildlife in such manner so as to cause it unnecessary pain or suffering including the housing, confining or breeding of any wildlife in any premises which is not suitable for or conducive to the comfort or health of the wildlife;
- (d) uses any wildlife for performing or assisting in the performance of any work or labour which by reason of any infirmity, wound, disease or any other incapacity it is unfit to perform;
- (e) uses, provokes or infuriates any wildlife for the purpose of baiting it or for fighting with any other wildlife or animal, or manages any premises or place for any of these purposes; or
- (f) wilfully does or wilfully omits to do anything which causes any unnecessary suffering, pain or discomfort to any wildlife.

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<sup>111</sup> Ibid, s 44 (2).

<sup>112</sup> Ibid, s 44 (3).

<sup>113</sup> Ibid, s 44 (4). Animal wrestling, particularly animal play, could benefit animals in several circumstances. It is thought to better equip animals for life in the future or to help them to minimise fitness risks in the present. See Suzanne D. E. Held and Marek Spinka, 'Animal Play and Animal Welfare' (2011) 81 *Animal Behaviour* 891, 895.

<sup>114</sup> *Wildlife Conservation Act 2010* (Malaysia), s 86 (1) (a)–(f).

Hence, any persons who are involved in the commission or omission of any of the actions above will be liable to be convicted of the offence of cruelty to wildlife and shall, on conviction, be liable to a fine of not less than five thousand ringgit and not more than fifty thousand ringgit or to imprisonment for a term not exceeding one year, or to both.<sup>115</sup>

However, the WCA allows the hunting of wildlife to be excluded from cruelty offences as long as it is authorised by the authority concerned.<sup>116</sup> There are also individuals or groups who can obtain permits to hunt wildlife. Indigenous Malays may hunt certain species of wildlife for their sustenance.<sup>117</sup> Wildlife Officers, for example, may hunt wildlife in circumstances where the wildlife causes danger to human life and property, and if it is necessary and expedient to prevent undue suffering on the part of the wildlife.<sup>118</sup>

The Act also allows for the destruction or killing of wildlife for certain purposes beneficial to humans. The use of birdlime by the landowner or occupier to destroy grain-eating birds is permissible during the crop-ripening season.<sup>119</sup> Capturing and killing wildlife for the protection of crops is also permitted.<sup>120</sup> The Act also permits the killing of wildlife which represents a danger to human life.<sup>121</sup>

#### *(c) Animal Welfare Bill 2012 (AWB)*

The Malaysian government is proposing a new Bill to replace the current *Animals Act 1953*. This Bill is in the process of being tabled in the Parliament. It introduces a new part<sup>122</sup> to deal with the prevention of harm to animals and covers not only cruelty offences<sup>123</sup> but includes other harm such as killing,<sup>124</sup> poisoning<sup>125</sup> and fighting.<sup>126</sup>

The AWB proscribes cruelty in greater detail and includes any of the following:

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<sup>115</sup> Ibid, s 86 (2).

<sup>116</sup> Ibid, s 50.

<sup>117</sup> Ibid, s 51.

<sup>118</sup> Ibid, s 52.

<sup>119</sup> Ibid, s 53.

<sup>120</sup> Ibid, s 54.

<sup>121</sup> Ibid, s 55.

<sup>122</sup> *Animal Welfare Bill 2012 (Malaysia)* Part IV Prevention of Harm.

<sup>123</sup> Ibid, s 29. (Cruelty Offences).

<sup>124</sup> Ibid, s 31. (Killing of Animals).

<sup>125</sup> Ibid, s 32. (Administration of Poisons).

<sup>126</sup> Ibid, s 33. (Animal Fighting Ventures).

- (a) cruelly beats, kicks, over-rides, over-drives, over-loads, tortures or terrifies any animals;
- (b) causes or procures, or being the owner, permits any animal to be so used;
- (c) being in charge of any animal in confinement or in course of transport from one place to another neglects to supply such animal with sufficient food or water
- (d) by wantonly or unreasonably doing or omitting to do any act causes any unnecessary pain or suffering, or, being the owner, permits any unnecessary pain or suffering to any animal;
- (e) causes, procures or, being the owner, permits to be confined, conveyed, lifted or carried any animal in such manner or position as to subject it to unnecessary pain or suffering;
- (f) employs or causes or procures or, being the owner, permits to be employed at any work labour, any animal which in consequence of any disease, infirmity, wound or sore, or otherwise is unfit to be so employed;
- (g) keeps or confines any animal in any cage or other receptacle which does not measure sufficiently in height length and width to permit the animal a reasonable opportunity for its natural movement;
- (h) keeps any animal chained or tethered with a short or heavy chain or cord, or hobbles the legs of any animal;
- (i) being the owner of any animal fails to provide such animal with sufficient food, drink or shelter;
- (j) abandons any animal in circumstances which render it likely that it will suffer trauma, pain or suffering by reason of relocation, starvation, thirst, injury, or illness;
- (k) wilfully or negligently permits any animal, of which he is the owner, to go out unattended in any place while the animal is infected with contagious or infectious disease or, permits any diseased or disabled or injured animal, of which he is the owner, to die in any place;
- (l) offers for sale or without reasonable cause, has in his possession any animal which is suffering in pain by reason of mutilation, starvation, thirst, overcrowding or other ill treatment;
- (m) mutilates an animal in any manner including ear cropping, tail docking, defanging, declawing, branding, piercing or kills any animal in any manner other than as prescribed;

- (n) causes, procures or assists at fighting or baiting of any animal, or keeps, uses, manages, or acts or assists in management of any premises or place for the purpose, of fighting or baiting any animal, or permits any premises or place to be so kept, managed, or used, or receives or causes or procures any person to receive money for the admission of any person to such premises or place;
- (o) promotes or takes part in any shooting match or competition wherein animals are released from captivity for the purpose of such shooting;
- (p) organises, participates, promotes or in any manner is associated with any sport or activity involving the use of animals, where such animals are subjected to cruelty either during the sport or activity itself or while in training;
- (q) skins or roasts or kills for superstition or extracts parts of any live animals through a procedure which causes pain and suffering for the purpose of getting skins, oils or other animal products; and
- (r) dynamites or electrifies or poisons any streams or rivers or other water bodies to kill, harvest or catch animals.

However, the AWB qualifies certain acts which may be regarded as cruelty offences under three circumstances: if the Animal Welfare Board prescribes the act as accepted veterinary service; if it involves the baiting of any pest animals for the purpose of public health, disease control, population control and relocation for conservation; and if it is in the natural course to use particular animals for the feeding of other animals.<sup>127</sup>

The AWB generally prohibits the killing of animals. Nevertheless, it permits killing in several circumstances: for human consumption; in the case of emergencies; when the animal is incurably ill<sup>128</sup> as determined by veterinary authority; to prevent any danger which an animal may cause to human beings; for the purpose of animal population control by lawful authority; and for any reasons as determined by veterinary authority.<sup>129</sup>

The AWB also criminalises animal poisoning without lawful authority or reasonable excuse. The person commits an offence of animal poisoning if he or she administers any poisonous or injurious drug or substance to any animal, knowing it to be poisonous

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<sup>127</sup> Ibid, s 30 (1)(a)–(c). Exception to offences under s 29.

<sup>128</sup> Ibid, s 32 (2) defines 'incurably ill' as the situation where an animal is fatally wounded or sick with a grave prognosis certified by a veterinary authority or registered veterinary surgeon.

<sup>129</sup> Ibid, s 31 (1)(a)–(f). Killing of Animals.

or injurious, or causes any poisonous or injurious drug or substance to be taken by any animal knowing it to be poisonous or injurious.<sup>130</sup>

To prevent animal harm, the AWB also makes illegal any event involving animal fighting, wrestling or baiting for the purposes of sport, wagering or entertainment.<sup>131</sup> Any act which is connected to animal fighting such as organising or publicising animal fights, betting, or taking part as participants or spectators constitutes an offence under the Bill.<sup>132</sup>

This study suggests that the provisions of prevention of harm to animals in the AWB aim to further detail activities which may become cruelty offences, and to overcome the limitations of any definition of cruelty under the current *Animals Act 1953*. This effort is not solely the work of government politicians. The creation of public awareness on animal welfare issues, in particular, animal cruelty and suffering, initiated by Malaysian animal welfare organisations, has put pressure on the government to come up with the new law designed to enhance the protection and welfare of animals.

## **5.5 Protection for conservation and the environment**

### **5.5.1 Justification of conservation and environmental protection**

The first question to ask is: what is involved in conservation? Generally, there are two main justifications for conservation: a human-centred focus, which is anthropocentric in nature, for human consumption, health and aesthetic pleasure; and an ecological focus, designed to maintain the ecological stability of animals and to prevent the extinction of species, particularly endangered species. Garner suggests that the interests which conservation serves determine its objectives.<sup>133</sup> The promotion of the interests of animals is generally advocated because it involves the furtherance of human interests. A prominent view is that the natural world has no value in itself, that it serves as a resource for humans to manage and that management requires conservation.<sup>134</sup> However, another view suggests that we should conserve animals for

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<sup>130</sup> Ibid, s 32 (1)–(2). Administration of Poisons.

<sup>131</sup> Ibid, s 33 (1) defines animal fighting ventures to include any event that involves a fight between at least two animals and that is conducted for the purposes of sport, wagering or entertainment. The same section defines animal fighting as an occasion on which an animal is placed with an animal, or with a human, for the purpose of fighting, wrestling or baiting.

<sup>132</sup> Ibid, s 33 (1)–(6). Animal Fighting Ventures.

<sup>133</sup> Robert Garner, 'Wildlife Conservation and the Moral Status of Animals' (1994) 3(1) *Environmental Politics* 114, 115.

<sup>134</sup> Ibid.

their own sake because they have interests which can be harmed in the absence of protection.<sup>135</sup>

Most of the international treaties on conservation emphasise benefits to humans. For instance, the *Convention for the Protection of Birds Useful to Agriculture 1902* and the *International Convention for the Regulation of Whaling 1946* were instituted to protect economic interests. The *Convention on the Conservation of Migratory Species of Wild Animals 1979* asserts that wild animals must be conserved for the good of mankind. Human benefit was the sole objective of anthropocentric-based international treaties on conservation, until the coming into force of the *Convention on International Trade in Endangered Species 1973* (CITES) with its emphasis on animal interests, particularly the restrictions and prohibitions on trading in some species.

The destruction of natural vegetation and forests and the concomitant danger to wildlife has raised moral and scientific concerns over the loss of species particularly for advocates arguing for the protection of all creatures.<sup>136</sup> Preservation of species from extinction becomes a core objective in conservation.<sup>137</sup> This study suggests that conservation serves both the interests of humans and those of other animals. Humans may benefit in terms of economic and aesthetic considerations and, at the same time, animals are protected from extinction and exploitation.

#### 5.5.2 Malay customary law

The Malay *adat* has long acknowledged the relationship between humans and nature. The Minangkabau idiom '*Alam Takambang Jadi Guru*' (let nature be the teacher) evidences the importance of nature and encourages humans to preserve and protect the human–nature relationship.<sup>138</sup> The Malay *adat* promoted environmental sustainability generally in two ways: first, by promoting activities which enhance concern and awareness of the environment; and second, by preventing those activities which adversely affect the interests of nature, including animals.

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<sup>135</sup> Ibid.

<sup>136</sup> Jeyamalar Kathirithamby-Wells, *Nature and Nation: Forests and Development in Peninsular Malaysia* (University of Hawai'i Press, 2005) 189.

<sup>137</sup> Ibid.

<sup>138</sup> Eri Barlian, 'Pelaksanaan Pepatah Petitih Adat Minangkabau oleh Masyarakat dalam Melestarikan Alam Sekitar (*Application of Custom of Minangkabau among Society in Environmental Sustainability*)' (2010) 28(1) *Sari - International Journal of the Malay World and Civilisation* 189, 193.

In promoting the interest of animals, to enable them to range freely without interference from humans, the *adat* acknowledged them as living beings, and as the kings of their own domain, and that nobody should be able to make decisions or interfere with their conduct to live out their own lives:

Even poultry are kings in their own domain. When it comes to laying eggs the wisest man on earth cannot successfully compete with a humble hen.<sup>139</sup>

The *adat* also suggested that animals, particularly birds, have the right to move around as they share the same earth with the King and his people:

While the king shared with the birds the highroad with its stepping stones, the waris and their chief shared with them the hills and the hillbases.<sup>140</sup>

These two circumstances clearly stipulate that Malay custom promotes animal conservation for their own interests and also provides some limitations on human exploitation. The *adat* acknowledged their right to move freely in their own pattern of life without interference.

At the same time, the *adat* also provided certain restrictions on any acts which could affect or harm animals or damage the environment in which they live. For instance, the *adat* restricted the hunting of wild animals except for necessary human consumption, and determined the types of animals which could not be killed such as elephants, rhinoceroses and various species of birds.<sup>141</sup> The *adat* also protected certain species of fish by limiting the venues for fishing and prohibiting certain methods of fishing which could harm the fish or the water in which they live: for example, it prohibited the poisoning of fish.<sup>142</sup>

### 5.5.3 Malaysian law

The reconciliation of human–animal conflict in early 1900 in the Malay states marked the beginning of wildlife conservation.<sup>143</sup> The concept of the national park was promoted to limit the tension between the interests of agriculture and those of nature

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<sup>139</sup> R.J. Wilkinson, 'Law. Part I. Introductory Sketch' (Government of the Federated Malay States, 1922) 17.

<sup>140</sup> Joseph Minattur, 'The Nature of Malay Customary Law' (1964) 6 *Malaya Law Review* 327, 339.

<sup>141</sup> Tenas Effendy, 'Norma Masyarakat Hukum Adat Melayu terhadap Pelestarian Hutan' (Dewan Kesenian Riau, 2001) 3.

<sup>142</sup> Ibid, 4-5.

<sup>143</sup> Due to forest destruction, and the opening of plantations in early 1900, the latter created an attractive environment which invited wild animals like elephants, wild pigs, deers, tigers and gaurs (Indian bison) to search for food. To protect the plantations and settlements from these wildlife, many animals were shot or trapped.

preservation.<sup>144</sup> The excessive killing of wildlife because it was a perceived threat to human crops led to a system of rewards for the killing of certain types of wildlife. This, in turn, resulted in the lobbying of the British government to protect wildlife in Malay states.<sup>145</sup> This resulted in the establishment of the Wildlife Commission Survey Committee to study the matter.

The Wildlife Commission Survey revealed that Malays favoured the conservation of wildlife due to anxiety about its depletion.<sup>146</sup> The Wildlife Commission Survey proposed that the British government should protect animal life from exploitation and extinction. The Colonial Office approved the Wildlife Report which led to the establishment of the Game Department in 1937 and King George V National Park which ranged across Pahang, Kelantan and Terengganu with an area 4,343 sq km in 1938/1939.<sup>147</sup>

In 1955, the Federal Government introduced new legislation, the *Wild Animals and Wild Birds Protection Ordinance 1955*, which was designed to coordinate the enforcement of wildlife protection in Peninsular Malaysia. However, the administration of the state game departments was still under the respective state governments. Between 1972 and 1976, the Federal Government, after consulting with the state governments, federalised the administration of all state game departments in Peninsular Malaysia following the enactment of the *Protection of Wildlife Act 1972*. The Game Department was later known as the Department of Wildlife and National Parks Peninsular Malaysia (DWNP).<sup>148</sup> Later, in 2010, Malaysia enacted the *Wildlife Conservation Act 2010* which replaced the *Protection of Wildlife Act 1972* to further enhance wildlife protection.

There are various legal provisions in Malaysia which are aimed at animal conservation for two main purposes: for human interests; and in the interests of animals. The anthropocentric approach in conservation focuses on the commercial or economic benefits particularly to various businesses involving dealing, taxidermy, breeding, birds' nest collection and wildlife research, and to human aesthetic interests and entertainment such as recreational hunting, wildlife exhibitions and zoo operation. The ecological approach concentrates on the sole benefit of animals in protecting and

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<sup>144</sup> Kathirithamby-Wells, above n 136, 189.

<sup>145</sup> Ibid, 195-208.

<sup>146</sup> Ibid, 209.

<sup>147</sup> Department of Wildlife and National Parks Malaysia, *Background* (18 December 2012) <<http://www.wildlife.gov.my>>

<sup>148</sup> Ibid.



preserving species from extinction by ensuring the maintenance of their habitat and restricting any activities which are detrimental to any animal species.

The *Wildlife Conservation Act 2010* (WCA), for instance, specifies both conservation approaches. The WCA still allows wildlife exploitation for human interests such as providing avenues for human businesses and entertainment which include dealing, taxidermy, commercial breeding and birds' nest collection, wildlife exhibitions and recreational hunting. However, these activities are regulated to ensure the sustainable use of wildlife for future economic and aesthetic interests by imposing various restrictions and limitations such as licensing and penalties, and by providing reasonable human duties to animals when engaging in these activities. At the same time, the WCA also focuses its conservation objective on animal interests by providing controlled environment habitats, determining which species of wildlife should be protected, and by declaring wildlife reserves and sanctuaries.

In providing healthy environments and wildlife habitats, the *Environmental Quality Act 1974* (EQA) (Malaysia) provides for legal measures which are designed to regulate activities which may cause pollution and, as a result, be hazardous to the habitats of animals, birds, wildlife, fish or aquatic plant life. The EQA empowers the Minister to limit or restrict any prescribed activity which may have significant environmental impacts by requiring a report titled the Environmental Impact Assessment (EIA).<sup>149</sup> For instance, the *Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987* (Malaysia) prescribes activities relating to agriculture, airport construction, drainage and irrigation, fisheries, forestry, and resort and recreational development which may impact on the habitat and environment of wildlife. Any activities such as these must be strictly assessed before implementation so that the habitat of any animals is protected.

The *International Trade in Endangered Species Act 2008* (Malaysia) which aims to implement the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) complemented the efforts on wildlife conservation by regulating activities which can lead to animal extinction and loss of habitat arising from trade in endangered species. Malaysia also extended conservation to aquatic animals by enactment of the *Fisheries Act 1985* (Malaysia) which regulates activities in Malaysian fisheries' waters.

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<sup>149</sup> *Environmental Quality Act 1974* (Malaysia), s 34A.

Malaysian law therefore protects animals for conservation purposes either expressly or indirectly. Wildlife conservation for the sole benefit of animal interests is ideal, as it preserves and conserves the animals for their own benefit from human exploitation and loss of habitat. Wildlife conservation for human interests is also a good effort as incremental steps create awareness of the sustainable use of wildlife. The regulation of certain human activities which may impact on animals should serve as a long-term strategy which may also lead to the abolition of such activities. With optimistic and positive thinking, both approaches will definitely lead to the single objective of conservation which, in turn, will enhance the protection of animals by preserving them from exploitation and extinction and by providing them with a helpful and beneficial habitat within which they can display their own patterns of life.

## **5.6 Conclusion**

Determining the legal status of non-human beings can be a difficult task. If we determine the legal status of animals by reference to the sophisticated requirements of the notions of rights, particularly the rights we accord to humans, then animals are definitely without rights. However, if the use of the term 'rights' refers to 'protection from harm and suffering' or 'interests', animals, without a doubt, have rights. The reference to positive attributes makes the term 'animal rights' less controversial, less complicated and non-extreme. In that sense then, the notion of animal rights is reachable.

Generally, those who argue from the animal welfare proposition position regard animals as inferior to humans but, nevertheless, animals matter to them. The fact that animals are the property of humans does not permit them to be treated in the same way as we treat humans. However, even those who argue that animals are property still argue that animals have interests and should be protected from harm and unnecessary suffering. This study proposes that Malaysian law follows the animal welfare model which regards animals as property and, as a result, they merit three main protections: protection as property, protection from unnecessary cruelty and protection for conservation and environmental purposes.

Protection as property means that animals are protected from being taken or removed illegally from their owners. Therefore, Malaysian law criminalises theft and robbery to protect animals as the property of persons. It also limits other activities which could harm animals. Protection from unnecessary cruelty becomes an essential aim of animal legislation which criminalises activities that could inflict unnecessary harm and

suffering to animals. Protection for the purpose of conservation is intended to protect animals from exploitation and loss of habitat.

Malaysian law, therefore, protects animals either expressly or indirectly. Protection of animals for their intrinsic value is an ideal, as it protects the animals for their own benefit from cruelty, exploitation and loss of habitat. Protection of animals in furtherance of human interests is also desirable as it represents an incremental step in creating awareness of the sustainable use of animals. The regulation of certain human activities which may impact on animals such as hunting should serve as a long-term strategy and may, in turn, result in the long-term abolition of such activities. With optimistic and positive thinking, both approaches will definitely come to a single objective of animal protectionism, to enhance the protection of animals by criminalising cruelty offences, preserving animals from exploitation and extinction, and providing them with a helpful and beneficial habitat in which they can display their own pattern of life. The protection of animals as property, from cruelty and for environmental purposes, denotes the relationship between their welfare and animal protection law. This relationship between animal welfare and the law will be explored in the next chapter.

## CHAPTER 6: ANIMAL WELFARE AND INTERNATIONAL LAW

### 6.1 Introduction

Animal welfare is a unique field of study. It involves the scientific study of the welfare of animals as pets, in zoos, laboratories, on farms and in the wild. Although animal welfare has been of considerable concern for thousands of years both in religion and culture, the investigation of animal welfare using rigorous scientific method is a relatively recent development. The study of animal welfare combines two important fields of study: the study of the physical, health and behavioural needs of animals; and the ethical responsibility of humans in providing proper treatment to animals for the interest and benefit of both humans and animals. As Fraser suggests, animal welfare is a 'mandated science' which has been commissioned in order to guide actions, decisions and policy of the government.<sup>1</sup> Despite this, it is still rooted in value-based ideas concerning the beliefs that humans have about the ethical entitlements and rights which should or should not be accorded to animals.

As an international reference organisation for animal issues, the World Organisation of Animal Health (OIE) developed and published two codes: the Terrestrial Code and the Aquatic Code. These provide international standards for animal welfare. In the absence of any international treaty concerning animal welfare, currently there is an attempt to propose a multilateral agreement concerning animal welfare. The World Society for Animal Protection (WSPA) leads the effort in promoting the Universal Declaration of Animal Welfare (UDAW) for Ministerial consideration in the United Nations (UN) Assembly.

When the Brambell Committee issued its report on intensive animal husbandry in England in 1965, it suggested that an animal's welfare should be considered in terms of the Five Freedoms. These freedoms defined ideal states rather than standards of acceptable welfare. The report led to the British Parliament establishing the UK Farm Animal Welfare Council (FAWC) which was designed to implement the Five Freedoms as the guiding principle in assessing animal welfare.<sup>2</sup>

Malaysian animal welfare legislation has reflected both international trends and what had occurred in Great Britain. So far, Malaysia has passed several pieces of legislation

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<sup>1</sup> See 6.2.3 Animal welfare: science and value-based, for discussion.

<sup>2</sup> See 6.2.4 Standards and assessment of animal welfare, for discussion.

designed to govern animal welfare, such as the *Animals Act 1953*, the *Wildlife Conservation Act 2010* and the *Fisheries Act 1985*. In addition, the government has issued codes of practice and policies which provide basic guidelines for regulating animal welfare, including national policies on agricultural and biological diversity and the *Code of Good Animal Husbandry Practice (GAHP)*.

This chapter proposes standards of animal welfare and a set of guidelines which could be implemented in Malaysia. It does this by considering current Malaysian policies and legislation concerning animal welfare and comparing them with established standards proposed by several organisations at an international level such as the FAWC, the OIE and the WSPA through the Terrestrial and the Aquatic Codes, the Five Freedoms recommended in the Brambell Report, the Three Rs (replacement, reduction and refinement) and the Universal Declaration on Animal Welfare.

## **6.2 The nature of animal welfare**

### **6.2.1 Philosophical basis of animal welfare**

As discussed in Chapter 3, the attitude of individuals towards animals is shaped by their beliefs and their culture. As a result, most people view animal welfare from an anthropocentric perspective. They consider that humans are the central or most significant species (more so than any other animal) and consider reality through a purely human perspective. For example, it is arguable that certain wildlife species should be protected because these species are endangered. However, the reality is that humans, by and large, have shown almost a cavalier attitude towards the welfare of endangered species. Genuine concern about animal welfare incrementally arises when humans start considering protecting endangered animals not only for their instrumental value or human interests, but for the interests, well-being and quality of life of the animals themselves.

Radford suggests that the term 'welfare' may have two different meanings. The first is the dictionary definition. As a noun it connotes well-being, good fortune, health, happiness, prosperity, etc, and leads to phrases such as 'the state of being or doing well' and 'a good or satisfactory condition of existence'.<sup>3</sup> On this point, several authors regard the welfare of animals as a state or condition which leads to a successful life, of mental and physical health, that animals are in harmony with their environment, and in

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<sup>3</sup> Marc Bekoff (ed), *Encyclopedia of Animal Rights and Animal Welfare* (Greenwood Press, 1998) 55.

a condition or habitual activity in which animals are 'well-off'.<sup>4</sup> In contrast with its dictionary term, the second definition denotes welfare as a relative term. Radford, for example, refers to a scientific definition provided by Broom who asserts that animal welfare is the 'state of an animal as it attempts to cope with its environment'.<sup>5</sup> Broom does not consider that the term can refer to the benefits given to animals by humans, and to a measure of welfare using a good or bad scale, not just the positive side of it.<sup>6</sup> In other word, it suggests two scales or states for the welfare of animals: good welfare and bad welfare. The scientist could determine this state by gathering evidence relating to the physical and mental state of an animal (ie how it feels) as it seeks to meet its physiological and behavioural needs.<sup>7</sup>

What humans understand about the well-being of animals also depends on cultural factors and individual belief systems. These beliefs and cultures then offer justifications as to how humans perceive the quality of life of animals. For instance, a community may regard animal housing and confinement which is designed to prevent them from becoming diseased as providing for the good health of animals. Another community may oppose animal confinement and argue that animals should be able to roam at will for their own good so that they have plenty of fresh air and freedom and can, as a consequence, exhibit their natural behaviour. These differences reflect the different concerns and emphases of what constitutes a satisfactory life for animals in human care which Fraser groups under three broad headings. They are that:<sup>8</sup>

1. animals should be spared any negative effects of human contact (e.g. pain, fear, hunger, etc) as much as possible, and by experiencing the positive consequences they will be contented;
2. animals should be able to lead reasonably natural lives by being able to perform important types of normal behaviour and by having some natural elements in their environment such as fresh air and the ability to socialize with other animals in normal ways; and

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<sup>4</sup> Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001), 266-7.

<sup>5</sup> Ibid. Radford quoted Broom.

<sup>6</sup> Donald Broom, 'Animal Welfare: Concepts and Measurement' (1991) 69 *Journal of Animal Science* 4167, 4168.

<sup>7</sup> John Webster, *Animal Welfare: Limping Towards Eden* (Blackwell Publishing, 2005) 2.

<sup>8</sup> David Fraser, 'Understanding Animal Welfare' (2008) 50(S1) *Acta Veterinaria Scandinavica* 1; Fraser also details the topic of understanding animal welfare in its cultural context in his book, David Fraser, *Understanding Animal Welfare: The Science in Its Cultural Context* (Wiley-Blackwell, 2008).

3. animals should function well in the sense of good health, normal growth and development, and normal functioning of the body.<sup>9</sup>

However, Fraser advises that pursuit of any one of these approaches does not guarantee a high level of welfare as judged by the other approaches.<sup>10</sup> For example, separating an infant monkey from its mother for disease-free purposes can produce monkeys with excellent physical health but have unpleasant psychological consequences. Similarly, free-range animals may have plenty of fresh air and freedom to perform their natural behaviours, but this may expose them to parasites, predators and harsh weather which could affect their welfare. Yet again, a happy pet which is too well-fed and cared for will never suffer from hunger but is likely to develop health problems from being overweight.<sup>11</sup>

Therefore, each approach has its own justifications and limitations, which are based on the cultural and belief systems of a society or community. This explains how a community or a society pursues animal welfare objectives although sometimes those objectives may affect the cost of production or result in other economic concerns.<sup>12</sup> Improvement of the basic health of animals by reducing disease and injury will improve the efficiency of animal production and help reduce production costs. However, this may require animals to be given more space such as larger cages or a free-range environment which conforms to animal welfare standards, but this may increase production costs. Hence, compromising between the cost factors and the most prevalent philosophical bases of animal welfare would accord animal welfare greater or less priority.<sup>13</sup>

## 6.2.2 Evolution of the concept of animal welfare

As mentioned, the term 'welfare' most commonly connotes 'good fortune, health, happiness and prosperity'.<sup>14</sup> After the end of the Second World War, when people in most prosperous countries found themselves increasingly free from basic wants and threats to personal security, they started to emphasise and advance welfare, well-being and quality of life issues. In similar fashion, concern about animals came naturally to

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<sup>9</sup> Fraser, above n 8, 71.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Jessica Vapnek and Megan Chapman, *Legislative and Regulatory Options for Animal Welfare* (Food and Agriculture Organization of the United Nations, 2010) 5-6.

<sup>13</sup> Ibid.

<sup>14</sup> Fraser, above n 8, 65.

focus on the welfare of animals.<sup>15</sup> English social reforms of the 1800s and those following the Second World War are now often referred to 'welfare legislation'. This legislation was designed to provide a social safety net for those who did not pay national Insurance contributions such as the homeless, the physically handicapped and unmarried mothers.<sup>16</sup> In a similar manner, natural concern arose at that time about vulnerable animals and that they should be protected from exploitation. This concern arose from the application of the concept of human welfare to animals.<sup>17</sup>

However, despite the broad use of the term, welfare did not emerge as an identifiable area of scientific study or as a factor influencing public policy towards animals until the second half of the 1960s.<sup>18</sup> The welfare of animals only started to spark policy concern by the publication of a seminal book by Ruth Harrison entitled *Animal Machines*. This book was, in particular, critical of modern farming methods and it represented a breakthrough of public concern for the welfare of animals in England.<sup>19</sup> Harrison drew attention to the condition of extreme confinement of domestic animals such as broiler chickens,<sup>20</sup> veal calves,<sup>21</sup> broiler beef, rabbits and pigs.<sup>22</sup> She also criticised the practice of poultry packing stations and battery cages which she regarded as inhumane.<sup>23</sup> She noticed that the supply of food from intensive factory farming processes could be dangerous for human consumption.<sup>24</sup> Her views about undesirable practices in the animal industry were supported by the media and this, in turn, influenced public sentiment in England towards animal welfare issues.<sup>25</sup>

#### (a) *The Five Freedoms*

The UK government responded to the issue that Harrison raised by appointing a committee, the Brambell Committee, 'to examine the conditions in which livestock are kept under systems of intensive husbandry and to advise whether [animal welfare] standards ought to be set, and if so, what they should be'.<sup>26</sup> The Committee noted that

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid, 66.

<sup>17</sup> Ibid.

<sup>18</sup> Radford, above n 262.

<sup>19</sup> R. Harrison, *Animal Machines: The New Factory Farming Industry* (Stuart, 1964).

<sup>20</sup> Ibid, 9-25.

<sup>21</sup> Ibid, 62-88.

<sup>22</sup> Ibid, 89-97.

<sup>23</sup> Ibid, 27.

<sup>24</sup> Ibid, 176.

<sup>25</sup> Webster, above n 7, 12.

<sup>26</sup> 'Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems' (Her Majesty's Stationery Office, 1965) para 1.



the term 'welfare' is an open-ended term which embraces both the physical and mental well-being of animals.<sup>27</sup> It concluded, therefore, that any attempt to evaluate animal welfare must take into account the scientific evidence available concerning the feelings of animals (ie how they responded to confinement) and this could be determined by looking at their physiology as well as their behaviour.<sup>28</sup>

In addressing the issue, the Brambell Committee disapproved of any degree of confinement of an animal which necessarily frustrates most of the major activities which make up its natural behaviour. It did not consider such confinement or restraint permissible over a long period unless there were other advantages thereby conferred upon the animal and those advantages had to be very substantial.<sup>29</sup>

The Committee further suggested that 'animals should at least have sufficient freedom of movement to be able without difficulty, to turn round, groom itself, get up, lie down and stretch its limbs.'<sup>30</sup> It also asserted that farm animals belong to species which should be able to engage in their natural patterns of behaviour.<sup>31</sup> Animals must also be provided with adequate food and drink so as to prevent them suffering from hunger or thirst.<sup>32</sup>

The UK Farm Animal Welfare Council (FAWC) later adopted the suggestions of the Brambell Committee and paraphrased them into a popularly form known as the Five Freedoms.<sup>33</sup> FAWC considered that good animal welfare implies both fitness and a sense of well-being and suggested that good animal welfare can be effectively promoted by referring to the Five Freedoms which are:

1. Freedom from thirst, hunger and malnutrition by ready access to fresh water and a diet to maintain full health and vigour.
2. Freedom from discomfort by providing an appropriate environment including shelter and a comfortable resting area.
3. Freedom from pain, injury or disease by prevention or rapid diagnosis and treatment.

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<sup>27</sup> Ibid, para 25.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid, para 37.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid, para 38.

<sup>32</sup> Ibid, para 39.

<sup>33</sup> 'Report on Priorities for Animal Welfare Research and Development' (FAWC, 1993).

4. Freedom to express normal behaviour by providing sufficient space, proper facilities and company of the animal's own kind.
5. Freedom from fear and distress by ensuring conditions and treatment which avoid mental suffering.<sup>34</sup>

*(b) The Three Rs*

It is interesting to note that, earlier in 1954, a decade before the principle of Five Freedoms was introduced, the animal welfare community already had a framework with regard to the welfare of laboratory animals. At that time, the Universities Federation for Animal Welfare (UFAW), a scientific animal welfare organisation based in the United Kingdom, appointed William Russell, a zoologist, and Rex Burch, a microbiologist, to conduct a study of humane techniques for laboratory animal experiments.<sup>35</sup>

In 1959, based on the study sponsored by the UFAW, Russell and Burch published their findings, using the headings of replacement, reduction and refinement. In the study, they suggested that every person involved with laboratory animals shall have a moral duty in animal experiments to keep the numbers of animals used at a minimum and to refine procedures to lessen discomfort and stress to animals.<sup>36</sup>

This finding led to the important principle of animal welfare with regard to animal experiments which is known as the Three Rs:

*(i) Reduction in numbers of animals*

The concept of reduction in animal research refers to methods that result in the use of fewer animals to obtain scientifically valid information. Reduction also can be achieved by obtaining more information from a given number of animals so that in the long run, fewer animals are needed.<sup>37</sup>

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<sup>34</sup> Ibid, paras 8, 9.

<sup>35</sup> 3R's: *History* (2005) California National Primate Research Center  
<<http://www.cnprc.ucdavis.edu/animals/history.aspx>>

<sup>36</sup> Ibid.

<sup>37</sup> 3R's: *Reduction* (2005) California National Primate Research Centre  
<<http://www.cnprc.ucdavis.edu/animals/reduction.aspx>>

### *(ii) Refinement of experimental methods*

In the world of animal research, "refinement" refers to methods to reduce possible stress or discomfort to the animals involved. It also encompasses measures to improve animals' overall well-being and environment.<sup>38</sup>

### *(iii) Replacement of animals with non-animal techniques*

Advances in technology have given scientists a number of alternatives to using animals in research. Use of tissue cultures and computer models are examples of alternatives that may, in some research studies, replace the need for animals.<sup>39</sup>

## 6.2.3 Animal welfare: science and value-based

The sciences play a very important role in showing how humans perceive other living beings including animals. Waldau suggests that science contributes significantly to human claims about animals. It does this in at least in three ways: by providing confirmation of many common-sense observations about animals; by making corrections to those common-sense observations if they prove to be incorrect; and, by providing detailed information about the actual realities of animals.<sup>40</sup> It follows that science helps to show humans how they should engage in animal welfare as well as determining the right approach with regard to the treatment of animals.

However, science itself is also influenced by prevailing philosophical views about what is important or desirable so that animals can have a good life. Fraser, for instance, argues that the approaches which scientists suggest as preferences concerning animal welfare are influenced by different world views that are present in global cultural perspectives:

Animal welfare is clearly a concept that can be studied scientifically, but our understanding of animal welfare, and even the science that we do to assess and improve animal welfare, is influenced by value-based ideas about what is important or desirable for animals to have a good life. Thus, we have a concept that is both science-based and values-based.<sup>41</sup>

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<sup>38</sup> 3R's: *Refinement* (2005) California National Primate Research Centre  
<<http://www.cnprc.ucdavis.edu/animals/refinement.aspx>>

<sup>39</sup> 3R's: *Replacement* (2005) <http://www.cnprc.ucdavis.edu/animals/refinement.aspx>  
<<http://www.cnprc.ucdavis.edu/animals/replacement.aspx>>

<sup>40</sup> Paul Waldau, *Animal Rights: What Everyone Needs To Know* (Oxford University Press, 2011) 162-163.

<sup>41</sup> Fraser, above n 8, 6.

As Fraser discussed, there are two views which influence humans' attitudes and preference in determining animal welfare conditions. The first is the Romantic/Agrarian view which sees nature as an ideal state, and values the emotional experience and the freedom of the individual, and refers back to the golden age when people lived in harmony with nature.<sup>42</sup> The second is the Industrial view, which is a product of the Enlightenment when humans focused on reason and science, with its emphasis on productivity and progress.<sup>43</sup>

A preference for the Romantic/Agrarian view would see: first, a natural life as a good life for animals, by emulating nature through the means of free range systems and access to the outdoors; and second, by placing emphasis on the emotions of animals, whether they are happy or suffer, and consequently attaching importance to their freedom. This view favours the traditional, non-confinement systems as an ideal for animals and opposes confinement systems as incompatible with the good welfare of animals.<sup>44</sup> In contrast, the Industrialist view focuses on: first, a healthy life as a good life for animals, by preventing disease and avoiding the vicissitudes of nature; and second, values rationality and the scientific basis of systems more than the freedom of individual animals. This view perceives a high level of productivity as evidence of good animal welfare, and considers any confinement system as a form of progress which improves animal welfare.<sup>45</sup>

These value-based views also influence scientists in determining animal welfare conditions. Therefore, science itself does not stipulate which approach to animal welfare is correct or which is not; rather, it adopts a different value-based view of animal welfare. A study by Fraser confirms that scientists employ different criteria for animal welfare by providing justifications from different approaches in assessing and improving animal welfare.<sup>46</sup> Animal welfare is also not only a type of normal science which is undertaken simply to understand the natural world of animals, but rather a 'mandated science' which has been commissioned in order to guide actions, decisions and the policy of governments.<sup>47</sup> Even though the concept of animal welfare is based

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<sup>42</sup> Ibid, 4.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid, 5.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid, 6.

on fully scientific research, it is still rooted in value-based ideas about what people believe to be more or less desirable.<sup>48</sup>

Therefore, this study suggests that when the scientists themselves have several convictions or beliefs which are based on certain values or global perspectives, these will later influence their scientific analysis and assessment of what constitutes animal welfare. It hence approves of the proposition that this study argued in Chapter 2 that global perspectives, which have their roots in cultural and religious perspectives, steer human attitudes towards animals, and this includes the work of animal welfare scientists. The position of animal welfare as a mandated science which guides the decisions and government policies also justifies the influence of attitudes and perspectives of people in dealing with animals, particularly those rooted in their belief systems and customs.

#### 6.2.4 Standards and assessment of animal welfare

Animal welfare science plays a very important role in providing information about animals. It provides help to humans in understanding the physical and mental state of animals and later in suggesting ways in which animals should be treated. Animal welfare scientists employ multiple research techniques in assessing the level of welfare and these suggest several approaches as to how to provide better welfare of animals. As discussed previously, scientists may emphasise different approaches in assessing the welfare of animals but tend to focus on three main components: animal feeling, animal biological function and animal naturalness. These components, however, centre on a similar major theme of animal welfare, that is, the quality of life of animals. There are two main criteria which contribute to an animal's quality of life in suggesting the level of welfare of animals: the affective state of animals in coping with their environment, and the freedom to access certain opportunities and sources.

##### *(a) Coping*

Coping refers to the process of controlling environmental effects.<sup>49</sup> When an individual animal has control of its mental and bodily stability, all the various control systems function effectively and the animal is said to be able to successfully cope with its environment.<sup>50</sup> As the welfare of individual animals refers to their attempts to cope in

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<sup>48</sup> Ibid.

<sup>49</sup> Bekoff, above n 3, 58.

<sup>50</sup> Ibid.

their environment, Broom suggests an assessment of their coping mechanisms depends on what has been done to help them cope and how well or how badly they are, in fact, coping.<sup>51</sup> If the ability to cope can be achieved easily, the animals are in a good welfare condition. In contrast, if coping is difficult, the welfare of animals is considered poor. The difficulty in coping and a failure to cope may be associated with pain and suffering, and, thus affect the welfare of the animals concerned.<sup>52</sup>

When an individual animal has the opportunity to determine its own actions and responses, it is said to have freedom. The extent to which an individual animal has freedom affects its welfare.<sup>53</sup> The Brambell Committee has rightly pointed out that animals should at least have sufficient freedom of movement to be able without difficulty, to turn around, groom itself, get up, lie down and stretch its limbs.<sup>54</sup> This recommendation of the Brambell Committee has been incorporated into the FAWC to become the concept of the Five Freedoms. This freedom is one which is used to assess the welfare of animals.<sup>55</sup> Although the principles underlying the Five Freedoms are the benchmark for assessing the welfare of farmed animals, it is also suggested that the principles are well suited to the assessment of other animals such as companion animals, laboratory animals used for research and wild animals.<sup>56</sup>

Broom suggests that the welfare of individual animals can be measured by three important components: body damage, disease level and behavioural change.<sup>57</sup> Animals with broken bones and wounds are likely to have poor welfare compared to healthy animals. The inability of the immune systems of animals to combat disease also determines their welfare. Abnormal behaviour such as unnatural fierceness, noisiness or quietness can also signify the quality of life or welfare of individual animals.

Broom also observes several other indicators of poor welfare. A shorter life than is normally expected for a particular species can be a measure of the extent to which their welfare has been considered.<sup>58</sup> Similarly, extreme inactivity or the unresponsiveness of animals could indicate poor welfare.<sup>59</sup> Stereotypies (eg repetitive

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<sup>51</sup> Broom, above n 6, 4168.

<sup>52</sup> Ibid.

<sup>53</sup> Bekoff, above n 3, 60.

<sup>54</sup> Brambell Report, above n 26, para 137.

<sup>55</sup> Farm Animal Welfare Council (FAWC), 'Farm Animal Welfare in Great Britain: Past, Present and Future' (Farm Animal Welfare Council, 2009) 1, para 5.

<sup>56</sup> John Webster, *Animal Welfare: A Cool Eye Towards Eden* (Blackwell Science, 1994) 13-14.

<sup>57</sup> Broom, above n 6, 4170-4171.

<sup>58</sup> Ibid, 4172.

<sup>59</sup> Ibid.

or ritualistic movements, posture or utterances) often occur in animals which are frustrated, threatened or unable to cope with their environment.<sup>60</sup> Animals also have natural preferences. These preferences can be used to decide which species are most likely to thrive with human intervention.<sup>61</sup> When those preferences are satisfied, the animals concerned will reflect this in their behaviour and their physiology. If their welfare is taken into account, then their quality of life will be measurable.

#### *(b) Freedom*

It is also pertinent to note that by referring to the principle of the Five Freedoms, FAWC also suggests three levels of indication of welfare or quality of life of animals, from an animal's perspective. They are ranked as follows: a good life will indicate good welfare or quality of life; a life worth living is the minimum standard as an acceptable quality of life or welfare; and a life not worth living indicates an unacceptable welfare or quality of life of animals.<sup>62</sup> Therefore, the minimum standard of welfare which animals must have is a life worth living. Any pain, suffering, distress or lasting harm must be necessary, proportionate and minimal, and the system of husbandry and care should provide for the animals' needs and certain wants.<sup>63</sup> When an animal suffers a severe disease which is untreatable, and which involves a severe physical state such as starvation, the quality of animal life is not worth living and it should be treated swiftly or euthanised promptly and humanely.<sup>64</sup> The best indication of animal welfare is a good life, which goes well beyond the minimum standard of a life worth living. It is suggested that a good life requires not only compliance with the law, but also with policies associated with good practices, plus the highest standard of stockmanship and veterinary care.<sup>65</sup>

As the principle of the Five Freedoms and the standard of assessing welfare or quality of life of animals are products of foreign instruments, this study argues that they may influence or be adopted by Malaysia when addressing its national standards for assessing animal welfare. However, these principles and standards may serve only as guidance as to best practice with no binding effect unless they are translated into legislation. So far, the principles underlying the Five Freedoms have yet to be incorporated into Malaysian law. Even though the Five Freedoms are yet to be the

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<sup>60</sup> Ibid, 4173.

<sup>61</sup> Ibid.

<sup>62</sup> (FAWC), above n 55, 18.

<sup>63</sup> Ibid, 14.

<sup>64</sup> Ibid, 15-16.

<sup>65</sup> Ibid, 16.

written foundation for government authorities dealing with animal matters, they have already become the policy of academic and research institutions, and animal welfare organisations in Malaysia.<sup>66</sup>

Most of the standards pertaining to animal welfare are initiated by developed countries. These standards received support from many countries and later became the benchmarks for international standards. This has been achieved through the various international treaties dealing with animal matters and the promotion of global standards by relevant international organisations. The next section of this chapter will briefly analyse these international standards and guidelines and the extent to which Malaysia has incorporated them into its legal system.

### **6.3 International law and animal welfare**

#### **6.3.1 International law**

The establishment of the International Office for Epizootics (OIE)<sup>67</sup> in 1920 marked the development of animal protection at an international level. However, Bowman suggests that the first three significant conventions<sup>68</sup> on animal protection adopted in 1935 were not ratified by many countries and failed to have a substantial impact.<sup>69</sup> As an international body which focused on eradicating contagious diseases among animals, OIE indirectly brought the issue of animal welfare and animal suffering to the international agenda. For instance, the *International Convention Concerning the Transit of Animals 1935* expressly provided that exporting countries should ensure that the animals are properly loaded and suitably fed and that they should receive all necessary attention, in order to avoid unnecessary suffering.<sup>70</sup> Bowman also suggests that the

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<sup>66</sup> There is no formal statement that the Five Freedoms are the base of the policy of government authorities dealing with animals such as the Department of Veterinary Services (DVS) and the Department of Wildlife and National Parks (DWNP). Nevertheless, various documents and brochures of the respective departments refer to the Five Freedoms as the benchmark of animal welfare. However, all academic and research institutions, and animal welfare organisations officially refer to the Five Freedoms in their main policies regarding animals.

<sup>67</sup> The International Office of Epizootics became the World Organisation for Animal Health in 2003, but kept its historical acronym, OIE. This thesis discuss further details of OIE in para 6.3.3.

<sup>68</sup> *International Convention for the Campaign Against Contagious Diseases of Animals 1935*, *International Convention Concerning the Transit of Animals, Meats and Other Products of Animal Origin 1935*, and *International Convention Concerning the Export and Import of Animal Products 1935*.

<sup>69</sup> Michael Bowman, 'The Protection of Animals under International Law' (1988) 4 *Connecticut Journal of International Law* 487, 489.

<sup>70</sup> *Ibid.*



issue of international transportation was the first to be approached from an animal welfare perspective.<sup>71</sup>

Even though not many countries adopted the 1935 conventions, the Council of Europe (COE)<sup>72</sup> and European Union (EU)<sup>73</sup> have put a great effort into ensuring the welfare of animals particularly in the European region. For instance, the COE at least has agreed to several conventions to be considered by member countries with regard to animal welfare such as the Convention for the Protection of Pet Animals, the Convention for the Protection of Animals kept for Farming, the Convention for the Conservation of European Wildlife and Natural Habitat, the Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes, the Convention on the Protection of Animals for Slaughter and the Convention for the Protection of Animals during International Transport.<sup>74</sup>

The EU, which was formerly known as the European Economic Community (EEC) or European Community (EC), has also, by the Treaty of Amsterdam in 1997, included a protocol on animal welfare which created clear legal obligations on member states to pay full regard to the welfare requirements of animals: it refers to animals as sentient beings.<sup>75</sup> The EU also has numerous statutes and regulations concerning animal welfare which bind member countries such as protection of farm animals,<sup>76</sup> the

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<sup>71</sup> Ibid.

<sup>72</sup> The Council of Europe (COE) is not part of the European Union (EU) but an international organisation in its own right, based in Strasbourg. Its main role is to strengthen democracy, human rights and the rule of law throughout its member states. The 27 member states of the EU are all members of the COE, whereas the COE, with its 47 member states, has a much wider membership. <http://www.consilium.europa.eu/contacts/faq?lang=en&faqid=79264> accessed 29 January 2012).

<sup>73</sup> European Union (EU) is a unique economic and political organisation of 27 democratic European countries. It was given its current name in 1993. When the Treaty of Lisbon entered into force on 1 December 2009, the European Union replaced the European Community (EC), which had existed since 1958, and took over all its rights and obligations. (<http://www.consilium.europa.eu/contacts/faq?lang=en&faqid=79264> accessed 29 January 2012).

<sup>74</sup> Edward N. Eadie, *Animal Suffering and The Law: National, Regional, and International* (Seaview Press, 2009) 133.

<sup>75</sup> Protocol on protection and welfare of animals in Treaty of Amsterdam Amending the Treaty of European Union, the Treaties Establishing the European Communities and Related Acts. Official Journal C 340, 10 November 1997. (<http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0110010013> accessed 29 January 2012).

<sup>76</sup> Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes Official Journal L 221, 08/08/1998 p. 0023–0027, Council Directive 2008/119/EC of 18 December 2008, Official Journal L 010, 15/01/2009 P. 0007–0013 laying down minimum standards for the protection of calves (codified version), Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs

protection of animals at the time of slaughter and killing,<sup>77</sup> the protection of animals during transport,<sup>78</sup> the protection of cat and dog fur,<sup>79</sup> the protection of wild animals in zoos,<sup>80</sup> the protection of animals used for experimental and scientific purposes<sup>81</sup> and the trade in seal products.<sup>82</sup>

Despite existing regional protections for animals particularly in Europe and the great effort made by many individual countries, there is still no direct or express international or global agreement covering animal welfare, although there is a move towards the achievement of the Universal Declaration for Animal Welfare.<sup>83</sup> However, there are various existing international agreements covering the conservation of specific species of animals and general environmental protections which have an indirect effect in improving the welfare of individual animal species.<sup>84</sup> The international agreements include the *Convention on International Trade in Endangered Species of Wild Fauna and Flora 1975* (CITES) which regulates the wildlife trade and the *International Convention for the Regulation of Whaling 1946* (IWC) which controls whaling activities.<sup>85</sup> Other existing international agreements also include wildlife and habitat protections which indirectly affect animal welfare such as the *Convention on Biological Diversity 1992* and the *Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971* (the Ramsar Convention).

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Official Journal L 47, 18/02/2009 p. 5 (codified version), Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens Official Journal L 203, 03/08/1999 p. 0053–0057, Council Directive 2007/43 of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production (OJ L 182, 12.7.2007 p. 0019–0028).

<sup>77</sup> Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing Official Journal L 340, 31/12/1993 p. 0021–0034, 88/306/EEC: Council Decision of 16 May 1988 on the conclusion of the European Convention for the Protection of Animals for Slaughter Official Journal L 137, 02/06/1988 p. 0025–0026.

<sup>78</sup> Council Regulation (EC) No 1/2005 of 22 December 2004, on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/9, Council Decision (2004/544/EC) of 21 June 2004 on the signing of the European Convention for the protection of animals during international transport.

<sup>79</sup> Regulation (EC) No 1523/2007 of the European Parliament and of the Council of 11 December 2007 banning the placing on the market and the import to, or export from, the Community of cat and dog fur, and products containing such fur. Text with EEA relevance (Official Journal L 343, 27.12.2007 P. 0001–0004).

<sup>80</sup> Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos, Official Journal L 094, 09/04/1999 P. 0024–0026.

<sup>81</sup> 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 Official Journal L 276, 20.10.2010 p. 33–79 (revising Directive 86/609/EEC).

<sup>82</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products.

<sup>83</sup> Eadie, above n 74, 188–189.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

### 6.3.2 World Trade Organization (WTO)

As there is no multilateral treaty on animal law, the states which are concerned about animals initiate their own standards of animal welfare. Many countries introduce laws which primarily aim to regulate how animals are to be treated in their respective countries. For instance, in protecting farm animals from cruelty, the EU has banned the three most harmful aspects of industrial farming, namely, veal crates, battery cages and sow stalls.<sup>86</sup> The United States (US) has also moved to protect and conserve its marine species particularly dolphins and tuna, and regulates fishing activities which may affect these species.<sup>87</sup> However, free trade rules under the World Trade Organization (WTO) may require the countries which require higher standards of animal welfare for their own animal products not to impose their own standards on the animals or products coming from other countries which may not meet their standards. The WTO, which implements the General Agreement on Tariffs and Trade 1994 (GATT 1994), provides that:

No prohibitions or restrictions ... shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.<sup>88</sup>

It follows that any country imposing animal welfare standards on its own citizens cannot enforce those standards against other members of the WTO. As a result, any country imposing a ban on battery cages for chickens because it perceives them as involving cruelty cannot restrict the sale of eggs from countries which do not have such an embargo. This is a requirement of the GATT 1994.<sup>89</sup>

This study suggests that the WTO and the GATT 1994 adversely affect the promotion of good animal welfare. The law of a country which restricts products from other countries that may be harmful to animals may be declared invalid and inconsistent with WTO rules. This happened in the Tuna-Dolphin cases.<sup>90</sup> The US enacted its *Marine Mammal Protection Act 1972* (MMPA) to regulate the catching of tuna by US fishermen and others operating within its jurisdiction who may incidentally kill other marine

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<sup>86</sup> European Union Council Directive 1999/74/EC.

<sup>87</sup> *Marine Mammal Protection Act 1972* (United States)

<sup>88</sup> *General Agreement on Tariffs and Trade 1994* (United Nations), Article XI: General Elimination of Quantitative Restrictions.

<sup>89</sup> Peter Stevenson, 'The World Trade organisation Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare' (2002) 8 *Animal Law Journal* 107, 111.

<sup>90</sup> United States – Restrictions on Import of Tuna DS21/R – 39S/155 (3 September 1991).

mammals.<sup>91</sup> The MMPA also empowered the US to prohibit the import of any commercial fish or fish products caught by methods which do not meet US criteria, which resulted from incidental killing or serious injury to marine mammals.<sup>92</sup> The problem arose on two different occasions: first, when the US government prohibited the import of yellow fin tuna and tuna products from Mexico which were caught by methods which did not meet US standards. Second, Italy and Spain challenged US law which imposed on intermediary nations an embargo on their tuna products. The panel in both cases held that the US MMPA which restricted any imports which did not meet the US requirement was inconsistent with WTO rules which promoted a fair trading market. Therefore, the US had no right to restrict the importation of products from other countries even though the products so produced did not comply with US law.

US attempts to protect its marine animals have continued. The US issued regulations requiring all US shrimp trawlers to use turtle excluder devices (TEDs) to ensure that no turtles would be affected by shrimp trawling. The US then imposed a ban on shrimps caught with commercial fishing technology that could affect sea turtles.<sup>93</sup> Only countries which use TEDs could export shrimp to the US. In the Shrimp-Turtle case, several countries which were affected by this import restriction, including Malaysia, Thailand, Pakistan and India, requested that a panel be convened to examine the complaint regarding the US imports.<sup>94</sup> The panel followed the decision in the Tuna-Dolphin cases and found that the restrictions were again inconsistent with WTO rules. The US then issued a revised set of guidelines for the countries to use with any similar programs which were identical to the TEDs for commercial fishing.

In order to avoid unnecessary impediments to trade as happened in the Tuna-Dolphin and Shrimp-Turtle cases, and to further facilitate the safe international trade in animals and animal products, member countries of the WTO signed the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS agreement). The SPS agreement encourages members of the WTO to base their sanitary measures on international standards and guidelines.<sup>95</sup> The OIE is appointed as the WTO reference organisation to establish those standards and guidelines with regard to animals and

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<sup>91</sup> *Marine Mammal Protection Act 1972* (United States) s 101(a)(2).

<sup>92</sup> *Ibid.*

<sup>93</sup> Public Law 101-162 (United States) s 609.

<sup>94</sup> United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 October 1998).

<sup>95</sup> World Organisation for Animal Health (OIE), *International Standard* (2013) <<http://www.oie.int/>>

animal products.<sup>96</sup> This appointment marks the first ever international standard and set of guidelines for animal welfare and protection.

### 6.3.3 World Organisation for Animal Health (OIE)

Due to the slow progress of diplomatic negotiations designed to fight animal diseases, particularly rinderpest epizootic<sup>97</sup> which occurred unexpectedly in Belgium in 1920, the concern over the spread of the disease led to an International Conference in March 1921.<sup>98</sup> The conference proposed an International Agreement for Dealing with Contagious Disease of Animals<sup>99</sup> on 25 January 1924, signed by 28 countries. This agreement created the Office International des Epizooties<sup>100</sup> (OIE), an intergovernmental organisation which primarily aimed to improve animal health worldwide. In May 2003, the organisation became the World Organisation of Animal Health, but kept its historical acronym, OIE.<sup>101</sup> Since its establishment, and in particular by its OIE Strategic Plan 2001–2005, member countries mandated the OIE to take the lead on animal welfare issues internationally.<sup>102</sup> Considering that animal health is a key component to animal welfare, that OIE plays a role as the international reference organisation for animal health, elaborating recommendations and guidelines for regulating animal welfare practices.<sup>103</sup> Operating from its headquarters in Paris with regional and sub-regional offices on every continent, the OIE has a total of 178 member countries and maintains permanent relations with 45 other international and regional organisations.<sup>104</sup> The OIE has published two important codes to be referred to as international standards for animal welfare. They are the Terrestrial Animal Health Code<sup>105</sup> and the Aquatic Animal Health Code.<sup>106</sup>

The development of these standards and recommendations is the result of continuous work since 1960 of one of the OIE's Specialist Commissions, the OIE Terrestrial Animal

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<sup>96</sup> Ibid.

<sup>97</sup> Epizootic (from Greek *epi-* upon + *zoion* animal) is a disease that appears as new cases in a given animal population, during a given period, at a rate that substantially exceeds what is "expected" based on recent experience.

<sup>98</sup> Wikipedia [http://en.wikipedia.org/wiki/World\\_Organisation\\_for\\_Animal\\_Health](http://en.wikipedia.org/wiki/World_Organisation_for_Animal_Health).

<sup>99</sup> International Agreement for the Creation at Paris of an International Office for Dealing with Contagious Diseases of Animals, and Annex (Paris, 25 January 1924).

<sup>100</sup> Office International of Epizooties (OIE) is located at Paris since its establishment until now.

<sup>101</sup> World Organisation for Animal Health (OIE), *History* (2013) <<http://www.oie.int/>>

<sup>102</sup> World Organisation for Animal Health (OIE), *The OIE's Achievements in Animal Welfare* (2013) <[www.oie.int](http://www.oie.int)>

<sup>103</sup> Ibid.

<sup>104</sup> World Organisation for Animal Health (OIE), *Member Countries* (2013) <[www.oie.int](http://www.oie.int)>

<sup>105</sup> *Terrestrial Animal Health Code 2012* (OIE).

<sup>106</sup> *Aquatic Animal Health Code 2012* (OIE).

Health Standards Commission. The first *Terrestrial Code* was published in 1968. This Commission draws upon the expertise of internationally renowned specialists to prepare draft texts for new articles of the *Terrestrial Code* or to revise existing articles in the light of advances in veterinary science.

As the international reference for animal welfare, since 1960, the OIE has established ad hoc groups of experts to develop draft texts for animal welfare standards known as the OIE Terrestrial Animal Health Code (Terrestrial Code). The OIE Animal Welfare Working Group normally reviews the draft texts and recommends them to the Terrestrial Animal Health Standard Commission (Code Commission). The Code Commission further reviews the texts and the draft texts which are then sent to member countries for comment. After two rounds of comments, following standard setting procedures, the draft texts may be proposed for adoption in the Terrestrial Code. The first Terrestrial Code was published in 1968. Following various amendments and modifications, the OIE keeps updating the Terrestrial Code, with its latest 21<sup>st</sup> edition in May 2012. With the same concern for aquatic animals, the OIE published the first Aquatic Animal Health Code (Aquatic Code) in 1995.

Since May 2005, the 178 member countries which form the World Assembly of OIE Delegates have adopted eight animal welfare standards in the Terrestrial Code and three standards in the Aquatic Code as follows:

#### Terrestrial Code

1. The transport of animals by land.
2. The transport of animals by sea.
3. The transport of animals by air.
4. The slaughter of animals for human consumption.
5. The killing of animals for disease control purposes.
6. The control of stray dog populations.
7. The use of animals in research and education.
8. Animal welfare and beef cattle production systems.

#### Aquatic Code

1. The welfare of farmed fish during transport.
2. The welfare aspects of stunning and killing of farmed fish for human consumption.
3. Killing of farmed fish for disease control purposes.

(a) *Terrestrial Code*

The OIE identified animal welfare as a priority in its 2001–2005 Strategic Plan. In 2002, it established a permanent Working Group on Animal Welfare to develop a set of guiding principles as a philosophical basis for all of the OIE. The member countries during the OIE 72<sup>nd</sup> General Session in May 2004 later adopted these principles to be included in Chapter 7 of the Terrestrial Code. The guiding principles for animal welfare are as follows:<sup>107</sup>

1. That there is a critical relationship between animal health and *animal welfare*.
2. That the internationally recognised Five Freedoms (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) provide valuable guidance in *animal welfare*.
3. That the internationally recognised ‘three Rs’ (reduction in numbers of *animals*, refinement of experimental methods and replacement of *animals* with non-animal techniques) provide valuable guidance for the use of *animals* in science.
4. That the scientific assessment of *animal welfare* involves diverse elements which need to be considered together, and that selecting and weighing these elements often involves value-based assumptions which should be made as explicit as possible.
5. That the use of *animals* in agriculture and science, and for companionship, recreation and entertainment, makes a major contribution to the well-being of people.
6. That the use of *animals* carries with it an ethical responsibility to ensure the *welfare* of such *animals* to the greatest extent practicable.
7. That improvements in farm *animal welfare* can often improve productivity and food safety, and hence lead to economic benefits.
8. That equivalent outcomes based on performance criteria, rather than identical systems based on design criteria, be the basis for comparison of *animal welfare* standards and recommendations.

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<sup>107</sup> *Terrestrial Animal Health Code 2012* (OIE) Art 7.1.2.

In suggesting standards for animal welfare, the Terrestrial Code has an article which specifically deals with animal welfare. It provides recommendations for animal welfare by defining what animal welfare means:

*Animal welfare* means how an *animal* is coping with the conditions in which it lives. An *animal* is in a good state of *welfare* if (as indicated by scientific evidence) it is healthy, comfortable, well nourished, safe, able to express innate behaviour, and if it is not suffering from unpleasant states such as pain, fear, and distress. Good *animal welfare* requires *disease* prevention and veterinary treatment, appropriate shelter, management, nutrition, humane handling and humane *slaughter/killing*. *Animal welfare* refers to the state of the *animal*; the treatment that an *animal* receives is covered by other terms such as animal care, animal husbandry, and humane treatment.<sup>108</sup>

As careful transportation is regarded as crucial to animal welfare, the Terrestrial Code provides standards for the transportation of animals by means of sea,<sup>109</sup> land<sup>110</sup> and air.<sup>111</sup> The provisions state that animal welfare is of paramount importance in all dealings with animals during transportation. Among the important considerations included is journey time, which should be kept to the minimum.<sup>112</sup> The types of transportation must suit the animals concerned and be designed so that they can be comfortable during the journey. Animal handlers must be experienced and competent and understand the patterns of behaviour which are distinct for each species of animals.<sup>113</sup> All people dealing with the transportation of animals are responsible for the welfare of those animals and should be competent enough to carry out their relevant responsibilities.<sup>114</sup> Journeys must be well-planned so as to ensure that animals are properly prepared for the journey such as being physically fit for the journey, adequate mechanism for the control of diseases must be made, space allowances which suit the animals concerned must be provided, and there must be an ability to observe animals during the journey along with the provision of effective emergency response procedures.<sup>115</sup> Loading and unloading activities for the journey must be supervised so as to ensure the safety of animals without unnecessary noise, harassment or force.<sup>116</sup> In the case of refusal to allow the importation of a shipment, the welfare of animals should be the first consideration, and the importing country should make available

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<sup>108</sup> Ibid, chapter 7.1.

<sup>109</sup> Ibid, chapter 7.2.

<sup>110</sup> Ibid, chapter 7.3.

<sup>111</sup> Ibid, chapter 7.4.

<sup>112</sup> Ibid, art 7.2.1.

<sup>113</sup> Ibid, art 7.2.2 (sea).

<sup>114</sup> Ibid, art 7.2.3 (sea)-responsibilities of person, art 7.2.4-competent person.

<sup>115</sup> Ibid, art 7.2.5 (sea).

<sup>116</sup> Ibid, art 7.2.8 (sea)-loading, art 7.2.10-unloading.



isolation facilities to allow the unloading of animals without posing a risk to national health.<sup>117</sup>

One of the most controversial issues in animal welfare is animal slaughtering for human consumption. Chapter 7.5 of the Terrestrial Code addresses recommendations for ensuring the welfare of food animals during pre-slaughter and slaughter processes until their death inside or outside slaughterhouses. It also recommends slaughtering practices which do not cause unnecessary stress and suffering to animals.<sup>118</sup> This chapter also suggests stunning and bleeding methods so as to ensure the welfare of animals during the slaughtering process. The Terrestrial Code also considers similar concerns about the killing of animals for disease purposes. Following the decision to kill such animals, the killing should be carried out as soon as possible.<sup>119</sup> Methods used for killing for disease control should result in immediate death or immediate loss of consciousness lasting until death.<sup>120</sup> Various killing methods for the instant death of animals are prescribed in the Code including the captive bolt piston (cattle gun), the penetrating captive-bolt stunner, and the electrical application and injection.<sup>121</sup>

In preventing zoonotic diseases, particularly rabies, the Terrestrial Code recommends dog population management as an integral part of rabies control programs. This recognises that stray dog population control is necessary without causing unnecessary animal suffering.<sup>122</sup> The Terrestrial Code recommends the promotion of responsible dog ownership and changes in human behaviour which are designed to reduce the number of stray dogs and the incidence of zoonotic diseases.<sup>123</sup>

In recognising the vital role of the use of live animals in research and education, the Code provides assistance and advice to the member countries in formulating regulatory requirements.<sup>124</sup> The Code suggests that those who use live animals in research and education should consider the following: the importance of the Three Rs; that animals should be only used when necessary and when no other alternative research method is available; that the minimum number of animals should be used to achieve the scientific or educational goal; and that such use of animals should cause as little pain and

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<sup>117</sup> Ibid, art 7.2.11(sea).

<sup>118</sup> Ibid, art 7.5.7.

<sup>119</sup> Ibid, art 7.6.1 (3).

<sup>120</sup> Ibid, art 7.6.1 (8).

<sup>121</sup> Ibid, art 7.6.5.

<sup>122</sup> Ibid, chapter 7.7.

<sup>123</sup> Ibid, art 7.7.1.

<sup>124</sup> Ibid, chapter 7.8.

distress as possible to those animals.<sup>125</sup> Chapter 7.9 of the Code addresses the welfare of beef cattle commercial production systems, from birth through to finishing. It includes all operations such as breeding, rearing and the finishing of cattle intended for beef consumption.

*(b) Aquatic Code*

The Aquatic Code provides the following guiding principles: that (a) the use of fish in harvest or capture fisheries, in research and for recreation (e.g. ornamentals and aquaria), makes a major contribution to the well-being of people; (b) there is a critical relationship between fish health and fish welfare; and (c) improvements in farmed fish welfare can often improve productivity and hence lead to economic benefit. As a result, the OIE provides recommendations for the welfare of farmed fish.<sup>126</sup> Therefore, the OIE developed recommendations for the welfare of farmed fish during transport,<sup>127</sup> slaughter<sup>128</sup> and destruction for disease control purposes.<sup>129</sup>

#### 6.3.4 Universal Declaration of Animal Welfare

In the absence of formal multilateral agreements concerning animal welfare, the World Society for the Protection of Animals (WSPA) initiated a draft of the Universal Declaration of Animal Welfare (UDAW). The WSPA introduced the draft of the UDAW during the Animals 2000 World Congress held in London from 16-17 June 2000.<sup>130</sup> The WSPA continued their efforts in promoting the draft at the Manila Conference on Animal Welfare in 2003, which was attended by delegations from 19 countries who agreed to the foundation text of the UDAW.<sup>131</sup> The campaign for the UDAW to be given official status, to be ratified in the United Nations (UN) Declaration, was led by WSPA as secretariat and supported by another four international groups concerned about animal welfare. They are the American Society for the Prevention of Cruelty to Animals (ASPCA), Compassion in World Farming (CWF), the Royal Society for the Prevention of Cruelty to Animals (RSPCA) and the Humane Society of the United States (HSUS).

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<sup>125</sup> Ibid, chapter 7.8.

<sup>126</sup> *Aquatic Animal Health Code 2012* (OIE) chapter 7.1.

<sup>127</sup> Ibid, chapter 7.2.

<sup>128</sup> Ibid, chapter 7.3.

<sup>129</sup> Ibid, chapter 7.4.

<sup>130</sup> Miah Gibson, 'The Universal Declaration of Animal Welfare' (2011) 16(2) *Deakin Law Review* 539, 540.

<sup>131</sup> The delegations were from Australia, Bangladesh, Cambodia, China, Czech Republic, Egypt, Germany, India, Indonesia, Israel, Italy, Netherlands, New Zealand, Singapore, Switzerland, Spain, Philippines, Thailand and the United Kingdom.

Until now, the petition for the UDAW has received very strong support and over two million people have signed and supported it.<sup>132</sup> In 2007, the OIE in its resolution also supported the UDAW.<sup>133</sup>

In 2011, considering feedback from UN Member States, international organisations and NGOs, the new draft of the UDAW was proposed. The new draft incorporated suggestions made by the steering committee, and was based on the earlier draft discussed at the Manila (2003) and the Costa Rica (2005) Conferences.<sup>134</sup> The draft UDAW focused on animal sentience and affirmed that animal welfare is an issue worthy of consideration. It acknowledged that humans share the planet with other species, and all forms of life coexist within an interdependent ecosystem. It also emphasised that animal welfare should be guided by the best available science and ethical values. It further restated the Five Freedoms, which provided valuable general guidance for animal welfare. While it recognised that many member states already have a system of animal protection, it highlighted the importance of, and continued acceptance of, animal protection systems and the development of better and more comprehensive animal welfare provisions.

Malaysia, through the Ministry of Agriculture, supported the UDAW by issuing a letter of endorsement in August 2008.<sup>135</sup> The 13<sup>th</sup> Yang Dipertuan Agong of Malaysia (the Malaysian Royal King) also signed the petition with other ministers of the Malaysian cabinet in support of the UDAW.<sup>136</sup> More than 10,000 Malaysians have also signed the petition to express their support for animal welfare.

## 6.4 Conclusion

People who handle animals on a daily basis come to an understanding of the needs and behaviours of those animals. This common understanding of animals' needs, behaviour and attitudes can then establish a common belief system and a conviction which marks the recognition of a need for the communal treatment of animals. The recognised public treatment of animals could then establish a mutual practice which is

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<sup>132</sup> WSPA, *Universal Declaration on Animal Welfare* World Society for the Protection of Animals <<http://www.wspa-international.org/wspaswork/udaw/Default.aspx>>

<sup>133</sup> <[http://www.oie.int/fileadmin/Home/eng/International\\_Standard\\_Setting/docs/pdf/ENG\\_WG\\_September\\_2007\\_final\\_report.pdf](http://www.oie.int/fileadmin/Home/eng/International_Standard_Setting/docs/pdf/ENG_WG_September_2007_final_report.pdf)>

<sup>134</sup> New draft of UDAW 2011 <[http://s3.amazonaws.com/media.animalsmatter.org/files/resource\\_files/original/Latest%20draft%20UDAW%20Text%20-%202011.pdf?131417748](http://s3.amazonaws.com/media.animalsmatter.org/files/resource_files/original/Latest%20draft%20UDAW%20Text%20-%202011.pdf?131417748)>

<sup>135</sup> SPCA Selangor [http://www.sPCA.org.my/v51/campaigns\\_animalsmattertome.php](http://www.sPCA.org.my/v51/campaigns_animalsmattertome.php).

<sup>136</sup> Ibid, SPCA Selangor.

commonly acknowledged by a society in its daily routine or tradition. The common understanding of animals' needs, attitudes and behaviours could then be in parallel with religious teachings concerned with the promotion of animal compassion and this, in turn, could lead to a belief in the importance of good animal treatment. Hence, cultural and religious ideas generally contribute to the development of ethics in animal treatment. This marks the existence of value-based elements in animal welfare.

The subject of animal welfare which is rooted in a fully scientific approach works simultaneously with a value-based assessment to form a mandated science which leads to a common and shared acceptance and concern about the minimal standards for animal welfare. The accepted standard advances the need to develop rules, regulations and laws relating to animal welfare. This, in turn, leads to the development of improved community standards of animal treatment which a state can then mandate. A common community standard between states could expand and improve regional standards of animal treatment. For instance, the European Community and the Council of Europe in its regions have developed several regional standards for animal welfare treatment.

The establishment of minimum standards of welfare may also affect trade and business involving animal products. The countries which have higher standards of animal welfare may ban the importation of animal products from countries which do not meet the minimum standards of animal welfare in their products. Therefore, other countries which intend to trade with countries which have higher animal welfare standards have to observe minimal standards in order to profit from trade. This, in turn, may improve international standards of welfare for animals in trade and business. However, in reality, the WTO through the GATT prohibits the prohibition of banned products which require higher animal welfare standards under the fair trading rules. This may inhibit the development of international standards which can be imposed on countries that do not regard animal welfare as of paramount consideration.

To resolve the problems which arise from the WTO and the GATT rules, the OIE has appointed a WTO reference organisation to set up standards and guidelines with regard to animals and animal products. This has had a positive outcome resulting in the publication of the Terrestrial Code and the Aquatic Code which together provide general guidelines for member countries in promoting animal welfare in regulations and legislation in their respective countries. The effort to enhance animal welfare by having it formally recognised by the United Nations is by the proposal of a draft of a

multilateral agreement on animal welfare, that is, the Universal Declaration of Animal Welfare (UDAW) which is coordinated by the World Society for the Protection of Animals(WSPA).

## CHAPTER 7: FIELDWORK FINDINGS

### 7.1 Introduction

This thesis argues that law cannot be seen in isolation from the many factors which have led to its creation. The nature of law itself derives from many sources such as custom, religion and public practices which formerly were non-legal sources. With respect to Malaysia, the present law itself has arisen from the interaction between many forces ranging from the customs and religion of its people, the influence of foreign colonisation, and the internal political environment as well as public perspectives.<sup>1</sup> As Hutchinson fairly argues, the law has worked within and operated on society.<sup>2</sup> It is the legal community who tend to view the law as *a priori* and apply that type of reasoning which examines the general principles contained in case and statute law to discover what particular facts or real-life observations can be derived from them.

This thesis moves beyond such a doctrinal approach. As 'animal law' is multidisciplinary in nature, it is necessary to consider the practical links that it has with other disciplines such as philosophy, religion, politics and animal welfare science. It is important to not confine an understanding of these links to that which can be derived from a review of the literature, but to acknowledge the perspectives of the real actors in the practice and implementation of existing law and policies. Therefore, this study utilises a fieldwork study interview technique to consider the interaction between selected informants who deal with animal issues on a daily basis and the law of the land.

The views from the field are important as they have the potential to clarify, confirm, challenge and explicate the workings of the legal system. They can also enable a researcher to discover any problems or limitations within the field of animal law in Malaysia which no amount of library research could access and highlight.<sup>3</sup> The findings from the fieldwork research thus serve three important objectives: first, they confirm or challenge the data which the literature review provided; second, they help reveal any inconsistencies and shortcomings about animal welfare issues in Malaysia; and third,

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<sup>1</sup> Arif Yusof, 'Beyond Doctrinal Research: A Student's Experience' (Paper presented at the Sydney Law School Postgraduate Conference 2012, Sydney Law School, Australia, 1-2 November 2012).

<sup>2</sup> Terry Hutchinson, *Researching and Writing in Law* (Thomson Reuters, 3rd ed, 2010), 88.

<sup>3</sup> Julius Getman, 'Contribution of Empirical Data to Legal research' (1985) (35) *Journal of Legal Education* 489.

they provide possible suggestions from interviewees which can be used to enhance the protection afforded to animals in Malaysia.

These fieldwork findings therefore complement the findings obtained from available library materials which provide only limited insights into animal welfare. They also highlight the interaction between the theoretical and practical aspects of animal protection in Malaysia. The findings thus provide evidence of what is happening on the ground and enable a researcher to compare the rhetoric with the reality as far as animal welfare and the law in Malaysia is concerned

## **7.2 Research methodology**

As discussed in Chapter 2 (Research Methodology), this research adopts three categories of legal research: doctrinal, theoretical and reform-oriented. Doctrinal legal research refers to library research. Theoretical research looks for an advanced understanding of the conceptual bases of legal principles. Reform-oriented research seeks to recommend the changes needed for improvement in the law by assessing the adequacy and sufficiency of the existing rules in any system.

It is important for this research to not rely solely on the doctrinal resources. Therefore, this research provides an understanding of the law by looking beyond the published sources in order to answer legal questions. As a result, this research has adopted an interview approach as supplementary to other sources of data. It aimed to complement available data by collecting information and perspectives of those involved in the system. It also identified the problems and evaluated the policy relating to animal welfare and the law in the Malaysian legal system. In this study, the interview was crucial to develop detailed descriptions incorporating multiple perspectives on animal welfare. It provided an opportunity to understand and appreciate situations which are encountered in practice.

The information gathered from interviews is part of the process that informs, assesses and evaluates any proposed legal reforms. The purpose is to gain a better understanding of the implementation and practice of the law and policy as they relate to the welfare of animals. This process identified the perspectives and expectations of the informants including those members of the legal elites who are influential in law making. It also looked for obstacles and advantages of humane treatment of animals in international law, and in the formal law of the national legal system.

This chapter outlines findings from the fieldwork. It provides significant results which complement the available published sources relating to animal welfare law in Malaysia. This chapter provides insightful answers to the research questions. It evaluates the perspectives of selected Malaysians on five important themes concerning animal welfare and law in Malaysia as follows: the status of animals; religious and cultural perspectives concerning animals and their welfare; the relationship between animal welfare and the law; the status of animals under the existing framework; and the most effective way to protect animals in Malaysia now and into the future.

### **7.3 Interviews**

The interviews were conducted in Malaysia from 5 May 2011 to 29 August 2011. The total number of individuals interviewed was 38. Appendix 2a contains a description of the interviewees. The individuals were from three general categories: the public sector, the private sector and from NGOs, including animal welfare organisations.

Interviews were conducted mostly at the offices of the interviewees or at any place that the interviewee preferred. The length of the interviews ranged from 30 minutes to two hours depending on the time constraints of the particular interviewee. Most interviews were recorded by an audio recorder with the interviewee's permission. Ten interviewees requested the record be made by hand rather than be tape recorded. The handwritten transcript was then typed up as soon as practical after the interview and later forwarded to the interviewee by email for verification. The audio-recorded interviews were converted into text data by way of transcription and, if requested, were also forwarded to the interviewee for verification. The transcription process started during the time period of the fieldwork itself. For the purpose of data organisation, NVivo qualitative data analysis software was used.

### **7.4 Status of animals (philosophical, cultural and religious debate)**

As argued in Chapter 3 of this thesis concerning the status of animals, philosophers can be divided into three categories when discussing the moral status of animals. These categories are: that animals have no moral status; that animals possess some moral status, but are inferior to humans; and that animals are morally equal to humans. By referring to the categories of stance held by philosophers in general, this study tries to find the stance of selected Malaysians towards animals.



Historically, traditional Malays held two types of attitudes towards animals. Firstly, animals were considered an instrument of entertainment. Cockfighting and bullfighting at one time were popular games that the Malays enjoyed very much.<sup>4</sup> These animal combats justified the role of animals as having no moral status, the animal served as an object of entertainment and, as a result, the animal could be treated cruelly. The occasion of dog abuse by a pious Muslim Sultan may also evidence the ill-treatment of animals by the Malays.<sup>5</sup> This attitude may represent the opinions of the first category of philosophers who viewed animals as having no moral status and as inferior to humans who could do whatever they want to and with animals.

The second attitude referred to above may represent the stance of philosophers who viewed animals as having some moral status, but not as much as that of humans. The special status of animals that were regarded as the closest friends to Malays such as cocks, hens and buffaloes evidenced the value of animals as having moral status.<sup>6</sup> The Malays also prepared special shelters for their livestock and companion animals at their homes.<sup>7</sup> The existence of provisions in the digests of Malay states in protecting animals from cruelty may denote positive attitudes of Malays towards animals.<sup>8</sup>

To complement the data obtained from the literature, this study attempts to further observe how selected Malaysians perceive animals in their daily life. The fieldwork suggests that there are various perspectives as to how Malaysians view animals. Generally, all interviewees agreed that animal welfare is important.

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<sup>4</sup> Hugh Clifford, *In Court and Kampong: Being Tales and Sketches of Native Life in the Malay Peninsula* (Grant Richards, 1897) 46.

<sup>5</sup> R. O. Winstedt, 'Old Malay Digests and Malay Customary Law' (1945) 1(April) *Journal of the Royal Asiatic Society of Great Britain and Ireland* 17, 20.

<sup>6</sup> Lim Kim Hui, 'How Malay Proverbs Encode and Evaluate Emotion? A Paremiological Analysis' (2010) 28(1) *Sari - International Journal of the Malay World and Civilisation* 57.

<sup>7</sup> R.O. Winstedt, 'Life and Customs. Part II. The Circumstances of Malay Life' (Government of Federated Malay States, 1925) 6-7.

<sup>8</sup> See for instance, Laws of Malacca, Ninety-Nine Laws of Perak and Johor Code in Liaw Yock Fang, *Undang-Undang Melaka (The Laws of Malacca)* (Martinus Nijhoff, 1976), and Kedah Laws in R.O. Winstedt, 'Kedah Laws' (1928) VI(II) *Journal of the Malayan Branch of Royal Asiatic Society* 1.

A public veterinary officer in his response said:

Malaysians are aware of animal welfare. Animals should be taken care of. We should consider animals as a living being.<sup>9</sup>

A university student also shared the same view:

Animals are important. As humans, we should not only limit our relationship with our fellow humans. We should extend it to other living beings like animals.<sup>10</sup>

An animal activist observed that the perspectives depend on various circumstances:

It depends on the individual because different generations [have] different views. We [are a] generation that comes out to oppose animal abuse. However, at the same time, we also have many who are cruel to animals.<sup>11</sup>

However, a representative from an animal welfare group thought otherwise:

Animal welfare is important, but not many think it is important. Malaysia only has a small group of aware people. Most Malaysians just do not care. They think animals are just animals. Some of them regard animals as other objects, for instance, in one case, a dog is treated as only to protect a property of humans, [and is provided] with a little bit of food and water, and inadequate shelter, which is considered sufficient.<sup>12</sup>

This study also suggests that the anthropocentric view still dominates the views of Malaysians. For instance, an officer from a government department opined that:

Animals are different from humans. Humans are superior. They [animals] are not human. They are resources and [are of] benefit to humans. Therefore the sacrifice of animals for food and research for human interest are OK.<sup>13</sup>

Nevertheless, a private veterinary officer stressed that:

Human superiority does not permit humans to abuse animals. We should provide a limit to human superiority in treating the inferior beings. Inferior beings like animals also have rights and interests. Animals should only be killed for food. If animals are to be killed for purposes other than for food, the killing should be done in a very humane way.<sup>14</sup>

A representative from a religious group regarded animals as having certain rights:

Animals have the right to socialise just like humans. All animals deserve the rights to live. They are entitled to roam freely. Therefore we are responsible to protect

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<sup>9</sup> Interview data: INT030.

<sup>10</sup> Interview data: INT024.

<sup>11</sup> Interview data: INT010.

<sup>12</sup> Interview data: INT032.

<sup>13</sup> Interview data: INT020.

<sup>14</sup> Interview data: INT024.

their rights by preserving the environment from pollution and enforcing appropriate and relevant laws to preserve the animals.<sup>15</sup>

Most interviewees thought that animals are important. This research generally suggested that Malaysians are to some extent aware of animal welfare issues. Only one interviewee considered that Malaysians do not care about animals. That view was based on several cases of animal abuse.<sup>16</sup> Most held that animals are important in their lives. However, the fieldwork proposes that the importance of animals in the Malaysian community depends on various circumstances and limitations. The next section considers the circumstances and limitations which are from the cultural and religious perspectives.

### **7.5 Cultural and religious perspectives in Malaysia towards the status of animals**

The population of Malaysia as of July 2010 was estimated to be 28.3 million.<sup>17</sup> Ethnicity in Malaysia comprises Bumiputras (61.8%), Chinese (22.5%), Indians (6.7%) and others (0.8%). A total of 8.2% are citizens from other countries. Malays, a division of Bumiputras, make up the majority of the Malaysian population at 50.1%. Other Bumiputras represent 11% of the total population.<sup>18</sup> The three major ethnic groups which comprise the Malaysian population are Malays, Chinese and Indians. Others, which represent 0.7%, are a small minority of Malaysians who do not fit into the broader ethnic groups. They include people who are of European and Middle Eastern descent, Nepalis, Filipinos, Burmese and Vietnamese who have become Malaysian citizens.<sup>19</sup>

Malaysia is a multi-religious and multicultural society. About 61.3% of the Malaysian population are Muslims, followed by 19.8% practising Buddhism, 9.2% practising Christianity and 6.3% embracing Hinduism. A small population consisting of 1.3% are observers of Confucianism, Taoism and other traditional Chinese religions. The census in 2010 recorded 0.7% of Malaysians as having no religion: 0.5% are followers of other religions about which no detailed information was provided.<sup>20</sup>

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<sup>15</sup> Interview data: INT038.

<sup>16</sup> Interview data: INT032.

<sup>17</sup> Department of Statistics Malaysia, 'Population Projections Malaysia 2010-2040' (2012) 6.

<sup>18</sup> Bumiputra status is also accorded to certain non-Malay indigenous peoples, including ethnic Thais, Khmers, Chams and the natives of Sabah and Sarawak.

<sup>19</sup> Malaysia, above n 17.

<sup>20</sup> K. Hassan and G.B. Basri, *The Encyclopedia of Malaysia: Religions and Beliefs* (Archipelago Press, 1998). Traditional beliefs are still practised by the Orang Asal people. Loosely classified

It is a common consideration in Malaysia that religions follow ethnic lines. Most Muslims are Malays. The majority of the Chinese population follow the traditional Chinese religions such as Buddhism or ancestors' belief, for instance, Confucianism and Taoism. Most Indians in Malaysia practice Hinduism. Christianity is practised by a minority of Chinese and Indians, and other non-Malay Bumiputras.<sup>21</sup>

Generally, all religions promote kindness and prevention of cruelty to animals. Islam, for instance, encourages Muslims to be kind to all living beings including animals. In one of the most popular sayings of the prophet Muhammad, it was indicated that Allah promised a man that he could enter paradise because he gave a drink to a dog, while the other entered a hellfire for neglecting a cat by not providing it with water or releasing it to search for food by itself.<sup>22</sup> Irrespective of traditional Christian beliefs which are less sympathetic to animals, the modern Christian accepts that animals are conscious and holds that God gave rights to everything. He created animals to be treated respectfully and, therefore, a wrongdoing to animals is a wrongdoing to God.<sup>23</sup> In the same way, Buddhism and Hinduism are animal-friendly religions. Buddhists, for instance, respect animals as sentient beings.<sup>24</sup> Hinduism through the doctrine of

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as animism, these beliefs are not recognised by the state as a religion. Animistic beliefs are passed down through oral tradition due to the lack of a writing system in indigenous groups, who call their beliefs *agama adat* (traditional or customary religions). The different religions are rather varied, with different names and concepts for their supreme god and other supernatural deities. Most of the beliefs are heavily influenced by the environment, with physical features such as mountains, trees, valleys and rivers being sacred. A close relationship with nature is nurtured, and the relationship of humans and nature is a strong part of the religion, with everyday activities such as hunting and gathering having spiritual significance.

<sup>21</sup> Malaysian Tourism, *Religion* (29 August 2013) Malaysia Tourism Centre (MaTiC) <<http://www.matic.gov.my/en/information/about-malaysia/religion>>. Christianity is the predominant religion of the non-Malay Bumiputra community (46.5%) with an additional 40.4% identifying as Muslims. Many indigenous tribes of East Malaysia have converted to Christianity, although Christianity has made fewer inroads into Peninsular Malaysia.

<sup>22</sup> Kristen Stilt, *Animal Welfare in Islam* (Animal People & Marchig Animal Welfare Trust, 2006) 30, 36.

<sup>23</sup> BBC, *Christianity's Teachings about Animal Rights, Animal Sufferings and Humanity's Role in the World* (3 August 2009) <[http://www.bbc.co.uk/religion/religions/Christianity/christianethics/animals\\_1.shtml](http://www.bbc.co.uk/religion/religions/Christianity/christianethics/animals_1.shtml)>

<sup>24</sup> Norm Phelps, *The Great Compassion: Buddhism and Animal Rights* (Lantern Books, 7th ed, 2004) 53, 87.

'ahimsa' prevents any act which could injure animals.<sup>25</sup> Hindus regard the cow as sacred and encourage Hindu believers to follow a vegetarian diet.<sup>26</sup>

This study attempts to look at the various perspectives of the religions and cultures in Malaysia towards animals. It considers four major religions in Malaysia: Islam, Buddhism, Hinduism and Christianity.

Although Islam encourages kindness and the prevention of cruelty to animals, Muslims in Malaysia generally do not favour two kinds of animals: dogs and pigs. These animals are victims of misunderstanding<sup>27</sup> by Muslims. Islam only prohibits Muslims from consuming pig meat, and demands that adherents wash those parts of their bodies which come into contact with dog saliva, for purity and cleanliness reasons, during prayer.<sup>28</sup> Islam demands that Muslims be kind to all animals. An officer in one of the Islamic organisations in Malaysia in the field study asserted:

The Malay Muslims should understand that Islam promotes kindness to animals. Malays are too sensitive to these two animals [dogs and pigs]. In Islam, there is no problem touching dogs and pigs. Islam only prohibits eating pork. If a dog touches a Muslim, just wash. It's very simple. The most important thing is to get a clear picture from al-Quran and Hadith and not be prejudiced as a result of hearsay, but base belief systems on research. To do otherwise is to make a big mistake.<sup>29</sup>

A priest in a Buddhist association does not reject the fact that culture and religion play an important role in influencing human attitudes towards animals, but he believed that it depends on the individual person:

Culture and religion play an important role. But it depends on the attitude of the person. Malays may not favour the dog, but Chinese and Indians may regard the dog as special.<sup>30</sup>

The same feeling was also shared by a lawyer from a Hindu organisation:

There is not much difference between cultures and religions when it comes to animal treatment. Treatment varies only between educated and uneducated people. Education and a full understanding of the religions play an important role.<sup>31</sup>

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<sup>25</sup> Christopher Chapple, *Nonviolence to Animals, Earth, and Self in Asian Traditions* (State University of New York Press, 1993) 9.

<sup>26</sup> BBC, *Hinduism and Animals* (29 June 2010) <<http://www.bbc.co.uk/religion/religions/hinduism/hinduethics/animal.shtml>>

<sup>27</sup> Arif Yusof, 'A Victim of Muslims' Misunderstanding: The dog', *The Malay Mail* (Kuala Lumpur), 31 July 2013.

<sup>28</sup> William Roff, 'Whence Cometh the Law? Dog Saliva in Kelantan, 1937' (1983) 25(2) *Comparative Studies in Society and History* 323, 336.

<sup>29</sup> Interview data: INT002.

<sup>30</sup> Interview data: INT028.

A representative from a Christian organisation in an interview also suggested the importance of education:

Culture and religion do play a part but education can modify the thinking of people. People who are educated tend to value and respect animals and cruelty is seldom seen among them.<sup>32</sup>

A professor specialising in comparative religion gave a brief overview of religious perspectives towards animals in Malaysia:

Muslims, in particular, Malay people from Malaysia, generally love animals. They tend to love the cat very much. Perhaps in many hadith, the Prophet and Companions love the cat. However, Malays are sensitive about pigs, maybe because Islam prohibits pig for Muslims' consumption. A majority of Muslims also hate dogs, because in one of the hadith, dogs can be killed. Nevertheless, there are other hadith which encourage kindness to dogs. I believe that cultural views may override religious provisions in this circumstance.

Chinese are also animal lovers. Most Chinese and Indians love dogs very much. Perhaps a majority of them are Buddhist, Hindus and Christians, who favour animals. However, some Chinese hate the cat. Chinese love exotic foods like shark fin which has led to a reduction of the shark population. They also use animal parts like horns and private parts in medicine which in turn leads to poaching and the destruction of species like tigers, lions, etc.

Buddhism for example is against any form of cruelty to animals. Hinduism protects animals like the snake, the cobra, the monkey, the elephant, the cow and the rat. Christianity makes a great effort in modern animal welfare. In Malaysia it initiates a lot of activities to encourage the public to be kind to animals.<sup>33</sup>

It is not denied that all religions and cultures in Malaysia promote kindness to animals and prevent cruelty. However, when political elites dominate and control religions, there is a limited place for animal welfare:

Culture and religion play a role, but however sometimes religion and culture may be influenced by political bias. Politics may lead and justify the way for a religion to look unfavourably at animals. Then the followers of such religions tend to look at the animals with dislike and such animals suffer in their hands. Consequently, animals are often neglected or left out in a country's policies when political elites justify animal suffering under the name of the religions and culture, which is in fact not the true teaching of such religions and culture.<sup>34</sup>

This research examined whether religions and culture limit the importance of animals and animal welfare in the Malaysian community. The responses of the selected respondents indicated that religions may influence the attitude of Malaysians towards

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<sup>31</sup> Interview data: INT031.

<sup>32</sup> Interview data: INT034.

<sup>33</sup> Interview data: INT002.

<sup>34</sup> Interview data: INT033.

animals. For instance, all religions promote kindness towards animals. However, this research revealed that, on some occasions, culture may override religion in providing religious information which is not correct. This happens particularly in Islamic teaching in Malaysia, with regard to dogs and pigs. Islam as a religion requires Muslims to treat all animals humanely. However, Malay custom and culture mistakenly interpret the Islamic prohibition on the consumption of dogs and pork to mean that these animals should be avoided and out of favour. The situation is at its worst when this religious misinterpretation influences the political elites in deciding policies on animal issues.

## **7.6 Relationship between the law and animal welfare in Malaysia**

Many factors determine the development of the law relating to animals in Malaysia. The economic value of animals especially for food motivates law makers to control the process of animal-based food production.<sup>35</sup> Religious and cultural perspectives demand appropriate methods of animal slaughtering particularly for food products.<sup>36</sup> The changing of human attitudes towards animals, particularly in providing better treatment and combating cruelty, supports animal welfare promotion.<sup>37</sup> The pressure from animal welfare groups is moving the political environment to provide better legal protections for animals.<sup>38</sup> These economic, religious, cultural, political and social pressures chart the legal development of the law relating to animals in Malaysia.

### **7.6.1 Does the government protect animals?**

The field research suggested two conflicting ideas in elaborating the relationship between the law and animal welfare in Malaysia. The government personnel interviewed held that there is a positive link between the law and animal welfare. One of the senior wildlife officers proposed that:

The government generally protects animals. It is improving from time to time. The government is amending the *Animals Act 1953* to give better protection for animals. Previously, it amended the *Wildlife Conservation Act 2010*. The

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<sup>35</sup> Department of Standards Malaysia, *Good Animal Husbandry Practice (GAHP) MS 2027:2006* (Department of Standards Malaysia, 2006).

<sup>36</sup> Department of Veterinary Services, *Guidelines for Religious Animal Slaughter* (Department of Veterinary Services, 2012).

<sup>37</sup> Arif Yusof, 'World Animal Day: Sentient Beings Worthy of Respect', *The Star* (Kuala Lumpur), 4 October 2012.

<sup>38</sup> Lee Lam Thye, 'Amend Archaic Animal Act 1953', *The Star* (Kuala Lumpur), 24 April 2010.

government will issue new guidelines from time to time to ensure animals' welfare and interests.<sup>39</sup>

A senior legal officer also emphasised the seriousness of the Malaysian government in protecting animals:

The government is seriously taking care of animals. Many statutes and policies have been established to protect animals. Our Malaysian court is very proactive. Recently the High Court increased the penalty for animal smuggling cases. This marks the government's effort in ensuring the welfare of animals.<sup>40</sup>

However, representatives from animal welfare groups expressed their disappointment with the inadequate effort of the government in promoting animal welfare. A volunteer from an animal welfare group opined that:

Malaysia is not serious. The *Animals Act 1953* has not been updated. There has been too long a period for the new *Animal Welfare Act 2012* to be gazetted. We have so many laws, [which are] all toothless. The government poorly enforces the law. The enforcement officers rarely go into the field to enforce the law.<sup>41</sup>

An animal activist asserted that the government is not ready to promote animal welfare:

The government views animals as a nuisance. They do not look after the welfare of animals. If you go into the field, you will be very surprised to find out that there are no pounds for stray animals that the City Council uses. All strays are put temporarily in the lorry or truck for one or two nights before they are put to death.<sup>42</sup>

Meanwhile, a private veterinary officer in his general view observed:

The government does not give much priority to animals; human needs are taken care of before animal welfare [is considered]. Regardless of the many steps taken by the government, they are very slow in enforcement and implementation [of the law].

In my view, we have various government departments in charge of animal interests, but they seem not to interact with each other. Every department makes their own policies and does not refer to the others.<sup>43</sup>

#### 7.6.2 Consultation with experts or the public before issuing new policies and law

The Veterinary Services Department, which is in charge of the *Animal Welfare Bill 2012* has initiated a public survey through the internet to comment on the draft of the Bill. The survey received voluminous responses from the public.<sup>44</sup>

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<sup>39</sup> Interview data: INT006.

<sup>40</sup> Interview data: INT007.

<sup>41</sup> Interview data: INT014.

<sup>42</sup> Interview data: INT011.

<sup>43</sup> Interview data: INT024.



A senior officer in a department when interviewed highlighted the survey as an indication of the readiness of the government to discuss the issue with experts and other stakeholders before issuing any new policy:

The government does consult experts before enacting the law. Normally before amending the law, the government will organise a workshop or roundtable discussion with stakeholders and experts to get their opinions.<sup>45</sup>

However, a practising lawyer expressed his concern about the process of consultation in amending laws and policies for animal interests:

The government should consult experts, the public or stakeholders of animals, before initiating new policies and laws [are made]. I am afraid that in this regard no consultation was made with the animal welfare groups. If there was consultation, it was a last-minute meeting, and with very selective groups, and most of them are pro-government.<sup>46</sup>

A representative of an animal welfare group shared his experience of consultation with the government on animal issues:

The government rarely invites us to discuss the issue. We had once received a letter by fax on a late Monday afternoon, for a meeting to be held in Putrajaya on Tuesday morning. It was very short notice. Just imagine that we are 400 kilometres from Putrajaya. That's why many groups could not attend and were unable to give opinions on the issues. I doubt that the government really wants us animal welfare groups to voice our concerns for animals.<sup>47</sup>

A member of the opposition in a State Legislative Assembly raised his concern about freedom of speech in disseminating any idea which could be against government policy:

Malaysians move towards change, more compassion towards animals, but are sometimes not ready to express their opinions. Generally people in Malaysia think that saying what they think is forbidden in this country. For instance, many of us know that the government agencies themselves are cruel to animals, particularly in dealing with the strays, but a majority do not want to state this. They are afraid that they might be charged for criticising government policies.<sup>48</sup>

This fieldwork research suggested that the Malaysian government is, to some extent, doing its best to protect the welfare of animals. However, animal welfare groups opined that the effort is inadequate. Based on the findings from the fieldwork, and the slow

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<sup>44</sup> Jamaluddin Abdul Aziz, 'Experience of Malaysia With OIE Standards' (Paper presented at the Third OIE Global Conference on Animal Welfare Kuala Lumpur, 2012)

<<http://www.oie.int/eng/AW2012/presentations/PTT%20Session%202/2.6.%20Jamaluddin.pdf>>

<sup>45</sup> Interview data: INT021.

<sup>46</sup> Interview data: INT033.

<sup>47</sup> Interview data: INT005.

<sup>48</sup> Interview data: INT028.

progress of the tabling the new *Animal Welfare Bill 2012*, Parliament has indicated at least two shortcomings of the government's attitude towards animals. First, animal welfare is of considerably less importance than other issues as a subject of government action. Second, the government is not ready to fully protect the welfare of animals.

Currently, there are two pieces of legislation which involve animal welfare. They are the *Animals Act 1953* and the *Wildlife Conservation Act 2010*. The government argues that the law is progressing towards protecting animal welfare. The recent amendment to the *Wildlife Conservation Act 2010* which repealed the *Protection of Wildlife Act 1972* evidenced the commitment of the government to protecting the welfare of animals. The government also argues that it has doubled its effort to enact the new law to repeal the *Animals Act 1953*.

Nevertheless, representatives from animal welfare groups observed that the government does not fully consult animal welfare groups and animal welfare experts in proposing amendments to the law. Should consultation exist, the government rarely considers suggestions emanating from animal welfare groups. This leads to some discrepancies in the Bill which is thus unable to be tailored to the reality of all animal welfare perspectives in Malaysia. Lastly, the law may be good on paper, but less effective in terms of its implementation and enforcement.

### **7.7 Status of animals under existing Malaysian policy and legal framework**

As discussed in Chapter 5, the status that animals enjoy in human society is highly dependent on two important factors. The first is the classification and the treatment of animals provided by the system of a country. The second refers to how human society perceives the importance of animals in their daily lives. Based on the discussion in Chapter 5, this study proposes that Malaysia has considered animals as the subject of protection in its legal framework at least in three circumstances: protection as property, protection from gratuitous cruelty and protection for environmental purposes.

Interview data have provided insightful findings which complement the data obtained from the literature. The data offered three distinctive opinions as to how Malaysians view the importance of animals in their daily lives, that is, in the Malaysian policy and legal framework.

The first group comprised individuals and private persons whose view of animals as sentient beings suggested that animals should enjoy rights which naturally they possess as sentient beings. A lecturer in a private college observed:

Animals are sentient beings. As beings, they have their physical and psychological characteristics which we should respect. They have rights as beings not to suffer. We should respect their natural needs to enjoy their own life, to follow their patterns of behaviour, and to live in their own way.<sup>49</sup>

A practising lawyer agreed that animals enjoy certain status in human society. However, the status which animals enjoy is of the lowest order:

It is true that animals possess a status or rank in our human community. But it is the lowest rank of beings. As the lowest beings, they are the object of manipulation. Humans take very much advantage from animals for their own benefit. The protection that animals enjoy is very minimal.<sup>50</sup>

A laboratory scientist opined that establishing a standard for animal welfare may burden Malaysians in terms of the economic perspective:

Raising animal welfare standards particularly for the animal farm systems may affect Malaysians economically. Animal welfare means extra care for animals which in fact causes an extra cost for food production, which will influence food prices. I believe that this is the reason why the government is afraid to implement good animal welfare standards in farming systems. The food price will be increased and this would cause economic problems for Malaysians.<sup>51</sup>

A political analyst drew attention to the unreadiness of the political parties in Malaysia to accommodate animal welfare standards:

Malaysians are not ready to give animals any status. As far as I am concerned, none of the political parties in Malaysia include animal welfare in their political manifestos. There are no politicians who champion animal welfare issues in Malaysia. Unlike other countries such as United Kingdom or United States, animal welfare organisations in Malaysia do not shape the political climate. None of them seem to collaborate with political parties to advance animal issues.<sup>52</sup>

The second group consisted of government officers. They were mostly policy makers and senior officials who were directly in charge of animal issues. As government exponents, they seemed defensive of government policies. A senior director in a government department emphasised:

Our department is animal-friendly. We aim to protect animals from disease, abuse and cruelty. Currently, all policies and all statutes are animal-friendly, for the

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<sup>49</sup> Interview data: INT024.

<sup>50</sup> Interview data: INT031.

<sup>51</sup> Interview data: INT032.

<sup>52</sup> Interview data: INT017.

benefit of animals. We have issued national guidelines to maintain animal welfare standards.<sup>53</sup>

A senior federal counsel also shared the same notion with respect to animal welfare standards in Malaysia:

We have quite a good standard of animal welfare in Malaysia. In respect of legal status, animals are well protected. The recent amendment of the *Wildlife Conservation Act 2010* implemented a very stringent punishment for offences relating to wildlife such as poaching, smuggling and illegal trade. At the moment we are in the process of tabling the new Animal Welfare Act to amend our current *Animals Act 1953*. This development will improve the status of animals in our legal system.<sup>54</sup>

In suggesting the type of legal status to be granted to animals, a judge of the High Court noticed that:

Animals in Malaysia already have legal status. Legal status here means protection from abuse. But it is quite impossible to give legal status as a legal person to animals. They cannot speak and they do not have the characteristics of a person necessary to be given a legal status.<sup>55</sup>

In addressing the adequacy of the law in protecting animals, a deputy public prosecutor noted that:

The protection is adequate on paper. However, there are some limitations such as there are too few welfare officers and there are cost constraints. For instance, the cost of running the zoo is high. The sale of zoo tickets itself does not adequately provide the necessary funding needed to run the zoo.<sup>56</sup>

The third group were the analytical views of NGOs particularly from animal welfare organisations. They represented the views of animal activists and animal lovers. Their views seemed to challenge the government's approach in Malaysia to animal welfare policies and frameworks. A director of an animal shelter pointed out:

Law has no bite in Malaysia particularly in dealing with animal issues. Government agencies are not functioning properly. There are too many bureaucracies in government departments. For instance, the government is taking too much time in amending the new Animal Welfare Act. They make simple things complicated. They outline too many procedures that they themselves are unable to follow in combating cruelty.<sup>57</sup>

After analysing government policies with regard to animals, a researcher in an animal welfare group commented:

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<sup>53</sup> Interview data: INT025.

<sup>54</sup> Interview data: INT021.

<sup>55</sup> Interview data: INT037.

<sup>56</sup> Interview data: INT006.

<sup>57</sup> Interview data: INT013.

After going through all documents involving animal welfare, I could say that Malaysia is not ready to give legal status to animals under its policies, and may not do so in our lifetime. Even though our government stresses that we are a democratic country, which represents what the majority of people want, but, it is in fact autocratic in its administration. Nobody can afford to be too critical of government policies. If you talk too much, you have to face the consequences.<sup>58</sup>

A volunteer in a religious group, who was previously a staff member in a government department, shared his experience relating to animals during his service with one department:

Most of the officers, who graduated and serve in a government department, are young people. They may have theoretical knowledge on animal life, etc, but in terms of having practical knowledge, they have to learn much more. Many of the senior officers in animal departments rarely have direct experience in dealing with animals. Most of the work is done by support staff who are in fact the experienced staff, but are rarely referred to, in decisions and policy making. I believe this may cause some gaps in policy and the reality of animal welfare in Malaysia.<sup>59</sup>

A president of an animal activist group raised his concern about the imbalance in the protection between different classes of animals:

Sometimes, we may not realise that there is a long gap between protection of wildlife and domestic animals. The Malaysian system concentrates more on wildlife animals. Less concentration is given to domestic animals. We protect elephants, tigers and lions in the jungle, but we just ignore the strays in the street: dogs and cats. We love our pets for their sentimental value. But we exploit farm animals and in order to do that we provide an economic justification. Do we really protect animals in total? No. We don't!<sup>60</sup>

This study has argued that animals are deserving of moral status, a view with which today most people do not disagree. The responses of interviewees have been categorised into three different groups: first, those who argued that animals are sentient beings and are therefore deserving of protection from the legal system. This was the view expressed by a number of private and individual persons who were interviewed. The second group had a protective stance which held that the current legal system is already sufficiently protective of animals in Malaysia. This view was expressed by those interviewees who came from the government sector. The third group had an analytical perspective which posed challenges to the existing legal system concerning the protection of animals and their welfare. This was the attitude or angle expressed by representatives from animal welfare organisations who observed

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<sup>58</sup> Interview data: INT018.

<sup>59</sup> Interview data: INT005.

<sup>60</sup> Interview data: INT015.

the limitations in the current legal framework and in the enforcement of existing laws concerning the protection of animal interests in Malaysia.

### **7.8 The most effective way to protect the welfare of animals**

In Chapter 6, this research suggested that reference to animal welfare science and international law may serve as the best possible way to protect the welfare of animals. The important principles in animal welfare science: sentience, coping and freedoms mark two significant standards in animal welfare assessment. They are the Five Freedoms and the Three Rs. The establishment of the OIE also contributed a substantial influence which enhanced the relationship between animal welfare science and ethics. The publication of two important codes, the Terrestrial Code and the Aquatic Code, by the OIE marked an international move towards improved animal welfare legislation. The draft of the UDAW proved the seriousness of world countries towards the recognition of the importance of animals in human life.

As one of the members of the OIE and a signatory party to the UDAW, Malaysia is currently progressing towards improvements in animal welfare. Currently, two Malaysian statutes regulate animal welfare at a federal level. They are the *Animals Act 1953* and the *Wildlife Conservation Act 2010*. Various enactments are available at state level to govern animal activities such as the Control of Cattle Enactment, the Control of Pig Farming Enactment and the Poultry Farming Enactment.<sup>61</sup> Chapter 6 of this thesis suggested that there is a need for further explanation of animal welfare policies and frameworks which are less articulated in the literature. Therefore, this study employed the interview method to further investigate the extent to which Malaysian law and policies concerning animal welfare are observed and to suggest possible ways to address the issue of improving animal welfare. Therefore, this field study contributed significant knowledge derived from interviewees to complement the existing knowledge available from the literature relating to animal welfare. It draws on the opinions of personnel in government agencies, animal welfare organisations and individual persons.

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<sup>61</sup> See, for instance, the *Control of Cattle Enactment (Selangor) 1971* (Malaysia), the *Control of Pig Farming Enactment (Selangor) 1991* (Malaysia), and the *Poultry Farming Enactment (Selangor) 2007* (Malaysia). The same enactments which regulate the control of cattle, pig and poultry farming are enforced in all states in Malaysia.

As one of the OIE members, Malaysia signed the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The agreement encourages members of the WTO to base their sanitary measures on international standards and guidelines. This agreement also applies pressure to Malaysia to meet those requirements. In this regard, a senior director in a government office suggested that:

We have to understand that international law requires us to meet at least a minimum animal welfare standard. If we don't, developed countries may restrict our products which do not meet the standard. This will consequently affect our country's economic growth. This international pressure has led Malaysia to abide by these standards and requirements. The government is now preparing standards and guidelines for the better protection of animals ...<sup>62</sup>

In response to the question about whether Malaysia follows the principles suggested by international organisations such as the OIE, the WSPA and the WTO in setting its own standards, a senior officer in a government agency stressed that:

So far, Malaysia accepts the scientific findings that animals are sentient beings. The principles of Five Freedoms and Three Rs are incorporated in the policy of the government.<sup>63</sup>

However, the fieldwork revealed a contradictory view in another interview with a volunteer in an animal welfare group:

As far as I understand, there is no clearly stated principle of Five Freedoms in any policy of government's [although] in the *Animals Act 1953* we have [it stated] that animals should not be tortured, harshly ridden and such.<sup>64</sup>

An administrative officer in the government sector emphasised the effort put in by the government in protecting animal welfare:

We have adequate policy. Reaching the ideal is hard but the important thing is how to tailor our legal framework in accordance with our Malaysian environment. So far the government is progressing well in drafting its policies to achieve an acceptable standard. For instance, there are a lot of cases where Malaysian courts punish animal abusers, but which are not published in the law reports because most of the cases are decided in subordinate courts. Media should play their role in publishing more stories about court decisions on animal cruelty cases ...<sup>65</sup>

A legal officer in a Magistrate's Court noticed that judicial decisions also have an impact on animal issues:

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<sup>62</sup> Interview data: INT025

<sup>63</sup> Interview data: INT021.

<sup>64</sup> Interview data: INT002

<sup>65</sup> Interview data: INT022.

A maximum punishment ordered by the court in the case of animal abuse may serve as deterrent to the offence.<sup>66</sup>

In analysing whether the law follows international standards, a Session's Court judge observed:

It is undeniably true that Malaysia attempts to follow [the] international standard in providing better protection of animals in its legislation. However on this point, wildlife law is much more progressive compared to the Animals Act. In fact, as far as wildlife is concerned, it has the new law *Wildlife Conservation Act 2010*, but the Animals Act is still the old version of 1953. The government is taking too long to update the Animals Act ...<sup>67</sup>

A professor in a university's department of animal science regarded education and awareness as the most effective ways of protecting animals:

Education and awareness are the most effective ways to protect animals. The government should consult education experts and academicians on ways to educate people about animal welfare awareness. We must start animal welfare awareness from kindergarten. Animal welfare education should be inculcated in all subjects in school such as science, religion, morals and even language ...<sup>68</sup>

The president of an animal welfare organisation also shared the same view on education:

We need to protect animals by improving our education system. Education in Malaysia is too exam-oriented and passive, and does not encourage thinking, love and passion, towards animals.<sup>69</sup>

A leader of a religious group also observed the importance of education in promoting kindness towards animals:

Animal welfare education is important. People in Malaysia should have compassion and humane manners toward animals. In general, it is still a long way to go, and people need to be educated ...<sup>70</sup>

A director of an animal shelter felt that effective law enforcement was the best way of protecting animals:

The most important factor to promote animal welfare is by effective enforcement. We may declare that we have the best law to protect animals, but the law has no bite if there is no enforcement. This is a factor which is lacking in our policies.<sup>71</sup>

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<sup>66</sup> Interview data: INT029.

<sup>67</sup> Interview data: INT023.

<sup>68</sup> Interview data: INT001.

<sup>69</sup> Interview data: INT004.

<sup>70</sup> Interview data: INT038.

<sup>71</sup> Interview data: INT018.



A chairman of an animal welfare society also felt that the Malaysian SPCA should be given power to prosecute animal welfare cases:

So far, we cannot rely on government agencies to investigate and prosecute animal cruelty cases. They have their own limitations, shortage of staff and budget. The government should appoint the Malaysian SPCA to assist the Department of Veterinary Services and Attorney General's Chambers in animal cruelty cases particularly in prosecuting animal cruelty cases ...<sup>72</sup>

A private veterinary surgeon suggested the imposition of stricter penalties could provide a more effective way of protecting animals:

Laws must reflect the severity of the offence and heavier sentences must be meted out to offenders. The main thing is that the law must be able to open our eyes that animals also feel pain. The best [result is that] if we abuse an animal, then the law should abuse you back ...<sup>73</sup>

A practising lawyer commented on the role of political elites and public opinion in providing ways of protecting animals:

In Malaysia, the public can give opinions, but politics will shape the law. However, as you can see in the Malaysian political scenario, politicians just promise things and they are not capable of doing things. The best way that we have is to vote for politicians who are ready to protect animal welfare, which we are yet to see in Malaysia right now.<sup>74</sup>

The research has offered several suggestions as to the most effective ways of protecting the welfare of animals in Malaysia. This study found two factors, external and internal, which can contribute to the better protection of animals in Malaysia. External factors include international law and animal welfare science and the application of the principles of the Five Freedoms and the the Three Rs, and the acknowledgement of animal sentience. In order to function in a global environment, the Malaysian government is being pressured both externally and from within to incorporate these features into its legislation and policies. Some of these issues were highlighted or were implicit in some of the answers of the interviewees. Internal features involved pressure by Malaysian citizens for more effective law enforcement of animal welfare cases; updating of legislation to more adequately reflect the animal welfare issue, particularly international standards and developments in animal science; and, most importantly, improved animal welfare education at all levels of the

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<sup>72</sup> Interview data: INT016.

<sup>73</sup> Interview data: INT024.

<sup>74</sup> Interview data: INT017.

educational process. Again, these issues were raised by interviewees as a way of improving animal welfare in Malaysia.

## **7.9 Conclusion**

The findings from this fieldwork research present the perspectives of Malaysians towards the progress of animal welfare and the law in Malaysia. The sample covered representatives from three different groups who have a direct relationship with animal matters: that is, officials from public office, individuals from private organisations and members of NGOs. To overcome the limitations of published data, the findings from the fieldwork suggest that it is imperative to support and complement published data with the reality and practice from participants in the system.

The fieldwork study suggested that Malaysians generally regard animals as important in their daily lives. However, the importance of animals in the Malaysian community depended on such issues as religion, culture, economics, the political climate and education. This study proposed that culture and religion play an important role in determining Malaysians' attitudes towards animals. Different interpretations of religious texts may lead to different stances towards animals and may sometimes not favour animals in human lives. The stance shaped by the culture and religion affects the beliefs and thinking of the community concerning animals. It later moulds the social, political and legal perspectives of a community in the treatment of animals.

This study suggested a close relationship between animal welfare and Malaysian law. To a limited extent, the Malaysian government seems to be attempting to improve the welfare of animals. The consultation with stakeholders and the drafting of a new *Animal Welfare Bill 2012* are evidence of that fact. However, improvements are being hampered by inadequate law enforcement and the failure of the government to table the Bill.

The slow progress of the law relating to animals, particularly in enforcement, marks the current status of animals in the current legal framework. The government claims that animals enjoy protection from harm and abuse under its current policies. However, animal welfare groups keep voicing their concerns about the many shortcomings of current policies which are ineffective due to lack of research and consultation with non-government animal welfare experts. This fieldwork suggested that animals are fully protected when it benefits government in economic and international relations, but not

otherwise. Strays which cause problems would be regarded as a nuisance and a threat by the government.

The fieldwork study also made valuable reference to international law and animal welfare science in suggesting the best possible ways to protect the welfare of animals. The study found that references to scientific discovery on animal sentience, and the principles of Five Freedoms and the Three Rs may contribute to positive developments in animal welfare standards in Malaysia. The application of international documents such as the Terrestrial Code, the Aquatic Code and the Draft of the Universal Declaration on Animal Welfare in domestic policies and legislation may lead to improvements in animal welfare standards in Malaysia. The promotion of animal welfare in the national educational system is essential to produce future generations who could shape better protection of animals in Malaysia.

## CHAPTER 8: THE FUTURE OF ANIMAL WELFARE LAW IN MALAYSIA

### 8.1 Introduction

Malaysian animal welfare legislation reflects both international trends and what has occurred in Great Britain. To date, Malaysia has passed several pieces of legislation designed to govern animal welfare, such as the *Animals Act 1953* (Malaysia), the *Wildlife Conservation Act 2010* (Malaysia), and the *Fisheries Act 1985* (Malaysia). In addition, the government has issued codes of practice and policies which provide basic guidelines for regulating animal welfare, including national policies on agricultural and biological diversity and the *Code of Good Animal Husbandry Practice* (GAHP).

As Malaysia is assumed to follow the animal welfare approach in its model of legislation regulating the welfare of animals, the first section of this chapter analyses legislation to determine the parameters of the animal welfare model that Malaysia currently follows. The second section of this chapter will look further at the essential elements of animal welfare in Malaysian law and policies. Based on the philosophical concept of animal welfare, selected international documents formulated by international organisations concerning animal welfare discussed in Chapter 6 (6.1–6.3), are compared with the current elements of animal welfare evident in Malaysian legislation and policies. The final section of the chapter proposes a framework to chart the future of animal welfare law in Malaysia.

### 8.2 Animal welfare approach based in Malaysian law and policies

Chapter 3 (3.3.1) argued that an animal welfare approach required three important elements to be taken into consideration by respected entities in protecting the welfare of animals.<sup>1</sup> They are: (i) the prevention of cruelty; (ii) a claim for stronger laws; and, (iii) the promotion of humane treatment.

As this thesis also argued in Chapter 4 (4.4.4), the nature of animal law in Malaysia can be seen in three aspects. First, several laws are enacted in relation to animal products

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<sup>1</sup> For further discussion of the elements of the animal welfare approach in the animal protection regime, see Gary Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010); David Glasgow, 'The Law of the Jungle: Advocating for Animals in Australia' (2008) 13(1) *Deakin Law Review* 181; Cass R Sunstein, 'What are Animal Rights?' in Martha C. Nussbaum and Cass R. Sunstein (eds), *Current Debates and New Directions* (Oxford University Press, 2004) 5.

and animal control.<sup>2</sup> Second, there are laws which regulate the responsibilities of animal owners and the persons who are in charge of animals.<sup>3</sup> And third, there are laws which are specifically designed for animal protection and animal welfare.

For the purpose of animal protection and animal welfare, the *Animals Act 1953* (Malaysia) and the *Wildlife Conservation Act 2010* (Malaysia) are mechanisms which are designed to protect and conserve animals for their better welfare. The *Animal Welfare Bill 2012* (Malaysia), which has yet to be tabled in Parliament, is aimed at enhancing the better protection of and the welfare of animals in Malaysia. These legal instruments involve an important component of an animal welfare approach, that is, the prevention of cruelty, which the next section examines.

#### 8.2.1 Prevention of cruelty

This thesis argued in Chapter 5 (5.4.3) that the current main animal-related laws; the *Animals Act 1953* (Malaysia), the *Wildlife Conservation Act 2010* (Malaysia), and the *Animal Welfare Bill 2012* (Malaysia) among others, provide specific chapters on the prevention of cruelty to animals. Both statutes and the Bill criminalise animal cruelty by proscribing the activities which lead to the offence, instituting prosecutorial procedures and fixing penalties for offences. This section suggests that these laws and the Bill also mandate that animal owners must ensure that animals are supervised and protected from unnecessary suffering and any other specific cruelty, in order to prevent cruelty.<sup>4</sup>

To prevent cruelty, the legislation in Malaysia provides that it is an offence to cause unnecessary suffering to an animal by wantonly or unreasonably doing or omitting to

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<sup>2</sup> These include the laws which regulate the use of animals for human benefit, for example, in the *National Feed Act 2009* (Malaysia) which aims to promote healthy and safe feed for animals, and for human food and usage. Several laws in the states also intend to promote public health and safety and to prevent public nuisance by controlling animal management and rearing practices, for instance, the Control of Cattle Enactment, the Control of Pig Farming Enactment and the Poultry Farming Enactment.

<sup>3</sup> These laws aim to protect people from injury which may be caused by animals. This can be seen in the *Minority Offences Act 1955* (Malaysia) which established the responsibility of animal owners to supervise such animals so as to prevent them causing hurt or injury and nuisance to other persons and the public. To prevent public disorder, the *Penal Code* (Malaysia) for instance, criminalises the use of animals which cause hurt or injury to others.

<sup>4</sup> *Animals Act 1953* (Malaysia), s 44 (2); *Wildlife Conservation Act 2010* (Malaysia), s 86 (1); *Animal Welfare Bill 2012* (Malaysia), s 29.

do anything, or, being the owner, permitting any unnecessary pain or suffering to any animal.<sup>5</sup>

The case of *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor*<sup>6</sup> provides an example of the ambit of legislation in Malaysia in combating animal cruelty. In that case, the respondents ran a cattery business promising clients their pets would be well looked after in their hands. Much to their dismay, the owners of 30 cats who left their pets with the respondents when they left town for the 2011 Hari Raya Aidilfitri holidays<sup>7</sup> returned to find their cats either missing or in deplorable conditions. The cat food they had provided the respondents when they left the cats had been untouched. Eight of the cats died from undernourishment and the ones which survived were dirty and emaciated and suffered from a variety of health problems. The owners lodged complaints with the police and the respondents were charged in the Magistrate's Court with 30 counts of animal cruelty under section 44(1)(d) of the *Animals Act 1953* (Malaysia). The respondents pleaded guilty and were fined MYR200 in default of a month's jail on each charge. The respondents were fined a total of MYR6,000.

The prosecution appealed to the High Court against the leniency of the sentence. In passing sentence, the magistrate had considered s 44(2) of the Act which provided that 'where an owner was convicted of permitting cruelty within the meaning of this Act ... he shall not be liable to imprisonment without the option of a fine'. The Magistrate felt the section did not empower her to impose a custodial sentence. On the appeal, the High Court maintained the monetary penalty of MYR6,000 and ordered that the respondents serve three months' imprisonment for all the charges.<sup>8</sup>

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<sup>5</sup> *Animals Act 1953* (Malaysia) s 44(1)(d); *Wildlife Conservation Act 2010* (Malaysia), s 86 (1)(a); *Animal Welfare Bill 2012* (Malaysia), s 29 (1)(d).

<sup>6</sup> *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70.

<sup>7</sup> In English, this is known as the Festival of Breaking the Fast. One of the Muslim celebrations in Malaysia, it marks the end of Ramadhan, the Islamic holy month of fasting. Aidilfitri is declared as public holidays for two days in Malaysia.

<sup>8</sup> *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70, 79. The judge in para (22): For reasons aforesaid I find merit in this appeal by the public prosecutor. In my view the respondents' act warrants a custodial sentence. Their callous disregard for the well-being of the cats had left eight of them dead and 22 others suffering. In the circumstances I order that the respondents be sentenced to three months imprisonment for each offence in addition to the sentence of fine already imposed by the lower court. The imprisonment sentence is to take effect from today and is to run concurrently. In my view the additional three months concurrent imprisonment sentence is appropriate considering that the respondents faced not one but 30 cruelty charges.

Some unreported cases prosecuted under the *Animals Act 1953* that the Malaysian newspapers covered may illustrate the irregular and unsystematic treatment of animals in Malaysia.<sup>9</sup> Back in 2005, a dog owner neglectfully left his dog unattended, resulting in the dog's severe ill health, and was fined MYR100.<sup>10</sup> In 2011, a woman was reported to have tortured and stomped on her three kittens, killing them. The court found her guilty and fined her MYR400.<sup>11</sup> At the end of January 2013, a maid who killed her employer's dog was sentenced to one year's imprisonment.<sup>12</sup> In another unreported case, a hawker cruelly poured boiling water on a stray dog and was sentenced to one day's jail and fined MYR200.<sup>13</sup>

The prevention of cruelty constitutes an aspect of the welfare approach. In this regard, all laws and the Bill aim at preventing cruelty. However, each varies on the degree of penalty in animal cruelty offences. The *Animals Act 1953* (Malaysia) when it was first enacted only provided a maximum penalty of MYR200 for each animal cruelty offence, while the *Wildlife Conservation Act 2010* (Malaysia) provided a minimum penalty of MYR10,000 for each offence. At the same time, the *Animal Welfare Bill 2012* (Malaysia) provides a maximum penalty up to MYR100,000 for an animal offence. This trend shows the claim for stronger laws in combating cruelty for better protection of animals, which the next section observes.

### 8.2.2 Arguing for stronger laws

While an animal welfare approach does not seek to abolish the use of animals for human benefit such as for food, sport, entertainment, recreation and science, it argues for stronger laws to ensure the welfare of animals and to reduce their suffering.<sup>14</sup>

From a Malaysian perspective, despite the slow progress of animal protection regimes, the criticism of public policy and legislation has led to improvement in animal welfare

<sup>9</sup> Chin Mui Yoon, 'Horror of Horrors', *The Star* (Kuala Lumpur), 3 October 2011 <<http://www.thestar.com.my/story.aspx?file=%2F2011%2F10%2F3%2Flifefocus%2F9592903>>

<sup>10</sup> Chin Mui Yoon, 'RM100 Fine for Dog Abuse', *The Star* (Kuala Lumpur), 18 October 2005 <<http://www.thestar.com.my/Story.aspx?file=%2F2005%2F10%2F18%2Fcourts%2F12347380&sec=courts>>; See also Shoba, *Remembering Sheena* <<http://remembersheena.blogspot.com>>

<sup>11</sup> 'Woman Fined RM400 for Abusing Three Kittens', *The Star* (Kuala Lumpur), 28 July 2011

<sup>12</sup> 'Maid Jailed for Killing Dog', *The Star* (Kuala Lumpur), 26 January 2013 <<http://www.thestar.com.my/News/Nation/2013/01/26/Maid-jailed-for-killing-dog.aspx>>

<sup>13</sup> 'Hawker Jailed, Fined for Scalding Stray Dog', *The Malaysian Insider* 28 May 2013 <<http://www.themalaysianinsider.com/malaysia/article/hawker-jailed-fined-for-scalding-stray-dog>>

<sup>14</sup> Sunstein, above n 5, Glasgow, above n 5, 186.

protection. In 2010, due to an increase in cases of wildlife poaching, smuggling and the illegal wildlife trade, the government enacted the *Wildlife Conservation Act 2010* (Malaysia) to replace the former legislation, the *Protection of Wildlife Act 1972* (Malaysia).

Between the years 2010 to 2013, the media and animal welfare-related NGOs revealed various cases of irregular and unsystematic treatment of animals in Malaysia. The *Animals Act 1953* has recently been found to have too little a bite to curb animal abuse. The punishment for animal cruelty offences was far too low, with the maximum punishment only up of RM200, which had been maintained in the Act for 59 years. The government then established a committee to look into the existing law and to revise the *Animals Act 1953*, which aimed to give greater protection to the welfare of animals in Malaysia. The government invited NGOs and the public to participate in the process of preparing the new legislation. As a result, a draft of animal welfare legislation has undergone a public survey and was scheduled to be tabled in the Parliament. However, the process of tabling the Bill has been very slow and to date, it has yet to be tabled in the Parliament.

The leniency of the law in combating cruelty offences invites voluminous comment from the public and various institutions. Recently, the High Court in deciding the case of *PP v Shahrul Azwan and Anor*, in an obiter dictum, commented on the penalty for animal cruelty offences in the *Animals Act 1953* in the following terms:<sup>15</sup>

As a postscript it has to be said that the punishment for animal cruelty under the Act is archaic and out of touch with reality. When the Animals Ordinance (No 17 of 1953) was enacted 59 years ago in 1953 the penalty for animal cruelty as provided by s 44(1) was as follows:<sup>16</sup>

... a fine of two hundred dollars or to imprisonment for a term of six months or to both.

When the Ordinance was revised 53 years later in 2006 by the present Act (Act 647), the penalty for animal cruelty as provided by s 44(1) was as follows:<sup>17</sup>

... a fine of two hundred ringgit or to imprisonment for a term of six months or to both.

No prize for spotting the difference but it will be interesting to see if anything will be done to rectify the situation. Having to pay a fine of two hundred dollars in 1953 would probably hurt the pocket but to pay a two hundred ringgit fine in 2012 is not

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<sup>15</sup> *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70, 76.

<sup>16</sup> *Ibid*, para 23.

<sup>17</sup> *Ibid*, para 24.



even a slap on the wrist for businessmen like the respondents. If the two hundred dollars of 1953 were to be pegged against today's worth of two hundred ringgit, the fine of RM200 under the Act which has remained stagnant for the past 59 years will be more of a friendly pat on the back rather than a punishment. It cannot be the case that cruelty against animals is viewed less seriously today than it was in 1953. In my view the need to increase the penalty for animal cruelty, in particular the sentence of fine is long overdue. A substantial increase will at least give some semblance of protection to these poor defenceless creations of God.<sup>18</sup>

In responding to the decision of the court, and while waiting for the long overdue draft of animal welfare legislation to be tabled in the Parliament, the government made an effort to amend section 44 of the *Animals Act 1953* (Malaysia), to increase the punishment for animal welfare offences. In March 2013, the Parliament passed the *Animals (Amendment) Act 2013* (Malaysia). The provision for the revision of the penalty reads as follows:<sup>19</sup>

Subsection 44(1) of the principal Act is amended by substituting for the words "shall be guilty of an offence of cruelty and shall be liable to a fine of two hundred ringgit or to imprisonment for a term of six months or to both" the words "commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both."

This thesis argues that the above trend signifies a positive improvement in the government's effort to argue for stronger law to protect animal welfare in the country. The enactment of the recent *Wildlife Conservation Act 2010* (Malaysia), the preparation of the draft of animal welfare legislation, a recent effort to increase the penalty for animal cruelty offences, and the positive attitudes of the court and the public towards enhancing the protection of the welfare of animals mark a significant development in animal welfare protection. However, this thesis argues that the slow tabling of the *Animal Welfare Bill 2012* (Malaysia) may affect the motivation and consciousness of the public towards animal welfare protection which could be instilled through education, particularly education in the humane treatment of animals. The point addressed next is the promotion of humane treatment which constitutes the animal welfare model approach.

### 8.2.3 Promotion of humane treatment

This thesis in Chapter 6 (6.2.4 (b)) argued that there are no direct and express provisions in the current laws relating to animals with regard to the promotion of humane treatment of animals and their welfare. The provisions dealing with the

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<sup>18</sup> Ibid, para 25.

<sup>19</sup> *Animals (Amendment) Act 2013* (Malaysia), s 38.

promotion of humane treatment and welfare in the laws are indirect. They only proscribe particular forms of human behaviour which lead to cruelty offences, such as neglect or failure to provide animals with sufficient food and water.<sup>20</sup>

Despite this, the *Animal Welfare Bill 2012* (Malaysia) provides a concise legal perspective on the promotion of humane treatment and animal welfare. It clearly provides in its preamble for the promotion of the well-being and responsible ownership of animals, and the making of provisions about animal welfare.<sup>21</sup> It directly dedicates a section to the promotion of animal welfare and humane treatment, which specifically prescribes the duty of persons responsible for animals to ensure their welfare.<sup>22</sup> It first details the needs of animals that should be undertaken such as the need for a suitable environment and diet, an ability to display normal patterns of behaviour, the provision of housing which is separate from other animals and protection from pain, suffering, injury and disease.<sup>23</sup> These provisions put legal responsibility and obligation clearly on humans to take reasonable steps to ensure the needs and well-being of animals,<sup>24</sup> including humane handling in killing and slaughtering.<sup>25</sup>

For promoting humane treatment, the Bill goes further to address the duties of humans in attending to animals used in research, testing and teaching;<sup>26</sup> the responsibilities of humane treatment during animal transportation;<sup>27</sup> and regulating the transfer of pet animals by way of sale or prize to persons under 12 years old.<sup>28</sup> In addition to the promotion of humane treatment in animal handling, the Bill also deals with the dissemination of information and education dealing with animal welfare, which is elaborated in the next section.

#### *(a) Education in the humane treatment of animals*

As this thesis argued in Chapter 7 (7.8), the fieldwork findings suggested that the promotion of animal welfare through education should play a vital role in in shaping the attitudes of future generations towards animals in Malaysia. .Such education can be

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<sup>20</sup> *Animals Act 1953* (Malaysia) s 44 (1)(c); *Wildlife Conservation Act 2010* (Malaysia) s 86 (1)(c).

<sup>21</sup> *Animal Welfare Bill 2012* (Malaysia) preamble.

<sup>22</sup> *Ibid*, Part IV.

<sup>23</sup> *Ibid*, s 24 (1)(a)–(e).

<sup>24</sup> *Ibid*, s 24(2).

<sup>25</sup> *Ibid*, s 24(5).

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

<sup>27</sup> *Ibid*, s 27.

<sup>28</sup> *Ibid*, s 28.

defined as 'a process that encourages an understanding of the need for compassion and respect for people, animals and the environment and recognises the interdependence of all living things.'<sup>29</sup>

There is nothing in the current law relating to animals which specifies the need for education of the public in animal welfare issues. However, the *Animal Welfare Bill 2012* (Malaysia) is not silent on the issue: the Animal Welfare Board is to impart education in relation to the humane treatment of animals and to encourage the formation of public opinion against the infliction of trauma, pain or suffering to animals and for the promotion of animal welfare by means of lectures, books, posters, cinematographic exhibitions and the like.<sup>30</sup>

Indeed, education of this nature is important and must start from kindergartens and schools. As Eadie suggests:<sup>31</sup>

the incorporation of humane education in the formal education of children is fundamental to a long-term strategy of alleviating animal suffering on a global scale.

A professor of animal science suggested that animal welfare education should be inculcated in all subjects in Malaysian schools such as science, religion, morals and language.<sup>32</sup> The continuation of 'humane education' should also progress in higher learning and research institutions by improving animal protection and reducing animal suffering, particularly in animal experimentation.<sup>33</sup> The promotion of humane education by the authorities in the animal industry is essential in preventing animal cruelty. The cooperation of NGOs in encouraging and lobbying for humane education among the public must be commended.

To sum up this section, this thesis has argued that Malaysian legislation generally follows an animal welfare approach outlining several considerations for providing better protection for animal welfare; prevention of cruelty, claims for stronger laws and the promotion of education about humane treatment. However, the extent to which Malaysian laws provide for animal welfare protection could only be assessed by a

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<sup>29</sup> WorldAnimalNet (2014) Formal humane education (schools, etc), World Animal Net. <<http://www.worldanimal.net>>, accessed 4 March 2014.

<sup>30</sup> *Animal Welfare Bill 2012* (Malaysia) s 5(1)(b).

<sup>31</sup> Edward N. Eadie, *Education for Animal Welfare* (Springer-Verlag Berlin Heidelberg, 2011) 38.

<sup>32</sup> Interview data: INT001.

<sup>33</sup> Eadie, above n 31, 45.

detailed look at the current practice and domestic elements of animal welfare, which the next section analyses.

### 8.3 Elements of animal welfare in Malaysian law

#### 8.3.1 Constitutional provision

At the moment, there are three countries which have expressly provided for the protection of animals in their respective state constitutions, namely India, Switzerland and Germany. The Indian Constitution, for instance, requires the state to endeavour to organise animal husbandry on modern and scientific lines, prohibits the slaughter of cattle and dairy animals for religious reasons, and pronounces the duty of every Indian citizen to have compassion for living creatures.<sup>34</sup> The Federal Constitution of the Swiss Confederation regards animals as 'sentient creatures' and requires the state to legislate for the protection of animals.<sup>35</sup> The Basic Law for the Federal Republic of Germany also proclaims the responsibility of the state to protect the natural foundations of life and animals by legislation.<sup>36</sup> There is an emphasis on the protection of animals in the constitution of these states by the use of the deontic modal 'shall'. This indicates the seriousness of the state when it regulates animal welfare matters.<sup>37</sup>

What is the status of animals in the Malaysian Constitution? Although the Malaysian Constitution does not establish animal welfare principles, it provides avenues for the legislature to enact laws relating to animals. As discussed in Chapter 4, List III of the Ninth Schedule of the Malaysian Federal Constitution provides a power to both the federal and state legislatures to pass statutes relating to the protection of wild animals and wild birds, animal husbandry, prevention of cruelty to animals, veterinary services

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<sup>34</sup> *Indian Constitution 1950* (India) Art 48, Art 51 (A) (g).

<sup>35</sup> *Federal Constitution of Swiss Confederation* (Swiss) Art 80.

<sup>36</sup> *Basic Law for the Federal Republic* (Germany) s 20 (a).

<sup>37</sup> (i) *Indian Constitution 1950* (India) Art 48:

Organisation of agriculture and animal husbandry 'The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.'  
Article 48A: Protection and improvement of environment and safeguarding of forests and wild life.—'The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.'

(ii) *Federal Constitution of Swiss Confederation* (Swiss) Art 80 'The Confederation shall legislate on the protection of animals'.

(iii) *Basic Law for the Federal Republic* (Germany) s 20 (a) '[T]he state shall protect the natural foundations of life and animals by legislation'.

and animal quarantine. As to the seriousness of the protection of animals in the Malaysian Constitution, this study suggests that it may not reach the high level of urgency which India, Switzerland and Germany have provided but at least, the protection of animals is seen as important, even though it is optional on the legislature whether or not it passes animal welfare legislation. The Malaysian Constitution uses the modal verb 'may' which gives the Parliament the discretion either to pass laws relating to animal welfare or not to do so.<sup>38</sup>

Therefore, federal and state legislatures may pass legislation on animal welfare matters. However, in the event of a conflict between the federal and state law, federal law prevails.<sup>39</sup> At the moment, among the laws at federal level relating to animal matters are the *Animals Act 1953* (Malaysia), the *Wildlife Conservation Act 2010* (Malaysia), the *Veterinary Surgeons Act 1974* (Malaysia), and the *National Feed Act 2010* (Malaysia). At the same time, the states have also passed legislation relating to the control of cattle, and the control of pig farming and poultry farming, in their respective territories.

This study has suggested that the Constitution only determines the power to enact the laws relating to animals and classifies the items which the legislative body should enact in animal-related issues particularly the laws relating to the protection of wild animals and wild birds, prevention of cruelty to animals, veterinary services and animal quarantine.<sup>40</sup> As the Constitution does not establish animal welfare principles, there is no constitutional element which influences standards of welfare for animals in Malaysia. Therefore, it is argued that the Constitution does not by itself determine the standards of welfare for animals. As a primary source of Malaysian law, it only confers the power to legislative bodies to make law relating to animals. However, any legislation passed can have a very close relation to animal welfare. This will be specified in the next discussion.

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<sup>38</sup> *Federal Constitution* (Malaysia) List III of Ninth Schedule reads 'both federal and states **may** have power to legislate the law relating to the protection of wild animals and wild birds, animal husbandry, prevention of cruelty to animals, veterinary services and animal quarantine'.

<sup>39</sup> *Ibid*, Art 75.

<sup>40</sup> *Ibid*, List III of Ninth Schedule.

### 8.3.2 Animal welfare legislation/Law relating to animals

#### (a) *State of animals and the law*

There is no express provision for the welfare of animals in the current laws relating to animals in Malaysia. However, this study has suggested that the absence of express provisions does not itself reflect the non-existence of an animal welfare element in the law. Malaysian law has long recognised some elements of animal welfare even though they are not expressly provided for in the provisions. There are many indications or themes which reflect the existence of a welfare element in the legal provisions. Legislation which regulates animal affairs such as the prevention of cruelty, species protection and animal health, all pertain to animal welfare. Radford suggests that the issue of welfare is the principal factor which influences public policy relating to the treatment of animals.<sup>41</sup> In general, the welfare of animals has marked the development of animal law legislation in providing better treatment for animals. This study has suggested that issues of welfare have influenced the legislative bodies in Malaysia to make provisions for several important features in animal welfare such as animal examination, licensing, declaration of animal reserves and animal feed.

Animal examination is intended to ensure animal health, particularly upon importation and exportation.<sup>42</sup> This examination may serve several purposes, particularly in preventing disease which may affect both humans and animals. For the benefit of animals, they are observed, examined and treated carefully for any diseases. The

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<sup>41</sup> Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001), 287.

<sup>42</sup> *Animals Act 1953* (Malaysia), s 7, s 16.

Section 7 deals with the examination of imported animals. It reads as follows:

(1) Every animal or bird imported or about to be imported may be required to undergo an examination by a veterinary authority either at the place of arrival or at such other place as the veterinary authority may appoint and if any such animal or bird is considered likely to have been exposed to infection with any disease the veterinary authority may subject it to such biological or other test or treatment as he may think necessary, and may charge such fees for such examination, test or treatment as may be prescribed.

(2) Any such animal or bird may on importation be detained by a veterinary authority for observation, examination, test or treatment for such period and at such place as in the circumstances of the case he thinks proper.

Section 16 deals with examination of exported animals. The section provides 'every animal which is about to be exported may be required to undergo an examination by a veterinary authority at such place as the veterinary authority may appoint.'

infected animals are subjected to curative treatment to overcome any infection.<sup>43</sup> Moreover, the stable, cage or pen of any infected animal must be disinfected or, if necessary, destroyed in order to ensure its hygienic and sanitary condition, and to protect animal health.<sup>44</sup> An assurance that animals are free from disease and infection ensures their welfare. The destruction of animals which are so diseased or severely injured is also good for the welfare of animals for it prevents the continuous suffering of the animals.<sup>45</sup> This represents a sign of good welfare.

Having a licensing regime can also be positive for animal welfare, but this will not be the case if it permits animal exploitation. However, existing legislation incorporates some animal welfare elements. For instance, the provision of licences to possess animal vaccines and cultures is designed to regulate the use of drugs for animals.<sup>46</sup> Requiring dogs to be licensed goes some way to ensuring that the animals are safe and healthy. The possession of licences when dealing with wildlife such as hunting protected wildlife, taking and keeping derivatives from protected wildlife, collecting bird nests, carrying on a taxidermy business, and importing and exporting protected wildlife serve to protect the welfare of animals from illegal activities.<sup>47</sup> In other cases, all dealings require the possession of a special permit. This also indirectly ensures the welfare of those animals.<sup>48</sup>

The government can also declare special reserves for animal conservation.<sup>49</sup> In so doing, it is attempting to permit those animals to display their original patterns of behaviour in an environment which is as safe as possible from human threats. For instance, the government has declared 35 wildlife reserves and sanctuaries for animal conservation which are permitted to exist and prescribes that there should be no

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<sup>43</sup> Ibid, s 22 (1). The section reads as follows:

If a veterinary authority considers that any animal or bird has been exposed to infection with any disease he may order that such animal or bird be subjected to such prophylactic or curative treatment, including virus, vaccine, or serum therapy, or any such combination thereof as he may think necessary.

<sup>44</sup> Ibid, s 23(1): Disinfection of stables etc, s 24(1): Destruction of stables etc.

<sup>45</sup> Ibid, s 48 (1): Power to order destruction of animals.

<sup>46</sup> Ibid, s 30 (1): Licences to possess culture or vaccine.

<sup>47</sup> *Wildlife Conservation Act 2010* (Malaysia), s 9 (Requirement of licence), s 10 (Requirement of permit), s 11 (Requirement of special permit).

<sup>48</sup> Ibid, s 10 (Requirement of permit), s 11 (Requirement of special permit).

<sup>49</sup> The government agency in charge of wildlife reservations is the Department of Wildlife and National Parks.

activities which can affect the resident animals.<sup>50</sup> For the protection of aquatic animals, the government has also established several marine parks or marine reserves.<sup>51</sup> The declaration of closed seasons for activities relating to wildlife is also for the protection of the welfare of animals, particularly during animal breeding or nesting periods.<sup>52</sup>

In ensuring the welfare of animals, particularly in food quality, the *Feed Act 2009* (Malaysia) provides that the feed must satisfy the nutritional requirement of the animals. The food must be safe and must not be contaminated. This is designed to ensure animal safety and nutrition.<sup>53</sup> Finally, only a prescribed dose of a permitted antibiotic, hormone or other chemical can be incorporated into animal feed.<sup>54</sup>

#### *(b) Obligations/duties of humans*

Malaysian law also prescribes the obligations and duties of humans to ensure the welfare of animals. Duties to not inflict cruelty on animals are a common theme in animal cruelty in the legislation. The legislation is designed to proscribe particular forms of human behaviour as they relate to animal welfare. As a result, this has indirect benefits to animals as it promotes standards of welfare in various forms including rules, guidance and advice which humans have to consider in ethically dealing with animals.

The core obligation is to provide animals with adequate care such as providing them with sufficient food or water during transportation or providing rules with regard to confinement which signifies that humans have responsibilities associated with the welfare of animals.<sup>55</sup> The duty to exercise reasonable care and supervision of animals for their protection and to prevent cruelty also denotes the importance of animal welfare in the legislation.<sup>56</sup>

Although there are no direct provisions regarding what constitutes welfare in the current law relating to animals, the *Animal Welfare Bill 2012* (Malaysia) proposes remedies for the situation. It directly aims at promoting the well-being and responsible

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<sup>50</sup> *Wildlife Conservation Act 2010* (Malaysia), s 47: Declaration of wildlife reserves and sanctuaries.

<sup>51</sup> *Fisheries Act 1985* (Malaysia), s 41 (1): Establishment of marine parks and marine reserves.

<sup>52</sup> *Wildlife Conservation Act 2010* (Malaysia), s 27: No licence during closed session.

<sup>53</sup> *Feed Act 2009* (Malaysia), preamble.

<sup>54</sup> *Ibid*, s 19, s 20.

<sup>55</sup> *Animals Act 1953* (Malaysia), s 44 (1) (c): being in charge of any animal in confinement or in course of transport from one place to another neglects to supply such animal with sufficient food or water. See also *Wildlife Conservation Act 2010* (Malaysia), s 86 (1) (c).

<sup>56</sup> *Animals Act 1953* (Malaysia), s 44 (2).



ownership of animals, and the making of provisions about animal welfare.<sup>57</sup> The Bill defines animal welfare as animal needs and imposes a duty on persons to ensure animal welfare.<sup>58</sup> In ensuring the welfare of animals, several animal needs are considered of importance including the provision of a suitable environment and diet; an ability to display normal patterns of behaviour; the provision of housing which is apart from other animals; and protection from pain, suffering, injury and disease.<sup>59</sup> Under this provision, a person is duty bound to take reasonable steps to ensure the needs and well-being of animals,<sup>60</sup> including humane handling in killing and slaughtering.

The Bill also addresses the welfare of animals used in research and education as the current law is silent on the issue. The Bill proposes the assurance of physical, health and behavioural needs of animals in accordance with good practice and scientific knowledge before research on animals can be conducted.<sup>61</sup> Animals used in research should receive proper treatment in the case of injury or illness during the conduct of research.<sup>62</sup> The Animal Ethics Committee must also approve the use of animals in research and education in accordance with the scientific use code.<sup>63</sup>

The welfare of animals during transportation by means of land, air and water is also the Bill's concern. The transportation operator has to provide adequate, clean and sanitary facilities including sufficient food and water throughout the journey.<sup>64</sup> The person in charge should also ensure that confinement and restraints during the journey are not cruel.<sup>65</sup> The transfer of animals for sale to persons under 12 years old is also prohibited unless the child is accompanied by an adult.<sup>66</sup> The reason for this is that perhaps a minor may not have adequate knowledge concerning the care of animals and, hence, they should be advised by an adult.

### 8.3.3 Non-binding instruments

Apart from legislation which directly has legal effect on animal welfare-related issues, there also exist various forms of non-binding instruments such as standards or best

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<sup>57</sup> *Animal Welfare Bill 2012* (Malaysia), preamble.

<sup>58</sup> *Ibid*, s 2, Interpretation.

<sup>59</sup> *Ibid*, s 24(1)(a)–(e).

<sup>60</sup> *Ibid*, s 24(2).

<sup>61</sup> *Ibid*, s 26(1)(a).

<sup>62</sup> *Ibid*, s 26(1)(b).

<sup>63</sup> *Ibid*, s 26(2)(b).

<sup>64</sup> *Ibid*, s 27(1).

<sup>65</sup> *Ibid*, s 27(2).

<sup>66</sup> *Ibid*, s 28(1).

practices, and government policies and directions. Even though these instruments are not legally binding and have no legal effect on animal welfare issues, they can serve as a reference to what can be expected with regard to the welfare of animals. For instance, the *Good Animal Husbandry Practice* (GAHP Malaysia) sets general standards and minimum requirements for animal welfare as benchmarks for practices relating to animal issues.<sup>67</sup> Government policies on agriculture, forestry and biological diversity can influence the direction of the ruling government towards animal-related issues of welfare and interests.<sup>68</sup> Other ministerial and departmental circulars and guidelines also serve as guiding principles for animal welfare in Malaysia. Several important key features are the result of animal welfare concerns. These are contained in non-binding instruments in Malaysia as follows:

*(a) Knowledge, skill and competency*

Knowledge, skill and competency are important attributes which humans should possess when dealing with the treatment of animals. The appropriate knowledge, skill and competency in handling animals promote responsible animal ownership which marks minimum standards of good welfare for animals.<sup>69</sup> Professionals dealing with animals, for instance, veterinary officers are deemed to be skilful persons by virtue of their veterinary training and are under a particular obligation to make full and careful use of their knowledge and skill to take good care of animals entrusted to their care.<sup>70</sup>

*(b) Legal responsibility*

Even though best practices and policies have no legal effect, they should serve as educational tools in the promotion of sound animal treatment and welfare practices. They indirectly support and promote legal responsibility.<sup>71</sup> They encourage persons dealing with animals to conform to existing animal legislation. This includes the requirements of animal welfare, and the appropriate management of environmental

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<sup>67</sup> Department of Standards Malaysia, *Good Animal Husbandry Practice (GAHP) MS 2027:2006* (Department of Standards Malaysia, 2006)..

<sup>68</sup> For instance, Malaysia has issued several directive and national policies relating to animals such as the National Agricultural Policy 2010-2015, National Forestry Policy, National Policy on the Environment and National Policy on Biological Diversity.

<sup>69</sup> Malaysia, above n 67. Para 4.1 provides for requirements of knowledge and skill in handling animals particularly in animal farm management. Para 4.1.1 further provides the responsibility of farm or animal operators to provide adequate provisions for the animals to be able to perform at their optimum levels.

<sup>70</sup> *Code of Ethics and Guide to Professional Conduct for Veterinary Surgeons 1992* (Malaysia), s 1.

<sup>71</sup> Malaysia, above n 67, para 4.2, 4.2.1.

issues. On other important occasions, by ensuring that this occurs, veterinary surgeons will uphold the dignity and honour of the profession as dictated by their codes of ethics and conduct.<sup>72</sup>

*(c) Five Freedoms and Three Rs*

The Five Freedoms are not as yet contained in Malaysian animal legislation. However, in general, they serve as a benchmark for establishing minimum standards for animal welfare. Freedom from hunger and thirst; from thermal and physical discomfort; from pain, injury and disease; from undue anxiety; and freedom to display most normal patterns of behaviour are the non-written considerations which guide the objectives of government agencies in their activities relating to animals.<sup>73</sup> In other words, the Five Freedoms are yet to be the main consideration in the objectives of government animal-related agencies. However, the principles contained in the Five Freedoms are taken into consideration in practices relating to animal husbandry.<sup>74</sup>

Most research institutions also establish their own codes of practice for research involving animals and appoint their own Animal Ethics Committees.<sup>75</sup> These codes of practice provide guidelines which go some way to ensuring the ethical and humane care and use of animals for scientific purposes. The codes of practice also establish an Animal Ethics Committee<sup>76</sup> to determine whether animal use is justified and this ensures adherence to the principle of the Three Rs (replacement, reduction and refinement). Animals should be handled and restrained in an appropriate manner to

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<sup>72</sup> *Code of Ethics and Guide to Professional Conduct for Veterinary Surgeons 1992* (Malaysia), the veterinarian's oath:

‘I ....., on this day..... do solemnly pledge to uphold the dignity and honour of the Veterinary Profession and will faithfully observe the code of ethics and conduct as drawn up by the Malaysian Veterinary Council’.

<sup>73</sup> Department of Veterinary Services, Malaysia, Department of Wildlife and National Parks (Peninsular Malaysia), Sabah and Sarawak; Malaysian National Zoo, Society for Prevention of Cruelty to Animals (SPCA).

<sup>74</sup> Malaysia, above n 67.

<sup>75</sup> Higher learning institutions in Malaysia have established their own policy or code of practice for animals used for scientific purposes. See, for instance, University of Malaya Animal Care and Use Policy (University of Malaya ), Universiti Putra Malaysia Code of Practice for the Care and Use of Animals for Scientific Purposes (University Putra Malaysia), and Universiti Kebangsaan Malaysia Code of Practice for the Care of Experimental Animals (National University of Malaysia).

<sup>76</sup> Animal Ethics Committees are also known as Institutional Animal Care and Use Committees (IACUCs).

protect them from fear, stress, pain and injury.<sup>77</sup> There is a duty of care to ensure animals are free from cruelty, neglect and distress. These are key themes in establishing standards of welfare which the legislation can later criminalise and proscribe, for the safeguarding of animals.<sup>78</sup>

*(d) Animal transportation*

Issues relating to animal transportation are imperative in animal welfare. Movement of animals from one place to another could affect their well-being, physically and emotionally. The standards which govern the transportation of animals must ensure that transported animals are as free as possible from stress and disease.<sup>79</sup> The manner of transportation must take account of appropriate vehicles, space allowances and ventilation, journey time, the state of animal health and the responsibility of the transporter for the care of animals during the entire process of transportation.<sup>80</sup>

*(e) Animal health management*

The OIE's Terrestrial Code asserts that animal health is crucial in animal welfare issues. Good animal health management through correct management practices which comprise prevention, treatment and control measures designed to minimise disease is essential for maintaining the good health of animals.<sup>81</sup> Cleanliness of animal confinement,<sup>82</sup> feeding<sup>83</sup> and medication<sup>84</sup> provide a healthy environment for animals. For farm animals, farm design is vital for their welfare. The farm should be appropriately designed, so that its infrastructure including facilities provides a sound environment for ensuring the best welfare for animals.<sup>85</sup> Space requirements, floors and pathways, lighting and electrical installations, farm facilities, holding yards, fencing, and feeding and drinking facilities are among the important features for any animal farm. They go a long way to guaranteeing good animal welfare outcomes.<sup>86</sup>

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<sup>77</sup> Malaysia, above n 67, 4.12 (Handling and restraining of animals).

<sup>78</sup> Ibid, 67, para 4.3.

<sup>79</sup> Ibid, 4.13.

<sup>80</sup> Ibid, 4.13.1–4.13.7.

<sup>81</sup> Ibid, 4.9: Animal health management.

<sup>82</sup> Ibid, 4.8.1.

<sup>83</sup> Ibid, 4.10.5.

<sup>84</sup> Ibid, 4.10.7.

<sup>85</sup> Ibid, 4.11.

<sup>86</sup> Ibid, 4.11.2.

*(f) Religious slaughtering*

Islam is the dominant religion of the Federation in Malaysia.<sup>87</sup> It is noteworthy that animals for Muslims' consumption must be slaughtered in accordance with the Islamic way of slaughtering.<sup>88</sup> Islam promotes mercy to all living beings and specifically requires animals to be slaughtered in a very respectful manner to minimise pain and suffering. In conjunction with the Festival of Sacrifice that Muslims in Malaysia celebrate every year by slaughtering animals for religious purpose, the Department of Veterinary Services issues Guidelines for Animal Slaughtering. These establish the standards and practices for religious slaughtering.<sup>89</sup> Central to the guidelines is the promotion of important aspects of Islamic slaughtering for the public including animal welfare, cleanliness and food safety.<sup>90</sup> The guidelines also emphasise animal welfare ethics during the slaughtering process. This includes: the good handling and restraining of animals;<sup>91</sup> that competent and skilful persons do the slaughtering;<sup>92</sup> the use of sharp knives that is designed to ensure instant death of animals;<sup>93</sup> a prohibition on sharpening knives in front of animals that is designed to reduce animal stress;<sup>94</sup> as is the prohibition on slaughtering an animal in front of another animal.<sup>95</sup> Furthermore, no animal can be skinned until it is dead.<sup>96</sup>

The efforts that Malaysia is currently taking in improving animal welfare protection are commendable. However, this thesis has argued that there is still room for improvement. The next and final section in this chapter charts the framework for improving the standard of protection of the welfare of animals in Malaysia.

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<sup>87</sup> *Federal Constitution* (Malaysia), Art 4.

<sup>88</sup> Basheer Ahmad Masri, *Animal Welfare in Islam* (The Islamic Foundation, 2007) 49. In one of the sayings (hadith), Prophet Muhammad said:

Allah has prescribed benevolence towards everything and has ordained that everything be done in a good way. So when you must kill a living being, do it in the best manner, and when you slaughter an animal, you should use the best method and sharpen your knife so as to cause the animal as little pain as possible.

<sup>89</sup> Department of Veterinary Services, *Guidelines for Religious Animal Slaughter* (Department of Veterinary Services, 2012).

<sup>90</sup> *Ibid*, para 1.0.

<sup>91</sup> *Ibid*, para 4.1.

<sup>92</sup> *Ibid*, para 4.1.1.

<sup>93</sup> *Ibid*, para 4.2.3.

<sup>94</sup> *Ibid*, para 4.2.4.

<sup>95</sup> *Ibid*, para 4.2.2.

<sup>96</sup> *Ibid*, para 4.2.5.

## 8.4 Proposed framework for standards for the welfare of animals in law relating to animals in Malaysia

By referring to the philosophical ideas of animal welfare and selected international documents by international organisations concerning animal welfare in Chapter 6 (6.1-6.3), and comparing them with the current elements of animal welfare from the Malaysian perspective, this study now moves on to discuss the standards of welfare of animals which *should be* followed by Malaysia in regulating animal welfare issues in the future:

### 8.4.1 Definition of animal welfare

***Animal welfare should be properly defined in all policies and legislation.***

At the moment, there is no clear definition of animal welfare in current Malaysian legislation. The word ‘animal welfare’ or ‘welfare’ is mentioned in the legislation,<sup>97</sup> but there is no proper definition of what ‘animal welfare’ or ‘welfare’ means. An appropriate definition of ‘animal welfare’ would assist in ensuring the well-being of animals in Malaysia.

Attempts to provide a definition for animal welfare are being considered. It is noteworthy that the proposed *Animal Welfare Bill 2012* (Malaysia) provides a definition of animal welfare in terms of the minimum needs of animals and includes the need:<sup>98</sup>

- (a) for a suitable environment;
- (b) for a suitable diet;
- (c) to be able to exhibit normal behaviour patterns;
- (d) for some animals to be either housed with, or apart from, other animals; and
- (e) to be protected from pain, suffering, injury and disease.

The Bill defines ‘needs’ in terms of the Five Freedoms: item (a) the need for a suitable environment which has its root in the *freedom from physical and thermal discomfort*; item (b) the need for a suitable diet originates from the *freedom from hunger, thirst and malnutrition*; item (c) the need to be able to exhibit normal behaviour patterns derives from the *freedom to express normal patterns of behaviour*; item (d) the need for

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<sup>97</sup> For instance, *Animals Act 1953* mentions ‘animal welfare’ in the preamble ... for the purpose of welfare of animals in general.

<sup>98</sup> *Animal Welfare Bill 2012* (Malaysia), s 24(1)(a)–(e).

animals to be either housed with or apart from other animals depending on their make-up derives from the *freedom from fear and distress*; and item (e) the need to be protected from pain, suffering, injury and disease, is constructed from the *freedom from pain, injury and disease*.

The definition of welfare in terms of animal needs is also a reflection of section 9 of the *Animal Welfare Act 2006* (United Kingdom)<sup>99</sup> and the *Animal Welfare Act 1999* (New Zealand). Both define animal welfare in terms of the provision of a physical environment which ensures the health and behavioural needs of animals.<sup>100</sup>

Therefore, this study recommends that ‘animal welfare’ be defined in all laws relating to animals in Malaysia. This is for two important reasons: first, to provide a clear definition of animal welfare; and, second, to indicate the importance that the law ascribes to the protection of the welfare of all animals.

#### 8.4.2 Animal sentience

***Animal sentience should be the principal consideration in law and policies relating to animals.***

Scientific research has discovered that animals are sentient beings, and suffer pain and enjoy happiness. The OIE, for instance, regards animals as sentient beings and that they will be in a good state of welfare if they are healthy, comfortable, well nourished, safe and able to express innate behaviour, and if they are not suffering from

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<sup>99</sup> UK *Animal Welfare Act 2006* s 9 (2)(a)–(e).

<sup>100</sup> NZ *Animal Welfare Act 1999* s 4: Definition of physical, health and behavioural needs:

In this Act, unless the context otherwise requires, the term physical, health and behavioural needs, in relation to an animal, includes—

(a) proper and sufficient food and water:

(b) adequate shelter:

(c) opportunity to display normal patterns of behaviour:

(d) physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress:

(e) protection from, and rapid diagnosis of, any significant injury or disease,—

being a need which, in each case, is appropriate to the species, environment, and circumstances of the animal.

unpleasant states such as pain, fear and distress.<sup>101</sup> In the same tone, the UDAW, of which Malaysia is one of the signatories, affirms that animals are sentient beings and that their welfare is an issue worthy of consideration and respect by member states.<sup>102</sup> Malaysian cultural beliefs and the national religion also consider animals as sentient: as a consequence, they should be treated humanely and respectfully.<sup>103</sup>

As Fraser suggests, animal welfare is rooted in scientific and value-based knowledge, both of which consider the issue of sentience as an important consideration in animal welfare and treatment. This study asserts that 'animal sentience' should be the paramount consideration in the preparation of policy or legal instruments. Therefore, it is argued that sentience is of central concern and legislative bodies should state it in future legislation so that it represents a benchmark on which minimum standards of animal welfare can be mandated and in establishing legal and non-legal rules which affect animals including in relation to animal killing and slaughter. As animals have sentience, they need several entitlements and freedoms, enabling them to enjoy happiness. The next section deals with the principle of Five Freedoms which sentient animals should enjoy.

#### 8.4.3 Principle of Five Freedoms

***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 should be the benchmark in assessing animal welfare.***

The Brambell Committee in its reports on intensive animal husbandry practice in 1965 suggested that animals should have sufficient freedom to move without difficulty, to perform their natural patterns of behaviour and to have a suitable diet.<sup>104</sup> Based on the Brambell Committee's suggestion, the FAWC then introduced the principle of Five Freedoms. They are: 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. This principle of the Five Freedoms is used to assess the welfare of animals, to cover not only farmed

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<sup>101</sup> *Terrestrial Animal Health Code 2012* (OIE), art 7.1.1.

<sup>102</sup> UDAW, Preamble 1.

<sup>103</sup> Interview data: INT006.

<sup>104</sup> 'Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems' (Her Majesty's Stationery Office, 1965) para 37-39.



animals, but to include other types of companion animals, those used in laboratories and wild animals.<sup>105</sup> The principle of the Five Freedoms has been internationally recognised and has become the principal consideration in assessing welfare. The OIE adopted the principle of Five Freedoms in the Terrestrial Code and the WSPA also asserts it in the draft of the UDAW, in providing valuable guidelines for animal welfare policies and legislation.<sup>106</sup>

As Malaysia is a member of the OIE and a signatory state to the UDAW, this study suggests that the Five Freedoms should be the benchmark in assessing the state of animals in all legislation and policies relating to animals in Malaysia. At the moment, there is a good effort by the DVS and the DWNP to promote the principles underlying the Five Freedoms in their policies and legislation, but the principles are yet to be written as a main consideration in their departmental policies. However, despite the non-existence of the principle of the Five Freedoms in government agencies, it is made visible in the *Good Animal Husbandry Practice* (GAHP Malaysia) in providing guidelines to animal husbandry. Therefore, this study asserts that the principle of Five Freedoms should be visible as a benchmark for all animal-related agencies in Malaysia. In addition to Five Freedoms, the Principle of Three Rs also plays important role in enhancing the welfare of animals in research and education, which the next part will suggest.

#### 8.4.4 Principle of Three Rs

***Reduction in numbers of animals, refinement of experimental methods and replacement of animals with non-animal techniques should be the benchmark for the use of animals in research and education.***

Animals provide valuable benefits for humans particularly in medical and pharmaceutical research. Over the last hundred years, animals have served as instruments in scientific investigations designed to promote public health. At an international level, there is a call for justifiable uses of animals in research and education. The OIE, for instance, issues guidelines for animals used in research and education.<sup>107</sup> The OIE asserts that most scientists and members of the public agree

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<sup>105</sup> Farm Animal Welfare Council (FAWC), 'Farm Animal Welfare in Great Britain: Past, Present and Future' (Farm Animal Welfare Council, 2009) 1, para 5.

<sup>106</sup> *Terrestrial Animal Health Code 2012* (OIE) Art 7.1; UDAW preamble 4.

<sup>107</sup> *Ibid*, Art 7.8 Use of Animals in Research and Education.

that animals should only be used when necessary, when ethically justified and when there are no alternative methods other than the use of live animals. When that is the case, the minimum numbers of animals should be used to achieve the scientific educational goals, and the animals concerned should be subject to as little pain and/or distress as possible.<sup>108</sup> Therefore, the OIE called for member countries to regulate the use of animals in research and education for the benefit of the welfare of the animals.

Unfortunately, there is no legislation regulating the use of animals in research and education in Malaysia. However, there is increasing public pressure for the government to regulate the use of animals in science. At the moment, there only exist the codes of practice which research and educational institutions have established for the purpose of animal use in research. These are an internal regulating policy in the respective institutions.<sup>109</sup> The codes of practice in research institutions also establish Animal Ethics Committees who are mandated to determine whether the case for animal use is justified and to ensure adherence to the principle of the Three Rs.<sup>110</sup>

The movement to incorporate the principle of the Three Rs into legislation is addressed by the *Animal Welfare Bill 2012* (Malaysia). The Bill also addresses the welfare of animals used in research and education, about which the current law is silent. The Bill proposes the assurance of physical, health and behavioural needs of animals, in accordance with good practice and scientific knowledge before the research is conducted.<sup>111</sup> Animals used in research should receive proper treatment in the case of injury or ill health during the conduct of the research.<sup>112</sup> The Bill also establishes the Animal Ethics Committee which is responsible for monitoring the use of animals in research and education in accordance with the scientific use code.<sup>113</sup> The importance of humane experimental techniques in research and education is essential to ensure the welfare of animals. This has led the OIE to provide important guidelines in regulating animal welfare practices by the publication of the Terrestrial Code and the Aquatic Code, which will be discussed in the next section.

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<sup>108</sup> Ibid, preamble.

<sup>109</sup> See Chapter 8 (8.3.3(c)) for background discussion on the internal regulating policy in the Higher learning institutions in Malaysia.

<sup>110</sup> The Universiti Kebangsaan Malaysia (UKM) and University of Malaya (UM) provide the Three Rs in their policy.

<sup>111</sup> *Animal Welfare Bill 2012* (Malaysia), s 26(1)(a).

<sup>112</sup> Ibid, s 26(1)(b).

<sup>113</sup> Ibid, s 26(2)(b).

#### 8.4.5 Reference to OIE's Terrestrial Code and Aquatic Code

***The OIE's Terrestrial Code and Aquatic Code should be the guidelines in animal welfare components in policies and legislation relating to animals in Malaysia.***

As mandated by its member countries, the OIE serves as an international reference organisation for animal issues, providing recommendations and guidelines in regulating animal welfare practices.<sup>114</sup> The publication of two important codes; the Terrestrial Code and the Aquatic Code establish an international standard for animal welfare to be followed by member countries. Therefore, these two codes should become the guidelines for Malaysia in determining animal welfare elements in its policies and legislation. The Terrestrial Code suggests eight standards including animal transportation by land, sea and water; animal slaughtering for human consumption; animal killing for disease control purposes; stray dog population control; animals used in research and education, and the beef cattle production system. Meanwhile, the Aquatic Code provides a standard of welfare for farmed fish during transport, stunning and killing of farmed fish for human consumption and killing of farmed fish for disease control purposes.

This study has noted that Malaysia has set up various standards in implementing animal welfare elements in its policies and legislation. However, this study argues that these standards should be updated to include several standards for which Malaysian law is yet to provide in detail. The study has also suggested that consideration should be given to standards of welfare for the use of animals in research and education as well as aquatic animals, about which the Malaysian law is currently silent.

#### 8.5 Conclusion

In the Malaysian context, the existence of animal welfare legislation and various government policies on animal welfare proves its commitment to enhancing animal welfare. However, this study has argued that the contents of legislation and policies are yet to consider important elements of welfare in establishing Malaysia's seriousness with regard to animal welfare issues. Therefore, this study has suggested that Malaysia should improve and update its legislation and policies to be in line with international standards particularly in the provision of a concise definition of animal welfare,

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<sup>114</sup> World Organisation for Animal Health (OIE), *The OIE's Achievements in Animal Welfare* (2013) <[www.oie.int](http://www.oie.int)>

acknowledging animal sentience and recognising the principles of the Five Freedoms and the Three Rs. The study asserts that the government should table the *Animal Welfare Bill 2012* (Malaysia) in Parliament to prove the Malaysian commitment to animal welfare issues. Some of these goals could be achieved if the *Animal Welfare Bill 2012* (Malaysia) was passed by Parliament, signed and promulgated, so that it becomes law in Malaysia.

## **CHAPTER 9: SUMMARY AND CONCLUSION**

### **9.1 Introduction**

This thesis has explored the legal status of animals in Malaysia and ways to enhance the protection of their welfare within the Malaysian legal system. It does so by considering several important key issues.

Chapter 1 introduced the research. It mapped the importance of the research by looking at the contextual overview from which the research questions were derived. It outlined the objectives of the research which formed the framework and approach adopted for the research, and suggested the original contribution that the research could make to animal welfare law and practice, particularly in Malaysia.

Chapter 2 outlined the methodologies used in the research which were both doctrinal and non-doctrinal. It explained the research methods applied in this thesis, commencing with a detailed literature review which was followed by interviewing more than 30 animal welfare participants in Malaysia from the government and the non-government sectors.

Chapter 3 commenced with a theoretical discussion concerning the status of animals. It reviewed the philosophical, religious and cultural justifications which have influenced human attitudes towards animals at a particular time and place. It provided the background as to how philosophy, religion and culture have contributed and shaped those beliefs. It also provided the theoretical framework on which the legal protection of animals in Malaysia has to date been formulated. This chapter went further to explore the beliefs and customs of the people in Malaysia in dealing with animals.

Chapter 4 provided details concerning the influence of custom in determining the attitudes of the Malay people towards animals which later shaped the laws relating to animals in Malaysia. The historical background to animal protection laws in Malaysia was explicated.

Chapter 5 argued that animals in Malaysia have limited legal protection in the existing legal framework. They are protected as personal property; for environmental and conservation purposes; and from unnecessary cruelty, but no more, and even where there are legal protections for animals, more often than not, those protections lack adequate enforcement.

Chapter 6 assessed the relationship between animal welfare and the law in Malaysia. It did this by considering the discipline of animal welfare science, and selected instruments from international animal welfare organisations.

Chapter 7 presented the fieldwork findings which supported and supplemented the arguments from the previous chapters. It highlighted the views of selected Malaysians towards animal protection in Malaysia.

Chapter 8 observed the elements of animal welfare in Malaysian law. This chapter, by referring to the selected international instruments and findings from the fieldwork, provided suggestions and a set of guidelines designed to enhance the protection and welfare of animals under the Malaysian legal system.

This chapter (Chapter 9) provides an overview of the approach to the research, the methodology adopted in the study, and the animal welfare approach utilised in the study. It also provides the conclusions drawn from the findings and analysis presented in the previous chapters. It then addresses the implications and the limitations of the study, and concludes with suggestions for future research.

## **9.2 Methodology of research**

This study applied and incorporated both doctrinal and non-doctrinal approaches. Animal welfare is multidisciplinary. It crosses various disciplines from animal science and philosophy to public policy. As a result, this thesis explained the need for a multidisciplinary approach. It did this by way of a literature review including an examination of current trends in philosophy concerning animal welfare and animal rights debates, as well as exploring generally the historical development of animal welfare law in Malaysia and elsewhere. The relationship between the ideas emanating from philosophy, the debates concerning animal welfare and animal rights, the historical development of animal welfare notions and the development of law involving animal protection in Malaysia were further analysed, in order to identify and explicate a theoretical approach to the protection of animals. This study went further by positing an animal welfare approach designed to justify the protection and to better ensure the welfare of animals.

As there are limited doctrinal sources available in the area of animals and the law, particularly in Malaysia, and considering the differences in human attitudes towards

animals in any particular society and jurisdiction, this study employed an empirical qualitative research technique by interviewing Malaysian participants concerned with animal welfare. This qualitative approach enabled the researcher to interview the real actors who are involved with animal protection and who articulated the status of animals in the Malaysian jurisdiction. Lastly, this study utilised a reform-oriented research approach based on the incorporation of data available from a review of the literature coupled with the findings from fieldwork, to offer suggestions and recommendations designed to enhance the protection of the welfare of animals in Malaysia.

### **9.3 Animal welfare approach**

Generally, there are two approaches to animal protection. They can be summarised as the 'animal welfare' and 'animal rights' approaches. Chapter 3 provided details of these two approaches. The animal welfare approach is the approach which asserts that it is permissible for animals to be used for human purposes provided the welfare of animals is ensured. Conversely the animal rights approach is opposed to any and all human uses of animals.

Chapter 5 (5.2) justified the animal welfare approach in the Malaysian legal framework for two important reasons. Firstly, it is less controversial, intending as it does to protect animals from harm and suffering. Secondly, society may more easily understand and accept the notion of 'animal welfare' as a form of 'animal protection' designed to protect 'animal interests' than a strict 'animal rights' approach. This means that the term 'animal welfare' is seen as non-complicated, non-extreme and as concomitant to a reachable objective. It is here contended that the animal rights approach although it has led to important debate and discussion is seen as too idealistic and extreme to be viewed as acceptable to the majority of Malaysians.

The animal welfare approach is universal and has become the basis of animal protection laws in the majority of countries in the world (Chapter 3.3.1). Established international organisations like the World Organisation of Animal Health (OIE), the World Society for the Protection of Animals (WSPA) and other international animal welfare organisations prefer this approach. This approach is also in line with the Malaysian law which regulates and enhances the humane treatment of animals in its legislation and policies (Chapter 8.2)

#### **9.4 Conclusion to research questions**

The framed research questions are chapter-specific and the findings were thus summarised within the respective chapters. The following sections briefly summarise these findings.

##### **Research Question 1: What is the status of animals in current philosophical debate?**

Chapter 3 provided a discussion concerning the status of animals as part of the worldwide philosophical debate. This thesis suggested that there is a close relationship between the status of animals and the attitudes of humans toward animals. Therefore, in order to determine the status of animals, it is pertinent to appreciate human perspectives.

This thesis found that philosophically, there are three different perspectives about the moral status of animals (Chapter 3.2): first, animals have no moral status; second, animals possess some moral status, but are inferior to human beings; and third, there is moral equality between human beings and animals. These are summarised as follows:

##### *(i) Animals have no moral status (Chapter 3.2.1)*

This view considers that animals do not matter at all. It derives from two important considerations: first, the philosophical belief which ranks humans as dominant and, as such, humans take precedence over all other forms of life including animals; and, second, the religious doctrines which justify human dominion over animals.



*(ii) Animals possess some moral status, but are inferior to human beings (Chapter 3.2.2)*

This view demonstrates a protective stance towards animals. Humans are still superior but animals nevertheless matter in the scheme of things. However, if there is a conflict between the interests of humans and those of animals, the interests of humans always prevail. This is viewed as an orthodox attitude towards animals. Religious doctrine condemns cruelty and brutality towards animals. In a similar way, some philosophers regard animals as sentient beings and, therefore, humans have a duty to ensure that animals do not suffer unnecessarily.

*(iii) Animals are morally equal to humans (Chapter 3.2.3)*

The unreadiness of the orthodox view to consider animal interests, in the case where they conflict with human interests, has led to the birth of this view. Singer's utilitarian and Regan's inherent value arguments shape this view and have moved it towards a view of moral equality between humans and animals.

These three philosophical perspectives provide the background for how philosophers have presented their justifications concerning animal welfare considerations. These views have also impacted on the belief systems of humans in varying degrees in their daily treatment of animals and are reflective of the broad range of views that humans have towards the treatment of animals.

## **Research Question 2: What are the cultural and religious perspectives in Malaysia towards the status of animals?**

The three views concerning the status of animals in philosophy are, to some extent, reflective of the cultural and religious perspectives towards the status of animals in Malaysia. With Malaysia being a multi-ethnic and multi-religious country, the thesis found that the status of animals in Malaysia has been highly influenced by the customs and practices of particular ethnic groups or religions in Malaysia.

As religions follow ethnic lines in Malaysia, most Muslims are Malays, a majority of Buddhists are Chinese, and most Indians practise Hinduism. Christianity is practised by a minority of Chinese and Indians, and other non-Malay Bumiputras (Chapter 7). The

fieldwork found that Malay-Muslims are generally animal lovers, but are sensitive and cautious in their attitudes to dogs and pigs. Most Chinese-Buddhists are animal lovers, but some are keen on exotic foods and animal-based medicinal products. Most Indian-Hindus are animal lovers and some regard animals as sacred.

As the majority of Malaysian people are Malay-Muslim, this thesis focused on the attitudes of the Malay people towards animals. This thesis suggested that historically there have been two major perspectives held by the Malay people towards animals. The first perspective resembled the perspective from the philosophy which views animals as having no moral status. This can be seen from popular games such as animal fighting as well as animal abuse (Chapter 5.4.2). The second perspective is also reflected in the second philosophical view which holds that animals have some moral status, but not as much as that of humans. The status that animals enjoy in the Malay community, as the closest friends to humans, means that they are therefore deserving of special shelter, and this marks their worth and status in the lives of the Malay community. The existence of provisions in the traditional Malay digests which are based on custom and the religious texts in combating animal cruelty evidences this perspective (Chapter 5.4.2).

Chapter 4 further suggested that traditional Malay custom or *adat* which is based on Islamic law plays an important role in shaping the development of law, including the laws relating to animals. The Malay digests in a number of specific provisions provide rules concerning animal matters particularly with regard to animal theft, inflicting injury to animals, the responsibility of humans for animals and the limits to punishment (Chapter 4.2.4). This denotes a positive cultural and religious perspective towards their status.

This thesis also suggested that generally all religions in Malaysia promote kindness towards animals. However, the fieldwork findings revealed some inconsistency on some occasions where culture can override religious provisions by providing misinformation concerning animal treatment (Chapter 7.3). This occasionally happened particularly in Islamic teaching in Malaysia with regard to dogs and pigs. Malay custom occasionally regarded and interpreted the prohibition on the consumption of dogs and pork in the religious texts as involving either avoidance or lack of favour of these animals. This may limit the protective stance of religions towards animals.

### **Research Question 3: What is the status of animals in the existing Malaysian legal framework?**

It is difficult to determine the legal status of animals under a particular system of law. The fact that the moral worth of animals is still questionable in philosophy, religion and culture, limits the possibility of animals enjoying status as a legal entity.

Chapter 5 analysed whether animals deserve legal status. Generally, legal status refers to the standing of an entity in the eyes of the law. Therefore, in a strong sense, the law does not recognise animals as having standing and capacity or status in the eyes of the law. However, in a weak sense, if the status and standing merely refer to any rank, grade or status of moral importance, animals without doubt enjoy status under the legal framework. If this proposition is chosen, do animals enjoy legal status as a rights holder in a particular legal system?

The two major approaches in animal protection may provide a solution to this question. They are the animal welfare and animal rights approaches. The animal welfare approach argues for stronger laws for the protection of animals. At the same time, the animal rights approach contends that animals have a right not to be exploited by humans in any way, for food, for clothing, for entertainment or for research.

This thesis found that the reference to the concept of rights for animals can be analysed in three different ways. First, if rights refer to a classical definition of rights based on the will and capacity to enter the social contract, animals have no rights because they lack the will and ability to enter into a social contract with humans. Second, if animal rights refer to the right of animals to have legal standing, the situation becomes more problematic as no legal system or country in the world permits legal proceedings to be instituted by animals. Third, if the legal rights of animals refer to the protection of animals from unnecessary harm and suffering, the possibility of protecting the rights of animals seems to be easy and reachable, because most people agree that animals should be protected in this way. This is the argument of the animal welfare approach. It argues that animals should be better protected and that there should be fewer obstacles to their protection under any particular system of law (Chapter 5.2.2).

As this thesis argued, animals in Malaysia enjoy limited legal status as protected living beings under the Malaysian legal system. Chapter 5 further suggested that animals enjoy certain status and entitlements under Malaysian law: to be protected as property, from unnecessary cruelty and for environmental and conservation purposes (Chapter 5.3–5.5). It was argued in this thesis that protection as property means that animals are protected from being taken or removed illegally from their owners. Therefore, Malaysian law criminalises theft and robbery in order to protect animals as the property of persons. It also limits other activities which could harm animals. Further protection from unnecessary cruelty becomes an essential aim of animal legislation which criminalises activities which could inflict harm and suffering to animals. And lastly, the protection of animals for the purpose of conservation is designed to protect animals from exploitation and the loss of their habitat.

#### **Research Question 4: What is the relationship between the law and animal welfare in Malaysia?**

While this thesis posited in Chapter 5 that animals deserve legal status for limited purposes: as property, from unnecessary cruelty and for environmental and conservation purposes in the Malaysian legal system, it goes further to suggest a very close relationship between the law and animal welfare.

As the law regards animals as subjects for protection, it directly regulates any behaviour of humans which could infringe the interest which it needs to protect. As animal welfare refers to the state of the animal and the treatment that an animal receives such as animal care, animal husbandry and humane treatment, this thesis argued that the law also puts responsibilities on humans to protect the welfare of animals by providing humane treatment.

Chapter 6 found a close relationship between animal welfare and international law which, in turn, impacts on Malaysian law. The initiatives of the World Organisation of Animal Health (OIE) in its publication of the Terrestrial Code and Aquatic Code provided guidelines for policy makers and for the legislation of member states and this proved the close relationship between animal welfare and the law (Chapter 6.3.3). The initiative of the World Society for the Protection of Animals (WSPA) in promoting the Draft of the Universal Declaration of Animal Welfare (UDAW) to be considered for a

United Nations Ministerial Meeting evidences the importance of animal welfare in international legal treaties (Chapter 6.3.4).

This thesis also established the relationship between animal welfare science and laws relating to animals. The thesis found that the subject of animal welfare science which originates from a fully scientific approach worked together with a value-based assessment to form a mandated science which leads to a common minimal standard for animal welfare. This common standard then marked the need to develop rules, regulations and laws, relating to animal welfare (Chapter 6.2.3).

This thesis also traced the evolution of animal welfare considerations in the Malaysian legal system. It suggested that the Malaysian Constitution does not establish animal welfare principles. However, Parliament, nevertheless, has the power to enact laws relating to animals in relation to the protection of wild animals and wild birds, prevention of cruelty to animals and the provision of veterinary services. This thesis found that even though there are no definitions of the term 'animal welfare' in Malaysian legislation, there are many indications or themes in legislation which reflect the existence of animal welfare elements such as the prevention of cruelty, species protection and animal health (Chapter 8.3.1–8.3.3).

As Chapter 8 argued, the welfare of animals has marked the development of animal law legislation in providing better treatment for animals. The issue of welfare has influenced the legislative bodies to make provisions for several important features in animal welfare such as animal examination, licensing, declaration of animal reserves and animal feed (Chapter 8.4.2). The introduction of the new Act, the *Wildlife Conservation Act 2010*, to replace the *Protection of Wildlife Act 1972* is evidence of improvement in the welfare of animals in Malaysia. Recently, the drafting of *Animal Welfare Bill 2012* further marks the influence and the importance of animal welfare in Malaysian legislation.

Chapter 8 also suggested that, apart from legislation, other ministerial and departmental circulars and guidelines serve as guiding principles for animal welfare in Malaysia. The requirements of appropriate knowledge, skill and competency in handling animals and the legal responsibilities of humans may promote responsible animal ownership which, in turn, advances a minimum standard of welfare.

The Malaysian government has shown some effort in protecting the welfare of animals. However, the fieldwork study revealed that several circumstances, such as the lower priority of animal welfare issues, poor law enforcement and the lengthy process in updating legislation contribute to the limited effectiveness of this effort. This consequently marked animal welfare as a less important subject matter as far as legal developments in Malaysia are concerned (Chapter 7).

**Research Question 5: What is the most effective way to protect the welfare of animals in Malaysia?**

Chapter 6 surveyed selected international instruments initiated by international organisations which offer frameworks for the protection of animal welfare. The UK Federation of Animal Welfare Council (FAWC) incorporated the recommendations of the Brambell Report 1965 as the Five Freedoms to assess the standard of welfare of animals. The Five Freedoms are: 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.

The World Organisation of Animal Health (OIE) published two codes – Terrestrial and Aquatic – as guidelines for member states to legislate their law on animal welfare protection. The World Society for the Protection of Animals (WSPA) is currently lobbying for the Draft of the Universal Declaration of Animal Welfare (UDAW) to be a binding international treaty for United Nations Ministerial consideration.

This thesis found that selected documents from the FAWC, the OIE and the WSPA offer protection for the welfare of animals and share at least three common themes from scientific findings. The first theme is animal sentience which acknowledges that animals are sentient, able to feel pain and enjoy happiness. The second theme is the assessment of animal welfare which is based on the principle of the Five Freedoms, in determining whether animals are in good or bad welfare conditions. The third theme is the application of the principle of the three Rs (reduction in numbers of animals, refinement of experimental methods and replacement of animals with non-animal techniques) for the use of animals in research and education.

Based on the above findings, and comparing them to the current elements of animal welfare in the Malaysian law, Chapter 8 furthermore makes several suggestions to

enhance the protection of the welfare of animals in the Malaysian legal system as follows:

- i. Animal welfare should be properly defined in all policies and legislation (Chapter 8.4.1).
- ii. Animal sentience should be the principal consideration in law and policies relating to animals (Chapter 8.4.2).
- iii. The principle of the Five Freedoms (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) should be the benchmark in assessing animal welfare (Chapter 8.4.3).
- iv. The principle of the Three Rs (reduction in numbers of animals, refinement of experimental methods and replacement of animals with non-animal techniques) should be the benchmark for the use of animals in research and education (Chapter 8.4.4)
- v. The OIE's Terrestrial Code and Aquatic Code should form the guidelines for the animal welfare components in policies and legislation relating to animals in Malaysia (Chapter 8.4.5).

The fieldwork study also found that the promotion of animal welfare in the national educational system is essential to produce future generations who could mould society and Parliament towards the better protection of animals in Malaysia (Chapter 7.6).

## **9.5 Limitations of study**

This thesis aimed to analyse the legal status of animals under the Malaysian legal system and to provide suggestions to enhance the protection of the welfare of animals in Malaysia. It adopted multiple approaches in the consideration of this issue ranging from theoretical perspectives, legal doctrinal approaches to an empirical study. These approaches are useful to analyse the legal status of animals under the Malaysian framework and have resulted in the formulation of several suggestions for the improvement of the welfare of animals in Malaysia. However, this research encountered a number of limitations which need to be considered:

Firstly, there is a scarcity of literature concerning the laws relating to animals in Malaysia. Indeed, laws relating to animals have not excited much scholarly interest in Malaysia at all. As a result, there is no clear legal framework with a Malaysian flavour for this area. The development of laws relating to animals seems to have proceeded very slowly and in a piecemeal fashion. This area of animals and the law has received little if no concentration from the academic and legal fraternity. Therefore, the research has had to be largely based on other similar jurisdictions.

Secondly, there are a limited number of reported cases relating to animals and the law in Malaysia. To date, there is only one case reported in the High Court in respect to animal cruelty which is available to the public. As the majority of cases on animal matters are heard in the subordinate courts, they remain unreported and access to any information concerning cases heard in these courts is difficult, tedious and costly.

Thirdly, there is also limited access to government documents in Malaysia. Some of the government circulars, policies and bills in draft form, and records are confidential and, if they are available, the facts and figures supporting them are sometimes not available to be viewed due to administrative and political reasons.

Fourthly, with regard to the fieldwork study, most of the lawyers who participated in the interviews had no vast experience in conducting cases relating to animals or animal welfare, as there are a limited number of cases involving animals brought to the court. Only one of the interviewees had conducted a hearing while the others had only represented the accused for mitigation purposes.

Fifthly, a number of people interviewed noted that in Malaysia one has to be very cautious about espousing animal welfare principles for fear of repercussions from authorities. It is difficult to know to what extent interviewees felt the need for caution and therefore were not as forthcoming as they might otherwise have been about animal welfare issues.

## **9.6 Suggestions for future research**

This study is the first detailed research undertaken as part of a PhD thesis designed to examine Malaysian animal welfare law. There is therefore considerable opportunity for further detailed research which could be undertaken in the following areas.



- i. More detailed research into the attitudes of the various religions and the way in which they consider and encourage animal welfare and the extent to which they are amenable to information from the sciences.
- ii. More detailed research into the attitudes of the various cultures in Malaysia and the factors which mitigate against changes in attitudes by these cultures towards animal welfare and the extent to which they are amenable to information from the sciences.
- iii. An examination of the extent to which animal welfare considerations, whether legal, social or cultural, are incorporated into the Malaysian education system and the factors which could lead to their inclusion.
- iv. An examination on limitation of attention and effort in the legal system to prosecute and punish despite the law and despite the prevailing positive attitude.
- v. A detailed examination of the factors which come into play and which limit the enforcement of animal protection laws in Malaysia.
- vi. Given the impact of international animal welfare law on Malaysian law, should the Malaysian Constitution be changed to include animal welfare principles and are there any limitations or impediments which might mitigate against such change?
- vii. What are the factors, internal and international, which led to the drafting of the *Animal Welfare Bill 2012* and what are the factors which tend to mitigate against it becoming law in Malaysia?
- viii. Should amendments to the *Animal Welfare Bill 2012* (Malaysia) be recommended in the light of the animal welfare model proposed in this thesis?
- ix. As this study aimed to look at the status of animals in general, future research may be narrowed to consider specific species of animals. For example, detailed research concerning the legal protection of species such as the orangutan is needed. In that context, addressing the failure of Malaysian law to protect the environment in which orangutans live is clearly warranted, given

their critically endangered species status. The question could be: “Malaysian animal welfare law seeks to protect the habitat of animals for environmental purposes. If that is so, why has Malaysian law failed to protect the orangutan?”

## **9.7 Conclusion**

This thesis offers an examination and analysis of Malaysian laws and policies in determining the status of animals in the Malaysian legal system. It maps the growth and development of animal protection provisions in Malaysia from the historical period before the coming of the British, the period of British occupation and post-independence.

This thesis suggested that animals in Malaysia deserve to have improved legal status based on an animal welfare model and to enjoy greater protection under Malaysian law. This thesis argued that the current content of legislation and policies has yet to articulate important issues concerning the welfare of animals in Malaysia and until this occurs Malaysia cannot be seen as taking animal welfare issues seriously or at least not in any systematic way. This thesis then offers possible suggestions for enhancing the protection and welfare of animals in Malaysia.

In terms of the impact of this study on the development of law in Malaysia, it expands the relationship between philosophical debate and cultural and religious perspectives on the law relating to animals. It also adds to the growth of knowledge and theories about the legal protection and welfare of animals. From a practical perspective, the key findings of the study may provide useful information to law reform and legislative bodies seeking to enhance the protection of the welfare of animals in Malaysia. It is designed to initiate such discussion and expand on the limited research already undertaken concerning animal welfare issues and law in Malaysia. Most importantly, the thesis urges the Malaysian government to expedite the tabling of the *Animal Welfare Bill 2012* (Malaysia) in parliament to prove the government’s commitment to protecting the welfare of animals.

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## **Appendixes**

### **Appendix A: Interview Schedule**

#### **Concepts and perspectives**

1. In your opinion, what are the similarities and differences between humans and animals?
2. Do you think the animals should have certain rights/entitlements/interest? If yes, please specify.
3. Do humans have duty towards animals? What are the duties?

#### **Scope of protection and entitlements of animals**

4. In your opinion, do you think the government and the people of Malaysia think it is important to protect the welfare of animals?
5. Do you think it is important for the animals to have their welfare and entitlements protected by the law and/or policies? Probe: What are the basic entitlements that the animals should be accorded?
6. Do you think that the current laws are adequately protecting the animals in Malaysia? Probe: Would you agree that there is different protection for different types of animals, for example; animals used for companionship should be given greater protection than animals used for human consumption.

#### **Existing government policies, laws and practices in Malaysia**

7. Do you think that the government policy protects welfare of animals in Malaysia? Probe: Should the government as a matter of policy make laws specifically related to animal welfare? What are the initiatives or steps taken by the government to ensure the welfare of animals?
8. In your experience, how does the government treat the welfare of animals? Are different types of animals treated differently? Probe: Is there different treatment for different categories of animals; farmed animals, pet, wildlife animals, animals used for experimentation, animals used for recreation, services and sports?
9. In your opinion, what are the considerations that should be taken by the government before enacting the law related to animals? Probe: Should the government seek advice from experts/animal groups/people that has interest with the animals? Should the government appoint appropriate committee to make further research before enacting the law?
10. How the current law can protect the welfare of animals in Malaysia?
11. What are the barriers/impediments in existing laws which limit the protection given to the animals? Probe: Does the current law adequately protect the animals in Malaysia? Penalty for animal cruelty cases? Definition of welfare in legislations.
12. In your opinion, how does the public treat the animals? Probe: Do you think animals should be fully utilised for benefit/interest of humans?

13. Do you think cultural and religion plays important role in shaping the attitude of Malaysians towards animals? Please specify Probe: What are the values or impacts that religion and cultural contribute to human attitudes towards animals?
14. Do you think the cultural/religious leaders/groups should be consulted when addressing issues dealing with the welfare of animals? Probe: Do their views considered?
15. What are the roles/functions of the animal welfare groups in Malaysia? Probe: Do they play their role effectively?
16. Does government consult the animal welfare groups to discuss animal welfare issues?

#### **Legal development in Malaysia**

17. In your opinion what is the major influence shaping developments in the law relating animal welfare in Malaysia? Probe: Political elites, civil servants, lawyers, judges, non government organisations, animal welfare groups, media including the internet? How far can public opinion go in contributing changes in law relating to animals?
18. In your experience, does the court's ruling on the animal issues lead to changes in the policy/procedure/practice in the government's approach to the matter related affecting the animals and their welfare? Probe: Does the government consider the suggestion in judicial decision? Do the judicial decisions proactive in addressing animal issues?
19. In your opinion, should animals be given legal status under the law in Malaysia? Probe: Should animals be given legal entity? Should animals be given legal standing like companies or corporations? Should animals be regarded as subject in the Malaysian legal system?
20. In your opinion, should Malaysia adopt the Universal Declaration on Animal Welfare (UDAW), concepts of Five Freedoms and Three R's to be inserted in the law relating to animals? Please explain. Probe: Should Malaysia accept the fact that animals are sentient beings, able to feel pain and pleasure and possess certain cognitive abilities?
21. Do you think we should refer to other international legislations to accord greater protection to animals? Probe: What are the legislations? From which country?
22. What do you see as being the key points that an ideal policy and legal framework for the protection of animals should contain? Can they be seen in the present framework that Malaysia has?

## Appendix B: Information to Participants



# INFORMATION TO PARTICIPANTS INVOLVED IN RESEARCH

### **You are invited to participate**

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You are invited to participate in a research project entitled "Reforming Malaysian animal law: The legal status of animals under Malaysian law: Is it a time to apply a modern philosophical view to the law to accord animals in Malaysia a greater protection?"

This project is being conducted by a student researcher, Arif Fahmi Md Yusof, as part of a PhD study under the supervision of Dr Edwin Tanner from the Faculty of Business and Law.

### **Project explanation**

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The purpose of the research being undertaken is to identify the status of animals under Malaysian law by referring to theoretical, legal and cultural perspectives. The perspectives will be used to outline the standard of welfare and entitlements that should be accorded to animals in Malaysia and will be further used to suggest possible amendments in the Malaysian law.

### **What will I be asked to do?**

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You are invited to participate in an interview which takes about one hour to 90 minutes. The interview is about your view and perspectives on the status of animals in Malaysia and how they could be accorded greater protection in the law. It relates to both legal and policy practices. It seeks to draw on your experience of these practices. You are, however, not obliged to disclose anything which you are not comfortable with or answer any question which you do not wish to.

### **What will I gain from participating?**

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Your comments, based on your knowledge and experience, will contribute to identify the welfare and entitlement that should be accorded to animals under Malaysian law. Specific to this research, it may lead to a greater protection to animals under the law. This may also lead to possible amendments particularly to the laws relating to animals in Malaysia.

### **How will the information I give be used?**

---

The information you provide will be contained in a thesis which will be available in the library of Victoria University. Also some parts of the information may be published in various academic journals. If required, your response to questions will remain confidential and you will not be named as having participated in the research project. Your statement or comments may be republished in the thesis or in academic journals, but not in such a way that you, and your organisation, could be identified.

### **What are the potential risks of participating in this project?**

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A minimal risk may exist in the interview. Throughout the interview, if you feel uncomfortable or require some form of explanation; please feel free to raise the issue with the researcher. You are free not to answer any question and will not be identified as the maker or author of any statement, if you so wish. Also, the statement or comment will not be used in a way which will identify you. You may withdraw at any time and for any reason without prejudice.

### **How will this project be conducted?**

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To identify the status of animals in Malaysia and to outline the standard of welfare and entitlements to be accorded to animals in Malaysian law, it is necessary to have understanding on the practice of the laws and policies related and the views of the peoples in the relevant professions. Collection of data for this study will involve two sources. The first source is literature review on the philosophical status of animals from primary sources, the position of animals under Malaysian law and other select jurisdictions to the issue. The second source is interviews with people from various categories who have experience in the issue including the government officials, officials in certain institutions related to animal welfare, legal professionals, the animal welfare groups' representatives, representatives of related non-governmental organisations and academicians. In short, the project will be conducted using both primary sources and qualitative analysis.

### **Who is conducting the study?**

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The project is conducted by  
Dr Edwin Tanner ([Edwin.Tanner@vu.edu.au](mailto:Edwin.Tanner@vu.edu.au));  
Professor Neil Andrews ([Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au)); and  
Mr Arif Fahmi Md Yusof ([Arif.Yusof@live.vu.edu.au](mailto:Arif.Yusof@live.vu.edu.au))

Any queries about your participation in this project may be directed to the Principal Researcher listed above.

If you have any queries or complaints about the way you have been treated, you may contact the Ethics and Biosafety Coordinator, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4148.

## Appendix C: Consent Form



# CONSENT FORM FOR PARTICIPANTS INVOLVED IN RESEARCH

### INFORMATION TO PARTICIPANTS:

We would like to invite you to be a part of a study into, "Reforming Malaysian animal law: The legal status of animals under Malaysian law: Is it a time to apply a modern philosophical view to the law to accord animals in Malaysia a greater protection?", to identify the status of animals in Malaysia, to outline the standard of welfare and entitlements to be accorded to animals in Malaysian law and to suggest possible amendments to the law relating to animals in Malaysia.

### CERTIFICATION BY SUBJECT

I, \_\_\_\_\_

of \_\_\_\_\_

certify that I am at least 18 years old\* and that I am voluntarily giving my consent to participate in the study: "The legal status of animals under Malaysian law: Is it a time to apply a modern philosophical view to the law to accord animals in Malaysia a greater protection?" being conducted at Victoria University by: Dr Edwin Tanner.

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by Mr Arif Fahmi Md Yusof.

and that I freely consent to participation involving the below mentioned procedures:

- An interview: (please choose an appropriate box:
  - ☐ In which the answer will be recorded on an audio tape; or
  - ☐ In which the answers will be recorded in the form of note taking.

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.

I have been informed that the information I provide will be kept confidential.

Signed:

Date:

Any queries about your participation in this project may be directed to the researcher Dr Edwin Tanner at +61(0)3 9919 1805 or [Edwin.Tanner@vu.edu.au](mailto:Edwin.Tanner@vu.edu.au).

If you have any queries or complaints about the way you have been treated, you may contact the Ethics & Biosafety Coordinator, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4148.

#### Appendix D: List of Interviewees

No	Code/Date	Date of interview	Background
1.	INT001	5 May 2011	A professor of animal welfare science at a public university, a researcher and scientist focusing on animal welfare and distress, a member of Animal Welfare and Ethics Committee, Malaysian National Zoo.
2.	INT002	25 May 2011	A president of environmental society (state of Pahang, an environmentalist and animal welfare activist.
3.	INT003	26 May 2011	A veterinary doctor, animal welfare activist, a president of an animal welfare organisation (state of Pahang).
4.	INT004	26 May 2011	An animal activist and rescuer, a secretary of an animal welfare organisation (state of Pahang).
5.	INT005	7 June 2011	An animal welfare activist, a president of an animal welfare organisation in Kuala Lumpur.
6.	INT006	10 June 2011	A senior officer at Department of Wildlife and National Park Malaysia.
7.	INT007	10 June 2011	A senior legal officer at Department of Wildlife and National Park Malaysia.
8.	INT008	11 June 2011	An enforcement officer, Department of



			Wildlife and National Park Malaysia.
9.	INT009	11 June 2011	A senior research officer, Department of Wildlife and National Park Malaysia
10.	INT010	14 June 2011	A chairman of an animal welfare organisation (state of Selangor), an animal welfare activist.
11.	INT011	16 June 2011	A chairman of an animal welfare organisation (state of Perak), an animal welfare activist.
12.	INT012	16 June 2011	A senior committee of an animal welfare organisation (state of Perak), an animal welfare activist.
13.	INT013	17 June 2011	A secretary of an animal welfare organisation (state of Perak), an animal welfare activist.
14.	INT014	20 June 2011	A secretary of an animal welfare organisation, (state of Penang), an animal welfare activist.
15.	INT015	20 June 2011	A president of animal welfare organisation (state of Penang), an animal welfare activist.
16.	INT016	20 June 2011	A committee member of an animal welfare organisation (state of Penang), an animal welfare activist.

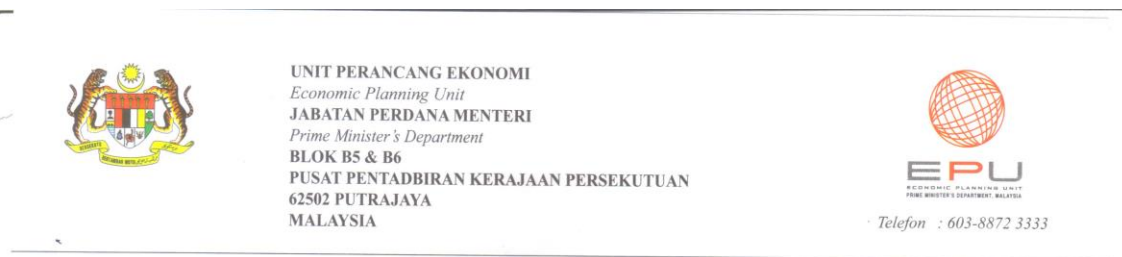
17.	INT017	21 June 2011	Law lecturer, at a public university.
18.	INT018	24 June 2011	A manager of an animal shelter, an animal welfare activist.
19.	INT019	27 June 2011	A senior officer, Department of Wildlife and National Park Malaysia (state of Pahang).
20.	INT020	4 July 2011	A public health officer at Kajang City Council (state of Selangor)
21.	INT021	5 July 2011	A senior legal officer at Nilai City Council (state of Negeri Sembilan)
22.	INT022	5 July 2011	A public health officer at Nilai City Council (state of Negeri Sembilan)
23.	INT023	8 July 2011	A Session's Court Judge at state of Perak. He served as a Magistrate in various states in Malaysia before appointed to this position.
24.	INT024	12 July 2011	A professor at Faculty of Veterinary Medicine in a public university, a chairman of Animal Ethics of a public university, and a senior member of an Animal Science Association.
25.	INT025	13 July 2011	A veterinary officer at Department of Veterinary Services.
26.	INT026	13 July 2011	A senior enforcement officer at Department of Veterinary Services.

27.	INT027	13 July 2011	An enforcement Officer at Department of Veterinary Services.
28.	INT028	17 July 2011	A president of an animal organisation (a Buddhist based organisation).
29.	INT029	18 July 2011	A legal officer at Department of Veterinary Services, Malaysia
30.	INT030	18 July 2011	A senior legal officer at Department of Veterinary Services.
31.	INT031	19 July 2011	An advocate and solicitor, High Court of Malaya, a member of Justice Party, an animal welfare activist.
32.	INT032	20 July 2011	A senior committee of Student Representative Council at Faculty of Veterinary Medicine I na public university.
33.	INT033	1 August 2011	An advocate and solicitor, an animal welfare activist, a member of Malaysia Hindu Sangam Association.
34.	INT034	8 August 2011	An advisor of an animal welfare organisation (state of Selangor), an animal welfare activist.
35.	INT035	16 August 2011	A president of an animal organisation (a

			Christian based organisation).
36.	INT036	3 August 2011	A senior veterinary officer, in Animal Welfare Unit, at Department of Veterinary Services.
37.	INT037	25 August 2011	A High Court judge; formerly a legal Advisor and Legal Officers in many states.
38.	INT038	28 August 2011	A professor of Islamic Studies, a director of an Islamic Institute at a public university. He serves as a senior advisor of Islamic National Consultative Committee for the government.

## Appendix E: Approval Letters to Conduct interviews

### 1. Approval letter from the Economic Planning Unit, Prime Minister's Department Malaysia.



Arif Fahmi Md Yusof  
12c Corrigan St  
Glenroy Vic 3046  
Australia  
Email: [arifkuim@yahoo.com](mailto:arifkuim@yahoo.com)

Ruj. Tuan:  
Your Ref.:

UPE: 40/200/19/2762

Ruj. Kami:  
Our Ref.:

Tarikh:  
Date:

22 February 2011

#### APPLICATION TO CONDUCT RESEARCH IN MALAYSIA

With reference to your application, I am pleased to inform you that your application to conduct research in Malaysia has been *approved* by the **Research Promotion and Co-Ordination Committee, Economic Planning Unit, Prime Minister's Department**. The details of the approval are as follows:

Researcher's name : **ARIF FAHMI MD YUSOF**

Passport No. / I. C No: **761002025479**

Nationality : **MALAYSIAN**

Title of Research : **"THE LEGAL STATUS OF ANIMALS UNDER MALAYSIAN LAW: IS IT A TIME TO APPLY A MODERN PHILOSOPHICAL VIEW TO THE LAW TO ACCORD ANIMALS IN MALAYSIA GREATER PROTECTION?"**

Period of Research Approved: **8 MONTHS**

2. Please collect your Research Pass in person from the Economic Planning Unit, Prime Minister's Department, Parcel B, Level 4 Block B5, Federal Government Administrative Centre, 62502 Putrajaya and bring along two (2) passport size photographs. You are also required to comply with the rules and regulations stipulated from time to time by the agencies with which you have dealings in the conduct of your research.

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3. I would like to draw your attention to the undertaking signed by you that you will submit without cost to the Economic Planning Unit the following documents:

- a) A brief summary of your research findings on completion of your research and before you leave Malaysia; and
- b) Three (3) copies of your final dissertation/publication.

4. Lastly, please submit a copy of your preliminary and final report directly to the State Government where you carried out your research. Thank you.

Yours sincerely,



(MUNIRAH ABD. MANAN)

For Director General,  
Economic Planning Unit.

E-mail: [munirah@epu.gov.my](mailto:munirah@epu.gov.my)

Tel: 88725281/88725272

Fax: 88883961

ATTENTION

This letter is only to inform you the status of your application and **cannot be used as a research pass.**

## 2. Approval letter from the Chief Judge of Malaya (in Malay)



MAHKAMAH PERSEKUTUAN MALAYSIA  
ISTANA KEHAKIMAN  
PRESINT 3  
62506 PUTRAJAYA

Telefon : 03-88803500

03-88803995

Fax : 03-88804003

Laman Web: <http://www.kehakiman.gov.my>

(~~8~~)HBM/kursus/jue

Ruj Tuan : 5 Mei 2011

Ruj Kami :

Tarikh :



Arif Fahmi Md Yusof  
No 202, Jln Dillenia 12  
Laman Dillenia, Nilai Impian  
71800 Nilai  
**NEGERI SEMBILAN**

Tuan,

### INVITATION TO PARTICIPATE IN RESEARCH AND REQUEST FOR PERMISSION TO INTERVIEW OTHER HIGH COURT JUDGES

Dengan segala hormatnya saya merujuk kepada perkara di atas dan surat tuan bertarikh 22 April 2011.

2. Sukacita dimaklumkan bahawa Yang Amat Arif Tan Sri Arifin Zakaria , Hakim Besar Malaya, telah bersetuju untuk meluluskan permohonan puan bagi menjalankan penyelidikan bagi perkara tersebut di atas.

3. Selanjutnya pihak tuan juga dibenarkan untuk menemuduga YA Hakim/ Pesuruhjaya Kehakiman yang berkenaan.

Sekian, terima kasih

**"BERKHIDMAT UNTUK NEGARA"**

Saya yang menurut perintah



**CHE WAN ZAIDI BIN CHE WAN IBRAHIM**

Pegawai Khas I Kepada

Yang Amat Arif Hakim Besar Malaya

*(Sila nyatakan rujukan kami apabila menjawab surat ini)*

English translation for approval letter from the Chief Judge of Malaya

Arif Fahmi Md Yusof  
No 202, Jln Dillenia 12  
Laman Dillenia, Nilai Impian  
71800 Nilai  
**NEGERI SEMBILAN**

Date: 5 May 2011

Dear Sir,

**INVITATION TO PARTICIPATE IN RESEARCH AND REQUEST FOR PERMISSION  
TO INTERVIEW OTHER HIGH COURT JUDGES**

I refer to the above matter and your letter dated 22 April 2011.

It is to inform that The Right Honourable Tan Sri Arifin Zakaria, the Chief Judge of Malaya, agreed and approved your application to conduct your research.

You are also permitted to conduct interviews with the respected High Court Judges/Judicial Commissioners.

Thank you.

Yours faithfully,

signed

**CHE WAN ZAIDI BIN CHE WAN IBRAHIM**

Special Officer I for

The Right Honourable Chief Judge of Malaya



### 3. Approval letter from the Department of Veterinary Services, Malaysia (by email)

Windows Live Hotmail Print Message

<http://bl115w.blu115.mail.live.com/mail/PrintMessages.aspx?cpids=c...>

Print

Close

#### **Kebenaran menjalankan temubual bagi penyelidikan Phd**

From: **SITI KHADIJAHANIM BT ZAINUDDIN** (khadijahanim@dvs.gov.my)  
Sent: Wednesday, 15 June 2011 4:50:34 PM  
To: arif.yusof@live.vu.edu.au; arifkuim@yahoo.com  
Cc: ARDHY BIN ADNAN (adronvet@dvs.gov.my); NURIHAN NOORDIN (nurihan@dvs.gov.my)

Salam En Arif,

Saya dengan hormatnya diarah untuk merujuk surat Tuan bertarikh 26 april 2011 dan email bertarikh 20 mei 2011.

Dimaklumkan bahawa Ketua Pengarah Perkhidmatan Peterinar (KPPV) tiada halangan bagi hasrat Tuan untuk berjumpa dengan pegawai-pegawai Jabatan yang berkenaan untuk ditemubual bagi tujuan penyelidikan Phd tersebut.

Setelah itu, Tuan bolehlah membuat temujanji bagi menemubual KPPV bagi melengkapkan penyelidikan Tuan. Tuan boleh menghubungi Pn Norihan bagi membuat temujanji tersebut di talian 03-88702201.

Dr Anim  
Pegawai Khas Direktorat  
b/p KPPV  
DVS

English translation for approval letter from the Department of Veterinary Services Malaysia.

**APPLICATION TO CONDUCT INTERVIEW FOR PHD RESEARCH**

From : SITI KHADIJAHANIM BT ZAINUDDIN ([khadijahanim@dvs.gov.my](mailto:khadijahanim@dvs.gov.my))

Sent : Wednesday, 15 June 2011 4:50:34 PM

To : [arif.yusof@live.vu.edu.au](mailto:arif.yusof@live.vu.edu.au); [arifkuim@yahoo.com](mailto:arifkuim@yahoo.com)

Cc : ARDHY BIN ADNAN ([adronvet@dvs.gov.my](mailto:adronvet@dvs.gov.my)); NURIHAN NOORDIN ([nurihan@dvs.gov.my](mailto:nurihan@dvs.gov.my))

Dear Mr Arif,

I refer to your letter dated 26 April and your email dated 20 May 2011.

The Director General of Veterinary Services has no objection for you to conduct the interview with officers in the Department of Veterinary Services for your PhD research.

Please make an appointment to conduct the interview with the Director General of Veterinary Service. Please contact Miss Norihan to arrange the time for interview by phone: 03-88702201.

Dr Anim,

Special Officer

On behalf of

The Director General of Veterinary Services.

#### 4. Approval letter from the Department of Wildlife and National Park Malaysia (by email)

PERMOHONAN MENJALANKAN TEMUBUAL BAGI PENYELIDIKAN PHD - ... Page 1 of 1

### PERMOHONAN MENJALANKAN TEMUBUAL BAGI PENYELIDIKAN PHD

Misliah Mohd Basir <mislih@wildlife.gov.my>

Fri 29/04/2011 5:41 PM

To: Arif Yusof <arif.yusof@live.vu.edu.au>;

Cc: Burhanuddin Mohd Nor <burhan@wildlife.gov.my>;

Tuan,

Berhubung perkara diatas surat tuan bertarikh 26 April 2011 berkaitan.

2. Pada dasarnya pihak Jabatan tiada halangan diatas permohonan tuan . Sila berhubung dengan En. Burhanudin , Pengarah Bahagian Juru Perunding untuk tindakan selanjutnya dialamat emailnya ; burhan@wildlife.gov.my

Sekian, terima kasih

Misliah Mohamad Basir  
b/p: Ketua Pengarah  
Jabatan PERHILITAN

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English translation for approval letter from the Department of Wildlife and National Parks Malaysia

**APPLICATION TO CONDUCT INTERVIEW FOR PHD RESEARCH**

From : Mislih Mohd Basir [mislih@wildlife.gov.my](mailto:mislih@wildlife.gov.my)

Fri 29/4/2011 5. 41 PM

To : Arif Yusof [arif.yusof@vu.live.edu.my](mailto:arif.yusof@vu.live.edu.my);

Cc : Burhanuddin Mohd Nor [burhan@wildlife.gov.my](mailto:burhan@wildlife.gov.my);

Dear Sir,

Your letter dated 26 April 2011 is referred to.

The department has no objection for your application. Please contact Mr Burhanudin, the Director of Consultancy for further action through his email; [burhan@wildlife.gov.my](mailto:burhan@wildlife.gov.my).

Kind regards,

Mislih Mohamad Basir

On behalf: The Director General

Department of Wildlife and National Parks