

**AN ECOFEMINIST ETHIC OF CARE APPROACH TO RHINOCEROS
PROTECTION IN SOUTH AFRICA:**

by

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Submitted in fulfilment of the requirements for the degree

LLM

In the Faculty of Law,
University of Pretoria

Date

December 2016

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PROLOGUE:

This is the Black Rhino, the elastic boulder, coming at the gallop.
The boulder with a molten core, the animal missile,
Enlarging towards you. This is him in his fame –

Whose past is Behemoth, sixty million years printing in the strata
Whose present is the brain-blink behind the a recoiling gunsight
Whose future is a cheap watch shaken in your ear

[...]

For this the Black Rhino, who vanishes as he approaches

Every second there is less and less of him

By the time he reaches you nothing will remain, maybe, but the horn – an ornament
for a lady's lap

[...]

Quickly, quick or even as you stare

He will have dissolved

Into a gagging stench, in the shimmer.

Bones will come out of the negative.

No wonder man

Craving his drug

Divides you small

Strip every scrap

And bloody rag

Off your wraith,

Hooked on his faith

Or senile hope

Your relics will heal

And restore all.

And carves your horn

To adorn

The dagger that stands

His touchy pride's

Totem pole-
The sentinel
Over the hole
Of his navel
And what it hides.
You are to blame
With your horn's length
You have nailed your strength
To eden's coffin
Tree, the tree
Of sophistry,
Too solidly
To tug yourself free. So now you die.

Already dead
The rhino cried
From puddle of blood
Almost dried
In the African dust:
What can you know
Of wrong or right
Of evil of good?
You are the crime
I accept
I no more exist
Outside your dream
[...]

This poem tells the heart wrenching story of the plight of the rhinoceros.¹ Hughes paints a picture of the powerful rhinoceros who is disappearing. Vanishing really quickly due to the poaching epidemic. As a result all that is left is the skeleton, an empty shell of what the dominant rhinoceros used to be. This is a wonderful illustration of the story behind this dissertation.

¹ The Black Rhino I & II. Ted Hughes wrote a poem called Black Rhino in the 1980's to help raise funds for the campaign to help save the black rhino from poaching. He writes this poem after finding a rhino bull skeleton. The black rhino population numbers plummeted from about 17 000 to 4000 between 1980 - 1986. In 1987 the actual numbers of rhino left were uncertain, they were on the brink of extinction. T Hughes *Wolfwatching* (1989) 26-29.

CHAPTER 1: INTRODUCTION

The rhinoceros is a beautiful and unique animal.² Despite their large size and tough exterior, they have a gentleness about them. Ian Player says that there is a 'sacredness about their presence'.³ In South Africa we have two species of rhinoceros, the calmer white rhinoceros who has a flat lip for grazing animal and the more feisty black rhinoceros who has a triangular lip for browsing. These majestic animals are considered one of the big five, weighing in at about 1 - 2 tons each and have two horns, one larger and one smaller, made of keratin, the main component of hair, nails and hooves. Over the last eight years, rhinoceros poaching has exponentially escalated due to the fact that rhinoceros horn is believed to have medicinal and even magical properties.⁴ Julian Rademeyer says that 'perhaps the greatest irony is that rhinos are being killed for the very thing that evolved to offer them a means of defense'.⁵ Rhinoceros horn on the black market in Southeast Asia is worth more than gold, cocaine, heroin and platinum per kilogram.⁶ People are willing to kill and die for it.⁷ In Vietnam, it is a party drug for the rich and an 'elixir' for the terminally ill, but yet it has no proven benefits.⁸ More than six thousand rhinoceros have been killed by poachers in Africa in the past decade.⁹ Of those 79.2% are South African rhinoceroses.¹⁰ In the last year alone (2015) 1175

² J Rademeyer *Killing for Profit: Exposing the Illegal Rhino Horn Trade* (2012) vii.

³ Rademeyer (2012) viii. Player played an important role in saving the southern white rhino from extinction in the 1960's – 1970's. The numbers increased from 1800 to 19 000 of which 95% are in South Africa.

⁴ J Rademeyer 'Tipping Point: Transnational organized crime and war on poaching. Part 1 of 2: investigations into rhino horn trafficking in Southern Africa' (July 2016) [<http://globalinitiative.net/wp-content/uploads/2016/07/Global-Initiative-Tipping-Point-Part1-July-2016.pdf>] (accessed 5 November 2016) 6.

⁵ Rademeyer (2012) ix.

⁶ Rademeyer (2012) ix.

⁷ Rademeyer (2012) ix.

⁸ Rademeyer (2012) ix. The artificial value of rhinoceros horn is based on a centuries old myth deeply rooted in their culture

⁹ Rademeyer 'Tipping Point: Transnational organized crime and war on poaching. Part 1 of 2: investigations into rhino horn trafficking in Southern Africa' (July 2016) 3.

¹⁰ Rademeyer 'Tipping Point: Transnational organized crime and war on poaching. Part 1 of 2: investigations into rhino horn trafficking in Southern Africa' (July 2016) 7. The crisis is not insolated to local incidents but on an international museums around the world have been raided in search of rhinoceros trophies.

rhinoceros have been poached in South Africa which works out to three to four rhinoceros a day.¹¹ Since January 2006 5460 rhinoceroses have been brutally slaughtered by poachers in South Africa.¹² The killings show little to no signs of slowing.¹³ The problem is not only a biodiversity and conservation issue but an emotional one too. Braam Malherbe says 'I have heard the sounds made by a wounded rhino, seen hapless calves defending the corpses of their dead mothers against the pangas of poachers'.¹⁴ Player said 'rhinos have a particularly plaintive cry, which once heard is never forgotten, the screams of agony from rhinoceros that have had their horn chopped off while still alive should reach out into the hearts of all of us'.¹⁵ Female rhinos are targeted and rhinoceros calves are left orphaned by the poachers. They do not leave their mutilated mothers sides, and often die from dehydration. Poachers attack the calves who are trying protect their mothers leaving them to die. It is this ultimate carelessness and emotionless treatment of nature which has resulted in the degradation of the environment.

South Africa's conservation policies hinge on the sustainable use of wildlife.¹⁶ It encourages economic incentive for private rhinoceros ownership which includes breeding, sale to eco-tourism and hunting.¹⁷ Rademeyer says that about 6 141 white rhinoceros live on private land which equates to about a third of the population.¹⁸ The result of private ownership is that it has a direct financial implication. This means that economic considerations are at the core of any decision made by a private

¹¹ Rademeyer 'Tipping Point: Transnational organized crime and war on poaching. Part 1 of 2: investigations into rhino horn trafficking in Southern Africa' (July 2016) 6.

¹² Dozens more have been killed in pseudo-hunts in South Africa. Wildlife crime syndicates hire sham hunters to 'legally' hunt rhinoceros for the Asian black market. Rademeyer 'Tipping Point: Transnational organized crime and war on poaching. Part 1 of 2: investigations into rhino horn trafficking in Southern Africa' (July 2016) 6 & 36.

¹³ Rademeyer 'Tipping Point: Transnational organized crime and war on poaching. Part 1 of 2: investigations into rhino horn trafficking in Southern Africa' (July 2016) 4.

¹⁴ Already in 2014 more rhinos were being slaughtered than calves being born. B Malherbe 'The Rhino Wars' (2014) [<http://www.braammalherbe.com/braam-malherbes-2nd-blog-post/>] (accessed 5 November 2016).

¹⁵ Rademeyer (2012) ix.

¹⁶ Rademeyer 'Tipping Point: Transnational organized crime and war on poaching. Part 1 of 2: investigations into rhino horn trafficking in Southern Africa' (July 2016) 36.

¹⁷ Rademeyer 'Tipping Point: Transnational organized crime and war on poaching. Part 1 of 2: investigations into rhino horn trafficking in Southern Africa' (July 2016) 36.

¹⁸ Rademeyer 'Tipping Point: Transnational organized crime and war on poaching. Part 1 of 2: investigations into rhino horn trafficking in Southern Africa' (July 2016) 36.

owner and the result of which is that the interests of nature are not made a priority. This stems from the hierarchical and fragmented relationship which humans have with nature. This is seen in the case *Kruger and Another v Minister of Water and Environmental Affairs and Others*.¹⁹ In this case the moratorium which was placed on domestic rhinoceros horn trade in 2009 was challenged by private rhinoceros breeders.²⁰ The application was brought on the basis that there was insufficient consultation with the necessary parties (including the applicants Johan Kruger and John Hume) by the minister of environmental affairs when the moratorium was initially proposed.²¹ This application is brought in terms of the right to procedurally fair administrative action.²² The minister must give notice to the person whose rights are materially and adversely affected by the administrative action.²³ Kruger and Hume contended that because they are the largest rhinoceros breeder in South Africa, their rights were adversely affected and therefore they needed to be consulted.²⁴ According to the applicants the fact that this did not occur invalidates the implementation of the moratorium and as a result the Judge set the moratorium aside.²⁵

This case raises important issues regarding the ability of law to protect animals and nature. The judgement starts with the following quote by an ‘environmentalist expert’²⁶ who filed an expert report in support of the application of second applicant Hume:

Animal rightists believe that animals have the same right to life and liberty as have humans, and they believe that man has no right to ‘use’ animals in any way. They

¹⁹ *Kruger and Another V Minister of Water And Environmental Affairs & Others* (2015) (57221/12) ZAGPPHC 1018 (GP). Herein after *Kruger v MEA*.

²⁰ *Kruger v MEA* (2015) para 87. The moratorium was since reinstated on the 6 June 2016, as a result of rule 19 of Constitutional Court Rules, which suspends the High Court ruling according to the press release ‘Moratorium on rhino horn trade reinstated as Minister Edna Molewa files for leave to appeal to Constitutional Court’ (08 June 2016).

[https://www.environment.gov.za/mediarelease/molewa_appeal_moratoriumonrhinohorntrade] (Accessed 06 October 2016).

²¹ *Kruger v MEA* (2015) para 3.

²² Sec 33 of the Constitution.

²³ *Kruger v MEA* (2015) para 6.

²⁴ *Kruger v MEA* (2015) para 3.

²⁵ This case is discussed in detail in chapter 3.

²⁶ This term ‘environmentalist expert’ is placed in quotation marks because the legitimacy of the ‘expert’ is questioned in chapter 3.

say that animals should NOT be eaten by men, and that he should subsist on a vegetable diet alone. The animal rights doctrine also supports the biggest confidence industry the world has ever known. Animal Welfare people, on the other hand, do not object to man using or eating animals-such as when he uses an ox to plough a field, or a horse to draw a cart- such use should be humane, and that when a man has to kill an animal to gain benefits (such as to obtain meat to eat) such killing should be carried out without cruelty. We should ALL, therefore, support animal welfare which maintains man's civilized standards with regard to his treatment of animals.

The moratorium of the sale of rhinoceros horns within South Africa is not one example of 'animal use' but it represents just the tip of a gigantic ice-berg of misunderstanding.²⁷

This quote is calling for the more conservative animal welfare approach as an overarching solution for animal protection in South Africa. Contempt is clearly shown for the animal rights approach, as it calls for a more radical approach to animal protection. The problem lies in the fact that these two approaches mentioned in the quote (animal welfare and animal rights approach) cannot sufficiently assist in the protection of animals to the extent needed. Despite the inroads that these two approach have made to further the protection of animals, they have their roots in a masculine modern system. Modernity can be seen as anthropocentric in nature and therefore an approach which has ties to an anthropocentric system, and which predominantly has human interests at heart will not be able to provide sufficient protection needed by animals. The relationship between humans and nature is fragmented and hierarchical because man believes he is separate from and superior to nature and can thus dominate over it. This disintegrated relationship continues to result in the destruction and the oppression of the environment, as seen in the *Kruger V MEA* case. Ecofeminist authors identify the oppression of women and nature by the patriarchal society as intersectional, and trace the degradation of the environment back to the fragmented relationship between humans and nature. I look to an ethic of care approach to develop a new environmental ethic to provide protection to animals. Developing a holistic and ecologically responsive relationship is at the core of an ethic of care approach. It is about the development of

²⁷ This quote runs central to my research problem and is discussed throughout this dissertation. *Kruger v MEA* (2015) para 1 & 2. The word 'expert' is put into quotation marks because the expert construct is in itself a product of modernity and bears a false sense of authority as discussed in chapter 2.

relationships with animals which listens to their voice.²⁸ As a result it is a contextual and narrative approach to animal protection.

This dissertation starts with a look into the beginnings of man's dominion over nature which can be traced back to the rise of modernity.²⁹ During this time humanity believed that humans are separate from nature and ultimately that humans have dominion over nature for this reason. It is because of this belief that we currently have an ecological crisis. Animals were seen as mere machines and their exploitation played an enormous role in the creation of a modern society. This formed the roots for the current relationship we have with nature and animals today. This relationship is embodied in the animal welfare and animal rights approaches to animal protection. These approaches, although they have taken important steps in recognizing the value of animals, they are limited in terms of the scope of protection which they can afford to animals. *Kruger v MEA* case provides a look into the South African environmental context but also exposes the seriousness of the demise of the rhinoceros as not only a national but a global environmental issue. I look to an ethic of care approach to provide a caring response to the disintegrated relationship humans have with nature and animals.

In the next chapter I start the chapter by looking at the South African environmental law context. In this chapter I look at the South African Constitution, as the supreme law of the country, offering a right to the environment in sec 24.³⁰ This right places an obligation on the state to positively realise the right. As a result, the state is deemed the custodian of nature on behalf of the national community. Therefore, the state has the obligation to have the best interests of the environment at heart. It is evident in the third chapter that the state does not adequately promote the interests of nature. Under the scope of the environmental right, legislation has been enacted to promote the protection of animals which are domestic or used for

²⁸ This is from Carol Gilligan's ethic of care as seen in chapter 5. This voice is not calling for an anthropomorphic characteristic but allows animals to be heard. To hear how the careless acts of humans are truly affecting animals. C Gilligan *In a different voice* (1982) 63.

²⁹ Man is specifically mentioned in chapter two, as opposed to humanity is general, because in the chapter highlights the shortcomings of a patriarchal system. The hierarchical and fragmented relationship has bearing on humanity as a whole.

³⁰ The Constitution of the Republic of South Africa 1996. Herein after the Constitution.

agricultural and entertainment purposes. The Animals Protection Act³¹ is a welfare based act, it provides for the use of animals but attempts to protect against unnecessary cruelty during those activities. Activities involving wild animals on the other hand are regulated in terms of National Environmental Management Biodiversity Act (NEMBA).³² This act manages any activities which involves the farming or conservation of the rhinoceros as it is a wild animal and plays an essential role in the South Africa's biodiversity. The last aspect of environmental law which I look at is the Convention on International Trade in Endangered species of Wild Fauna and Flora (CITES convention).³³ This is an international treaty for the regulation trade of protected species, of which the black and white rhinoceros are listed. International trade of rhinoceros horn has been banned by CITES since 1977.³⁴ It's important to note that the purpose of this convention is not to promote conservation of species as such but the regulation of the international trade of these species.

In the second part of chapter two I look at how a masculine modernity has resulted in man's belief that we are separated from and the controllers of nature. A masculine modernity is an era characterised by what is traditionally typified as masculine qualities of rationality and power. These masculine values have contributed to the othering of the natural environment. During the rise of modernity scientific experimentation and the use of animals was at the forefront of the development of a modern society. Rene Descartes laid down the theory that animals are mere machines incapable of feeling.³⁵ As a result humanity was seen as being free of any moral responsibility towards animal and could treat them as they pleased. This endorsed the instrumental use and ultimately the exploitation of animals. Val Plumwood an ecofeminist author identifies that the problem lies in the fact that humans see themselves as separate from nature and thus have an instrumental view of nature.³⁶ Humanity sees this 'outside of nature' position as advantageous as

³¹ Act 71 of 1962.

³² Act 10 of 2004.

³³ 1973.

³⁴ B Malherbe 'The Rhino Wars' (2014) [<http://www.braammalherbe.com/braam-malherbes-2nd-blog-post/>] (accessed 5 November 2016).

³⁵ P Singer *Animal Liberation* (2002) 200.

³⁶ V Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 10.

it provides a vantage point from which man can be the masters of nature.³⁷ It has created a culture of separation, which divides the world into a set of opposites. This mind-set entrenches power relations as dualisms.³⁸ As a result the relationship between humans and nature takes the form of a human/nature dualism. A dualism results in a power imbalance by endorsing a hierarchal relationship between the dominant/inferior. Plumwood critiques this dualistic world view as fragmented and hierarchical.³⁹ I identify this oppressive relationship between human/nature as one of the main causes of the destruction of the environment. The *Kruger v MEA* judgement shows how the relationship between humans and nature remains to this day in the form of the human/nature dualism because the judgement reinforces the hierarchal nature of the relationship.

In the last part of chapter two we see that much of the environmental literature which currently exists reinforces the hierarchical relationship between humanity and nature by promoting the idea that in order for one party to succeed another must lose. The judgement of *Kruger v MEA* exposes the way in which human interests are weighed up against the interest of nature, and an anthropocentric legal system will inherently promote human interests above that of nature. In order to challenge this ecofeminism calls for a holistic understanding of the world wherein everything is interconnected and part of the 'whole' earth. An interconnected relationship with the earth can challenge the anthropocentric nature of a masculine modernity. It discredits the culture of separation and transcends anthropocentrism in favour of a harmonious relationship with animals and the earth.

In chapter three I look at the *Kruger v MEA* facts and decision in detail in order to facilitate the discussion to follow later in the chapter. In the second part of the chapter I have a critical look at the animal welfare approach as a method for animal protection. Animal welfare has taken important steps to provide some protection to animals but is very limited in terms of its scope of protection. The welfare approach is a derivative of the utilitarian theory which allows humans to

³⁷ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 7.

³⁸ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 6.

³⁹ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

maintain a system of utility of animals as long as practices do not cause ‘unnecessary suffering’.⁴⁰ Peter Singer says that if a being can suffer, regardless of their species, cognisance must be taken of such suffering.⁴¹ This is based on the premise that animals can suffer from harm inflicted because they have similar nervous systems to humans.⁴² All sentient beings share in an interest not to suffer. Therefore an animal use practice is deemed acceptable by the animal welfare approach if the most benefit is achieved at the expense of the least amount of harm to the animal. This is the basis for the protection offered by the welfare approach. Josephine Donovan points out that the welfare system endorses a fragmented and hierarchal relationship with nature because it results in the worth of a being simply being reduced to a calculation of the interests an animals has in not suffering and ultimately results in a mathematical quantification of suffering.⁴³ Gary Francione mentions that this is based on the false perception that animals are not concerned with the fact that we use them but only care about how we use them because they are sentient.⁴⁴ Animal welfare endorses the animals-as-property paradigm in order to continue the instrumental use of animals. In the last part of chapter three I look at how the *Kruger v MEA* judgement perpetuates a fragmented and hierarchical relationship with nature. We see this through the anthropocentric interpretation of certain laws to frustrate efforts to protect the environment. This case endorses what Jacklyn Cock calls the commodification of nature.⁴⁵ The only value afforded to the rhinoceros is an economic one for human benefit. The culture of separation has resulted in the belief that nature must be exploited in order to protect it.

In chapter four I look at the fact that a rights based approach calls for certain interests to be absolutely protected and which may not be limited in favour of human benefit.⁴⁶ For this reason it can be seen as a more radical form of animal protection.

⁴⁰ G Francione ‘The problem of animal welfare and the importance of vegan education’ (2012) 27 *South African Journal of public law* 28

⁴¹ Singer (2002) 8.

⁴² Singer (2002) 11.

⁴³ J Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Journal of Women in Culture and Society* 358.

⁴⁴ Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 29.

⁴⁵ J Cock ‘The Green Economy: A Just and Sustainable development path or a ‘Wolf in Sheep’s Clothing?’ (2014) 5 *Global Labour Journal* 28.

⁴⁶ G Francione ‘Animal rights and animal welfare’ (1996) 48 *Rutgers law review* 398.

A rights based approach possibly could provide a wider scope of protection to animals.⁴⁷ In the first part of the chapter I look at the Kantian theory of rationality and how it has resulted in the masculinization of morality. According to Immanuel Kant, morality is a concept distant from emotion, rather it belongs to the realm of reason which is a separate entity from emotion, kindness or caring.⁴⁸ This entrenches a reason/emotion dualism. Patriarchy has used masculine values of rationality and power to other women and nature. JM Coetzee says that the only reason why superiority afforded to the value of rationality is because of the human ego due to the fact that it is a creation of the human mind.⁴⁹ In the second part of chapter four I discuss Tom Regan's critiques of Kant's theory that animals are merely a means to an end and that only rational beings are worthy of moral concern.⁵⁰ Regan suggests that rights should be extended to animals who fulfil the subject of a life criterion.⁵¹ Donovan says that this approach continues to perpetuate a hierarchical relationship with nature because it falls short when protecting beings without a complex self-awareness.⁵² This translates into the fact that animal still require a complex awareness which is similar to that of rationality in order to be granted rights. This raises the question whether the rights based approach, as a liberal tool focused on liberating the autonomous individual is the right approach for the protection of animals.

In the final chapter I look to an ethic of care. Carol Gilligan says that an ethic of care approach to animal and environmental protection is grounded in developing relationships focused on the importance of everyone having a voice and to listen to these voices carefully, in their own right and on their own terms. The focus of an ethic of care is the giving of a voice to the animal. A relationship based on an ethic of care directs our attention to the need of humanity to be ecologically responsive. It involves paying attention, listening and responding. An ethic of care transcends

⁴⁷ Animal rights approach is a more radical approach because it pushes for the complete abolition of the exploitation of animals. T Regan 'Understanding Animal Rights Violence' in S Armstrong & R Botzler (eds) (2007) *The Animal Ethics Reader* 564.

⁴⁸ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 4.

⁴⁹ JM Coetzee *The lives of animals* (1999) 24.

⁵⁰ T Regan *The Case for Animal Rights* (1983) 175.

⁵¹ Regan (1983) 151.

⁵² Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355

gender bias and hierarchies that are the foundation of a patriarchal institutions and cultures. It endorses 'mode of thinking that is contextual and narrative rather than formal and abstract'.⁵³ This is so important because we need a system which works directly with the problem, not on an abstract level which the modern animal protection theories do. In the last part of the final chapter I look at the importance of identifying the problem underling the *Kruger v MEA* case, not merely as a superficial interaction between human rights and environmental law. The underlying problem is the maintenance of the fragmented and hierarchical relationship between humans and nature. The fact that animals continue to be silenced by the underlying anthropocentric interests of the law. I hope to tell the story of how the voice of the rhinoceros has been silenced. The rhinoceros has a voice and needs to be heard.

⁵³ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 374.

CHAPTER 2: MAN'S DOMINION OVER NATURE

2.1 INTRODUCTION

In order to protect the earth from irreparable ecological destruction we need to change the relationship we have with nature from one which is hierarchal and fragmented to one which is ecologically responsive and creates a dialogue with animals. The relationship we have with nature is hierarchical and fragmented because has its root in culture of separation created by masculine modernity. This culture of separation divides the world into a set of opposites. These sets of opposites are known as dualisms. The human/nature relationship has taken on a dualistic nature.

In the first part of this chapter I look at the South African legal context. This is in order to lay the groundwork of the laws that apply to animal protection in South Africa for the case discussion to follow in the next chapter. I look at the constitutional right to the environment, framework environmental legalisation, specific animal protection legislation and applicable international treaty. In the second part of this chapter I trace the belief that man is separate from and the controllers of nature back to the rise of modernity. It was during this time that scientific experimentation was at the forefront led by a masculine way of thinking of the world. Cartesian objectivism was one of the leading philosophies at the time and laid the groundwork for the instrumental use of animals.⁵⁴ Animals were seen as mere machines, incapable of being living beings.⁵⁵ This is why modernity can be said to be anthropocentric in nature. Humanity denied any connection to nature. Patriarchy uses masculine psychological tools such as rationality to entrench their position as not only outside of but controllers of nature. Masculine thought dominated, suppressed and subdued any connection humanity had with the natural or the feminine. As a result, hyper-separations were created between human/nature and the masculine/feminine. Kant gave ethical and moral theories a masculine identity by aligning these theories with

⁵⁴ Singer (2002) 200.

⁵⁵ Singer (2002) 200.

rationality. Reason is used as a masculine tool to separate and dominate women and nature. This masculine modernity has shaped the current relationship humans have with nature. This relationship, as a result, has taken on a dualistic form, defining man as separate and opposite to nature.

In the third part of this part of this chapter, I look to ecofeminist theory which identifies dualisms as horizontal relationships between parties which have a hierarchical nature. We have to trace the cause of the human/nature dualism back to the hyper-separation caused by a masculine modernity. I identify this oppressive relationship as one of the main causes of the destruction of the environment. In the judgement of the *Kruger v MEA* case I look at how the relationship between humans and nature remains to this day in the form of the human/nature dualism because the judgement reinforces the hierarchal nature of the relationship. In order to remove the fragmented and hierarchical nature of the relationship, ecofeminist authors' call for an understanding of the relationship as one based on an understanding of the ecological interconnectedness between humanity and nature. Humanity is not separate from and controllers of nature but actually interconnected to, bound by and intertwined in the laws of nature

2.2 THE SOUTH AFRICAN LEGAL CONTEXT

The development of environmental law in South Africa is relatively recent.⁵⁶ Most of the law governing environmental relations are found in legislation and are generally area specific.⁵⁷ It is made up of framework legislation which ties the individual spheres of environmental law together.⁵⁸ The Constitutional also acts as a framework to environmental law and offers a right to the environment.⁵⁹ The constitution allocates responsibilities regarding environmental regulations to the

⁵⁶ M Kidd *Environmental Law* (2008) 20.

⁵⁷ Kidd (2008) 20. For example issue of pollution and conservation of wildlife.

⁵⁸ Kidd (2008) 20.

⁵⁹ The other sections of the Constitution which could apply to environmental law include; sec 38 *Locus Standi* clause, sec 33 Just administrative Action and sec 25 Property clause (both of which we see discussed in the *Kruger v MEA* case), sec 36 Limitation clause. Kidd (2008) 20 & 26 - 30.

different spheres of government.⁶⁰ Sec 24 of the Constitution offers a right to the environment.⁶¹

Everyone has the right -

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

This is known as a third generation or 'green' right.⁶² This means that it is a group right for the interests of the public at large rather than for specific individuals.⁶³ This right has two parts to it, the first part sec 24(a) makes up a fundamental human right, says Kidd, and the second sec 24(b) puts a positive duty on the state to take positive steps to fulfil the right.⁶⁴ The classification of part (a) as a human right is problematic as it will inherently result in the promotion of human interests above the interests of the environment.⁶⁵ Part (b) is problematic in the sense that it is phrased as a condition saying that the environment must be protected but that economic and social considerations must play an integral part in making that assessment.

Legal protection afforded to animals in South Africa is limited. Activities involving wild animals falls under the broader biodiversity and conservation framework legislation which is administered by the department environmental affairs.⁶⁶ Activities involving agricultural, laboratory and circus animals are regulated by legislation which is administered by the department of agriculture, forestry and

⁶⁰ Schedule 4 sets out the functional areas of concurrent national and provincial legislative competence and schedule 5 sets out the function areas of exclusive provincial legislative competence Kidd (2008) 20 & 31.

⁶¹ Kidd (2008) 20.

⁶² Kidd (2008) 21.

⁶³ Kidd (2008) 21.

⁶⁴ Kidd (2008) 22.

⁶⁵ This right is further discussed in chapter 3.

⁶⁶ The mission statement of the DEA says 'providing leadership in environmental management, conservation and protection towards sustainability for the benefit of South Africans and the global community'. Department of environmental affairs [https://www.environment.gov.za/aboutus/departments#mandate] (Accessed 5 November 2016).

fisheries.⁶⁷ This highlights the fragmented nature of animal protection in South Africa. Wild animals are seen as valuable resources, which has an economic value to the country and therefore protection and at the same time sustainable use thereof must be promoted. Other animals used for agricultural purposes, experimental testing and entertainment only have instrumental value and need only be protected against the causing of ‘unnecessary harm’ during the animal use activities. The Animals Protection Act is intended to prevent cruelty to animals which includes agricultural, domestic and wild animals in captivity.⁶⁸ Sec 1 defines the possible offences committed to an animal which includes for example overloads, ill-treats, neglects, maims or cruelly beats any animal.⁶⁹ The wording of the act is problematic in the sense that it refers to ‘destroying’ of an animal, which has its roots in the human mastery of nature and the animals-as-property paradigm.⁷⁰ This legislation is clearly a product of the animal welfare approach as it does not ban the use of animals but merely attempts to regulate the maltreatment of animals.

The legislation which regulates activities concerning wild animals comes from broader framework legislation.⁷¹ The National Environmental Management Act (NEMA)⁷² aims to give effect to the constitutional environmental right in sec 24 at a framework level.⁷³ Sec 2 provides an extensive list of internationally accepted principles which apply to actions affecting the environment.⁷⁴ Sec 3 provide for environmental implementation and management plans which includes procedures for co-operative governance.⁷⁵ The National Environmental Management Biodiversity Act (NEMBA) was enacted from the framework of NEMA in order to regulate issue of biodiversity and conservation.⁷⁶ This involves protecting certain species and eco-

⁶⁷ The mission statement of the DAFF says ‘Advancing food security and transformation of the sector through innovative, inclusive and sustainable policies, legalisation and programs. Department of agriculture, forestry and fisheries [<http://www.daff.gov.za/daffweb3/About-Us/Vision-and-Mission>] (Accessed 5 November 2016).

⁶⁸ Long title and sec 1 of Act.

⁶⁹ Sec 1(a) of the Act.

⁷⁰ Sec 5 of the Act.

⁷¹ Kidd (2008) 35.

⁷² Act 107 of 1998.

⁷³ Kidd (2008) 35.

⁷⁴ Kidd (2008) 35 – 36.

⁷⁵ Kidd (2008) 40.

⁷⁶ Kidd (2008) 102.

systems, sustainable and equitable sharing of national resources.⁷⁷ This act regulates activities connect to the rhinoceros as a wild animal which is part of a protected species on the Threatened or Protected Species Regulation (TOPS).⁷⁸ NEMBA is further discussed in chapter 3 as it forms an integral part of the *Kruger v MEA* case.

The last element of the South African environmental law context to discuss is the Convention on International Trade in Endangered species of Wild Fauna and Flora (CITES convention).⁷⁹ The purpose of this convention is to protect international trade of species does not cause the over-exploitation of endangered species. What is important to note is that the purpose this convention is to regulate trade and not to provide protection from extinction. This convention is made up of three appendixes.⁸⁰ Fauna and flora on Appendix I offers the highest protection and prohibits commercial international trade of species caught in the wild.⁸¹ Appendix II conveys responsibility to the respective state to regulate the trade of endangered species through a permit system.⁸² Appendix III merely contains a list of species brought forward by the state.⁸³ The black rhinoceros is currently on appendix I⁸⁴ and the white rhinoceros on appendix I and II to allow the live trade on animals to suitable and appropriate destinations and trophy hunting.⁸⁵

It is concerning that trophy hunting of white rhinoceros are still allowed during these harrowing times in the mists of a poaching epidemic. It shows just how distorted and disintegrated the relationship between humans and nature is. This relationship is as a result of a system which has a culture of oppression and separation. It can be seen subtly underling the animal protection approaches in

⁷⁷ Kidd (2008) 102.

⁷⁸ TOPS notice 255 of 2015. Norms and standards have also been published for the marking of rhinoceros horn, hunting of white rhinoceros for trophy hunting GN 756 in GG 32426 of 20 July 2009. Kidd (2008) 103.

⁷⁹ South Africa ratified this international convention 15 July 1975. Kidd (2008) 131.

⁸⁰ Kidd (2008) 131.

⁸¹ Kidd (2008) 131.

⁸² Kidd (2008) 131.

⁸³ Kidd (2008) 131.

⁸⁴ CITES [https://cites.org/eng/gallery/species/mammal/black_rhino.html] (accessed 10 November 2016).

⁸⁵ CITES [https://cites.org/eng/gallery/species/mammal/white_rhino.html] (accessed 10 November 2016).

the South African context. The roots of this culture can be traced back to the Enlightenment and the rise of modernity.

2.3 THE RISE OF MODERNITY AND MAN'S DOMINION OVER NATURE

The period of the Renaissance brought with it the rise of humanist thought, which by no means meant humanitarianism or acting humanly.⁸⁶ Humanist thought was the view that humans are the centre of the universe (anthropocentrism).⁸⁷ Descartes a distinctive modern thinker, was regarded as the father of modern philosophy.⁸⁸ Descartes says that everything made of matter has a mechanical existence.⁸⁹ Humans are also made of organic matter, does this make them machine like to?⁹⁰ Descartes was able to escape this unpalatable view by saying the difference lies in the fact that humans have an immortal soul.⁹¹ According to Descartes, within the universe, there are two categories of existence, on the one hand, beings that have a soul and on the other things which do not and have a mechanical physical nature.⁹² Humans are classified as beings which are conscious and who have a consciousness and thus are not purely made of matter but have an immortal soul which survives the decomposition of the matter.⁹³ Animals do not have an immortal soul nor are they conscious, they are seen as mere machines (automata) feeling no pain or pleasure.⁹⁴ The result of which is that humans are free of any moral responsibility when killing or harming animals, it can be done without any negative consequences.⁹⁵ The result of which is that Descartes's views endorsed the exploitation of animals by means of experimentation, vivisection and instrumental use. Experimentation and dissections of animals were a widespread

⁸⁶ Singer (2002) 198.

⁸⁷ Singer (2002) 198.

⁸⁸ Singer (2002) 200.

⁸⁹ Singer (2002) 200.

⁹⁰ Singer (2002) 200.

⁹¹ Singer (2002) 200.

⁹² Singer (2002) 200.

⁹³ Singer (2002) 200.

⁹⁴ Singer (2002) 200.

⁹⁵ Singer (2002) 200.

practice at this time.⁹⁶ There was no control measures or anaesthetics, so causing pain to animals was part and parcel of the era.⁹⁷ Some of the eye-witness accounts of these experiments at this time mention the convenience of Descartes theory of animals as mere machines incapable of feeling:

The [Cartesian] scientists administered beatings to dogs with perfect indifference and made fun of those who pitied the poor creatures as if they felt pain. They said the animals were clocks; that the cries they emitted were only the noise of a little spring that had been touched, but that the whole body was without feeling. They nailed the poor creatures up on boards by their four paws to vivisect them to see the circulation of the blood which was a great subject of conversation.⁹⁸

With the new ‘vogue’ wave of animal experimentation, an understanding emerged with some scholars of the similarities between the anatomy between humans and animals.⁹⁹ This led to criticism of the Cartesian objectivism theory as inconstant with these new discoveries.¹⁰⁰ Voltaire responded by saying that:

[T]here are barbarians who seize this dog, who so greatly surpasses man in fidelity and friendship, and nail him down to the table and dissect him alive, to show you the Mesaraic veins! You discover in him *all the same organs of feeling as in yourself*. Answer me, mechanist, has nature arranged all the springs of feeling in this animal *to the end that he might not feel?*¹⁰¹

There were no radical movements to improve the lives of animals at the time but there was a gradual recognition of an animal’s ability to feel pain and to suffer.¹⁰² David Hume’s theory developed during this time suggesting the ‘gentle usage’ of animals.¹⁰³ Essentially all this meant was that the use of animals continued to be acceptable but it had to be done ‘gently’. We will see in the third chapter that the ‘gentle use’ approach is not much different from the welfare approach of today.¹⁰⁴ Jean-Jacques Rousseau said that we must regain a ‘kinship with the beasts’ and see

⁹⁶ Singer (2002) 200.

⁹⁷ Singer (2002) 200.

⁹⁸ Quoted from L Rosenfeild *Beast-Machine to Man-Machine: The Theme of Animal Soul in French Letters From Descartes to La Mettrie* (1940). Singer (2002) 201-202.

⁹⁹ Singer (2002) 202.

¹⁰⁰ Singer (2002) 202.

¹⁰¹ Quoted from Voltaire *Dictionnaire philosophique* (first pub 1764). Singer (2002) 202.

¹⁰² Singer (2002) 202.

¹⁰³ Singer (2002) 202.

¹⁰⁴ Singer (2002) 202.

ourselves as part of nature once again.¹⁰⁵ This was in no way was a call for a more moral relationship with animals but rather the only intention was that we must reaffirm the human position as on top of the hierarchy in relation to with nature.¹⁰⁶ These thinkers were not alone, Christian religious scholars also promoted the idea of animals as inferior because they had no soul and thus subject to human will.¹⁰⁷ This hierarchical and masculine thought is a direct product of the enlightenment.¹⁰⁸ Kant was very much a part of this movement and is prominent in much of today's literature about morality and rationality.¹⁰⁹ Kant's lectures included the idea that we have no direct duties to animals, and of course the thought that animals are merely a means to an end, that ends being human beings.¹¹⁰

The rise of modernity resulted in the division of labour and the rise of capitalism.¹¹¹ This was the basis for the private and public sphere division, on the one hand, the private sphere defined as the woman's place at home and on the other the public sphere as space wherein men work and endure the struggle for survival.¹¹² This caused a separation between reason and emotion. Reason is seen as a masculine characteristic needed for the survival of men and emotion a feminine characteristic kept within the confines of the home.¹¹³ Science is a rational, masculine occupation, feels no empathy (a feminine characteristic) for its victim because to feel empathy for an animal (an irrational entity) is a 'futile occupation'.¹¹⁴

[In] their nauseating physiological laboratories [scientists] force [information] from defenceless [animals] ... the conclusion they draw from mutilated bodies [is that] ... because he does injury to animals, he and [him] alone in all creation voluntarily function... reason ... belongs to man. The animal ... knows only irrational terror. [But

¹⁰⁵ Singer (2002) 203.

¹⁰⁶ Singer (2002) 203.

¹⁰⁷ Singer (2002) 203.

¹⁰⁸ Singer (2002) 203.

¹⁰⁹ This is discussed further in fourth chapter where I will critique the Kantian theory of rationality in relation to the animal rights approach. Singer (2002) 203.

¹¹⁰ What is interesting is that during the time Kant was lecturing on his anthropocentric views of rationality in 1780, Jeremy Bentham was completing his work *Introduction to the Principles of Morals and Legislation* which contains one of the first references to the ability of animals to feel pain. Singer (2002) 203.

¹¹¹ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 362.

¹¹² Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 362.

¹¹³ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 362.

¹¹⁴ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 362.

the scientists feel no compassion for or empathy with his victims because] for rational beings to feel concern about an irrational creature is a futile occupation. Western civilisation has left this to women [through] the division of labour imposed by man.¹¹⁵

Donovan says that Descartes took this machine paradigm and developed the theory to the extreme.¹¹⁶ At the heart of his theory, was the idea that animals are 'feelingless, unconscious robots'.¹¹⁷ Susan Bordo says that the Cartesian paradigm is the ultimate masculinization of thought and that it is a reaction to get as far from feminine thought as possible.¹¹⁸ In terms of this theory, the 'organic female earth' becomes a mechanical entity which is not alive the only way of understanding 'it' is through the objectification of 'it'.¹¹⁹ Bordo goes on to say that modern scientific thought 'crystalized masculinist modes of thinking'.¹²⁰ James Hillman says that modernity created a specific form of consciousness as scientific and in creating this consciousness it has disposed of all that is feminine within it.¹²¹ The Cartesian project was rooted in the total separation from the natural and the feminine.¹²² The feminine becomes the other and from this position, the mastery and domination become a possibility.¹²³ The organic ties which once existed between man and nature are now reimagined as the man as the engineer of the separation.¹²⁴ 'She becomes 'it' and 'it' can now be understood, not through a sympathetic lens but by the objectification of 'it'.¹²⁵ This thinking has shaped the current relationship humans have with nature. The relationship, as a result, has taken on a dualistic form, defining man as separate and opposite to nature. I identify this oppressive relationship as one of the main causes of the destruction of the environment.

¹¹⁵ Quoted from Horkheimer & Adorno *Dialectic of Enlightenment* (1972). Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 362.

¹¹⁶ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 364.

¹¹⁷ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 364.

¹¹⁸ From Susan Bordo 'The Cartesian Masculinity of Thought' 3 *Signs* (1986). Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 364.

¹¹⁹ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 364.

¹²⁰ S Bordo 'The Cartesian Masculinity of Thought' (1986) 3 *Journal of Women in Culture and Society* 441.

¹²¹ Bordo 'The Cartesian Masculinity of Thought' (1986) 3 *Signs* 441.

¹²² The project was to be the 'father of oneself' phrased in the masculine, instead of the 'helpless child of a mother'. Bordo 'The Cartesian Masculinity of Thought' (1986) 3 *Signs* 451.

¹²³ Bordo 'The Cartesian Masculinity of Thought' (1986) 3 *Signs* 452.

¹²⁴ Bordo 'The Cartesian Masculinity of Thought' (1986) 3 *Signs* 452.

¹²⁵ Bordo says that the 'emotional response obscures objectivity, feelings for nature muddles the clear lake of the mind. The otherness of nature is now what allows it to be known'. Bordo 'The Cartesian Masculinity of Thought' (1986) 3 *Signs* 452.

2.4 HUMAN/NATURE: A DUALISTIC RELATIONSHIP

Modernity is inherently anthropocentric and has, as a result, othered the natural environment through masculine values such as rationality and power. Plumwood in her article suggests that masculine values promote a culture of separation through the fact that masculinity is equated to rationality and power whereas femininity is equated to values of emotion and weakness.¹²⁶ Reason is the tool that has been used over centuries to separate the human from nature and in so doing it has also contributed towards the obsession with the self.¹²⁷ This culture of separation has endorsed the instrumental use of animals. Plumwood says that modern environmental ethics are stuck within a modern masculine ethics paradigm which tries to address instrumentalism by making use of a theory of intrinsic value.¹²⁸ Regan refers this within the rights based approach.¹²⁹ According to the intrinsic value theory, all beings with intrinsic value must be treated equally, thus if humans and animals are both seen as beings with intrinsic value, they should be treated as being of equal worth, thereby in theory abolishing the instrumental use of animals.¹³⁰ Although this might address an aspect of the problem, it does not go to the root of the cause, which Plumwood points out, is the fact that humanity sees itself as separate and controllers of nature.¹³¹ The instrumental use of animals has been a result of this 'separate from nature' mind-set, thus this mind-set needs to be addressed in order to limit its damaging effects.¹³² Humanity sees this outside of nature position as advantageous as it provides a vantage point from which man can

¹²⁶ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 7.

¹²⁷ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 6.

¹²⁸ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 10.

¹²⁹ Regan (1983) 236.

¹³⁰ Regan (1983) 236.

¹³¹ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 10.

¹³² Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 10.

be the masters of nature.¹³³ It is an anthropocentric culture which reaffirms the human's position as outside of and distant from nature.¹³⁴ Modern anthropocentrism treats any difference from humanity as inferior which leads to the subordination of all parties who are seen as part of nature.¹³⁵ Nature is thought of the collection of whoever is more primitive than man, included in this category are women who are seen as less developed than their male counterparts.¹³⁶ Progress is then seen as the control of the barbaric non-rational state of nature by the rational male.¹³⁷ Plumwood calls this rational colonisation as she attempts to show it is a prominent feature of western modernity.¹³⁸ It relies on this power imbalance and need of western masculinity to dominate.¹³⁹

Plumwood makes reference to 'the difference imperative' in terms of which, all that is important in being human has to opposite to and completely different to animals.¹⁴⁰ This creates a dichotomy (dialectic) between humans on the one hand and nature on the other.¹⁴¹ This human vs nature (expressed as human/nature) dichotomy is known as a dualism.¹⁴² Modern masculine thinking entrenches power relations as dualisms which include, for example, human/nature, masculine/feminine, and rationality/emotion.¹⁴³ Similarities can be drawn from the human/nature dualisms to other dualisms to, for example, between the masculine/feminine.¹⁴⁴ Humanity is whatever is not natural and this view extends to the feminine too, humanity is

¹³³ This is a particularly western view but as Plumwood points out is not confined to the west. Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 10.

¹³⁴ Plumwood 'Decolonizing Relationships with Nature' in Ashcroft, Griffiths & Tiffen (eds) (2006) 504.

¹³⁵ Plumwood 'Decolonizing Relationships with Nature' in Ashcroft, Griffiths & Tiffen (eds) (2006) 504.

¹³⁶ Plumwood 'Decolonizing Relationships with Nature' in Ashcroft, Griffiths & Tiffen (eds) (2006) 503.

¹³⁷ Plumwood 'Decolonizing Relationships with Nature' in Ashcroft, Griffiths & Tiffen (eds) (2006) 503.

¹³⁸ Plumwood 'Decolonizing Relationships with Nature' in Ashcroft, Griffiths & Tiffen (eds) (2006) 503.

¹³⁹ Plumwood 'Decolonizing Relationships with Nature' in Ashcroft, Griffiths & Tiffen (eds) (2006) 504.

¹⁴⁰ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

¹⁴¹ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

¹⁴² Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

¹⁴³ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 6.

¹⁴⁴ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 11.

whatever is not feminine, which shows a clear masculine tendency.¹⁴⁵ The characteristics which are likened to humans are rationality and freedom which is not shared with nature.¹⁴⁶ It is an anthropocentric culture which reaffirms the human's position as outside of and distant from nature.¹⁴⁷

Ecofeminist literature shows us that each of these dualisms have two things in common. Firstly it represents an unequal relationship, one side of the dualisms is always seen as more valuable than the other.¹⁴⁸ Secondly the fact that the valued half is always the masculine form.¹⁴⁹ This is why the human/nature dualism can be called a hyper-separation which means that it extends way past the mere dichotomy but it is rooted in the fact that the dominant entity (humanity) is completely opposite to the subordinate entity (nature).¹⁵⁰ The human/nature dichotomy is maintained through the rejection and total denial of the similarities between humans and animals.¹⁵¹ There are no shared similarities but only sharp distinctions between what makes us humans versus them as animals.¹⁵² Dualistic power relationships divides the world into sets of opposites.¹⁵³ It is this the western, modern, masculine view of the world that has led to a dualistic relationship with nature, endorsed by the rationalist paradigm.¹⁵⁴ The root of the dualistic way of thinking can be traced back to a mechanical view promoted by modern science.¹⁵⁵

This hyper-separation has contributed to the modern view that humans are separate from and controllers of nature when actually the truth of the matter is that

¹⁴⁵ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 11.

¹⁴⁶ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

¹⁴⁷ Plumwood 'Decolonizing Relationships with Nature' in Ashcroft, Griffiths & Tiffen (eds) (2006) 504.

¹⁴⁸ M Kheel 'The Liberation of Nature: A Circular Affair' in J Donovan & A Carol (eds) *The feminist ethic of care tradition in Animal ethics* (2007) 40.

¹⁴⁹ Kheel 'The Liberation of Nature: A Circular Affair' in Donovan & Carol (eds) (2007) 40.

¹⁵⁰ Plumwood 'Decolonizing Relationships with Nature' in Ashcroft, Griffiths & Tiffen (eds) (2006) 504.

¹⁵¹ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

¹⁵² Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

¹⁵³ Kheel 'The Liberation of Nature: A Circular Affair' in Donovan & Carol (eds) (2007) 39.

¹⁵⁴ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 10.

¹⁵⁵ Kheel 'The Liberation of Nature: A Circular Affair' in Donovan & Carol (eds) (2007) 40.

humans are part of, bound by and intertwined in the laws of nature.¹⁵⁶ Ecofeminism aims to promote healthy relationships based on the value of care to remove the legacy of domination.¹⁵⁷ Dualistic thinking endorses the oppression of nature and disintegrates the relationship by entrenching the dominant/inferior.¹⁵⁸ Feminist care tradition is critical in challenging dualistic thinking by removing not only the human/nature but also the reason/emotion dichotomy.¹⁵⁹ In the place of a dualistic world view which is fragmented and hierarchical, feminist theory proposes in its place a holistic view of the world wherein everything is interconnected and part of the 'whole' earth.¹⁶⁰ Much of the environmental literature which currently exists reinforces the hierarchical characteristic to the current relationship by promoting the idea that for humanity to benefit, nature must lose, thus reinforcing the dualist thought.¹⁶¹ This is what the *Kruger v MEA* judgement continues to reinforce by stating that interests of the applicants to the case, as business owners must be a priority because of their economic loss caused by the Moratorium.¹⁶² Human interest which most of the time take for form of economic considerations are placed above the interests that the rhinoceros has in being protected from dehorning and poachers.¹⁶³

Addressing this dualistic paradigm is not as simple as just elevating the status of nature within the hierarchy to an equal level of humanity but it actually comes down to a total re-evaluation of the way we see and treat nature.¹⁶⁴ As seen in the discussion above modernity has its roots in an objectification of nature and a separation of the human from nature. This has created a culture of separation and domination which led to the hierarchical relationship we have not only with animals but with nature as a whole. Plumwood suggests that if one frees humanity from the

¹⁵⁶ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

¹⁵⁷ C Adams & L Gruen 'Introduction' in C Adams & L Gruen (eds) *Ecofeminism: Feminist Intersections with other Animals & the Earth* (2014) 1.

¹⁵⁸ Adams & Gruen 'Introduction' in Adams & Gruen (eds) (2014) 2.

¹⁵⁹ Adams & Gruen 'Introduction' in Adams & Gruen (eds) (2014) 3.

¹⁶⁰ Kheel 'The Liberation of Nature: A Circular Affair' in Donovan & Carol (eds) (2007) 40.

¹⁶¹ Kheel 'The Liberation of Nature: A Circular Affair' in Donovan & Carol (eds) (2007) 41.

¹⁶² See further chapter 3.1.3. *Kruger v MEA* (2015) para 34.

¹⁶³ See further chapter 3.1.3. *Kruger v MEA* (2015) para 34.

¹⁶⁴ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 17.

dualistic legacy of rationality we may be in a position to reconceptualize what it means to be human, as no longer separate from but interconnected to nature.¹⁶⁵ To say that humans are part of nature does not sufficiently get the point across that humans are more than just a part of nature, they are subject to the laws of nature and their entire existence is interconnected with the biosphere of the earth.¹⁶⁶ Marti Kheel quotes the following:

A new understanding of life must be systematic and interconnected. It cannot be linear and hierarchical, for the reality of life on earth is a whole, a circle, an interconnected system in which everything has its part to play and [must] be respected and accorded dignity.¹⁶⁷

Ecofeminists often depicts the relationship between humans and the natural environment in the form of a web.¹⁶⁸ The image of a web shows the interconnectedness and interdependence within this relationship.¹⁶⁹ Part of the journey to a relationship with animals built on an ethic of care is to challenge the dualistic and anthropocentric relationship we currently have with nature, through a realisation that we are interconnected to nature and that all our actions have an effect. A relationship base on an interconnectedness discredits the modern masculine theory that man is separate from nature and thus entitled to dominate over it.¹⁷⁰ It rejects anthropocentrism in favour of a harmonious relationship between the web of beings.¹⁷¹ Placide Temples said 'the world of forces is like a spider web, of which one single thread cannot be caused to vibrate without shaking the whole net web'.¹⁷² In order to preserve our delicate web of life we need an ecofeminist reconstruction of the human-nature relationship. It is vitally important that we develop an environmental culture of care and respect in order to ensure the survival of all

¹⁶⁵ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 17.

¹⁶⁶ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

¹⁶⁷ From E. D. Gray *Green paradise lost* (1979). Kheel 'The Liberation of Nature: A Circular Affair' in Donovan & Carol (eds) (2007) 39.

¹⁶⁸ R King 'Caring about Nature: Feminist Ethics and the Environment' (1991) 6 *Hypatia* 77.

¹⁶⁹ King 'Caring about Nature: Feminist Ethics and the Environment' (1991) 6 *Hypatia* 77.

¹⁷⁰ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 12-13.

¹⁷¹ K Behrens *African Philosophy, Thought and Practice, and their contribution to Environmental Ethics* (2011) (DLitt) Thesis 33.

¹⁷² B Bujo 'Ecological and Ethical Responsibility from an African Perspective' in MF Murove (ed) *African Ethics: an Anthology of Comparative and Applied Ethics* (2009) 282.

beings. Survival of the human species is dependent on the wellbeing of all beings in the web of life.¹⁷³ Bènèzet Bujo says that the existence of earth is a circle of life and death and this tension does not affect humans alone.¹⁷⁴ All beings in the universe possess a 'vital force of life' and there is a constant interaction between all beings in the web of beings (cosmos) at all times.¹⁷⁵ Human survival is dependent on and connected to the cosmos.¹⁷⁶ It is to this web that humans are not only connected but also dependent on for survival.¹⁷⁷ Humans play only but a small part of this web of creation, a 'microcosm within in a microcosm' - a tiny part in a bigger picture of life.¹⁷⁸ The salvation of the human species is connected to the survival of the cosmos.¹⁷⁹ Existence is fragile, if the cosmos is neglected or harmed, human existence too will cease to exist.¹⁸⁰ Destruction of the cosmos means self-destruction.¹⁸¹

A new environmental culture must replace the current culture of separation which has endorsed the human/nature and reason/emotion dualisms.¹⁸² An example of a new environmental culture can be found in the South American legal system which created rights for the Pachamama (Mother Nature).¹⁸³ The Pachamama a

¹⁷³ This is a very important intersectional social justice issue. The wellbeing of the water, soil, plants, animals and humans are all interdependent on each other.

¹⁷⁴ Bujo 'Ecological and Ethical Responsibility from an African Perspective' in Murove (ed) (2009) 282.

¹⁷⁵ Bujo 'Ecological and Ethical Responsibility from an African Perspective' in Murove (ed) (2009) 282.

¹⁷⁶ Bujo 'Ecological and Ethical Responsibility from an African Perspective' in Murove (ed) (2009) 282.

¹⁷⁷ Bujo 'Ecological and Ethical Responsibility from an African Perspective' in Murove (ed) (2009) 282.

¹⁷⁸ Bujo 'Ecological and Ethical Responsibility from an African Perspective' in Murove (ed) (2009) 282.

¹⁷⁹ African philosophy is characterized by the interrelationships it shares with the cosmos. Bujo 'Ecological and Ethical Responsibility from an African Perspective' in Murove (ed) (2009) 282.

¹⁸⁰ Bujo 'Ecological and Ethical Responsibility from an African Perspective' in Murove (ed) (2009) 285.

¹⁸¹ Bujo says that it will ultimately result in suicide. He makes reference to New Guinea, where the timber industry is destroying the rain forests, the forests are our life source to plants, animals and humans alike. A proverb from New Guinea says 'The forest is our skin and if one removes the skin of a (human) being, the end result is death'. These destructive practices are products of western rationality which is rooted in the values of masculine domination over nature. Bujo says 'whosoever wishes only to greedily consume, even destroy nature's last secret with no care for conservation, becomes a murderer and ultimately commits suicide'. Bujo 'Ecological and Ethical Responsibility from an African Perspective' in Murove (ed) (2009) 285.

¹⁸² V Plumwood *Environmental culture* (2002) 4.

¹⁸³ The wonderful thing about this law is that it requires all existing laws to adapt themselves in order to comply with the Pachamama principles and it requires public policy to be based on us living in harmony with nature instead of the current consumer orientated mind-set. The Pachamama principle requires a total mind-set change on behalf of the Bolivian society (and humanity in general) as well the economy in favour nature and cosmic harmony. Essentially this means that there has to be a

holistic cosmological approach can challenge the current separate from nature mind-set.¹⁸⁴ The law of the rights of Mother Earth, passed by the Bolivian Assembly in 2010 contains seven specific rights.¹⁸⁵ These include; the right to life, clean air, equilibrium, diversity of life, clean water, restoration, live free of contamination.¹⁸⁶ This declaration is based on indigenous principles which states that Mother Earth (Pachamama) is a sacred home to all entities within the cosmos.¹⁸⁷ Furthermore the declaration states that 'Mother Earth is a living dynamic system made up of undivided community of all living beings, who are interconnected, interdependent and complementary sharing in a common destiny'.¹⁸⁸ Vandana Shiva who was part of the team who drafted the declaration said 'separateness is the disease of the past' and for this reason the declaration enforces the principles of interconnectedness and interdependency.¹⁸⁹ The Pachamama is recognised as a living being with which we have this interconnected and even spiritual relationship.¹⁹⁰ The main aim of the declaration is to remove the separate, dualistic and patriarchal mind-set.¹⁹¹ It challenges the western 'colonisation of nature', whereby the Pachamama is only seen as valuable as its collection of raw materials.¹⁹² This is true for the *Kruger v*

drastic shift in all operations which will infringe on the Pachamama principle. This declaration has been called 'the most radical environmental bill in global history'. The declaration affirms the nature-women connection. The declaration, as well as promoting feminine values also rejects the western way of thinking about the relationship with nature being one of control. N Thomas & P Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *Journal of Economics and development studies* 45 - 49.

¹⁸⁴ Thomas & Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *JEDS* 45.

¹⁸⁵ Thomas & Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *JEDS* 45.

¹⁸⁶ Thomas & Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *JEDS* 45.

¹⁸⁷ Thomas & Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *JEDS* 45.

¹⁸⁸ Thomas & Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *JEDS* 45.

¹⁸⁹ Thomas & Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *JEDS* 48.

¹⁹⁰ Thomas & Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *JEDS* 48.

¹⁹¹ Thomas & Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *JEDS* 48.

¹⁹² Thomas & Bhardwaj 'An Ecofeminist and Marxist Analysis on the Bolivian Declaration for the Rights of Mother Earth' (2013) 1 *JEDS* 49.

MEA, the value of a rhinoceros is solely determined according to the economic value of rhinoceros horn to the rhinoceros farmers.¹⁹³

A feminist ethic of care tradition which requires humans to move away from the masculine way of thinking about our relationship with animals (as an unequal power relationship) towards a more feminine approach in which caring for and respecting nature, therefore it will allow us to challenge the masculine values of power and rationality because it is rooted in feminine characteristics of care, kindness and compassion.¹⁹⁴ In the final chapter of this dissertation we will see that ecofeminism provides us with the tools to challenge the *status quo* because it considers how to develop a relationship with nature which allow the voice of an animal to be heard. Dualistic thinking endorses oppression and disintegrates our relationship with nature by entrenching the inferior other upheld against the dominant.¹⁹⁵ Therefore it is imperative that this relationship we have with nature has to change, from one rooted within a dualistic paradigm, seeing these two entities as and separate an opposite, to one based on the realisation that we are not separate from but actually interconnected to the laws of nature. A new relationship must take on a human within nature identity.

2.5 CONCLUSION

In this chapter, I traced man's dominion of nature back to the rise of modernity and the enlightenment. Scientific experimentation, vivisection and the instrumental use of animals were at the forefront of this era. The masculine and anthropocentric nature of modernity, led to men denying any connection to nature, using psychological tools such as rationality and power to entrench their position as not only outside of but also controllers of nature. Modernity has its roots in an objectification of nature and a separation of the human from nature. This caused the human/nature relationship to take on a dualistic form. Modernity created a culture of separation between, masculine/feminine and human/nature and the reason/emotion.

¹⁹³ See further Chapter 3.4. *Kruger v MEA* (2015) para 71&72.

¹⁹⁴ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 8.

¹⁹⁵ Adams & Gruen 'Introduction' in Adams & Gruen (ed) (2014) 2.

These power relationships are hierarchical in nature causing a dominant/subservient and superior/inferior nature to the relationship.

Ecofeminist literature enables us challenge the hierarchical structure created by these dualisms. It calls for the relationship to be cognisant of an ecological interconnectedness between humanity and nature. Interconnectedness discredits the theory that man is separate from nature and thus are entitled to dominion over nature.¹⁹⁶ It rejects anthropocentrism and denies human dominion over nature in favour of a harmonious relationship which takes the organic nature of the earth into consideration.¹⁹⁷

This chapter highlights the historical underpinnings, ideas and assumption that ultimately forms and shapes the law. There is a call to rethink humanity's relationship with the environment. This entails the rethinking of ways of doing, being and seeing produced by a history of human conceptual and philosophical thinking. It is the rethinking of entire value systems acquired through a history of habit. The Cartesian paradigm has created a masculine and anthropocentric legacy which is perpetuated by the current animal protection theories of animal welfare and animal rights approach. An anthropocentric legacy can be seen in the judgement of the *Kruger v MEA* case where the judgement reinforced the hierarchal nature of the human/nature relationship. The animal welfare approach and the judgement of the case is discussed in the next chapter.

¹⁹⁶ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 12-13.

¹⁹⁷ Behrens *African Philosophy, Thought and Practice, and their contribution to Environmental Ethics* (2011) 33.

CHAPTER 3: *KRUGER AND ANOTHER V MINISTER OF ENVIRONMENTAL AFFAIRS & OTHERS AND THE ANIMAL WELFARE APPROACH*

3.1 INTRODUCTION

In the previous chapter, I traced the culture of separation of humanity from nature back to the enlightenment. The Cartesian masculinity of thought endorsed man's dominion over nature. The belief that man is separate from and the controllers of nature has resulted in the disintegrated relationship that currently underlies animal protection approaches. The *Kruger v MEA* judgement shows us that the anthropocentric legacy of a masculine modernity still underpins the relationship between humans and nature today.

In the first part of this chapter I will look at the case of *Kruger v MEA*. In the judgement, the moratorium on the domestic rhinoceros horn trade was set aside based on noncompliance with the rules of administrative law. The judgement looks at the rights of the applicants and the right to the environment in making the decision. The judge starts the judgement with a quote which calls for animal welfare to be the overarching solution for animal protection. In the second part of this chapter, I look at the shortcomings of the animal welfare approach. Animal welfare, as a derivative of the utilitarian theory, allows humans to maintain a system of utility of animals as long as practices do not cause 'unnecessary suffering' to the animals. An animal use practice is deemed acceptable if it has the most benefit to the least harm ratio. This is determined by weighing up and balancing of each parties interests (human benefit to animal harm ratio). This weighing up of interests ultimately results in a mathematical quantification and justification of suffering says Donovan. Francione points out that the welfare system sees animals as having had less moral value than humans which endorses the instrument use of animals and the animals as property paradigm. Welfare is seen as an ethical defence for not only use of but also the killing of animals. In the last part of this chapter I look at how *Kruger v MEA* case entrenches the dualistic relationship humans have with nature by endorsing an

anthropocentric interpretation of laws which frustrate efforts to protect nature. I also look at how this case is an example of the commodification of nature.

3.2 KRUGER AND ANOTHER V MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS CASE OVERVIEW

3.1.1 FACTS OF THE CASE

In this case, the applicants, both wealthy males Kruger¹⁹⁸ and Hume challenged the moratorium which was placed on domestic trade of rhinoceros horn in 2009.¹⁹⁹ The applicants questioned whether there was sufficient consultation of the necessary parties by the minister of environmental affairs when the moratorium was proposed.²⁰⁰ This enquiry is based on sec 3 of the Promotion of Administrative Justice Act (PAJA)²⁰¹ and sec 33(1) of the Constitution.²⁰² In terms of PAJA sec 3(2)(b) in order to give effect to the right to procedurally fair administrative action the minister must give notice to the person whose rights are materially and adversely affected by the administrative action.²⁰³ The minister must give a clear statement of the intended administrative action,²⁰⁴ give adequate notice of the nature of the purpose of the administrative action,²⁰⁵ and allow reasonable opportunity for affected parties to make representations.²⁰⁶ Hume put forward that because he is a breeder of one of the largest populations of rhinoceros in the world he was entitled to receive

¹⁹⁸ Kruger is also challenging other amendment made to TOPS in paras 76-86 of the case. I mention this in order to give a complete overview of the case but the discussion of the TOPS amendments in those paragraphs are not relevant for purposes of my discussion of the case. *Kruger v MEA* (2015) para 3.

¹⁹⁹ Notice 148 and 170 of 13 February 2009. *Kruger v MEA* (2015) para 3.

²⁰⁰ *Kruger v MEA* (2015) para 3.

²⁰¹ Act 3 of 2000. Sec 3 deals with deals procedurally fair administrative action affecting any person. *Kruger v MEA* (2015) para 6.

²⁰² In terms of sec 33 (1) of the constitution 'Everyone has the right to administrative action which is lawful, reasonable and procedurally fair'. *Kruger v MEA* (2015) para 6.

²⁰³ Person as contemplated in s1 of PAJA. *Kruger v MEA* (2015) para 6.

²⁰⁴ Sec 3(2)(b)(iii) of PAJA. *Kruger v MEA* (2015) para 6.

²⁰⁵ Sec 3(2)(b)(i) of PAJA. *Kruger v MEA* (2015) para 6.

²⁰⁶ Furthermore in terms of sec 3(2)(b)(iv) adequate notice must be given of the right of review or internal appeal and sec 3(2)(b)(v) adequate notice of the right to request reasons (in terms of sec 5). *Kruger v MEA* (2015) para 6.

such notice of the proposed moratorium, but these above mentioned procedures were not followed.²⁰⁷ Hume also contended that his rights in terms of sec 22 of the Constitution, to choose ones trade and sec 25, the right to property, were adversely affected by the imposition of the moratorium.²⁰⁸ The minister responded by stating that in terms of sec 3(5) of PAJA that the minister at the time was empowered to follow a different procedure than that prescribed in sec 3(2)(b).²⁰⁹ The consultation process prescribed for the moratorium was to be found in in sec 99 (consultation) and sec 100 (participation of the public) of NEMBA.²¹⁰ Included in sec 100(1)(b) is the requirement to give notice 'in at least on newspaper distributed nationally' which the minister is said not to have done.²¹¹

Sec 2 of NEMBA says that the acts objectives are the management and conservation of biological biodiversity in South Africa, ensure the sustainable use of

²⁰⁷ Hume has about 1124 Rhinoceros (mostly comprising of white rhinoceros and a small number of black rhinoceros). He also has in his possession 4000kg of rhinoceros horn which he says he obtained in a legal manner from the dehorning of his own rhinoceros *Kruger v MEA* (2015) para 7.

²⁰⁸ The moratorium has adversely affected the right to choose ones trade. *Kruger v MEA* (2015) para 7.

²⁰⁹ Sec 3(5) of PAJA 'where the administrator is empowered by any empowering position to follow a procedure which is fair but different from the position in (2), the administrator may act in accordance with that difference procedure'. *Kruger v MEA* (2015) para 8.

²¹⁰ Sec 99 of NEMBA – Consultation

(1) Before exercising a power which, in terms of a provision of this Act, must be exercised in accordance with this sec and sect100, the Minister must follow an appropriate consultative process in the circumstances.

(2) The Minister must, in terms of subsec (1)- (a) consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power; (b) in accordance with the principles of co-operative governance set out in Chapter 3 of the Constitution, consult the MEC for Environmental Affairs of each province that may be affected by the exercise of the power; and each province that may be affected by the exercise of the power; and (c) allow public participation in the process in accordance with sec 100.

Sec 100 of NEMBA – Public Participation

(1) The Minister must give notice of the proposed exercise of the power referred to in sec 99- (a) in the Gazette; and (b) in at least on newspaper distributed nationally, or if the exercise of the power may effect only a specific area, in at least one newspaper distributed in that area.

(2) The notice must- (a) invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and (b) contain sufficient information to enable members of the public to submit meaningful representations or objections.

(3) The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person designated by the Minister. The Minister must give due consideration to all representation or objection received or presented before exercising the power. *Kruger v MEA* (2015) para 12.

²¹¹ *Kruger v MEA* (2015) para 13.

biological resources, furthermore giving effect to ratified international agreements which are binding on the country.²¹² The question is whether these objectives are rooted in the conservation of biodiversity or if they are limited by economic considerations. These objectives are framed in such a way that they are in the interest of protection of biodiversity, but the applicants use the section (99 and within this act) to defeat the aim of these objectives, protection of nature. Sec 3 of NEMA states that the state must fulfil the rights in terms of sec 24 in the Constitution²¹³ and through its state organs manage, conserve and sustain biodiversity and implement the act in order to achieve the progressive realisation the rights.²¹⁴

3.1.2 APPROPRIATE CONSULTATION ON THE MORATORIUM

The judge said that even though the minister did not give proper notice of the intended moratorium ‘in at least one newspaper distributed nationally’, the minister contends that there was substantial compliance with sec 99 and 100 on the following grounds; the proposal on the moratorium was submitted to working group MINTECH,²¹⁵ there was unanimous support by minister and members of the department of environmental affairs,²¹⁶ information regarding the proposal was tabled in the National council of provinces,²¹⁷ the department informed the wildlife forum that the moratorium was under consideration and a draft notice would be

²¹² Sec 2(iii) of NEMBA makes mention to ‘the fair and equitable sharing amongst stakeholders of benefits arising from bioprospecting involving indigenous biological resources’, which makes me question whether the interests of the environment are taken into consideration during such a discovery (interests of the environment in her own resources) or whether it comes down to an enquiry of economic interests. *Kruger v MEA* (2015) para 10.

²¹³ *Kruger v MEA* (2015) para 16.

²¹⁴ *Kruger v MEA* (2015) para 11.

²¹⁵ MINTECH (Working Group IV on Compliance and Enforcement) established in terms of Intergovernmental relations framework act 13 of 2005. It is an intergovernmental body comprised of individuals from provincial environmental affairs departments and CEOs of provincial conservation authorities or entities including members from South African National Parks and Minister and Department and members from other governmental departments with functional areas which are involved. *Kruger v MEA* (2015) para 13.1.

²¹⁶ *Kruger v MEA* (2015) para 13.2.

²¹⁷ During the Budget speech 2008. *Kruger v MEA* (2015) para 13.3.

published for public participation.²¹⁸ The department thus considers this consultation of the wildlife form and wild game ranching association (WRSA) as reasonable and appropriate methods to reach their members because the forum was established to facilitate these type of discussions.²¹⁹ Furthermore, the constitution WRSA specifically mentions that the organisations objective includes the duty to act as a national representative of the wildlife ranching industry in SA and in so doing protect the interests of the industry and to act as the national negotiator between the governmental department, industry and other stakeholders.²²⁰ Thereafter information regarding the proposed moratorium was published in at least six media platforms including newspaper articles, internet articles and newsletters, a workshop was held on the implementation of the proposed moratorium.²²¹ In August 2008 a draft moratorium notice was published in a Government Gazette for public comment.²²² The moratorium notice was promulgated on the 13 of February 2009.²²³

The Judge had to weigh up what was an appropriate consultative process under the circumstances by looking at sec 24 of the constitution.²²⁴ This section states that this right to the environment is available to ‘everyone’ and not just one small elite part of the population and for this reason, the right to consultation and public participation (sec 99 and sec 100 of NEMBA) must be read with is in mind.²²⁵ David Bilchitz suggests in his article *Does Transformative Constitutionalism require the recognition of animal rights* that the term ‘everyone’ in the bill of rights should include the inclusion of the animal species if we had a transformative interpretation of the constitution.²²⁶ This opens the question of whether, if considering the value of a moratorium to the animal species whether ‘everyone’ can be said to have the

²¹⁸ The Wildlife Form was made up of environmental stakeholders, established to facilitate consultation on environmental issues between the Department and the wildlife Industry. Kruger and Hume are both members of the wild game ranching association of South Africa (WRSA), who are a member of the forum and who were consulted *Kruger v MEA* (2015) para 13.4.

²¹⁹ *Kruger v MEA* (2015) para 13.4.1

²²⁰ *Kruger v MEA* (2015) para 13.4.2.

²²¹ WRSA attended. *Kruger v MEA* (2015) para 13.5 & 13.6.

²²² Government gazette notice 31301 notice 835. *Kruger v MEA* (2015) para 13.7.

²²³ Government gazette notice 148. *Kruger v MEA* (2015) para 13.8.

²²⁴ *Kruger v MEA* (2015) para 14 & 16.

²²⁵ *Kruger v MEA* (2015) para 17.

²²⁶ D Bilchitz ‘Does transformative constitutionalism require the recognition of animal rights’ (2010) 25 *South African Journal of Public Law* 279. However as this is a modern, western interpretation of the modern legal system, this line cannot be reconciled with my project in this LLM.

benefit of this right. Furthermore sec 24 confirms and strengthens the welfare trend in South Africa's legal system by suggesting that we must secure our ecology, ensure sustainable development and use of natural resources (the only reason why we have natural resources is because welfare condones the instrumental use of nature as long as it is done in a manner that does not inflict unnecessary harm) but the problem comes in with the fact that the section is worded to form a condition as the last part of sec 24 which says 'while promoting justifiable economic and social development'. So essentially this boils down to the protection of nature (and I use the word lightly here because it is limited to a welfare based protection) must only be fulfilled while anthropocentric interests are promoted.

The judge said that in light of sec 24(b)(iii) the notice regarding the proposed moratorium must be published in one newspaper to allow for public participation is a minimum requirement and has not been fulfilled by the Minister.²²⁷ Furthermore, the judge said that the failure to comply with this minimum requirement should have resulted in the initial invalidity of the moratorium.²²⁸ The notice in the government gazette came after the decision to implement the moratorium, the publishing of articles and that consulting WRSA (as mentioned above) did not render the minimum requirement of a notice inviting submissions to the minister superfluous.²²⁹ Therefore there was no valid implementation of the moratorium.²³⁰

3.1.3 NOTICES AND PUBLICATIONS OF ANNOUNCEMENT AND IMPLEMENTATION OF THE MORATORIUM

²²⁷ The newspaper can either be a nationally distributed one or if the issue deals with a specific group, distributed in their area. *Kruger v MEA* (2015) para 18 & 19.

²²⁸ The judge referred to the *Poala V Jeeva NO & Others* 2004 1 SA 396 (SCA). The judgement of this case para 14 -16 states the recommendation of a building control officer is needed prior to the approval of building plans. The fact that this approval was not is was not present meant that the jurisdictional elements which are needed for the valid compliance with the statute was not complied with. Thus there was no valid approval of the plans. *Kruger v MEA* (2015) para 21 & 22.

²²⁹ Sec 100(2)(b) of NEMBA above. In order for power to be exercised in terms of sec 99(1) all the jurisdictional factors have to be complied with as noted in *Poala V Jeeva case* above. *Kruger v MEA* (2015) para 22.

²³⁰ Absence of compliance with this section means the power exercised in terms of the act did not exist. *Kruger v MEA* (2015) para 22.

The judge then addressed the content of the notice which was published in the government gazette. The notice must be of such a nature that it ‘contains sufficient information to enable members of the public to submit meaningful representations or objections’.²³¹ The intended objectives of the moratorium are to reduce the flow of rhinoceros horn to the international market and in so doing also reduce the demand and it is intended to support compliance with the international ban through CITES which may result in the reduction of poaching.²³² These objectives were not voiced in the notice published, and as a result, the judge said that the members of the public could not offer meaningful representations in that regard.²³³ Therefore the Judge concluded that the notice failed to meet the requirements set out in the act.²³⁴ The judge points out in his judgement that rhinoceros breeders such as Hume and Kruger and other business owners ought to have been prioritised as parties would be affected by the moratorium.²³⁵ The minister also put forward that publications in the media was part of the process of public involvement.²³⁶ The judge thus concludes that the moratorium should be reviewed and set aside.²³⁷ In making this ruling the judge is, by prioritising business owners, showing a bias towards human interests based on economic considerations. The fact that groups who are supposed to have environmental interests at heart, such as SAN Parks, WRSA and the wildlife form, were consulted through the process seems to be of no importance.

²³¹ This would include meaningful reasons, motivation and background. *Kruger v MEA* (2015) para 25.

²³² International Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to which South Africa is a signatory. *Kruger v MEA* (2015) para 27 & 28.

²³³ *Kruger v MEA* (2015) para 30.

²³⁴ The notice requirements are set out in Sec 100(2)(b). *Kruger v MEA* (2015) para 30.

Sec 100(3) states that there should be an opportunity for oral representations, the minister has the duty to provide a platform for such discussions which the judge says the minister did not. The minister put forward that there was a roadshow to engage with parties on the TOPS regulation, workshops were held, invitations to meeting published in newspapers. There was some ambiguity as to the TOPS regulations but comments were noted and amendments to the regulations were made thereafter. *Kruger v MEA* (2015) para 31&32.

²³⁵ Issues of economic loss and right to freedom of trade. *Kruger v MEA* (2015) para 34.

²³⁶ Cape Argus Newspaper (Kruger and Hume put forward the decision to impose the moratorium already taken), Cape Times Publication (western province), Newsletter, Mercury Publication (KZN publication), Daily New Publication (daily publication in KZN) but in each there was no invitation for public participation. *Kruger v MEA* (2015) para 35.

²³⁷ Empowering legislation is sec 57(2)(a) of NEMBA which states that the minister is empowered to, by notice in the government gazette, prohibit any activity which negatively impacts on the survival of a listed / endangered species. This section provides specifically for listed, threatened or protected species to which an international agreement regulating international trade applies *Kruger v MEA* (2015) para 44.

3.1.4 GROUNDS OF REVIEW: RATIONALITY

The rationale behind the moratorium is to reduce the flow of rhinoceros horn to the international market and in so doing also reduce the demand secondly compliance with the international ban through CITES and lastly making smuggling and poaching crimes easier to prosecute.²³⁸ Kruger and Hume propose that imposing the moratorium was irrational because it is unable to reduce rhinoceros poaching.²³⁹ The judge says that the test in terms of the rationality enquiry is whether 'imposing a moratorium, is related to the public good it seeks to achieve' taking into consideration sec 24 of the Constitution and sec 57(2) (empowering provision) of NEMBA.²⁴⁰ Firstly the objectives did not mention that there would as a result of the moratorium be no rhinoceros poaching and even if the moratorium has not constituted to the reduction of rhinoceros poaching, it would not make the imposition irrational.²⁴¹ There need only be a rational objective justifying the decision.²⁴² There is thus no reason to find that the moratorium is irrational.²⁴³

3.1.5 GROUNDS OF REVIEW: REASONABLENESS

Reasonableness is not an enquiry as to what a more 'desirable' solution is but only whether the measures are reasonable.²⁴⁴ The minister put forward that the export of rhinoceros horn is not solely as a result of illegal poaching but also from domestic sales which make their way into international markets which contravenes

²³⁸ Heads of Argument by the Minister as to why the moratorium is rational and reasonable. *Kruger v MEA* (2015) para 45.

²³⁹ *Kruger v MEA* (2015) para 47.

²⁴⁰ Taken from Moseneke DCJ's judgement in *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (cc) para 35. *Kruger v MEA* (2015) para 46.

²⁴¹ *Kruger v MEA* (2015) para 50.

²⁴² *Kruger v MEA* (2015) para 51.

²⁴³ The judge emphasises the important issue of separation of powers and that should not interfere with the decision simply because it disagrees with it *Pharmaceutical Manufactures Association of SA and Another: In re ex parte President of RSA and Others* 2000 (2) SA 674 (CC) para 90 Chaskalson CJ.

²⁴⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2201 (1) SA 46 (CC) Jacob J para 39-41.

the terms of CITES.²⁴⁵ Thus whether the moratorium has achieved its objectives is once again not the test, the test is only whether it is reasonable taking into consideration the separation of powers doctrine.²⁴⁶ The judge mentions that there is context in having adopted a moratorium and as a member of CITES, the international trade in horns are banned. Therefore the imposition of moratorium can be said to be reasonable.²⁴⁷ Rhinoceros poaching in South Africa has become a serious ecological crisis and that the moratorium did play a vital role in our compliance with International law and limiting trade in general.²⁴⁸

3.1.6 GROUNDS OF REVIEW: LAWFULNESS AND ULTRA VIRES

The minister was empowered by sec 57 of NEMBA to implement the moratorium which should be read with sec 24 of the Constitution.²⁴⁹ Therefore had it not been for the judge's finding that the minister did not comply with sec 99 and 100 of NEMBA there would be no finding of unlawfulness.²⁵⁰ The moratorium is also not ultra vires, the minister acted within the ambit of sec 57 of NEMBA.²⁵¹ Hume contends that the moratorium has a negative impact on the survival of the rhinoceros population and as a result the breeders are left with no other option but to kill their rhinoceros.²⁵² The judge does not agree with this because the moratorium is derived out of the need to protect the species from extinction and to ensure the conservation and protection of our biodiversity from acts of poaching and smuggling horn into illegal markets.²⁵³

3.1.7 GROUNDS OF REVIEW: CONSTITUTIONALITY

²⁴⁵ *Kruger v MEA* (2015) para 56.

²⁴⁶ *Kruger v MEA* (2015) para 56.

²⁴⁷ *Kruger v MEA* (2015) para 57.

²⁴⁸ *Kruger v MEA* (2015) para 56 & 57.

²⁴⁹ *Kruger v MEA* (2015) para 58.

²⁵⁰ *Kruger v MEA* (2015) para 59.

²⁵¹ *Kruger v MEA* (2015) para 62.

²⁵² *Kruger v MEA* (2015) para 61.

²⁵³ *Kruger v MEA* (2015) para 61 & 62.

According to the applicants, there are three competing constitutional rights at play, sec 22, 24 and 25.²⁵⁴ Sec 22 deals with the right to choose a trade which overlaps with sec 25 which has to deal with the deprivation of property.²⁵⁵ These rights seem to be competing with the right to have an environment which is protected for the benefit of all generations (future and present) and to take action to ensure the protection and conservation of our biodiversity.²⁵⁶ The judge looked at the right in sec 22 and said that he would have found that the limitation on the right by the moratorium is a justified limitation in terms of sec 36 because of the purpose which the limitation by the moratorium was fulfilling.²⁵⁷ The limitation was also not intended to be permanent.²⁵⁸ In terms of sec 25, Hume, at the time, owned 1124 rhinoceros and 4000kg of rhinoceros horn from the lawful dehorning of his rhinoceros.²⁵⁹ His investment in his rhinoceros goes into the hundreds of millions of Rands, which include their protection and upkeep.²⁶⁰ Hume declared that his 4000kg of rhinoceros horn was deemed worthless by the moratorium because he cannot sell it, which amounts to deprivation of property.²⁶¹ The fact that the rhinoceros horn is seen as 'worthless' is really problematic in the sense that worth is an anthropocentric term. It puts an economic value on something that has inherent and intrinsic value to the animal.²⁶²

Hume contends that if the proper process as prescribed in sec 99 and 100 he would have been aware of the impact the moratorium was going to have on his investment, which would have allowed him to make proper submissions allow for a special dispensation for those who legally had possession of the horn.²⁶³ The judge

²⁵⁴ *Kruger v MEA* (2015) para 63.

²⁵⁵ Sec 22 says Every citizen – has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

Sec 25(1) no one may be deprived of property except in terms of law of general application, and no one may permit arbitrary deprivation of property. *Kruger v MEA* (2015) para 64.

²⁵⁶ Sec 24 of the Constitution. *Kruger v MEA* (2015) para 65.

²⁵⁷ Looking at the importance of the purpose of the limitation, the nature and extent of the limitation and the relationship between the limitation and its purpose. *Kruger v MEA* (2015) para 71.

²⁵⁸ *Kruger v MEA* (2015) para 71.

²⁵⁹ *Kruger v MEA* (2015) para 72.

²⁶⁰ *Kruger v MEA* (2015) para 72.

²⁶¹ *Kruger v MEA* (2015) para 72.

²⁶² Economic value cannot be attributed to a body part. In human society such an act would be contra bonos mores. *Kruger v MEA* (2015) para 72.

²⁶³ *Kruger v MEA* (2015) para 73.

submits that Hume is being disadvantaged because he has stock which he cannot sell, he also has to increase his security to protect his rhinoceros and horn stockpile.²⁶⁴ The judge reserved his judgement on the issue of deprivation of property and just referred to the fact that compliance with sec 99 and 100 was needed by the minister.²⁶⁵ This part of the judgement clearly exposes the anthropocentric interests of modernity, the fact that no reference made to the value of the horn to the rhinoceros, only the value it has to humanity and the fact that the economic value is given to a part of an animal is endorsed, when the trade in human body parts is considered *contra bonos mores*. The right trade and property should not be weighed up against the inherent value the horn has to the rhinoceros.

3.1.8 REMEDY

The judge concluded by saying that the minister failed to comply with sec 99 and 100 and that the moratorium must be reviewed and set aside.²⁶⁶ The minister contended that the lifting of the moratorium would 'bring about a flood of poaching and smuggling of rhinoceros horn out of the republic'.²⁶⁷ The judge replied by stating that the moratorium was never meant to be permanent and that there has actually been an increase of rhinoceros poaching since the moratorium was put in place.²⁶⁸ The judge ended the judgement by asking 'what disastrous implications would be brought about by lifting the moratorium? I cannot think of any'.²⁶⁹ The moratorium was thus set aside by this judgement until 6 June 2016, the result of which is that rhinoceros horn trade in South Africa was for a short while legal, despite the fact that we are a signatory on CITES and the fact that rhinoceros poaching in South Africa is a serious ecological crisis.²⁷⁰ The moratorium did play a vital role in our compliance

²⁶⁴ *Kruger v MEA* (2015) para 74.

²⁶⁵ *Kruger v MEA* (2015) para 76.

²⁶⁶ *Kruger v MEA* (2015) para 87.

²⁶⁷ *Kruger v MEA* (2015) para 88.

²⁶⁸ *Kruger v MEA* (2015) para 88.

²⁶⁹ *Kruger v MEA* (2015) para 89.

²⁷⁰ 'Moratorium on rhino horn trade reinstated as Minister Edna Molewa files for leave to appeal to Constitutional Court' (08 June 2016)

[https://www.environment.gov.za/mediarelease/molewa_appeal_moratoriumonrhinohorntrade]
(Accessed 06 October 2016).

with International law and limiting trade in general.²⁷¹ The setting aside of the ban on domestic trade of rhinoceros is encouraging the farming rhinoceros for rhinoceros horn. This will be in line with the animal welfare approach because it can be seen as utility without ‘unnecessary’ suffering but can lead to the exploitation of these wonderful animals for human interests and at the expense of the animal’s quality of life. This is an example of how modernity has led to the value of an animal being reduced to an economic resource. Rhinoceros are regarded as mere commodities with an economic value.

3.3 ANIMAL WELFARE AS A MECHANISM FOR ANIMAL PROTECTION

The quote in the *Kruger v MEA* case portrays the following view of the animal welfare approach

Animal Welfare people, on the other hand, do not object to man using or eating animals-such as when he uses an ox to plough a field, or a horse to draw a cart-such use should be humane, and that when a man has to kill an animal to gain benefits (such as to obtain meat to eat) such killing should be carried out without cruelty. We should ALL, therefore, support animal welfare which maintains man’s civilized standards with regard to his treatment of animals.²⁷²

This quote shows a favouritism towards the animal welfare approach because it allows for the use and killing of animals for human benefit but under the guise of regulated activities. Martha Nussbaum mentions that the utilitarian theory has contributed more than any other theory to the recognition of animal interests to date and for that recognition must be given.²⁷³ It dispenses with the higher consciousness criterion as promoted by the rights theory and instead it relies on the theory of sentience.²⁷⁴ However, I do not feel that the animal welfare approach cannot provide sufficient protection to animals because it has its roots in a modern masculine system and thus continues to perpetuate this reality.

²⁷¹ *Kruger v MEA* (2015) para 57.

²⁷² *Kruger v MEA* (2015) para.

²⁷³ M Nussbaum ‘Beyond compassion and Humanity’ in CR Sunstein & MC Nussbaum (eds) *Animal rights: current debate and new directions* (2004) 303.

²⁷⁴ Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 355.

In terms of the animal welfare approach, a system of utility of animals can be maintained as long as it is done humanely and that their welfare is not unduly compromised.²⁷⁵ If practices do commence in an inhumane manner, the welfarists will merely push for these practices to be reformed not necessarily abolished.²⁷⁶ This is rooted in the belief that animals have less moral value than what humans do and it is thus acceptable to use animals as humanity deems fit as long as there is no 'unnecessary suffering'.²⁷⁷ The primary concern of animal welfare is only that animals live reasonably good lives.²⁷⁸ The problem lies in the fact that animal welfare has been developed within a modern masculine era. It endorses animal exploitation under the guise of humane animal practices.²⁷⁹ It carries with it an anthropocentric culture which has human interests at heart. Welfare makes society feel more comfortable with the ongoing exploitation of animals, therefore taking away the guilt and making it morally acceptable.²⁸⁰

Animal welfare has its roots in the utilitarian theory. Singer, a modern-day utilitarian suggests that animal welfare practices should be cruelty-free based on the theory of sentience.²⁸¹ The theory of sentience was first seen in Jeremy Bentham's work. Bentham famously said 'The question is not, can they reason? Nor can they talk? But, can they suffer?'.²⁸² The theory of sentience says that animals suffer bodily pain as humans do based on the fact that we have biologically similar nervous

²⁷⁵ Regan 'Understanding Animal Rights Violence' in Armstrong & Botzler (eds) (2007) 564.

²⁷⁶ Regan 'Understanding Animal Rights Violence' in Armstrong & Botzler (eds) (2007) 564.

²⁷⁷ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 28.

²⁷⁸ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 28.

²⁷⁹ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 36.

²⁸⁰ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 36.

²⁸¹ Singer (2002) 7.

²⁸² 'The day may come when the rest of animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny ... 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?'. Even though Bentham uses the words rights in his work, his interpretation of the word in terms of the context he uses it in is more likely to mean equality or moral protections. Bentham is known to have said that 'natural rights' is 'nonsense upon stilts'. Singer (2002) 7 & 8.

systems.²⁸³ This means that animals and humans are both sentient beings.²⁸⁴ Therefore the fact that animals and humans share the ability to feel pain and to suffer, and the interest that sentient beings have in not suffering should be of equal consideration.²⁸⁵ If a being can suffer, regardless of their species, cognisance must be taken of such suffering, to act otherwise would be speciesist.²⁸⁶ Sentience, rather than an enquiry into rationality, is a much more encompassing requirement to fulfil in order to be considered as worthy of moral consideration and in turn protection.²⁸⁷ I agree that theory of sentience is a much more encompassing approach compared to rationality or as we will see in the next chapter the subject of a life criterion. However, it is still a tool of a modern masculine society because it still endorses the idea that protection is only available a limited group of 'deserving' beings. Animal welfare uses a convenient understanding of the theory of sentience to create an arbitrary threshold to regulate, not even ban, exploitative practices.

Welfare use activities aim to always promote the most benefit to humans and the least harm to animals. Nussbaum says this speaks to the nature of the utilitarian theory. She says that it is made up of three constituent parts namely, consequentialism, sum-ranking and preference satisfaction.²⁸⁸ It is based on the premise that the right option is the one that will, in the end, produce the most beneficial consequences or results.²⁸⁹ All moral theories in her opinion, have an element of consequentialism within them.²⁹⁰ Sum-ranking adds all the interests (pleasure and pain) of all the parties together to make one unified total.²⁹¹ The theory does not allow for individual circumstances to be taken into consideration and can

²⁸³ Singer (2002) 11.

²⁸⁴ Singer (2002) 11.

²⁸⁵ Singer (2002) 7.

²⁸⁶ Singer argues that the belief that humans are more valuable and that animals should not fall into our moral concern, due only to the fact that animals and humans are classified into different species, is a prejudice. This prejudice is known as speciesism. The fact that humans believe that the human species, is more valuable than the animal species operates in the same way that a racist believes their race is superior or sexists believe that their gender is superior. Bringing an end to speciesism, cannot be achieved by blindly accept that all beings are equal in every sense but to allow similar beings of any species to have a similar right to and quality of life. Singer (2002) 8 & 9.

²⁸⁷ Singer (2002) 8.

²⁸⁸ Hedonism for Bentham and Preference satisfaction for Singer. Nussbaum 'Beyond compassion and Humanity' in Sunstein & Nussbaum (eds) (2004) 303.

²⁸⁹ Nussbaum 'Beyond compassion and Humanity' in Sunstein & Nussbaum (eds) (2004) 303.

²⁹⁰ Nussbaum 'Beyond compassion and Humanity' in Sunstein & Nussbaum (eds) (2004) 303.

²⁹¹ Nussbaum 'Beyond compassion and Humanity' in Sunstein & Nussbaum (eds) (2004) 304.

therefore not determine if it is being prejudicial to one party.²⁹² Finally, preference satisfaction which prescribes that pleasure is the most important good.²⁹³ This is an elusive notion because the feeling of pleasure has so many variables in its creation.²⁹⁴ There are many aspects of animal's life other than pleasure such as family bonds and freedom.²⁹⁵ One must also ask oneself if all pleasures are good and whether the pleasure of one will not cause the pain of another.²⁹⁶

An animal use practice is deemed acceptable if it has the most benefit to the least harm ratio.²⁹⁷ Animal welfare aims to maximise benefits and minimise harms.²⁹⁸ Welfare is used as a way to fulfil not only individual interests but also broader social needs too.²⁹⁹ A practice is therefore deemed acceptable if in comparison to other alternative practices it has the most benefit to the least harm ratio when taking into account the balancing of the parties' interests.³⁰⁰ This is the main rule of utility which prescribes that in whichever practice is used, the least harm should always be the main concern, the most value promoted over disvalue.³⁰¹ In this case, it will mean the ratio of human benefit to animal harm. If the benefit to humanity will greatly outweigh the harm caused to animals, animal welfare will allow for the practice to cause suffering to an animal. This will require an enquiry into all the circumstances of the situation and the result of this evaluation will determine the fate of the animal.³⁰² Singer admits that because of this there could be situations when the causing of suffering to animals will be justified.³⁰³ Welfare does therefore, justify some situations when suffering can occur.³⁰⁴ Donovan says that this is the problem with the animal

²⁹² Nussbaum 'Beyond compassion and Humanity' in Sunstein & Nussbaum (eds) (2004) 304.

²⁹³ Nussbaum 'Beyond compassion and Humanity' in Sunstein & Nussbaum (eds) (2004) 304.

²⁹⁴ Nussbaum 'Beyond compassion and Humanity' in Sunstein & Nussbaum (eds) (2004) 304.

²⁹⁵ Nussbaum 'Beyond compassion and Humanity' in Sunstein & Nussbaum (eds) (2004) 304.

²⁹⁶ Nussbaum 'Beyond compassion and Humanity' in Sunstein & Nussbaum (eds) (2004) 304.

²⁹⁷ T Beauchamp *et al The Human Use of Animals: Case Studies in Ethical Choice* (2nd ed) (2008) 19.

²⁹⁸ Beauchamp *et al* (2nd ed) (2008) 19.

²⁹⁹ Beauchamp *et al* (2nd ed) (2008) 19.

³⁰⁰ Beauchamp *et al* (2nd ed) (2008) 19.

³⁰¹ Beauchamp *et al* (2nd ed) (2008) 19.

³⁰² Rights based theory says that no animal suffering is ever justifiable under any circumstances. Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 357.

³⁰³ For example Singer says in his book *Ten Years of Liberation* if the use of an animal would result in a cure for cancer, causing harm to an animal would be justifiable. Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 357.

³⁰⁴ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 357.

welfare theory.³⁰⁵ It requires a weighing up, and ultimately a mathematical quantification of interests which exposes the underlying masculine and modern culture.³⁰⁶ Donovan says that the process of weighing up of interests requires a quantification of suffering and this is wherein the problem lies.³⁰⁷ The utilitarian theory is locked within a rational paradigm because it resorts to the worth of a being only found through the quantification of suffering.³⁰⁸ The exact values that must be considered when weighing up these interests are not provided says Donovan, thus it allows for unknown prejudices to emerge during this enquiry.³⁰⁹ A scientific model that leads directly to the justification of animal suffering.³¹⁰ It resorts to the mathematical quantification of the worth of a being, and their interest in not suffering. Just as the animal rights theory ‘inherently privileges rationality’, the welfare theory relapses into a masculine mathematical mastery of nature, not unlike what is found in the realm of animal farming and experimentation, in order to justify the abuse of animals for scientific gain.³¹¹ Donovan points out that for this exact reason, we must look to feminist literature for an alternative theory of animal protection.³¹²

Animal welfare, although it attempts to regulate animal use practices, endorses the slaughtering industry. It provides little to no protection against the killing of an animal. The application of equality of interests is fairly straight forward regarding the infliction of pain and suffering; working from the assumption that animals can feel pain as humans do and that there can be no justification in regarding the pain felt by animals as less significant as that felt by humans.³¹³ The killing of an animal, on the other hand, is a more complex issue.³¹⁴ Singer states that it is not arbitrary to see a being who has an interest in a continued existence as more valuable as a being such as an animal which does not.³¹⁵ Therefore human lives are seen as more valuable

³⁰⁵ Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 358.

³⁰⁶ Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 358.

³⁰⁷ Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 358.

³⁰⁸ Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 358.

³⁰⁹ Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 358.

³¹⁰ Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 358.

³¹¹ Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 358.

³¹² Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 358.

³¹³ Singer (2002) 17.

³¹⁴ Singer (2002) 17.

³¹⁵ Singer (2002) 20.

than that of an animal as an animal has no interest in a continued existence.³¹⁶ Francione says that it is very strange that utilitarian theorists advocate that animals do not know what is lost by killing them and thus death cannot be seen as causing suffering.³¹⁷ It is thus used an ethical defence to kill animals.³¹⁸ Singer put forward that the cognitive ability to have an interest in a continued existence, to live a good life, is not a requirement for sentience.³¹⁹ The ability to feel pain and suffer in a particular moment is not the same as having an interest in a continued existence.³²⁰ The ability to suffer and having an interest in a continued existence are two separate issues. The only cognitive ability needed in order for a being to be seen as sentient is that the being is subjectively aware (suffering).³²¹ Francione says that the problem lies within this interpretation of sentience.³²² It is by virtue of being a sentient, animals as sentient beings do have an interest in continuing their existence and have an interest in remaining alive and pain-free.³²³ It is arbitrary to say that a sentient being is not being harmed by death (even without 'unnecessary' suffering) because it is within the very framework of sentience that a continued existence is founded.³²⁴ How can killing ever be without unnecessary suffering? Sentience is a characteristic which allows sentient being to identify situations what are harmful and thus threaten the beings existence.³²⁵ If a being can feel pain, simply by that being's ability to feel

³¹⁶ Singer (2002) 20.

³¹⁷ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 29.

³¹⁸ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 30.

³¹⁹ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 30.

³²⁰ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 30.

³²¹ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 30.

³²² Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 31.

³²³ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 31.

³²⁴ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 31.

³²⁵ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 31.

pain shows a consciousness by the desire not to feel pain.³²⁶ Therefore by saying that a sentient being is not harmed by death is denying the being the interest which sentience serves to protect.³²⁷ Francione quotes the Jains of India who expressed the issue at hand perfectly ‘All being are fond of life, like pleasure, hate pain, shun destruction, like life, long to live. To all life is dear’.³²⁸

Welfare places an arbitrary threshold on animal use activities, which is use ‘without causing unnecessary’ suffering’ to the animal. This raises the question, when does pain cause suffering and when does that suffering become unnecessary? Adams asks the important question whether suffering is generic.³²⁹ Can one say that the pain felt by humans is the same pain experienced by animals?³³⁰ The assumption that pain is a generic model based on a human frame of reference is very much what the theory of sentience relies on.³³¹ Bernard Rollin points out that ‘the most eloquent signs of pain, human or animal, are non-linguistic’.³³² Animals, although they can express pain in a linguistic manner can also express pain differently, for example, hooved animals do not ‘whimper or squeal’ when they are in pain.³³³ Rollin says ‘animals do show unique pain behaviour it just does not happen to be human pain behaviour. But, then why should it be?’.³³⁴ Much of the animal defence movements use a generic pain model against which to compare pain which animals feel in order to determine the action needed. To assume a generic model of pain based on a human frame of reference is anthropocentric in nature. An ethic of care addresses this by suggesting a model which listens directly to nature and not merely prescribes human generic solutions. This is why the threshold which prescribes practices without causing ‘unnecessary’ suffering is actually meaningless.

³²⁶ Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 31.

³²⁷ Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 31.

³²⁸ Quoted from ‘Akara? ga’ Sutra in Muller (ed) *the sacred book of the east: Vol 22:jaina sutras part 1* (1989). Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 31.

³²⁹ C Adams ‘Caring about Suffering’ J Donovan & C Adams (eds) *The feminist care tradition in Animal Ethic: A Reader* (2007) 206.

³³⁰ Adams ‘Caring about Suffering’ in Donovan & Adams (eds) (2007) 206.

³³¹ Adams ‘Caring about Suffering’ in Donovan & Adams (eds) (2007) 206.

³³² Adams ‘Caring about Suffering’ in Donovan & Adams (eds) (2007) 206.

³³³ Adams ‘Caring about Suffering’ in Donovan & Adams (eds) (2007) 207.

³³⁴ Adams ‘Caring about Suffering’ in Donovan & Adams (eds) (2007) 207.

It once again resorts to the mathematical quantification of suffering, in order to determine whether the 'unnecessary' threshold has been met or not.

Animal exploitation has to be justified in some way in order for it to continue for so long within our societies.³³⁵ The instrumental use of animals is the one field where there is a constant justification because it is such a morally wrong practice.³³⁶ Justification is used to show that certain practices are right or acceptable and also to prove adequate grounds to show the practice should continue, that being said there is a difference between having a good motive for the reason why something should be done and on the other hand having sound justification for why it should continue.³³⁷ This can be seen for example in the practice of medical research, the motive for testing certain medication is a good one, so that any side effects are the least possible harmful for the person it is intended for, but the question is whether the use of animals to achieve these goals are justified?³³⁸ Human subjects are generally not used for such experiments and tests because the tests are often painful and invasive and could even be lethal but just because the justification for using humans is absent does not justify the use of animals.³³⁹ The problem lies with the fact that there are so many different reasons as to what is considered a justifiable harm in terms of the use of animals.³⁴⁰ In terms of justifying pain and suffering, there are many empirical problems with trying to assess how much pain and suffering is felt by animals.³⁴¹

Almost all western animal ethics are rooted in a welfare approach. Welfare has deemed it is an acceptable notion that animals have less moral value than humans which endorse the instrumental use of animals as long as it is done so 'humanly' and without 'unnecessary suffering'.³⁴² Francione rejects the principles on which the welfare approach is built, firstly the notion that that animals can be used as a resource because they are seen as having had less moral value than humans,

³³⁵ Beauchamp *et al* (2nd ed) (2008) 28.

³³⁶ Beauchamp *et al* (2nd ed) (2008) 28.

³³⁷ Beauchamp *et al* (2nd ed) (2008) 28.

³³⁸ Beauchamp *et al* (2nd ed) (2008) 28.

³³⁹ Beauchamp *et al* (2nd ed) (2008) 29.

³⁴⁰ Beauchamp *et al* (2nd ed) (2008) 29.

³⁴¹ Beauchamp *et al* (2nd ed) (2008) 30.

³⁴² Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 28.

secondly the fact that until animals are no longer seen as property welfare cannot achieve much in terms of furthering the interests of animals.³⁴³ This theory, although it has taken the first important steps towards animal protection, is limited in the sense that it is based on the premise that an animals are not self-aware and thus have no interest in living a happy life.³⁴⁴ Welfarists believe that animals are not concerned with the fact that we use them but only care about how we use them because they can suffer.³⁴⁵ Francione says that it comes down to the belief that animals are inferior because of the perceived cognitive differences between humans and animals.³⁴⁶ Cora Diamond responds to the work of Singer by saying that we are blind to our exploitation and oppression of the animal species because it is profitable, we justify our treatment of them by endorsing the irrelevant differences such as the ability to talk, made up through our own speciesism.³⁴⁷ Certain practices are seen as normal regardless of whether they are inhuman and are deemed acceptable practices because it is assumed that the rational owner will not inflict more harm on the animal that needs to produce their product, which is highly problematic.³⁴⁸ This problem is relevant to the *Kruger v MEA* case because the owners are assumed to be 'rational' farmers who will not inflict more harm to the animal than needed to produce their product, any practices which may commence are assumed to be humane. These assumptions are dangerous because animal use practices then often commence without any regulation and checking up by authorities. This leads to a false belief that standards of industries that use animals have been improved through animal welfare.³⁴⁹ Animal welfare is rooted in and been developed to

³⁴³ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 28.

³⁴⁴ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 29.

³⁴⁵ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 29.

³⁴⁶ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 29.

³⁴⁷ C Diamond 'Eating Meat and Eating People' (1978) 53 *Philosophy* 465.

³⁴⁸ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 34.

³⁴⁹ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 35.

maintain this paradigm.³⁵⁰ Animal welfare approach strengthens the animals as property paradigm because it needs to maintain a system of utility of animals.³⁵¹ Once animals are considered beings the utility approach will no longer be able to maintain the animal use practices. It therefore entrenches the animals as property paradigm and the instrumental use of animals by makes animal exploitation acceptable under the guise of humane animal practices, in order to maintain the industry.³⁵² It does this by makes society feel more comfortable the exploitation of animal by taking away the guilt, making exploitation of animals morally acceptable.³⁵³ The *Kruger v MEA* case shows us how the welfare system continues to maintain the animals as property paradigm and instrumental use of animals for human benefit and furthering a profit.

3.4 THE *KRUGER V MINISTER OF ENVIRONMENTAL AFFAIRS* JUDGEMENT: PERPETUATING A MODERN MASCULINE SYSTEM

The first paragraph of the judgement in *Kruger v MEA* the judge starts the judgement with a quote from an ‘environmentalist expert’ in favour of the second applicant John Hume.³⁵⁴ This quote speaks directly to benefit of animal welfare as a favourable approach to animal protection as it allows for the continued use and killing of animals for human benefit.³⁵⁵ The quote also speaks strongly to the disdain the ‘expert’ has of the animal rights approach as it does not allow for any exploitation of animals he says ‘the animal rights doctrine supports the biggest industry the world has even known’.³⁵⁶ It also speaks to the fact that the moratorium is not seen as

³⁵⁰ Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 36.

³⁵¹ Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 36.

³⁵² Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 36.

³⁵³ Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 36.

³⁵⁴ *Kruger v MEA* (2015) para 1 & 2.

³⁵⁵ *Kruger v MEA* (2015) para 1.

³⁵⁶ *Kruger v MEA* (2015) para 1. This quote is extensively used by Ron Thompson. Thompson is a big game hunter having killed over 5000 elephants, 800 buffalo, 140 rhinoceros, 60 lions, 40 leopards. He is also quoted saying that he ‘identifies the animal rights doctrine as being the most insidious obstacle’ he

‘animal use’ but as ‘the tip of a gigantic ice-berg of misunderstanding’.³⁵⁷ The portion of the quote is arbitrary as moratorium does have a connection to animals use as it prohibited the domestic sale of rhinoceros horn by rhinoceros farmers. Commercial farming of rhinoceros and harvesting of their horn is defiantly the use, if not the abuse of animals. What is even more concerning is how the quote firstly perpetuates such strong views as to which approach should be followed ‘we should ALL, therefore support animal welfare which maintains man’s civilized standard with regard to his treatment of animals’.³⁵⁸ There is clearly weight attached to this quote by the Judge, as it was quoted in the first paragraph of the case as if to set the tone of the judgement to follow. Perhaps the reason for this is because he has been deemed an ‘environmentalist expert’ by the applicant’s legal counsel. An expert and the power afforded to their ‘opinion’ is once again a product of a modern, masculine society. Costas Douzinas says ‘the death of the intellectual coincides with the rise of the expert’.³⁵⁹ There is a big difference between an intellectual opinion and the ‘expert’ opinion. Douzinas says that the first wave of intellectuals were committed to social justice and equality, resistant to systems of oppression, they were philosophers, artists, authors.³⁶⁰ They voice ‘truth’ and universality which are not intended to merely discuss reality but to challenge it.³⁶¹ It speaks to morality, history and politics to provide critique and urge on change.³⁶² With the decline of the true intellectual come the division of the cognate fields into discipline and sub-

also says that ‘the animals rightists’ *modus operandi* ... qualify its operations as ‘racketeering’ – which is recognised as being part and parcel of organized crime’. ‘Elephant ‘conservation’’: the facts and fiction [<http://www.ronthomsonshuntingbooks.co.za/elephant-conservation.html>] (accessed 10 October 2016).

³⁵⁷ ‘The moratorium of the sale of Rhinoceros horns within South Africa is not one example of ‘animal use’ but it represents just the tip of a gigantic ice-berg of misunderstanding’. *Kruger v MEA* (2015) para 1.

³⁵⁸ *Kruger v MEA* (2015) para 1.

³⁵⁹ C Douzinas ‘A short history of the British Critical Legal Conference or, the responsibility of the Critic’ (2014) 25 *Law and Critique* 195.

³⁶⁰ Douzinas ‘A short history of the British Critical Legal Conference or, the responsibility of the Critic’ (2014) 25 *Law and Critique* 195.

³⁶¹ Douzinas ‘A short history of the British Critical Legal Conference or, the responsibility of the Critic’ (2014) 25 *Law and Critique* 196.

³⁶² Douzinas ‘A short history of the British Critical Legal Conference or, the responsibility of the Critic’ (2014) 25 *Law and Critique* 195.

disciplines.³⁶³ The new 'expert' knows a lot about a small field, the view is specialized and narrow.³⁶⁴ The expert's role say Douzinas is to make society forget about the critical issues which need a critique and keep regurgitating common knowledge.³⁶⁵ Therefore modernity has resulted in the decline of the multifaceted and critical thinking intellectuals and in its place it has created 'experts' which offer their narrow and cold opinion on a very limited portion of the subject, affording them a superiority which carries no value. In the case, the judge gives a lot of weight to an 'expert' opinion which shows a clear bias which has no substantiation, exposing the flaws of a modern system. In this case, the interests of nature are directly weighed up against human interests. This takes place directly through the balancing of human rights in sec 22 the right to choose one's trade and sec 25 the right to property against sec 24 the right to nature.³⁶⁶ It also takes place indirectly through the arguments of the parties and through the judgement

The applicants in this case are two of the wealthiest private rhinoceros breeders in South Africa.³⁶⁷ Kruger and Hume rely on the position of superiority which the masculine and modern system inherit affords them. This position of superiority turns relationships into power relations which has the effect of reverting the relationship with nature to a dualism. Law has an underlying anthropocentric culture due to the culture of separation at the root of a patriarchal system and as a result it furthers human interests. Rationality and power are masculine values which contributed to the othering of the natural environment.³⁶⁸ We see in the case that legal tools such as administrative action to frustrate the efforts to protect the environment.³⁶⁹ The right to the environment in terms of sec 24 is phrased in such a

³⁶³ These intellectuals are said to have died in the 1990's and intellectuals are almost all 'University employees'. Douzinas 'A short history of the British Critical Legal Conference or, the responsibility of the Critic' (2014) 25 *Law and Critique* 196.

³⁶⁴ Douzinas 'A short history of the British Critical Legal Conference or, the responsibility of the Critic' (2014) 25 *Law and Critique* 196.

³⁶⁵ Douzinas 'A short history of the British Critical Legal Conference or, the responsibility of the Critic' (2014) 25 *Law and Critique* 19.

³⁶⁶ The Constitution. *Kruger v MEA* (2015) para 63.

³⁶⁷ S Stuurman 'Court Ruled Against Appeal to Lift Ban on Rhinoceros Trade' (2016) [<http://www.sabc.co.za/news/a/f6dc23804b61ad6d99d5ff43e5868fd4/Courtundefinedrulesundefinedagainstundefinedappealundefinedtoundefinedliftundefinedbanundefinedonundefinedrhinocerosundefinedtrade-20162001>] (accessed 9 September 2016).

³⁶⁸ Adams & Gruen 'Introduction' in Adams & Gruen (eds) (2014) 1.

³⁶⁹ *Kruger v MEA* (2015) para 6.

way that it gives humans the right to a healthy environment, and to have it protected from degradation for future generations.³⁷⁰ This is problematic in the sense that it is phrased to benefit humanity, leaving little to no protection for the environment from human activity. This right also provides an interpretation standard for other environmental legislation which means that it can be given an anthropocentric interpretation by a human judge.³⁷¹ The objectives of NEMBA are to protect, manage and conserve biodiversity, but in this case the applicants state that procedure according to NEMBA specifically relating to consultation process has not been fulfilled and therefore the moratorium must be set aside.³⁷² The applicants use the law intended protect the environment to further their own economic interests which lie in maximising their profits from farming rhinoceros horn. The applicants use the law to entrench the hyper-separation between humanity/nature to create a vantage point from which to dominate over it, ultimately resulting in its exploitation.³⁷³

The rhinoceros is a wild animal in South Africa, it is considered a 'valuable resource' because it is not only a tourist attraction as one of the big five animals but it is also considered valuable because their horns have such a high economic value.³⁷⁴ A natural resource actually just means naturally produced property with economic value. The utilitarian idea of access to natural resources in anthropocentric in nature, seeing the environment as a collection of useful resources for human benefit.³⁷⁵ Protection of the environment is then solely aimed at the protection of resources so that the earth remains useful to humanity.³⁷⁶ Conservation of the environment in terms of the utilitarian approach is aimed at the 'sustainable development' model, which is the 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.³⁷⁷

³⁷⁰ Kidd (2008) 21.

³⁷¹ In this case NEMBA calls for the judge to look to sec 24 for interpretation purpose see chapter 3.1.1 above. *Kruger v MEA* (2015) para 16.

³⁷² See chapter 3.1.1 above. *Kruger v MEA* (2015) para 10 & 13.

³⁷³ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 10

Since 2010 the value of rhinoceros horn was recorded at about R60 000 – R80 000 per kilogram. I Michler 'summit on rhinoceros poaching' [<http://africageographic.com/blog/summit-on-rhino-poaching/>] (accessed 10 October 2016).

³⁷⁵ Kidd (2008) 14.

³⁷⁶ Kidd (2008) 14.

³⁷⁷ Definition by the World Commission on Environment and Development. Kidd (2008) 17.

This term finds itself into the environmental right sec 24, exposing the anthropocentric interests of the right.

Francione mentions above that the animal welfare system entrenches the instrumental use of animals and the animals as property paradigm.³⁷⁸ This once again endorses a hierarchical relationship between humans/nature.³⁷⁹ Francione says that there is no rational justification for us to use an animal as we choose in any way even if it is done 'humanly' or in terms of welfare standards i.e. 'without necessary suffering'.³⁸⁰ Francione says that as long as animals are regarded as objects or things they will never be equal members of the moral community and it actually all comes down to speciesism.³⁸¹ Animal welfare maintains a system of dominance over nature by endorsing the instrumental use of animals and the animals as property paradigm in order to allow humanity to continue to benefit from nature. It maintains this status quo. Animals as property are economic commodities with a market value.³⁸² The applicants maintains that it is expensive to look after these commodities and only if the 'owner' derives a profit from protecting animals will they do it.³⁸³ In the case Hume refers to the fact that he has 4000 kg of rhinoceros horn sitting in stockpiles that he cannot sell, rendering it 'worthless'.³⁸⁴ He also refers to the fact that it costs him millions of Rands annually to maintain and secure the rhinoceros and if there is no economic benefit from selling the rhinoceros horn 'he has to reconsider his entire rhinoceros breeding operations'.³⁸⁵ Hume currently cannot sell what once was his biggest assets, piles of rhinoceros horns which were 'rendered worthless through the imposition of the moratorium at a stroke of a pen'.³⁸⁶

³⁷⁸ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 36.

³⁷⁹ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 36.

³⁸⁰ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 33.

³⁸¹ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 33.

³⁸² Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 33.

³⁸³ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 34.

³⁸⁴ *Kruger v MEA* (2015) para 74.

³⁸⁵ *Kruger v MEA* (2015) para 74.

³⁸⁶ *Kruger v MEA* (2015) para 74.

This speaks to their motive and the reason why they are challenging the moratorium. The motive is profit based and in anthropocentric in nature.

Cock looks at this nature vs profit phenomenon and refers to the 'commodification of nature', which makes nature subordinate to economic considerations.³⁸⁷ Cock talks about going even further than the commodification of nature saying that 'it includes the 'financialization' of the functions of nature, 'ecosystem services'. It implies that nature should be measured and valued according to 'services' it provides (for example the capacity for wetlands to filter water, the capacity of forests and soil to capture and store carbon)'.³⁸⁸ Within our example growing rhinoceros horn for the sole purpose of it to be routinely hacked off and sold as a commodity. This can be seen in the case judgement where the applicants bring forward an argument based on sec 25 derivation of property, saying that their stockpiles have been rendered 'worthless' by the moratorium and had the applicants been warned that the moratorium would be put into place, they would have made arrangements to have sold their stockpiles before the moratorium was implemented.³⁸⁹ The use of the word 'worthless' is highly problematic because this raised the question, worthless to who? Rhinoceros horn is extremely valuable to a rhinoceros, who uses it for survival purposes every single day. Once that horn is removed and placed in a warehouse, it can no longer perform the important tasks for which it was intended, so while it lies 'worthless' in a warehouse, it has no economic value to humanity but still leaves the rhinoceros in desperate need of his horn. There is defiantly a false perception that endorses the exploitation of animals and that is that humanity has to exploit nature in order to protect it. This exposes the fact that the applicants are contributing to the commodification of nature, reducing the value of such a beautiful animal to a mere resource, which only has economic value.³⁹⁰ This mind-set endorses the animals as property paradigm, the fact that the value of these animals end up being reduced a mere mathematical equation of what it costs to keep them against the profit of selling their body parts. The fact that

³⁸⁷ J Cock 'Green Capitalism or Environmental Justice? A Critique of the Sustainability Discourse' (2010) Unpublished paper presented at the XIV SASA conference, University of Fort Hare 45.

³⁸⁸ Cock 'The Green Economy: A Just and Sustainable development path or a 'Wolf in Sheep's Clothing'?' (2014) 5 *GLJ* 28.

³⁸⁹ *Kruger v MEA* (2015) para 72-73.

³⁹⁰ See 3.1.4.8 Above. *Kruger and Another v MEA and Others* (2015) Para 72.

money and power plays such a big role in adjudication environmental matters exposes the underlying masculine modern and anthropocentric roots within the legal system.

Meaningful protection of nature and of animals cannot be achieved while our relationship with nature is hierarchical and fragmented. Even laws enacted for the purpose of environmental and animal protection will have the interest of humans at heart, and the application will amount to a mathematical balance and weighing up of interest and human interest will prevail. This will continue as long as animals are regarded as mere property and natures only measured through the economic value of its natural resources. Current Constitutional rights, administrative law and even environmental legislation are given a certain interpretation which inherently favours the interests of humanity. The way in which the right to the environment in sec 24 is phrased is as a directive towards the state, to take positive steps towards achieving the right.³⁹¹ This means that there is a duty on the state to progressively realise the right and thus to be the custodians of nature.³⁹² The state is supposed to act in such a way that will promote the best interest of the environment.³⁹³ The moratorium should not have been taken away with immediate effect, the invalidation should have, on request of the Minister, been on a later date so that interim measures could have been put into place. The outcome would have still been the same but the remedy tailored to the specific circumstances. The impact that the ruling would have on the environment was not considered by the court.³⁹⁴ The judge ended the judgement by actually saying ‘what disastrous implications would be brought about by the immediate lifting of the moratorium? I cannot think of any’.³⁹⁵ The minister could have started the process to properly implement a new moratorium as soon as the judgement was given to set aside the previous one if the government truly had the interests of nature at heart.

The result of the setting aside of the moratorium on rhinoceros horn trade is encouraging farming rhinoceros for rhinoceros horn, as an extremely profitable

³⁹¹ Kidd (2008) 22.

³⁹² Kidd (2008) 22.

³⁹³ Kidd (2008) 22.

³⁹⁴ *Kruger v MEA* (2015) para 89.

³⁹⁵ *Kruger v MEA* (2015) para 89.

occupation.³⁹⁶ The problem is that it will lead to the exploitation of an animal for human interests and the expense of the animal's quality of life. It costs a lot of money to protect these beings especially with the high poaching rate, and these animal are protected because they have such high economic value. Ian Michler says that owners of rhinoceros have 'invested heavily in rhinoceros and their horn' it is therefore not in their interests to resolve the rhinoceros poaching issue as it will affect the demand for the resource which their profit, and the reason why they farm with rhinoceros in the first place.³⁹⁷ If trade is legalised it will ultimately result in the domestication of the rhinoceros on commercial farms.³⁹⁸ The large profits which come from rhinoceros farming will also encourage the use of small areas with an over population and living conditions will deteriorate as seen with other commercial farms today. Michler says that commercial farming of other wild animals has done nothing to relieve the pressure on the wild populations.³⁹⁹ In fact, commercial farming has seen the opposite become true as seen with abalone and lion breeding farms. Michler says that the wild populations continue to be diminished through human activities of greed.⁴⁰⁰ Commercial farming and the domestication of rhinoceros could also lead to canned rhinoceros hunting, another profit driven activity which welfare tries to regulate.

3.5 CONCLUSION

In this chapter, I looked at the fact that animal welfare endorses the animals as property paradigm and the instrumental use of animals in order to maintain the current system of utility of animals. Although the theory of sentience has played an important role in the identifying that animals have an interest in not suffering, it can also form a limitation to only protect against 'unnecessary suffering'. Welfare condones animal use practices which promote the most benefit to the least harm ratio. For this reason Donovan said that animal welfare approach carries a masculine

³⁹⁶ I Michler 'Ian Mitchler's diary: the rhino crisis' (3 May 2012) [<http://africageographic.com/blog/ian-michlers-diary-rhino-crisis/>] (accessed 10 October 2016).

³⁹⁷ Michler 'Ian Mitchler's diary: the rhino crisis' (accessed 10 October 2016).

³⁹⁸ Michler 'Ian Mitchler's diary: the rhino crisis' (accessed 10 October 2016).

³⁹⁹ Michler 'Ian Mitchler's diary: the rhino crisis' (accessed 10 October 2016).

⁴⁰⁰ Michler 'Ian Mitchler's diary: the rhino crisis' (accessed 10 October 2016).

and even scientific culture with it because it requires the quantification of suffering. The mathematical quantification of pain is used to justify the use of animals and ultimately determines the worth of that being.⁴⁰¹ Animal welfare provides little no protection against death. It endorses the killing of animals through the idea that killing an animal does not cause harm because animals have no interest in a continued existence and do therefore not know what is lost by killing them.⁴⁰² Animals feel and express pain differently to humans and Adams says that pain cannot be seen as a generic human emotion, and thus cannot ‘measured’ accordingly. The result of which is that the threshold of ‘unnecessary suffering’ is rendered meaningless unless animal pain is understood differently.

In the second part of this chapter I look at how the judgement perpetuates the dualistic relationship humanity has with nature. I looked at how Kruger and Hume, as wealthy male applicants relied on the position of superiority which the masculine and modern system inherently afforded them. This position of superiority turns relationships into power relations which has the effect of reverting the relationship with nature to a dualism. The interpretation of law can result in it furthering human interests. This is seen through the use of legal tools such as administrative action to frustrate the efforts to protect the environment.⁴⁰³ Francione pointed out that animal welfare and animal as property paradigm has led to an economic motive for protecting animals, which is what is exposed in the *Kruger v MEA* case.⁴⁰⁴ This case is just an example of what Cock calls the commodification of nature and at the fact that the abuse of animals and nature is continually being endorsed through an abuse of an already anthropocentric legal system.⁴⁰⁵ In the end, this case was a prime example of how modernity has led to the value of an animal being reduced to a mathematical quantification as an economic resource.

⁴⁰¹ Donovan ‘Animal Rights and Feminist Theory’ (1990) 15 *Signs* 358

⁴⁰² Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 30.

⁴⁰³ *Kruger v MEA* (2015) para 6.

⁴⁰⁴ Francione ‘The Problem of Animal Welfare and the importance of Vegan Education’ (2012) 27 *SAPL* 36.

⁴⁰⁵ Cock ‘The Green Economy: A Just and Sustainable development path or a ‘Wolf in Sheep’s Clothing?’ (2014) 5 *GLJ* 28.

CHAPTER 4: ANIMAL RIGHTS APPROACH:

4.1 INTRODUCTION

In the previous two chapters I looked at how a masculine modernity has contributed to an oppressive and fragmented relationship with nature. This underlying relationship can still be seen in our interactions with nature as seen in the *Kruger v MEA* judgement. When looking the animal welfare approach we saw that the laws which are in theory designed to protect animals and nature still embody dualistic and hierarchical relationships.

In this chapter, I look at an animal rights approach and how this approach has made important inroads into animal protection because it calls for the total abolition of animal exploitation and not just the regulation thereof. However an animal rights approach is limited in its scope of protection because it still requires of a being to have a complex self-awareness which is almost identical to rationality.

In the first part of this chapter I look at Kantian theory of rationality. This theory says that we only have direct duties to rational beings. Rational beings (humans) are ends and that animals are mere means to an ends. Only rational beings can be bearers of rights because they have inherent value. I look at the fact that Kant equates rationality with morality and has resulted in the masculinization of morality. A masculine morality arises out of a duty and it distinct from an ethic based on emotion and care. Plumwood says that this entrenches a dualistic relationship between reason/emotion, further distancing the masculine from the feminine.

In the second part of this chapter I look to Regan who disagrees with Kant that only rational beings should be the bearer of rights. Regan puts forward that the new criterion should be beings who fulfil the subject of a life criterion. Donovan says that the subject of a life criterion creates a need for a complex self-awareness but falls short when protecting beings without it. Ecofeminism poses a challenge to the patriarchal value of rationality, to challenges the importance of rationality which has systemically othered animals.

4.2 ANIMAL RIGHTS AS A MECHANISM FOR ANIMAL PROTECTION

The 'expert' opinion quoted in the *Kruger v MEA* case starts with the following view of the animal rights approach:

Animal rightists believe that animals have the same right to life and liberty as have humans, and they believe that man has no right to 'use' animals in any way. They say that animals should NOT be eaten by men, and that he should subsist on a vegetable diet alone. The animal rights doctrine also supports the biggest confidence industry the world has ever known.⁴⁰⁶

This portion of the quote shows a disdain for the animal rights movement because it prescribes in theory that the right to life and liberty is shared with humans and animals which means that humanity cannot use animals as they deem fit, including eating animals. Animal rights, working almost precisely in the same way as human rights do, calls for certain interests to be absolutely protected and which may not be limited in favour of human benefit.⁴⁰⁷ It calls for the total abolition of animal exploitation, not just the improved regulation thereof as the use of animals will violate the fundamental value of justice.⁴⁰⁸ This radical approach to animal protection seems to scare the 'expert' because animal exploitation is so engrained within our societies.

Tomas Kelch writes that the extension of rights to animals can be regarded as a natural evolution of the political, social and legal structure but to the idea can seem to be a contradiction to many because animals are classified within these structures as things, not as beings capable of being granted rights.⁴⁰⁹ Having a right does not mean that it guarantees any amount exercisability or enforcement and in order for a right to be meaningful it must be able to satisfy at least one of those criteria.⁴¹⁰ Regan's approach is based on interests as the foundation of rights.⁴¹¹ This is based

⁴⁰⁶ *Kruger v MEA* (2015) para 1.

⁴⁰⁷ Francione 'Animal rights and animal welfare' (1996) 48 *Rutgers law review* 398.

⁴⁰⁸ Francione 'Animal rights and animal welfare' (1996) 48 *Rutgers law review* 398.

⁴⁰⁹ Thomas is pro-animal rights. T Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in J Donovan & C Adams (eds) *The feminist care tradition in Animal Ethic: A Reader* (2007) 259.

⁴¹⁰ It must be a positive right which has an obligation to fulfil it attached to it. Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 261.

⁴¹¹ There are four main theories as the foundation of rights, Hohfeldian theory, having interests, dignity, and lastly contractual theory. Hohfeldian theory says that rights and duties are correlative to each other. Therefore it can be said a right can also be seen as a claim. Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 263-270.

on the following premise; Firstly that all and only beings with interests can have rights, secondly that animals can have interests, therefore, animals can have rights.⁴¹² Much of the focus is thus on the second part of the premise – can animals have interests?⁴¹³ Singer believes that animals can have the interest which includes the desire to be free of pain. Regan refers to these beings, who have interests, as entities which are a subject of a life.⁴¹⁴ Joel Fienberg has a very restricted interpretation of interests in that they are made up of desires and aims and as a result, the entity needs to have beliefs, essentially have a cognitive life.⁴¹⁵ The problem with using interests as the criteria for rights is the fact that having interests' means that their interests have to be asserted positively by the being, which is what theorists argue, animals cannot do.⁴¹⁶ That being said this opens up the interpretation of interest as being able to be expressed by representatives either as in fulfilling a mandate from the principle or having to make decisions on their behalf.⁴¹⁷

The current human rights based approach calls for all bearers of rights to share one common characteristic, rationality.⁴¹⁸ Regan suggests that rationality is not encompassing enough and therefore calls for a new characteristic to be fulfilled in

⁴¹² Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 266.

⁴¹³ Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 266.

⁴¹⁴ Being a subject of a life means having beliefs, desires, an emotional life and a sense of future. Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 266.

⁴¹⁵ In terms of Fienberg's interpretation of interests it could actually result in animals being excluded from his definition of an entity which has interests. Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 266.

⁴¹⁶ Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 266.

⁴¹⁷ This interpretation is consistent with mentally ill humans, minors and deceased through executors, custodians and guardians. Animals would have to have representatives who have to make full decisions on their behalf. Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 267.

⁴¹⁸ Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 272.

order to be a bearer of right, the subject of life criterion.⁴¹⁹ Kelch says that the problem with the rights doctrine entrenches dualistic relationships.⁴²⁰ Rights perpetuate not only the; us/them, subject/object, rights/no-rights dualisms but also the hierarchical structures which endorse masculine domination of women and nature.⁴²¹ Kelch mentions that these dualisms contribute to the hierarchical structure which rights aims to provide protect against and if these dualistic relationships did not exist, there would be no need for rights to protect us against them.⁴²² Ironically these hierarchical structures and dualisms are also the tools used to prevent the extension of rights to animals.⁴²³ Rationality is a masculine tool which has been used over centuries to separate humans from nature and allow humanity to dominate over it. Kantian theory of rationality has contributed to the power of rationality and enabled it to objectify nature and women. Kant has also as a result caused the masculinization of morality by equating rationality and morality. Donovan, Plumwood and Coetzee critically examine the cold controlling nature of rationality and how it can contributed to the fragmented and hierarchal relationship we have with nature.

4.2.1 KANTIAN RATIONALITY AND THE MASCULINIZATION OF MORALITY

Kantian rationality has three main rules with regards to rationally as a criterion to be fulfilled to be considered as a bearer of rights. The first is that only humans can be rational based on the fact that they possess *priori* knowledge. Animals can therefore not be rational because Kant says they only respond to stimuli and

⁴¹⁹ Beings having more than mere consciousness, including beliefs, desires, a sense of future etc. Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 272.

⁴²⁰ Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 262.

⁴²¹ Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 262.

⁴²² Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 262.

⁴²³ Kelch says that despite the criticism offered against rights, they are the central focus of our legal systems, and they are needed for a functioning human community. This highlights the anthropocentric value of rights and a broader, more encompassing type of governance is needed. Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 262.

response. Secondly that there is therefore only an indirect duty to animals as non-rational beings. Lastly the fact that animals are seen as a mere means to an ends, and that end is humanity. Rationality is critiqued as a masculine tool used to other women and nature. Kantian rationality has resulted in the masculinity of morality.

In *Critique of Pure Reason* Kant explains that only humans can be rational. This is based on the fact that that humans have two types of knowledge. On the one hand, we have what Kant calls *priori* knowledge and on the other a *posteriori* knowledge.⁴²⁴ *Posteriori* knowledge is knowledge which we gain from experience.⁴²⁵ *Priori* knowledge is knowledge which is known to the human mind simply by the thought thereof, and which is totally independent of experience.⁴²⁶ *Priori* knowledge allows a being to think beyond a specific instance of experience, meaning that one can think beyond one's current particular time and space, known as universality.⁴²⁷ This concept of *priori* knowledge is thought to be exclusive to humans and forms the basis of rationality.⁴²⁸ Thus Kant puts forward that that only humans can think beyond their current time and space, and animals cannot, animals can therefore not be rational.⁴²⁹ Kantian rationality is based on the premise of universality, which forms the basis of *priori* knowledge.⁴³⁰ This theory of universality is known as the 'categorical imperative'.⁴³¹ The concept of universality is important because rational beings have a duty to always be rational to other rational beings.⁴³² This means before every intended action by a rational being, it must be asked before committing that intended action, whether it be expressed as a universal law thus rationally i.e. capable of expression without it creating a contradiction or inconstancy with experience.⁴³³ This is important because Kant believes that if a rational expression does create an inconsistency, thereby causing the action to be irrational, it will at the same time be immoral.⁴³⁴ Thus Kant equates irrationality and immorality.⁴³⁵ Kant

⁴²⁴ I Kant *Critique of pure reason* (trans J Micklejohn) (1934) 25.

⁴²⁵ Kant (1934) 25.

⁴²⁶ Kant (1934) 25.

⁴²⁷ Kant (1934) 26.

⁴²⁸ BE Rollin *Animal rights* (1981) 16.

⁴²⁹ Rollin (1981) 16.

⁴³⁰ Rollin (1981) 16.

⁴³¹ Quoted from I Kant *the groundwork of the Metaphysics of Morals* (Trans H.J Paton) (1964). Regan (1983) 175.

⁴³² Rollin (1981) 17.

⁴³³ Rollin (1981) 17.

⁴³⁴ Rollin (1981) 17.

excludes animals from being bearers of rights because he believes that animals are stuck in a system of stimuli and response and can thus never be rational.⁴³⁶ This is how rationality as a tool of a masculine modernity others animals.

In Kant's writing, we see that the duty towards animals is only an indirect one.⁴³⁷ Kant says that animals only exist as a means to an ends, that end is human beings.⁴³⁸ Animals do not exist as an ends and have no self-consciousness.⁴³⁹ There are no direct duties towards animals but there are indirect duties to animals because human behaviour towards animals is 'analogous' of behaviour between humans.⁴⁴⁰ This means behaving in a harmful manner towards animals is only relevant to the extent that this behaviour will harden one's treatment to one's own kind, human beings.⁴⁴¹ Non-rational animals only have relative value, and therefore can be thought of as property, and cannot be an ends.⁴⁴² This means that rationality is the minimum requirement to be accepted into the kingdom of ends.⁴⁴³ Kant writes that 'we are always to treat humanity, both in [our] own person and in the person of every other, always as an end, never as a means merely'.⁴⁴⁴ This is known as the formula of ends in itself.⁴⁴⁵ This highlights the ego of rationality, seeing the human as the centre (anthropocentric).⁴⁴⁶ The only reason why we would have a duty to animals is because it translated into an indirect duty to humanity.⁴⁴⁷ In terms of the indirect duty it will be acceptable to, for example, experiment on animals because animals have a merely instrumental value to humanity but harming an animal should not be a sport as it could translate to cruelty between humans.⁴⁴⁸

435 This causes the masculinization of morality. Rollin (1981) 17.

436 Rollin (1981) 16.

437 I Kant *Lecture on Ethics* (trans by P Health) (1997) 212.

438 Kant (1997) 212.

439 Kant (1997) 212.

440 Kant (1997) 212.

441 Kant (1997) 212.

442 Regan (1983) 177.

443 Regan (1983) 177.

444 I Kant *The groundwork of the Metaphysic of Morals* (trans by H.J. Paton) (1964) 76.

445 Kant (1964) 76.

446 Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 6.

447 Kant (1997) 213.

448 'He who is cruel to animals becomes hard also in his dealings with men'. Kant (1997) 213.

Plumwood mentions that the Kantian theory of morality is equated to rationality which is a separate entity from emotion, kindness or caring.⁴⁴⁹ Morality is seen as being distant from emotion, rather it belongs to the realm of reason.⁴⁵⁰ In terms of the Kantian moral theory caring for nature by showing kindness is not that same as a having a rational respect for nature.⁴⁵¹ Kindness is not seen as a genuine rational 'respect'.⁴⁵² Plumwood mentions that this draws strongly on the reason/emotion dichotomy.⁴⁵³ Respect for nature is then said to be on a cognitive level whereby one takes into account the value of nature and acting on that consideration from an ethical (moral) principle.⁴⁵⁴ Reason is the tool that has been used over centuries to separate the humans from animals and in doing so it has also contributed towards the obsession with the self.⁴⁵⁵ Both Plumwood and Donovan mention that feminine characteristics are portrayed by animal advocacy theories as unreliable and untrustworthy and seen as inferior to the male characteristic of reason.⁴⁵⁶ Plumwood says the Regan extends the standard concept of morality onto our relationship with nature in his work on animal rights.⁴⁵⁷ I agree with Plumwood when she says that in this day and age rights have seemed to have gathered an exaggerated importance

⁴⁴⁹ Plumwood refers to the work of Paul Taylor who rejects the Western instrumental view of nature in favour of a view encompassing respect for the natural world, also known as a bio-centric or life-centred view, but he does this through a theory of morality which rooted in rationality. Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 4.

⁴⁵⁰ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 4.

⁴⁵¹ Respect in this context is treating a being in such a way that recognises that they are worthy of consideration and not just as having instrumental value. Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 5.

⁴⁵² Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 5.

⁴⁵³ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 5.

⁴⁵⁴ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 5.

⁴⁵⁵ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 6.

⁴⁵⁶ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 5.

⁴⁵⁷ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 7.

which has its roots in the masculine concepts of rationality and separation.⁴⁵⁸ Much of the problem lies in the fact that women and animals have been classed as non-rational by the masculine rationalist definition of the self.⁴⁵⁹ This conception of the self, has created a new definition of what is essential and valuable in being human.⁴⁶⁰ And as a result the feminine, emotional and body of the animal and woman have been denied value, thus seen as inferior and given instrumental status.⁴⁶¹ The supremacy afforded to reason by masculinity is one of the core reasons why the western modernity has such an anthropocentric nature.⁴⁶² Kantian theory of morality has resulted in the supremacy of reason and the inferiority of feminine values in contrast.⁴⁶³ Plumwood refers to this as the 'rational egoism'.⁴⁶⁴

Donovan says that Kant dominated the field of ethics with his obsession with rationality, causing masculinization of morality by putting forward that for an action to be 'ethically significant' it has to arise out of a duty and not be influenced by inclination.⁴⁶⁵ Kant's distinct rejection of emotion as a basis for moral decision-making has three roots; firstly the fact that emotions are volatile, one can feel differently about the same subject from one day to the next (cannot be mathematically reproduced in exactly the same repetition), secondly that capacity to

⁴⁵⁸ Val Plumwood looks into this concept of providing animals with rights and states that she believes the implementation of such rights will have absurd results because these rights create an obligation for humans to intervene in order for the rights to be operational' It will have the effect that humans could have to intervene to prevent animal from suffering even within their natural environment to the extent that humans could be interfering even more or even have the effect of infringing one animal's rights to protect another. Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 8.

⁴⁵⁹ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 6.

⁴⁶⁰ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 6.

⁴⁶¹ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 6.

⁴⁶² Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 6.

⁴⁶³ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 6.

⁴⁶⁴ Moral progress is seen as an increase in adherence to moral (rational) norms and way from the natural, ultimately resulting in the extension of moral rules over nature. Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 6.

⁴⁶⁵ J Donovan 'Attention to Suffering' in J Donovan and C Adams (eds) *The Feminist Care Tradition in Animal Ethic: A Reader* (2007) 175.

be sentimental is not equally distributed between all, some feel more and some less, and lastly that sentimental ethic cannot be seen as universal and thus a universal ethic cannot be created.⁴⁶⁶ Much of this distaste for emotional care is because of its uncontrollable, erratic nature, and in Kant's option, totally irrational.⁴⁶⁷ Thus rationality and ethic of care are seen as being on totally different ends of the spectrum.⁴⁶⁸ Donovan looks critically at both theorists Singer as animal liberation theorists.⁴⁶⁹ Both theorists are actively against their theories being associated as one of based on emotion or sentiment, they fear these 'female values' will trivialise their arguments.⁴⁷⁰ Theorist such as Kant, Regan and Singer do not want to contaminate their moral theory (a masculine morality) with emotion.⁴⁷¹ Kant contributed to this mode of thinking through the foundation of morality as analogous to rationality which develops into moral right and duties.⁴⁷² It is his view that emotion is irrational; it clouds a rational view.⁴⁷³ Donovan points towards the fact that animal liberation theories are focused on masculine values of domination and rationality and clearly discriminate against emotion as a valuable tool which can contribute to animal protection theories.⁴⁷⁴ She notices that Regan shows this tension in his work by on the one hand downplaying emotion and sentiment as irrational by saying for example 'reason – not sentiment, not emotion – reason compels us to recognise the equal inherent value of ... animal' but on the other hand it is the exact purpose of Regan's theory to be critical of rationality as a tool which excludes animals from the protection of rights.⁴⁷⁵ Regan insists that recognising animals as ends is a moral duty (in a rational sense), and it is as a result of the theory of justice and not of kindness.⁴⁷⁶ Donovan say that the belittling of the value of emotion and sentiment in their theories

⁴⁶⁶ Donovan 'Attention to Suffering' in Donovan and C Adams (eds) (2007) 175.

⁴⁶⁷ Donovan 'Attention to Suffering' in Donovan and C Adams (eds) (2007) 176.

⁴⁶⁸ Donovan 'Attention to Suffering' in Donovan and C Adams (eds) (2007) 176.

⁴⁶⁹ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 351.

⁴⁷⁰ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 351.

⁴⁷¹ Kelch 'The Role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 277.

⁴⁷² Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 277.

⁴⁷³ Kelch 'The role of the Rational and the Emotive in a Theory of Animal Rights' in Donovan & Adams (eds) (2007) 277.

⁴⁷⁴ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 351.

⁴⁷⁵ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 351.

⁴⁷⁶ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355.

is not done by accident, rather it is an intentional motive which highlights their inherent bias towards the masculine value of rationality which Donovan points out, ironically, has been used for centuries as the justification for animal abuse in the form of Cartesian objectivism.⁴⁷⁷ Feminist theory on the other hand values emotion and sentiment and our bond with animals as an important tool in providing protection for animals.⁴⁷⁸ Salamone, as a leading feminist animal rights activist, says that she condemns the blatant masculine bias and rationalist views that the current animal rights theories endorse.⁴⁷⁹

Masculine values promote separation and dualism in the sense that the term masculine is equated to rationality, the public sphere, power and rights where the term feminine is equated to emotion, weakness, the private sphere.⁴⁸⁰ The dualistic contrasts which the western world have created feminine (private sphere) caring/masculine (public sphere) moral (rational), is what Plumwood puts forward as the root cause of the western treatment of nature.⁴⁸¹ She says that the opposition created by chauvinistic thought, between care and moral concern is a false one.⁴⁸² The capacity to care, to experience empathy and understanding of the sensitivity of a situation is part of our moral compass.⁴⁸³ Plumwood puts her perspective on the matter in the following words

Perhaps the kindest thing that can be said about the framework of ethical universalization is that it is seriously incomplete and fails to capture the most important element of respect, which are not reducible to or based on a duty or obligation anymore that the most important elements of friendship are, but which are an expression of a certain kind of selfhood and a certain kind of relation between self and other.⁴⁸⁴

⁴⁷⁷ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 351.

⁴⁷⁸ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 351.

⁴⁷⁹ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 352.

⁴⁸⁰ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 7.

⁴⁸¹ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 7.

⁴⁸² Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 7.

⁴⁸³ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 7.

⁴⁸⁴ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 7.

Nature as a comparison with reason is said to include (to name a few) emotion, the body, passion, faith, madness and irrationality.⁴⁸⁵ Essentially nature includes everything that rationality excludes.⁴⁸⁶ Plumwood says that this distinction is really important because she believes that some feminists have endorsed the relationship between women and nature without taking into consideration that association has been created out of exclusion.⁴⁸⁷ Although this can be seen as problematic it is important that one realises that by addressing this issue one is not endorsing the fact that nature is inferior or that women should fall part of that exclusion.⁴⁸⁸ It is the connection that women share with nature that formed the basis for the treatment of both women and nature.⁴⁸⁹ It has created a system based on the on inferiorization of both parties through instrumentalism and what Plumwood calls backgrounding (women as housewives, nurses and secretaries as some examples).⁴⁹⁰ Women are seen as ‘the environment’ in which men can achieve.⁴⁹¹ Cathryn Bailey writes about the anthropocentric and sexist rise of reason.⁴⁹² She says that the rise of reason is not incidental to the oppression of women and nature but rather that this oppression is what legitimised reason.⁴⁹³ Much of what the philosophy of reason stands for only came into being through its ability to dominate the feminine.⁴⁹⁴ As a result, the feminine stands in what is opposition to the rational.⁴⁹⁵ Bailey points out that it is irrefutable that reason is anthropocentric in nature, everything that separates man

⁴⁸⁵ V Plumwood *Feminism and the Mastery of Nature* (1997) 20.

⁴⁸⁶ Plumwood (1997) 20.

⁴⁸⁷ Plumwood (1997) 20.

⁴⁸⁸ Plumwood (1997) 20.

⁴⁸⁹ Plumwood (1997) 21.

⁴⁹⁰ Plumwood (1997) 21.

⁴⁹¹ Plumwood (1997) 22.

⁴⁹² C Bailey ‘On the Backs on Animals, The Valorisation of Reason in Contemporary Animal Ethics’ in J Donovan & C Adams (eds) *The feminist care tradition in animal ethics* (2007) 344.

⁴⁹³ Bailey ‘On the Backs on Animals, The Valorisation of Reason in Contemporary Animal Ethics’ in Donovan & Adams (eds) (2007) 346.

⁴⁹⁴ Bailey ‘On the Backs on Animals, The Valorisation of Reason in Contemporary Animal Ethics’ in Donovan & Adams (eds) (2007) 346.

⁴⁹⁵ Bailey ‘On the Backs on Animals, The Valorisation of Reason in Contemporary Animal Ethics’ in Donovan & Adams (eds) (2007) 346.

from their primal animal counterparts is reason.⁴⁹⁶ It is no coincidence that the question as to animal protection hinges on the rational enquiry on animals.⁴⁹⁷

In the book *lives of animals*, Coetzee writes a short novel based on the fictional main character Elisabeth Costello. In his story, Costello, an Australian writer of ground breaking Feminist fiction, is invited to give a lecture to Literature students.⁴⁹⁸ Costello elects to lecture on the rights of animal. In the story, Costello has very strong opinions regarding the way in which humanity treats animals, so much so that her son says that her opinions go as far as be 'propaganda' against cruelty to animals.⁴⁹⁹ After reading this novel one seems to wonder whether Elisabeth Costello is JM Coetzee's alter ego in that they share the same sentiments towards animal cruelty. Elisabeth Costello makes the following observations with regards to the theory of rationality.⁵⁰⁰ According to the writings of St Thomas of Aquinas, rationality comes from God, therefore because humans were created in the image of God, humans themselves are inherently rational.⁵⁰¹ Plato said that rationality itself is what the universe is based on and through the understanding of reason we can come to an understanding of how the universe works.⁵⁰² Reason and the universe are therefore seen as the same being.⁵⁰³ Costello says that animals are seen as property, and humans are seen as god-like because animals, as non-rational beings don't have a deep understanding of the universe but follow its rules blindly unlike the rational human.⁵⁰⁴ Costello cannot agree with either of these standpoints.⁵⁰⁵ Costello says;

Both reason and several decades of life experience tell me that reason is neither a being of the universe nor the being of god. On the contrary it looks suspiciously like the being of human thought; worse than that, like the being of one tendency of

⁴⁹⁶ Bailey 'On the Backs on Animals, The Valorisation of Reason in Contemporary Animal Ethics' in Donovan & Adams (eds) (2007) 346.

⁴⁹⁷ Bailey 'On the Backs on Animals, The Valorisation of Reason in Contemporary Animal Ethics' in Donovan & Adams (eds) (2007) 347.

⁴⁹⁸ Coetzee (1999) 12.

⁴⁹⁹ Coetzee (1999) 14.

⁵⁰⁰ Coetzee (1999) 24.

⁵⁰¹ Coetzee (1999) 24.

⁵⁰² Coetzee (1999) 24.

⁵⁰³ Coetzee (1999) 25.

⁵⁰⁴ Coetzee (1999) 25.

⁵⁰⁵ Coetzee (1999) 24.

human thought. Reason is the being of a certain spectrum of human thinking. And if this is so why should I bow to reason.⁵⁰⁶

I agree with Costello's perspective on rationality, as a product of the human mind.⁵⁰⁷ It would make sense that rationality as a product of the human brain would in turn is also a product of speciesism.

In the case of *Kruger v MEA* the court does an enquiry into the rationality of and the reasonableness of the implementation of the moratorium.⁵⁰⁸ This imposes a rational standard onto environmental protection measures. This is problematic because rationality is the tool which has othered the national environment and created the fragmented and hierarchical relationship we have with nature.

4.2.2 SUBJECT OF A LIFE CRITERION RE-ESTABLISHING A RATIONAL CRITERION

Kant proposes that only rational beings (moral agents) who have inherent value can be the bearers of rights. Regan disagrees with the fact that rationality should be the criterion to be fulfilled in order to be the bearer of rights. He puts forward that the new criterion to be fulfilled should be beings who fulfil the 'subject of a life' criterion. Donovan points out that the subject of a life criterion merely re-establishes the rationality criterion but under the guise of a rights based approach and it once again shows favouritism to those with a more complex awareness than those without.⁵⁰⁹

Kant makes mention of two role players within the theory of rationality, moral agents and moral patients. Moral agents are those who are capable of making a moral decision thereafter act in accordance with such decision.⁵¹⁰ Thus moral agents can be held morally accountable for their decisions.⁵¹¹ Moral patients, on the other hand, cannot formulate moral judgements, which results in them not being held morally responsible for those decisions (for example human infants, mentally ill and

⁵⁰⁶ Coetzee (1999) 24.

⁵⁰⁷ Coetzee (1999) 24.

⁵⁰⁸ See Chapter 3.1.5 & 3.1.6. *Kruger v MEA* (2015) para 47.

⁵⁰⁹ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355.

⁵¹⁰ Regan (1983) 151.

⁵¹¹ Adult human beings are a prime example of a moral agent according to Regan. Regan (1983) 152.

animals).⁵¹² Moral patients as a result cannot act in a way that is correct or incorrect but they can be party to treatment which can be right or wrong.⁵¹³ It is Kant's view is that moral agents (rational beings) exist as an end in themselves (having inherent value) not merely as a means (instrumental value).⁵¹⁴ As a result we cannot treat moral agents in any way we deem fit or because it will be beneficial.⁵¹⁵ Non-rational animals only have relative value, and therefore can be thought of as property, and cannot be an ends.⁵¹⁶ This means that rationality is the minimum requirement to be accepted into the 'kingdom of ends'.⁵¹⁷ Kant distinguishes between intrinsic value and inherent value.⁵¹⁸ Intrinsic value is that which a being attaches to certain experiences (e.g. a pleasurable experience which makes a person happier) versus inherent value which is attributable to the individual in her own right.⁵¹⁹ Kant believes that moral agents possess both inherent value and intrinsic value, moral patients on the other hand are seen as only having intrinsic value.⁵²⁰ By having inherent value, moral agents have value in and of themselves.⁵²¹ Moral agents are seen as having equal inherent value therefore just treatment must be applied to all moral agents equally.⁵²² Rational beings (moral agents) only have direct duties to other moral agents because they are an ends within themselves⁵²³ Moral patients have no inherent value, therefore there is no direct duty to treat them in accordance with a

⁵¹² They cannot make a decision based on what is right but at the same time Regan says they do not know what is wrong. There are two categories of moral patients, firstly those who are only conscious and sentient and secondly those who are conscious, sentient and possess further cognitive abilities, animal are believed to belong in the second group. When animals are referred to in terms of Regan's writing it must be seen as those belonging to the second category, i.e moral patients who are conscious, sentient and have further cognitive abilities like desires and beliefs. Regan (1983) 152 & 153.

⁵¹³ And in turn moral patients cannot act in a way right or wrong towards a moral patient but the opposite can be said to be true. Regan (1983) 154.

⁵¹⁴ Regan (1983) 175.

⁵¹⁵ This would be to treat them as if they were things (non-rational beings). Regan (1983) 175.

⁵¹⁶ Regan (1983) 177.

⁵¹⁷ Regan (1983) 177.

⁵¹⁸ Regan refers to this as an interpretation of formal justice, looking at the equality of individuals in terms of their value they have within themselves. Regan (1983) 235.

⁵¹⁹ Regan (1983) 236.

⁵²⁰ Moral patients are not seen as possessors of inherent value because they do not have the ability to make moral judgements. Regan (1983) 235.

⁵²¹ Regan (1983) 236.

⁵²² Regan (1983) 239.

⁵²³ Regan (1983) 177.

moral duty, only an indirect one which we owe to other moral agents.⁵²⁴ Regan critiques this point of view that animals as moral patients cannot be the subject of a moral duty because they cannot themselves make a moral judgement.⁵²⁵ Animals have a life of their own independent from their ability to serve humans.⁵²⁶ Regan says that denying that we have a direct duty towards moral patients (human and animal) is arbitrary because harms which are imposed onto moral agents are the same harm which are imposed on moral patients.⁵²⁷ The idea that moral agents and moral patients cannot be harmed in the same way is a fallacy.⁵²⁸ Therefore if the duty not to harm moral agents is a direct one because they have inherent value, then Regan says it would be arbitrary to deny moral patients have inherent value which requires a direct duty to avoid the same harm.⁵²⁹

Regan puts forward two alternative models for the determination of inherent value, the 'being alive' criterion and 'subject of a life' criterion.⁵³⁰ On the one hand, we have the requirement that the being simply needs 'be alive', Regan is critical that this approach.⁵³¹ Being alive would be the only criterion to fulfil in order to be recognised as having inherent value, which Regan feels is too broad.⁵³² He says that it will result in beings having direct duties towards things such as plants and 'cancer cells', as they will be seen as having inherent value.⁵³³ In the alternative to merely being alive, Regan suggests we have the 'subject of a life' criterion.⁵³⁴ The fulfilment of the subject of a life criterion requires something more than just being alive and conscious, that something more includes *inter alia* beliefs, desires, perception,

⁵²⁴ Regan (1983) 177.

⁵²⁵ Included in moral patients are some categories of human beings (infants and mentally ill) and unless it can be said that all moral patients are excluded from a direct duty (humans and animals) it would not be fair. Keeping in mind that to disqualify the humans that fall into the category of moral patients will not be seen in a positive light by humanity. Regan (1983) 178.

⁵²⁶ Regan (1983) 178.

⁵²⁷ Perhaps even worse harms are done to moral patients because of their moral status. Regan (1983) 239.

⁵²⁸ This is endorsed through Singer's theory of sentience. Regan (1983) 239.

⁵²⁹ Regan (1983) 240.

⁵³⁰ Taken from the work of Albert Schweitzer who calls the theory 'reverence of life'. Regan (1983) 241 & 242.

⁵³¹ Regan (1983) 242.

⁵³² Regan (1983) 242.

⁵³³ Regan (1983) 243.

⁵³⁴ Regan (1983) 243.

memory, and emotional life and welfare interests.⁵³⁵ Beings which fall into the subject of a life category have inherent value and should thus never be treated just as a means.⁵³⁶ Modern animal rights theorists claim during their quest for animal rights to be moving away from anthropocentric values of rationality but are actually not destroying the concept but just creating a variation of it.⁵³⁷ Donovan points out that the problem lies in this long list of characteristics which must be fulfilled by the recipient.⁵³⁸ Regan's subject of a life criterion creates the need for a being to have a type of complex self-awareness which is strikingly similar to that required by rationality.⁵³⁹ It perpetuates a modern masculine reality by favouring those beings more complex self-awareness (as rationality does) than those without.⁵⁴⁰ As seen in the discussion above Donovan critiques this rational paradigm. It is a tool used in masculine moral theory to other nature, not only because it is considered as the requirement to be fulfilled to be included in the kingdom of ends, but also because it perpetuates masculine values.⁵⁴¹ As a result of a need for a complex self-awareness, the subject of a life criterion favours adult mammals as the optimum example of a being which can fulfil the requirement.⁵⁴² What happens to those other animals who do not fall into the category? Although Regan makes a strong point in favour of animal protection, the masculine and anthropocentric idea of a hierarchy favouring humans still prevails when his theory is put to the test.⁵⁴³

The liberal rights movements show a tendency towards, the individual, rational self who is morally autonomous.⁵⁴⁴ Curtin mentions in his article that animal rights have of late, been gaining a lot of attention, and although on face value seeming to

⁵³⁵ Other characteristics include perception, memory, a sense of future (including their own), sentience, welfare interests, ability to initiate action according to their goals, individual welfare, psychophysical identity developed over time, logically independent of their utility for others, and logically independent of their being the object of anyone else's interests. Regan (1983) 242.

⁵³⁶ Regan (1983) 243.

⁵³⁷ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355.

⁵³⁸ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355.

⁵³⁹ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355.

⁵⁴⁰ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355.

⁵⁴¹ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355.

⁵⁴² Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355.

⁵⁴³ Donovan is referring to the lifeboat example. Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 353.

⁵⁴⁴ D Curtin 'Towards an Ecological Ethic of Care' in J Donovan & C Adams (eds) *The Feminist Care Tradition in Animal Ethic: A Reader* (2007) 39.

be a radical animal protection movement, it has its roots in a core institution created by a masculine modernity and moral theory which established human rights.⁵⁴⁵ Feminist literature asks whether the language of rights is the best tool for animal protection.⁵⁴⁶ Donovan criticise the rational roots of a neutral and objective liberal rights tradition.⁵⁴⁷ This is because it has its roots in the rationalism of the enlightenment, imposing masculine morality and cold political objectives.⁵⁴⁸ Mackinnon criticises the cold and neutral approach that the liberal tradition has to justice.⁵⁴⁹ Rights are a liberal tool and will inherently perpetuate these modern, masculine and anthropocentric roots. We see this in Regan's work, where he contracts his own rights philosophy by resorting to a hierarchical relationship between man and animals when the interests of man are in direct contrast with the interests of animals. The first example what Regan refers to as the 'right not to be harmed'.⁵⁵⁰ In theory inherent value requires respectful treatment and the right not to be harmed.⁵⁵¹ Anyone who does harm another must prove that such harm was 'justifiable' and if one considers the dominant position of man, it is very unlikely that there will be instances where harm will not be 'justified'. This approach is very similar to justifying harms in terms of the animal welfare approach. Donovan critiques the justification of harm as a mathematical quantification of the worth of a being.⁵⁵² The second example where Regan, in my opinion, contradicts his entire body of work in the example he uses in his book called the lifeboat example.⁵⁵³ In this example there are five survivors in total (four humans one dog), the lifeboat only space for four.⁵⁵⁴ According to the subject of a life theory, all the beings in the boat fall within the category of subject of a life and thus have equal inherent value and equally share the right to not be harmed.⁵⁵⁵ Regan says that the right choice would be to throw the dog off, as it would be justified by the worse off principle.⁵⁵⁶ The four humans will be

⁵⁴⁵ Curtain 'Towards an Ecological Ethic of Care' in Donovan & Adams (eds) (2007) 87.

⁵⁴⁶ Curtain 'Towards an Ecological Ethic of Care' in Donovan & Adams (eds) (2007) 87.

⁵⁴⁷ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 364.

⁵⁴⁸ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 364.

⁵⁴⁹ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 364.

⁵⁵⁰ Regan (1983) 286.

⁵⁵¹ Regan (1983) 287.

⁵⁵² Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 358

⁵⁵³ Regan (1983) 324.

⁵⁵⁴ Regan (1983) 324.

⁵⁵⁵ Regan (1983) 324.

⁵⁵⁶ Regan (1983) 324.

considered as worse off than the dog, allowing for the limitation of the dogs rights. Thus Regan is saying, that despite the subject of a life criterion, when it comes to a decision between humans and animals, humans are still more valuable than animals. This exposes the clear masculine modern and anthropocentric roots of the rights based system.

Plumwood suggests a much more encompassing approach, moving away from a modern rights based approach to one which is one based on feminine values of *inter alia* care, sympathy, concern, gratitude and responsibility.⁵⁵⁷ These values have been distorted by the masculine and dualistic lens through which they are seen.⁵⁵⁸ As seen above, rationality and ethic of care are on totally different ends of the spectrum.⁵⁵⁹ Donovan says that sympathy is not as irrational as Kant thought it to be, Max Scheler says that sympathy is a form of knowledge or understanding, an epistemological alternative to the objectification of Cartesian objectivism.⁵⁶⁰ This knowledge is needed in order to be able to decipher nature's own language, and not to merely see organic life as silent manipulable objects for instrumental use.⁵⁶¹ Donovan suggests that a better alternative to the subject of a life criterion, which requires a type of higher intelligence in order to enter the kingdom of ends (like the rationality criterion), is one based on feminine values.⁵⁶² Modern masculine thinking led to the domination and ultimately the abuse of animals, women and the environment.⁵⁶³ Patriarchy prescribes that the maturity of the 'man' is proven through their control over women and ultimately over nature.⁵⁶⁴ This power is exercised through the ability to control and to kill and it is exactly this which the ecofeminists aims to expose.⁵⁶⁵ Ecofeminism thus comes from a point where it recognises the

⁵⁵⁷ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 9.

⁵⁵⁸ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 8.

⁵⁵⁹ Donovan 'Attention to Suffering' in Donovan and C Adams (eds) (2007) 176.

⁵⁶⁰ From M Scheler *The Nature of Sympathy* (1913;1926). Donovan 'Attention to Suffering' in Donovan and C Adams (eds) (2007) 176.

⁵⁶¹ Donovan 'Attention to Suffering' in Donovan & Adams (eds) (2007) 178.

⁵⁶² Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355.

⁵⁶³ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 360.

⁵⁶⁴ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 367.

⁵⁶⁵ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 369.

importance of the connection between the domination of nature and of women.⁵⁶⁶ The patriarchal framework has been able to maintain, perpetuate and justify the domination of nature and women.⁵⁶⁷ Karen Warren says that when looking to an ecofeminist environmental ethic, we have to look at a feminine view on morality and that we have to have a move from a masculine view of morality has rights and rules to an ethic that makes values of caring, trust and reciprocity central to an understanding of who we are.⁵⁶⁸

Singer writes in the chapter *All Animals are equal* that the idea of animal rights was actually used as a parody for the women's rights movement.⁵⁶⁹ The author Thomas Taylor of satirical work which mocked the writings of famous feminist author Mary Wollstonecraft, tried to show that her writings were of no value because if the argument for equality between women and men could then be seen as applicable to animals too.⁵⁷⁰ Ironically despite Taylor's attempt to ridicule the women's rights argument, the satirical comment made by himself has resonated through the work of ecofeminist authors today.

4.3 CONCLUSION

Francione asks whether the animal rights movement has made an actual difference in an attempt to provide protection to animals, according to Francione, despite the acceptance of the animal rights movement it has failed to translate the theory into a strategy for actual social change.⁵⁷¹ In 1970s the animal rights movement emerged, Francione says that it that it retained the animal welfare position which took cognisance of the sentience of animals which need protection from unnecessary cruelty but brought it a new rights language calling for the end of

⁵⁶⁶ Curtin 'Towards an Ecological Ethic of Care' in Donovan & Adams (eds) (2007) 87.

⁵⁶⁷ Curtin 'Towards an Ecological Ethic of Care' in Donovan & Adams (eds) (2007) 87.

⁵⁶⁸ Curtin 'Towards an Ecological Ethic of Care' in Donovan & Adams (eds) (2007) 88.

⁵⁶⁹ Singer (2002) 1.

⁵⁷⁰ Mary Wollstonecraft was an author of the feminist work *Vindication of the rights of women* 1792. Singer (2002) 1.

⁵⁷¹ Francione 'Animal rights and animal welfare' (1996) 48 *Rutgers law review* 399.

institutionalised animal exploitation.⁵⁷² Interestingly the difference in vocabulary was inconsistent because those who defended institutionalised exploitation and slaughterhouses endorsed animal welfare.⁵⁷³

In this chapter I looked at Kantian rationality and the masculinization of morality. The supremacy afforded to rationality by a patriarchal society is the reason why modernity can be seen as anthropocentric in nature. Bailey said that the sexist nature of reason is not a by-product from the oppression of women and animals but it is the use of rationality as a tool of oppression which has legitimized its power.

In the second part of this chapter I look at why Regan's subject of a life criterion reinstates a rational criterion to be fulfilled in order to be the bearer of rights. Donovan pointed out in her work that the subject of a life criterion, despite its intention to move away from rationality is still promoting a rationalist paradigm because it firstly still requires the recipient to have a complex-self-awareness not much different from what the rationality requirement needed by the liberal rights movement but secondly, as a result the application of the subject of a life criterion is extremely limited in terms of who it protects. For this reason in the next chapter I call for an animal protection theory based on feminine values to decentralise the current fragmented and hierarchical system and to reconceptualize the human and nature relationship, as one based on an ecological responsiveness and care.

⁵⁷² The animal welfare system took cognizance of the sentience of animals who need protection from unnecessary cruelty but at the same time, endorses their instrumental use through so called regulated practices. Francione 'Animal rights and animal welfare' (1996) 48 *Rutgers law review* 398.

⁵⁷³ Animal welfare is the legal system through which those institutions and slaughterhouses are endorsed to operate legally, which makes the rights movement as well as its vocabulary arbitrary. Francione 'Animal rights and animal welfare' (1996) 48 *Rutgers law review* 398.

CHAPTER 5: AN ETHIC OF CARE APPROACH:

5.1 INTRODUCTION

In the previous chapters I have looked at how a fragmented and hierarchical relationship with nature has contributed to the destruction of the environment and the continued exploitation of nature by humanity. In this chapter I propose that in order to protect the little bit of nature that we have left and the animals who are on this earth with us, we need to change the relationship from a hierarchical one to one based on an ethic of care. Developing a new relationship is essential because without it the domination of nature by humanity will continue. Animals are thought of as meek objects which exist only to serve humanity. The truth is that they are not as meek and silent as humanity wants to believe. They too have a voice and have a lot to say, we are just not listening. Animals share this earth space with us and without them the world will be a much colder and lonelier place.

In the first part of this chapter I look at how ecofeminism and an ethic of care can challenge patriarchal system. Adams looks at how oppression of women and animals are interconnected and the fact that speciesism is gendered. Donovan says that dualistic relationships cause the inferiorization of women and nature as a result there will never be a mutual affirmation of the parties within the relationship. What is needed is a conversation within the relationship. Ruether says that human life must cease to be about the domination of nature, rather we must develop a new relationship based on ecological responsiveness. The relationship has to change from one which is dualistic in nature to one which is grounded in the ability to care. In the second part of the chapter I explore a new environmental ethic based on an ethic of care. Gilligan says that an ethic of care is based on the development of relationships which understands the importance of animals having a voice. More importantly listening with care to the voice of the animal and understanding which the animal has to say.

In the last part of this chapter I analyse the underlying problem of the *Kruger v MEA* case. The problem lies not only in the superficial interaction with the law in the judgement but with the maintenance of the fragmented and dualistic nature of the human and nature relationship. An ethic of care addresses this underlying culture of dominance by developing a relationship based on an ecological responsiveness.

5.2 ETHIC OF CARE APPROACH:

5.2.1 ECOFEMINISM AND AN ETHIC OF CARE CHALLENGING A PATRIARCHAL SYSTEM

Ecofeminism looks at inter alia sexism, heteronormativity, racism, colonialism and the relationships they have with speciesism and how all these elements intersect.⁵⁷⁴ It identifies that the biggest issue in animal and in environmental discourses is the othering of women and of animals which have contributed to the destruction of the environment as a whole.⁵⁷⁵ It exposes the intersectionality between these oppressive practices and thus in turn how damaging it is to separate these issues from each other.⁵⁷⁶ At the same time ecofeminists are cautious about the anthropocentric projections of sameness.⁵⁷⁷ Adams says that feminism identifies this 'environment as sexist' referring to the political environment in which suffering and caring for animals takes place.⁵⁷⁸ Adams says that 'Animal defenders see it as speciesist...sexism and speciesism are interconnected, mutually reaffirming the system of oppression and ways of organising the world'.⁵⁷⁹ Speciesism is gendered and racialized as it is rooted in an oppressive patriarchal system.⁵⁸⁰ This is why I look to ecofeminism and an ethic of care to transcend the oppressive patriarchal hierarchys, institutions and cultures.

⁵⁷⁴ Adams & Gruen 'Introduction' in Adams & Gruen (eds) (2014) 1.

⁵⁷⁵ Adams & Gruen 'Introduction' in Adams & Gruen (eds) (2014) 1.

⁵⁷⁶ Adams & Gruen 'Introduction' in Adams & Gruen (eds) (2014) 1.

⁵⁷⁷ Adams & Gruen 'Introduction' in Adams & Gruen (eds) (2014) 3.

⁵⁷⁸ Adams & Gruen 'Introduction' in Adams & Gruen (eds) (2014) 3.

⁵⁷⁹ Adams 'Caring about Suffering' in Donovan & Adams (eds) (2007) 202.

⁵⁸⁰ Adams 'Caring about Suffering' in Donovan & Adams (eds) (2007) 202.

Plumwood says that the women and nature relationship was forged out of exclusion, by an oppressive modern masculine system.⁵⁸¹ As seen in chapter two modernity has othered the natural environment and women through masculine tools of rationality and power. Donovan points out that women and animals have been 'cast' together by western political theories, excluding them from participating in masculine moral theories for centuries.⁵⁸² Donovan mentions in her article that is apparent throughout each of the waves of feminism that clear consideration given towards the mastery of women and of animals.⁵⁸³ In the first wave feminist authors provide a critique of the failings of the liberal system, saying that it is rooted in an individualistic and rational culture and proposed in the alternative a holistic concept of life which is rooted in values of the collective and the importance of an emotional bond.⁵⁸⁴ These flaws are highlighted in chapter four where the rights based approach is critiqued for perpetuating a rational standard to animals, as a result offering little to no protection to animals.⁵⁸⁵ In the second wave, well-known ecofeminist author Adams wrote about the importance of the movement towards vegetarianism and Constantia Salamone's book about the relationship between feminism and the broader theme of ecology, which became quite a popular part of the discourse of the time.⁵⁸⁶

Rosemary Ruther said that domination of women and of nature are made on two interconnecting levels, on the one hand a cultural level and on the other a socio-economic one.⁵⁸⁷ Western ecofeminists have been more exposed to the first, cultural level because of the patriarchal culture inherent in the west, which defines the woman as closer to nature (represented on the nature side of the dichotomy) by a

⁵⁸¹ Plumwood (1997) 20.

⁵⁸² Only white male, property holders were included into the category of 'persons'. Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 354.

⁵⁸³ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 358.

⁵⁸⁴ Donovan mentions feminist authors such as Margaret Fuller, Emma Goldman, Charlotte Perkins Gilman. Fuller in her book *Women in the nineteenth century (1845)* that the integration of women into the public sphere (liberation of women) would result in '*a reign of 'plant like gentleness', a harmonic, peaceful rule, an end to violence of all kinds (including, she specifies, the slaughter of animals for food)*' Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 358 - 359.

⁵⁸⁵ See chapter 4.

⁵⁸⁶ Other Authors include *inter alia*, Susan Griffin, Carolyne Merchant, Rosemary Radford Ruther, Paula Gunn Allen. Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 360.

⁵⁸⁷ Extract from Rosemary Radford Ruether *Ecofeminism and The Challenges of* in Adams & Gruen (eds) (2014) 11.

masculine hierarchy.⁵⁸⁸ Ruether says that this is shown through the body and sexuality of women assimilated to nature, being weak and 'sin-prone'.⁵⁸⁹ This is compared to the masculine being defined as spirit and mind of sovereign power.⁵⁹⁰ The second aspect, on a socio-economic level, relates to masculine domination of the female body and labour, which Reuther says can be connected to exploitation of water, animals and land.⁵⁹¹ What is at the heart of exploitation socio-economic level is the fact that women and nature have been 'colonised' by patriarchy on a legal, political and social level, resulting in women being the unseen sub-structure, for exploitation of natural resources and enriching the male class.⁵⁹² Reuther says revealing this shows how both nature and nature have been inferiorized and as a result, have functioned as the structure on which the domination of women and nature has been built.⁵⁹³ This domination has appeared to be natural and inevitable but has actually only come about through the exploitation of the parties which it seeks to dominate over.⁵⁹⁴ This reality is perpetuated by the animal welfare approach which endorses the animals as property paradigm so that the instrumental use and exploitation of animal can continue. The patriarchal system continues to oppress, use and exploit animals.

Donovan says that the fundamental defect in masculine thought is that it is engulfed in the concept of conquest.⁵⁹⁵ It will never be seen as mutual affirmation of both subjects, but always the need to conquer the foreign subject.⁵⁹⁶ Rather a conversation between the two sides of the dualism is needed says Donovan, no longer seeing her as a disobedient other in need of control.⁵⁹⁷ This is emphasised by Marilyn French

Patriarchy is an ideology founded on the assumption that man is distinct from the animal and superior to it. The basis for this superiority is man's contact with a higher

⁵⁸⁸ Ruether in C Adams & L Gruen 'Groundwork' in C Adams & L Gruen (eds) *Ecofeminism: Feminist Intersections with other Animals & the Earth* (2014) 11.

⁵⁸⁹ Ruether in Adams & Gruen 'Groundwork' in Adams & Gruen (eds) (2014) 11.

⁵⁹⁰ Ruether in Adams & Gruen 'Groundwork' in Adams & Gruen (eds) (2014) 11.

⁵⁹¹ Ruether in Adams & Gruen 'Groundwork' in Adams & Gruen (eds) (2014) 11.

⁵⁹² Ruether in Adams & Gruen 'Groundwork' in Adams & Gruen (eds) (2014) 11.

⁵⁹³ Ruether in Adams & Gruen 'Groundwork' in Adams & Gruen (eds) (2014) 11.

⁵⁹⁴ Ruether in Adams & Gruen 'Groundwork' in Adams & Gruen (eds) (2014) 12.

⁵⁹⁵ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 369.

⁵⁹⁶ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 369.

⁵⁹⁷ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 369.

power of knowledge called god, reason, or control. The reason for man's existence is to shed all animal residue and realise fully his 'divine' nature, the part that seems unlike any part owned by animals – mind, spirit or control.⁵⁹⁸

This masculine desire to kill and control everything is what French refers to as a sadomasochism and it comes down to the masculine wanting to rid itself and the modern world of all that is feminine.⁵⁹⁹ A new environmental culture call for a new epistemological and ontological shift to replace the sadomasochist control and dominance element of the current masculine scientific epistemology.⁶⁰⁰ Ruether looks at how we can achieve a new reciprocal relationship with nature and animals 'the project of human life must cease to be seen as one of domination of nature...rather we have to find a new language of ecological responsiveness, a reciprocity between consciousness and the world systems in which we live and move and have our being'.⁶⁰¹

The fragmented and dualistic nature of the human/nature relationship has greatly contributed to degradation of the environment. That is why we look to an ethic of care approach to change the relationship from one rooted in a culture of separation to one that recognises that humanity is interconnect to nature and that we therefore need a relationship based on an ecological responsiveness. Adams and Gruen start their edited collection on ecofeminism with a quote from Kheel who says,

Re-specting nature literally involves 'looking again'. We cannot attend to the quality of relations that we engage in unless we know the details that surround our actions and relations. If ecofeminists are sincere in their desire to live in a world of peace and nonviolence for all living beings, we must help each other through the painstaking process of piecing together the fragmented world view that we have inherited. But the pieces cannot simply be patched together. What is needed is a reweaving of all the old stories and narratives into a multifaceted tapestry.⁶⁰²

Plumwood says that the ethic of care approach based on the philosophy of non-instrumentalism which is a much more valuable environmental protection than the

⁵⁹⁸ From M French *Beyond Power* (1985). Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 369.

⁵⁹⁹ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 369.

⁶⁰⁰ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 369.

⁶⁰¹ From R Ruether *New Woman/New Earth* (1975). Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 369.

⁶⁰² Adams & Gruen 'introduction' in Adams & Gruen (eds) (2014) 1.

current rational and rights based or welfare approach.⁶⁰³ She says that this is an expression of a 'self-in-relationship' rather than a 'self-interested' or non-relational one as portrayed by masculine moral discourse.⁶⁰⁴ An ethic of care approach can transcend the current oppressive system because it aims to recreate our relationship with nature. Caring for animals is a natural response, it doesn't need reciprocity and it also doesn't need there to be an equal or unequal relationship. The wonderful thing about a model based on care is that we can even care for so called 'non-sentient beings' and sentient beings alike.⁶⁰⁵ To maintain a good relationship with nature we need the ethic of care, as it changes the entire dynamic of the relationship from a masculine, formalistic, abstract dichotomy (human as controllers of nature) to an encompassing, feminine, contextual caring one.

5.2.2 A NEW ENVIRONMENTAL ETHIC BASED ON AN ETHIC OF CARE

Plumwood suggests that when looking for a solution to the global ecological crisis we need not look to further technology and science to create a new more sustainable life because most of those advances have already been achieved by society, rather the solution lies on a cognitive level.⁶⁰⁶ We have to develop an environmental culture that recognises the full value of the human relationship with the entire biosphere so that we can make informed decisions.⁶⁰⁷ Plumwood mentions that she specifically uses the word 'culture' to emphasise how complex the challenge is and how deeply the challenge of the *status quo* and the western dualisms has to go.⁶⁰⁸ This new environmental culture must replace the current culture of reason which laid the foundation for the human/nature and reason/emotion dualism to exist.⁶⁰⁹

⁶⁰³ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 9.

⁶⁰⁴ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 9.

⁶⁰⁵ Curtin 'Towards an Ecological ethic of care' in J Donovan and C Adams (eds) (2007) 92.

⁶⁰⁶ Plumwood (2002) 3.

⁶⁰⁷ Plumwood (2002) 3.

⁶⁰⁸ Plumwood (2002) 4.

⁶⁰⁹ Plumwood (2002) 4.

Ecofeminists support the view that domination of nature must cease in favour of a new ecological consciousness which takes the organic nature of natural environment into consideration.⁶¹⁰ This means that one must be aware of the fact that nature is not mechanical in nature (as endorsed by the Cartesian objectivism paradigm) but is a living being which has a life energy that is host to a whole community of life forms.⁶¹¹ An ethic of care which urge humanity to change our relationship nature and with animals in order for us to keep the web of relationships between communities on the earth intact – in order to ensure survival.⁶¹² The ethic of care is grounded in relationships built on responsiveness, care and respect which will result in a feminist reconstruction of the current relationship that humans have with the natural world.⁶¹³ The consciousness of human beings should never be seen as bequeathed solely on humans but rather as interconnected with the ‘biomorphic’ spirit inherent in all beings of the earth.⁶¹⁴ Paula Gunn Allen writes that nature is not blind and mechanical in nature but rather it is organic, alive and aware, it is what she calls a ‘seamless web’ connecting all life on earth.⁶¹⁵ She proposes that we have to move away from the linear and hierarchical relationships to a more relational relationship.⁶¹⁶ A feminine model is focused on the preserving of life, which as Donovan points out, is contingent on the sustaining the connection between all beings and keeping the web of interconnected relationships intact.⁶¹⁷ The former rights based approach developed its theory on the basis that we are separate rather than interconnected.⁶¹⁸ What all these feminist authors propose, says Donovan, is an ethic which demands the respect of all earthly beings, an ethic which listens to, and has respect for the diversity of all ‘environmental voices’.⁶¹⁹ This ethic may be criticised for being too vague to be used but the point is not to lay out an exact step

⁶¹⁰ Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 369.

⁶¹¹ Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 369.

⁶¹² Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 374.

⁶¹³ Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 375.

⁶¹⁴ Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 369.

⁶¹⁵ From Paula Gunn Allen *the sacred hoop: recovering the feminine in America Indian Traditions* (1986)

Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 370.

⁶¹⁶ Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 370.

⁶¹⁷ Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 374.

⁶¹⁸ Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 374.

⁶¹⁹ Donovan ‘Animal rights and feminist theory’ (1990) 15 *Signs* 374.

by step guide but rather to develop a new epistemology about the human and nature relationship.⁶²⁰

In her book *In a different voice*, Gilligan speaks about what an ethic of care means.⁶²¹ She says that an ethic of care is grounded in the development of relationships which understand the importance of everyone having a voice, beings listened to carefully and heard with care and respect.⁶²² This voice must be allowed to speak in its own way and in their own right.⁶²³ It highlights the need for responsiveness into these relationships.⁶²⁴ An ethic of care takes animals into consideration in the mists of an anthropocentric society, ultimately trying to abolish a patriarchal system. This theory goes into the root of caring for animals and nature in a way that a mother (human and animal) cares for her child which involves listening to animals paying emotional attention to them and caring about what they have to say (as a horizontal relationship, not a vertical one).⁶²⁵ It involves a shift from theorising about to directly listening to animals.⁶²⁶ This ethic of care approach requires humanity to move away from the masculine way of thinking about our relationship with animals and nature (as an unequal power relationship) towards a more feminine approach in which caring about and respecting animals.⁶²⁷ Curtin says that whether or not animals have rights, we do and can care for them.⁶²⁸ Donovan writes that Gilligan's ethic of care is rooted in a 'mode of thinking that is contextual and narrative rather than formal and abstract'.⁶²⁹ This is so important because we need an ethic which works directly with the problem, as they are and not on an abstract level, as many of the animal protection theories do. She refers to this as a 'morality of responsibility and responsiveness' which Donovan says is in direct contrast to the 'morality of rights' of Regan.⁶³⁰ An ethic of care identifies morality as a

⁶²⁰ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 37.

⁶²¹ Gilligan (1982) 63.

⁶²² Gilligan (1982) 63.

⁶²³ Gilligan (1982) 63.

⁶²⁴ Gilligan (1982) 63.

⁶²⁵ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 375.

⁶²⁶ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 375.

⁶²⁷ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 375.

⁶²⁸ Curtin 'Towards an Ecological ethic of care' in J Donovan and C Adams (eds) (2007) 92.

⁶²⁹ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 374.

⁶³⁰ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 374.

physiological response to how we experience ourselves in relation to others⁶³¹ The origin of morality will now lie in the relationships we have with others.

Curtin writes that the rights based approach is stuck in a rigid formalistic implementation of the law with regards to animals, emphasising the identifying of moral interests, formal decision making procedures, adversarial approach to moral discourse and identity as an autonomous being.⁶³² An ethic of care approach takes into account a multiplicity of moral interest, contextual decision making (if needed at all) non-adversarial consideration of moral discourse and personhood as relational.⁶³³ This is where animal welfare falls short, and where an ethic of care can extend the scope of protection to all animals who need it.

Luke says that there is a distinction between justice and caring, justice, on the one hand, has its primary concern rooted in the abstract, focusing on the application general rules, consistency and fairness in resolving conflicting interests of parties.⁶³⁴ Caring, on the other hand, is focused on the particular, and on connection, response and meeting the needs of all beings involved.⁶³⁵ At the moment animal liberation is looked at as a justice issue but it should be understood as one of caring.⁶³⁶ Regan and Singer both are defenders of animal liberation as a justice movement.⁶³⁷ Their movements are driven by fair treatment rather than on a caring level of connection and responsiveness to, and the satisfaction of their needs.⁶³⁸ Within the justice framework, both their theories are focused on the idea of fairness and consistency of the treatment between humans and similar beings in the animal species, but within the caring framework the emphasis is not on comparisons of similar beings but consideration of each animal 'in and of itself'.⁶³⁹ The caring movement calls for the concern for an animal arising out of direct empathy for the animal itself and does not

⁶³¹ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 374.

⁶³² Curtin 'Towards an Ecological ethic of care' in J Donovan and C Adams (eds) (2007) 92.

⁶³³ Curtin 'Towards an Ecological ethic of care' in J Donovan and C Adams (eds) (2007) 92.

⁶³⁴ B Luke 'Justice, Caring, and Animal Liberation' in J Donovan & C Adams (eds) *The Feminist Care Tradition in Animal Ethic: A Reader* (2007) 124.

⁶³⁵ Luke 'Justice, caring, and animal liberation' in Donovan and Adams (eds) (2007) 125.

⁶³⁶ Luke 'Justice, caring, and animal liberation' in Donovan and Adams (eds) (2007) 125.

⁶³⁷ Luke 'Justice, caring, and animal liberation' in Donovan and Adams (eds) (2007) 125.

⁶³⁸ Luke 'Justice, caring, and animal liberation' in Donovan and Adams (eds) (2007) 125.

⁶³⁹ Luke 'Justice, caring, and animal liberation' in Donovan and Adams (eds) (2007) 130

arise out of the comparison of the treatment of humans.⁶⁴⁰ That translates to caring to be a universal model, one cares for human exploitation to but not out of a comparison but out of pure sympathy for the being.⁶⁴¹ Donovan makes an important point that one can have no justice and no morality without first having sympathy, the attentiveness to know when someone needs help.⁶⁴²

Shapiro writes that there is a tension between an animal activists' supposed primary concern to care about animals on the one hand and their need to aggressively expose abusive practices on the other.⁶⁴³ This masculine obsession with the aggressive exposing of inhumane practices has resulted in the suppressing of the most important aspect of being an animal activist, caring for animals.⁶⁴⁴ Caring about animals is an attitude, it means being attentive and being concerned.⁶⁴⁵ It is more than just an interest in or sympathy for their needs.⁶⁴⁶ Rather a caring attitude is a continuous process of understanding and responsiveness not a momentary process of concern or awareness.⁶⁴⁷ He describes it as 'moments of the heart and not of the brain', it is an all-encompassing movement which often extends from animals to the entire eco-system.⁶⁴⁸ The Dalai Lama says that compassion means wanted to do something to relieve the pain of another, it is not necessarily remaining on the same level but elevating oneself in order to assist that being.⁶⁴⁹

5.3 ETHIC OF CARE APPROACH AND *KRUGER AND ANOTHER V MEA AND OTHERS* CASE:

The Judge in the *Kruger v MEA* case is calling for animal welfare approach as an overarching solution for animal protection in South Africa. The problem is that

⁶⁴⁰ Luke 'Justice, caring, and animal liberation' in Donovan and Adams (eds) (2007) 130.

⁶⁴¹ Luke 'Justice, caring, and animal liberation' in Donovan and Adams (eds) (2007) 130.

⁶⁴² Donovan 'Attention to Suffering' in Donovan and Adams (eds) (2007) 199.

⁶⁴³ K Shapiro 'The Caring Sleuth' in J Donovan & C Adams (eds) *The Feminist Care Tradition in Animal Ethic: A Reader* (2007) 156 & 157.

⁶⁴⁴ Shapiro 'The Caring Sleuth' in Donovan & Adams (eds) (2007) 157.

⁶⁴⁵ Shapiro 'The Caring Sleuth' in Donovan & Adams (eds) (2007) 157.

⁶⁴⁶ Shapiro 'The Caring Sleuth' in Donovan & Adams (eds) (2007) 157.

⁶⁴⁷ Shapiro 'The Caring Sleuth' in Donovan & Adams (eds) (2007) 157.

⁶⁴⁸ Shapiro 'The Caring Sleuth' in Donovan & Adams (eds) (2007) 158 & 159.

⁶⁴⁹ Curtin 'Introduction: compassion vs. rights' in Adams & Gruen (eds) (2014) 40.

both above mentioned approaches (animal welfare and animal right approach) cannot sufficiently assist in the protection of animals to the extent needed in South Africa. This is because both the welfare and right based approaches still cling to a hierarchical relationships promoted by patriarchal cultures and institutions. The problem underlying the *Kruger v MEA* case is the maintenance of the fragmented and hierarchical relationship between humans and nature. An anthropocentric culture places human interest above that of the interests of nature, and as we see in the case is still dominant. Masculine thought is engulfed in the concept of conquest, it can never mutually affirm two parties to a relationship equally. The result of which is that the patriarchy always produces dualistic relationships. An ethic of care approach is able to transcend the oppressive institutions and cultures and produce relationships which are reciprocal.

The application of laws which are intended to protect animals but which have a ties to an anthropocentric culture will never be a successful model. This is seen in the judgment in the application of sec 24, the environmental right. Not only is it phrased in such a way that it has human interests at heart but when weighed up against other human rights (in this case sec 25) the human right, the system will inherently promote the human position.⁶⁵⁰ The rights based approach is stuck in a rigid formalistic implementation of the law with regards to animals by identifying of moral interests, enforcing formal decision making procedures, adversarial approach to moral discourse and identity as an autonomous being.⁶⁵¹ Gilligan, through and ethic of care approach, suggests a much more encompassing approach my means of taking into account a multiplicity of moral interest, contextual decision making (if needed at all) non-adversarial consideration of moral discourse and personhood as relational.⁶⁵²

An ethic of care calls for a new relationship with nature and it calls for a new environmental culture to be based on a feminine understanding of ethics to unearth the oppressive and fragmented system. Caring for animals is a natural response, it doesn't need reciprocity and it also doesn't need there to be an equal or unequal relationship. To maintain a good relationship with nature we need the ethic of care,

⁶⁵⁰ *Kruger v MEA* (2015) para 72.

⁶⁵¹ Curtin' Towards an Ecological ethic of care' in Donovan & Adams (eds) (2007) 92.

⁶⁵² Curtin' Towards an Ecological ethic of care' in J Donovan and C Adams (eds) (2007) 92.

as it changes the entire dynamic of the relationship from a masculine, formalistic, abstract dichotomy (human as controllers of nature) to an encompassing, feminine, contextual caring one. So what will a relationship based on an ethic of care look like?

Ecofeminist theory urges society recognises that the world is not a machine but organic life source, which is living and breathing nature of the earth and its animals, destroying the Cartesian concept of the earth as a machine.⁶⁵³ It calls for a new definition of the term 'ethics', in order to move away from a masculine Kantian theory of morality as a duty in favour of a definition as a feminine value based a caring relationship and the responsiveness that relationship brings with it.⁶⁵⁴ An ethic of care calls for a different understanding of pain and suffering, not as a generic human model, but understanding pain as an emotion felt and expresses differently by different beings.⁶⁵⁵ Expanding the understanding of pain from a mere physical response to having a psychological and emotional element too. This will provide a different understanding of farming rhinoceros horn. Understanding the loss of a horn as an emotional and psychological pain. An ethic of care can through a contextual and narrative approach change the dynamics of the human and animal relationship. It endorses a 'mode of thinking that is contextual and narrative rather than formal and abstract'.⁶⁵⁶ It calls for a relationship which understands that every being has a voice and by listening carefully to what that being has to say. It calls for an ecological responsiveness with animals which is sensitive to their needs and by so doing change the protection mechanism from a mathematical and abstract assumption to a contextual and psychological understanding. The current approaches are stuck in a rigid formalistic implementation of anthropocentric laws on to animals. An ethic of care approach is more encompassing as it takes into account a multiplicity of moral interest, contextual decision making (if needed at all) and an expands understanding of what it means to be a being.⁶⁵⁷

The rhinoceros has a voice and it needs to be heard. Donovan quotes Ludwig Wittgenstein who said that 'if lions could speak we couldn't understand him', she disagrees with this statement saying that 'lions do speak, and it's not impossible to

⁶⁵³ Donovan 'Animal Rights and Feminist Theory' (1990) 15 *Signs* 362.

⁶⁵⁴ Donovan 'Attention to Suffering' in Donovan and C Adams (eds) (2007) 175.

⁶⁵⁵ Adams 'Caring about Suffering' in Donovan & Adams (eds) (2007) 206.

⁶⁵⁶ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 374.

⁶⁵⁷ Curtin 'Towards an Ecological ethic of care' in Donovan & Adams (eds) (2007) 92.

understand much of what they are saying'.⁶⁵⁸ She quotes Jonathan Bates who says that 'we must learn the syntax of the land, not seeing through our own prison-house of language'.⁶⁵⁹ We need to develop an ethic of care relationship into a direct dialogue with animals.⁶⁶⁰ How do we achieve this? Adams suggests that we start by allowing their stories to be part of the narrative.⁶⁶¹ This can be achieved through improved practices of attentiveness which will include a development of the skills which accompany care.⁶⁶² Alison Jaggar says that they include 'openness, receptivity, empathy, sensitivity and imagination'.⁶⁶³ This can only be achieved through the rejection of the scientific voice which 'speaks with general and abstract authority'.⁶⁶⁴ Donovan says that the only way that the relationship with animals can be repaired is if humanity no longer imposes their voice onto the animal.⁶⁶⁵ The relationship but cease to be one of conquest of the other but rather what Reuther calls 'the conversation of two subjects'.⁶⁶⁶ This involves the recognition that animals have a nature of their own which needs to be listened to and with which one must enter into conversation.⁶⁶⁷

5.4 CONCLUSION:

In this chapter I looked to an ethic of care approach to uproot the current patriarchal oppressive system. It calls for a new ecological consciousness to the current relationship that humans have with animals, from a fragmented and hierarchical one formed as a dualism (human/nature) to one that recognises that we are interconnected to nature. We need to re-conceptualize this relationship and in so doing also re-conceptualize the dualisms which has led to the domination of nature

⁶⁵⁸ J Donovan 'Caring to Dialogue' in J Donovan & A Carol (eds) *The feminist ethic of care tradition in Animal ethics* (2007) 362.

⁶⁵⁹ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 362.

⁶⁶⁰ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 362.

⁶⁶¹ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 363.

⁶⁶² Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 363.

⁶⁶³ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 364.

⁶⁶⁴ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 365.

⁶⁶⁵ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 365.

⁶⁶⁶ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 365.

⁶⁶⁷ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 365.

and of women. Thus we have to remove the modern western hierarchical structures which have promoted dominion over nature.

An ethic of care calls for a relationship grounded in and recognises the importance of everyone having a voice, being listened to carefully and actually being heard with respect. Each voice should be allowed to speak within its own right and on their own terms. It highlights the need for a responsiveness within the human/nature relationship. It can through a contextual and narrative approach change the dynamics of this relationship, taking into account a multiplicity of moral interest, contextual decision making and an expanded understanding of what it means to be a being.

This is especially important for the *Kruger v MEA* judgement. As a result the problem underlying the case lies not only in the superficial interactions with the law but in the maintenance of the fragmented and hierarchical relationship between human and nature. In order to protect the natural environment from total destruction, we have to change the human and nature relationship, to one based on an ethic of care so that we can develop a new environmental ethic which is ecologically responsive to the biological nature of the living earth in order to facilitate a dialogue with the rhinoceros and other animals which we share the earth space with.

CHAPTER 6: CONCLUSION:

This dissertation highlights the need for a new environmental ethic which can challenge the disintegrated and oppressive relationship that we have with nature. The dualistic nature of the human/nature relationship overpowers and silences the animal. This is beautifully illustrated in the Hughes poem. An environmental ethic based on an ethic of care calls for a new relationship based on an ecological responsiveness. Responsiveness requires the development of a dialogue with animals. Sarah Orne Jewett said;

Who is going to be the linguist who learns the first word of an old crows warning to his mate...? [H]ow long we shall have to go to school when people are expected to talk to the trees, and birds, and beasts in their own language!...It is not necessary to tame [creatures] before they can be familiar and responsive, we can meet them on their own ground.⁶⁶⁸

An ethic of care recognizes the importance of everyone having a voice and being listened to carefully. Each voice of each animal should be allowed to speak freely, when and how she chooses to communicate with us. This dissertation has told the story of how our relationship with nature, although it has oppressive roots, can be developed into a bond with animals which transcends the oppressive background and form a new culture of responsiveness.

The Black Rhino is vanishing.
Horribly sick, without knowing,

She is vanishing. She is infected
With delusions of man. She has become a delusion.

Every cell of her body is ruptured with human delusion
She is vanishing⁶⁶⁹

⁶⁶⁸ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 363.

⁶⁶⁹ The Black Rhino III. Hughes *Wolfwatching* (1980) 30.

Chapter two starts off by looking at an overview of the South African environmental law. We see that the protection offered to animals by environmental law is limited. An animal welfare approach is apparent in the legislation, which promotes the cruelty free use of animals. The right to the environment in terms of sec24 can be seen as having human interests at heart. This could result in the interests of nature being weighed up against the interests of humanity which could allow a biased interpretation to occur. In the second part of chapter two I look at the fact that Cartesian objectivism endorsed the exploitation of animals by promoting the idea that animals are machines which cannot feel pain. This encourages the exploitation of animals. Bordo put forward that the Cartesian objectivism is the ultimate masculinization of thought, it results in the total separation of humanity from the natural and the feminine.⁶⁷⁰ It has resulted in a dualistic relationship between humans/nature. Plumwood said that this way of thinking comes from a patriarchal culture of separation. Humanity saw itself as separate from nature and through the difference imperative entrenched the fact that all that is important in being human is completely opposite and different to nature and animals.⁶⁷¹ Humanity saw this 'outside of nature' position as advantageous because it provided a vantage point from which it could dominate over nature. This mindset is the reason why the relationship with nature is hierarchical and fragmented and has led to the destruction of the environment and the silencing of animals. Dualistic thinking endorses the oppression of nature, it entrenches power relationships by creating a dominant/inferior element to the relationship which results in the objectification of the inferior party. We see in the *Kruger v MEA* case that the legal culture reinforces the dualistic relationship between human/nature by promoting the idea that the natural environment and animals must be exploited in order to be protected. In the last part of chapter two we look at how an anthropocentric culture stemming from the enlightenment can be challenged through the realization that humanity is not separate from nature but actually bound by, interconnected to and intertwined in the laws of nature. It discredits the view that man has dominion over nature. Ecofeminism calls for a new relationship which sees humanity within nature.

⁶⁷⁰ Bordo 'The Cartesian Masculinity of Thought' (1986) 3 *Signs* 441.

⁶⁷¹ Plumwood 'Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of rationalism' (1991) 6 *Hypatia* 10.

Chapter three starts with an overview of the *Kruger v MEA* facts and decision. Thereafter I look critically at the animal welfare approach and its ability to provide the protection needed by animals. Protection of animals is based on the theory of sentience in terms of which animals, as sentient beings, have an interest in not suffering. The scope of sentience is limited. Francione said that the welfare approach endorses not only use of but also killing animals. Animals are seen to have no interest in a continued existence, therefore, cannot know what is lost by killing them.⁶⁷² As a result death is not seen as the causing of suffering. Adams looked at the fact suffering cannot be understood as a generic model.⁶⁷³ Animals feel and express pain differently to what humans do. This is linked to the development of an ethic of care model to environmental protection which listens directly to the voice of the animal. Animal welfare makes animal use acceptable under the guise of humane practices. It makes society feel more comfortable with the ongoing exploitation of animals and by seemingly regulating these activities society feels less guilty, deeming these practices morally acceptable.⁶⁷⁴ Francione points out that there is an assumption within the welfare approach that the 'rational' owner of animals will not inflict more harm than necessary, therefore regulated activities often commence without check-ups, creating the false belief that the industry is regulated. In the last part of chapter three look at how the *Kruger v MEA* judgement perpetuated a dualistic relationship with nature by directly weighing the interests of nature against the economic interests of the human applicants. The applicants, both wealthy males asserted their dominance which was inherently afforded to them by an underlying anthropocentric culture within the system by using certain laws to frustrate efforts to protect the environment. Their financial motive was exposed when they said that their stockpiles of rhinoceros horn have been rendered 'worthless' by the imposition of the moratorium.⁶⁷⁵ Their interests lie in the profits of farming rhinoceros not in their protection from the current poaching crisis.

Into a hallucination. She has blundered somehow into man's phantasmagoria, and cannot get out.

⁶⁷² Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 29.

⁶⁷³ Adams 'Caring about Suffering' in Donovan & Adams (eds) (2007) 206.

⁶⁷⁴ Francione 'The Problem of Animal Welfare and the importance of Vegan Education' (2012) 27 *SAPL* 29.

⁶⁷⁵ *Kruger v MEA* (2015) para 72.

Even the ox-pecker cries in fear and the White Egret snatches away his shadow.

[...]

The first fatal tokens prickles awake

A torn wisp of stars – a free-fall glimpse of the constellated night bazaars of Japan
and Indo-China – blinding migraine.

[...]

The symptoms far-fetched but exact

Each gripping a dagger by the hilt of rhino horn at eight or nine thousand dollars a
handful

[...]

Sways blurs in her outline tries to hear

Tries to hold on to the cool wallow of the earthenware self, the mouthful of thorns, the
superb, mauling brawls of courtship, the monumental couplings⁶⁷⁶

[...]

In chapter four I look at the rights based approach as a more radical approach to animal protection as it aims to abolish all animal use practices. In the first part of the chapter I looked at the Kantian theory of rationality. Kant put forward that only humans can be rational. He says that this is because animals are stuck within a system of stimuli and response whereas humans are rational beings because they can think beyond their time and space. Humans only have an indirect duty towards animals as a result. Animals exist only as a means to an ends, that ends is humans. Plumwood offered a critique of the way in which Kant equates rationality and morality. This understanding of morality is separate from emotion.⁶⁷⁷ Masculinity is equated to reason and femininity with emotion. This mindset endorses the human/nature dualism. In the second part of chapter four I looked at the subject of a life criterion. Regan critiqued Kant's theory that only rational beings can be the bearer of rights. Rather he suggested that if a being fulfils the subject of a life criterion can be the bearer of rights.⁶⁷⁸ However Donovan said that this theory continues to maintain a hierarchical relationship with nature because it only protects

⁶⁷⁶ The Black Rhino III. Hughes *Wolfwatching* (1980) 30.

⁶⁷⁷ Plumwood 'Nature, Self, Gender: Feminism, Environmental Philosophy and the Critique of Rationalism' (1991) 6 *Hypatia* 4.

⁶⁷⁸ Regan (1983) 175.

beings with a complex self-awareness.⁶⁷⁹ In this way the rights theory relapses into a rational paradigm which promotes a culture of separation.

This leads me to chapter five in which I look at an ethic of care approach to animal protection. In the first part of the chapter I looked at how an ethic of care can challenge the patriarchal system. Adams looked at the fact that that sexism and a speciesism are interconnected and mutually reaffirm the system of oppression. It is through this understanding that ecofeminism identifies speciesism as gendered. An ethic of care is needed to transcend the oppressive patriarchy intuitions and cultures. Donovan pointed out that masculine thought is stuck within the paradigm of conquest. The one party always has to dominate over the other, there will never be a mutual affirmation of both parties within the relationship. It therefore maintains a dualistic relationship. This is why I look at an approach rooted in care and kindness. In the second part of chapter five I looked at the development of an environmental ethic based on an ethic of care. A new environmental ethic of care is needed to replace the culture of separation. A feminine understanding of nature as an organic being, sustaining the connection between animals and nature. An ethic of care is the development of a relationship with nature and with animals. It takes animals into consideration in the mists of an anthropocentric society. An ethic of care makes the move from theorizing about nature in an abstract manner to listening directly to animals in a contextual and narrative manner, the creation of a dialogue. In the last part of chapter five I looked at the problem underlying the *Kruger v MEA* case. The judgement maintained the fragmented and hierarchal relationship between humans and nature. The judge continued to silence the voice of the rhinoceros. Donovan called for the development of an ethic of care relationship to a direct dialogue with animals. Adams said that the only way to achieve this is to allow their stories to be part of narrative.⁶⁸⁰ It would require the attentiveness, empathy and imagination. The cold scientific voice must be rejected. Humanity must also not speak for the animal. Animals have their own voice, we must learn how to listen to them.

⁶⁷⁹ Donovan 'Animal rights and feminist theory' (1990) 15 *Signs* 355

⁶⁸⁰ Donovan 'Caring to Dialogue' in Donovan & Carol (eds) (2007) 363.

The most emotive part of the poem falls within the last part of the poem. The rhinoceros which started as masculine becomes feminine towards the end.⁶⁸¹ The beauty in the feminine is shown. I end my dissertation with the end of the poem because it highlights the human greed behind the poaching syndicates at the expense of the rhinoceros. It also shows the impact of the loss on nature, the trees and the waterholes mourn for the loss of the rhinoceros. This sad ending is carried across in such a narrative and contextual manner, it calls on the imagination. In the end one cares for the rhinoceros ultimately urging a kinder ending, urging us to care.

The thorny scrub has nothing to say. The waterholes are silent. The horizon mountain-folds are silent.

The Black Rhino
Is Vanishing

Into a soft
Human Laugh⁶⁸²

⁶⁸¹ The Black Rhino III. Hughes *Wolfwatching* (1980) 30.

⁶⁸² The Black Rhino III. Hughes *Wolfwatching* (1980) 30-32.

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