

**The Content and Context of Unnecessary Suffering under Kenya's Prevention of
Cruelty to Animals Act of 2012: Towards an Effective Standard of Domestic Animal
Welfare**

Submitted in partial fulfilment of the Bachelor of Laws Degree,
Strathmore University Law School

By
Cheptumo Jean Jeptoo
094649

Prepared under the supervision of
Mr. Desmond Tutu

December 2019
Word Count: 16,800

ACKNOWLEDGMENTS

I wish to extend my gratitude to my supervisor, Desmond Tutu, for his patience, fortitude and wise counsel throughout the writing of this dissertation.

I dedicate this study to my family. I thank them for their continuous support throughout my undergraduate journey. Viva!

DECLARATION

I, JEAN JEPTOO CHEPTUMO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

MR. DESMOND TUTU

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LIST OF ABBREVIATIONS

PCA	Prevention of Cruelty to Animals Act, Kenya
NGO	Non-Governmental Organisation
GDP	Gross Domestic Product
IGAD	Intergovernmental Authority on Development
PSPCA	Pennsylvania Society for the Prevention of Cruelty to Animals
KWS	Kenya Wildlife Service
SSPCA	Singapore Society for the Prevention of Cruelty to Animals
AVA	Agri-Food and Veterinary Authority
WAP	World Animal Protection
KSPCA	Kenya Society for the Prevention of Cruelty to Animals
UDAW	Universal Declaration on Animal Welfare
UK	United Kingdom
EU	European Union
OIE	World Organisation for Animal Health

LIST OF INSTRUMENTS

United Nations Environmental Programme, *United Nations Conference on the Human Environment (Stockholm Declaration)*, 5-16 June 1972.

African Union, *African Convention on the Conservation of Nature and Natural Resources Convention on Biological Diversity*, 15 September 1968.

World Organisation for Animal Health *Sub-Regional Representation for Eastern and the Horn of Africa*

Prevention of Cruelty to Animals Act (Kenya)

Veterinary Surgeons Act (Kenya)

Wildlife (Conservation and Management) Act (Kenya)

Constitution of Kenya

Sessional Paper No. 10 of 1975 (Kenya)

Animals and Birds Act (Singapore)

Criminal Code (Canada)

LIST OF CASES

Joseph Wanjogu Kungu v Republic (2005) High Court of Kenya

Robert Lee Allen v Pennsylvania Society for the Prevention of Cruelty to Animals (2007)

United States District Court

Ford v Wiley (1889) United Kingdom Queen's Bench Division (Divisional Court).

Duncan v Pope (1899) Scotland Justice for the Peace Reports

Public Prosecutor v Ling Chung Yee Roy (2013) Singapore District Court

Patchett v Macdougall (1984) Justiciary Case, Scottish Law Times

R v Gerling (2016) British Columbia Court of Appeal

New Jersey Society for the Prevention of Cruelty to Animals v Board of Education (2007)

Superior Court of New Jersey

ABSTRACT

“Humanity's true moral test, its fundamental test consists of its attitude towards those who are at its mercy: Animals.” -Milan Kundera-

The Prevention of Cruelty to Animals Act of Kenya of 2012 is the main legislation in Kenya that directly provides a legal framework for animal welfare. This statute declares it a crime to cause any animal to suffer unnecessarily. This effectively makes ‘unnecessary suffering’ the standard of animal welfare. On its surface, this appears to be a good standard, as it focuses on the experience of the animal, here being the presence or absence of suffering. By its nature, the term unnecessary suffering requires an inquisition into the purpose for which the animal in question at any given point is suffering. Consequently, the purpose can either be deemed necessary, hence acceptable or be deemed unnecessary hence unacceptable, and punishable by law. The focal point of animal welfare therefore is not the animal, rather it is human beings and their needs.

Whereas the Prevention of Cruelty to Animals Act under section 3 sets unnecessary suffering as the standard of animal welfare, it does not give any indication as to what this consists of. This lack of clarity in the act’s interpretation leaves great discretion to the courts to determine when suffering is necessary or not. It is important to note that in assessing whether suffering in an animal is necessary, a person’s perception of animals plays a fundamental role in their assessment. This is the same for judges as they are not exempt from the workings of human subjectivity.

This paper aims to discuss the meaning of unnecessary suffering, and propose a possible definition for the term unnecessary suffering for use by the courts in interpreting the provisions of the Prevention of Cruelty to Animals Act. This proposed definition is aimed at limiting the scope of judicial discretion and ensuring certain minimum protections for animals.

1.0 CHAPTER ONE: INTRODUCTION

1.1 Background

Human beings exist in an eco-system, comprising of both biotic (living) and abiotic (non-living) things.¹ The abiotic elements include water, air, and soil while the biotic elements are essentially all species of flora and fauna.² Within an ecosystem, all biotic and abiotic things co-exist.³ In fact, not only do they co-exist, they essentially work together to achieve a balanced ecosystem.⁴ An example of this is a food chain starting from primary producers such as grass, and ending with the apex predator such as a lion.⁵ Every species has a niche in the ecosystem that helps keep the ecosystem healthy.⁶ The removal of one species from the ecosystem will cause a change to the entire system, be it slight or significant.⁷

This broad, big-picture and somewhat metaphysical understanding of the context in which human beings physically exist is an important starting point of this study for two reasons. First, it brings to the forefront, the scientifically accepted fact that human beings are animals.⁸ In his book, *Behave: The Behaviour of Human Beings*, Dr. Robert Sapolsky states that human beings are animals, only with a greater intellectual capacity than all others.⁹ Secondly, and more importantly, it provides the explanation for why human beings interact with other animals. At its core, the human-animal interaction is dictated by the co-dependence of the ecosystem.¹⁰ Man keeps a dog for security, and the dog gets food and shelter from man. A give and take ‘transaction’ is at the heart of the interaction between the species.¹¹ In instances of poaching, where wild animals are illegally hunted and/or captured, the goal of the poacher is to retrieve something valuable to them from the animal such as ivory or animal skin.¹² In this scenario

¹ Moleon M, Sanchez-Zapata J, Margalida A, Carette M, Owen-Smith N, Donazar J, ‘Humans and Scavengers: The Evolution of Interactions and Ecosystem Services’ 64 *American Institute of Biological Sciences Oxford Journals* 5, 2014, 395.

² Bar-Massada A, Radeloff V, Stewart S, ‘Biotic and Abiotic Effects of Human Settlements in the Wildland-Urban Interface’ 64 *American Institute of Biological Sciences Oxford Journals* 5, 2014, 430.

³ Moore T, ‘Ecosystems’ 25 *The American Biology Teacher* 4, 1963, 249.

⁴ Moore T, ‘Ecosystems’, 249.

⁵ Post D, Connors M, Goldberg D, ‘Prey Preference by a Top Predator and the Stability of Linked Food Chains’ 81 *Wiley Ecological Society of America* 1.

⁶ Moore T, ‘Ecosystems’, 251.

⁷ Moore T, ‘Ecosystems’, 251.

⁸ Johnston M, ‘Human Beings’ 84 *The Journal of Philosophy* 2, 1987, 75.

⁹ Sapolsky R, *Behave: The Biology of Humans at Our Best and Worst*, 1 ed, Penguin Press, New York, 2017, 34.

¹⁰ Moleon M, Sanchez-Zapata J, Margalida A, Carette M, Owen-Smith N, Donazar J, ‘Humans and Scavengers: The Evolution of Interactions and Ecosystem Services’ 395.

¹¹ Moore T, ‘Ecosystems’, 251.

¹² Lusk J, Norwood F, ‘Animal Welfare Economics’ 33 *Applied Economics Perspectives and Policy* 4, 2011, 463.

there is an imbalance. Whereas the poacher receives the ivory or animal skin, the wild animal receives nothing.¹³

The reason for canvassing the ideal nature of human-animal interaction, is to explain the scope of this study and the reason for the chosen scope.

This study focusses on the regulation of the interaction of human beings with domestic animals with a view to ensuring animal welfare for said animals. The reason for the exclusion of wild animals from this study is the fact of an imbalance of protection between these two categories of animals.¹⁴ As early as 1975, the focus on wildlife conservation and management in Kenya began through sessional paper no. 3 of 1975.¹⁵ Promptly afterwards, in 1976, the Wildlife (Conservation and Management) Act was enacted to give effect to the policy.¹⁶ In truth, this focus is understandable due to the economic benefits gained from wildlife tourism.¹⁷ Nonetheless, domestic animals remain an important asset for human beings. They provide food, companionship, transport, and other materials used for industrial production such as leather and fur.¹⁸ Prior to colonization, Kenyan natives, as did all other African peoples, had cultural and societal systems in place.¹⁹ Albeit in a different form than the current written laws, Africans had societal laws and regulations.²⁰ However, after Kenya became a British colony, it adopted the laws of Britain through the Judicature act.²¹ The Prevention of Cruelty to Animals Act, hereinafter ‘the PCA’ was assented to and commenced its application in Kenya in December 1962.²² Since then, even with multiple revisions, this law has remained the same in substance while the British law on animal welfare has evolved significantly. In 1986, the British PCA was repealed and replaced with the Animals (Scientific Procedures) Act which has since then been amended severally. This stagnation is not because animal welfare in Kenya is a non-issue, rather, it is because this law originated from, and was informed by British culture.²³ An inquiry

¹³ Krener M, Morcom C, ‘Elephants’ 90 *American Economic Review* 1, 2000, 212.

¹⁴ Feber R, Raebel E, D’Cruze N, Macdonald D, Baker S, ‘Some Animals are More Equal than Others: Wild Animal Welfare Media’ 67 *Oxford Journal of Bioscience* 1, 62.

¹⁵ Republic of Kenya, Sessional Paper No. 3 of 1975.

¹⁶ *Wildlife (Conservation and Management) Act* (Act No. 6 of 1976).

¹⁷ Feber R, Raebel E, D’Cruze N, Macdonald D, Baker S, ‘Some Animals are More Equal than Others: Wild Animal Welfare Media’ 62.

¹⁸ Fraser D, MacRae A, ‘Four Types of Activities that Affect Animals: Implications for Animal Welfare Science and Animal Ethics Philosophy’ 20 *Animal Studies Repository* 4, 2011, 1.

¹⁹ General History of Africa, Vol 2, UNESCO.

²⁰ De Luna K, ‘Affect and Society in Precolonial Africa’ 46 *The International Journal of African Historical Studies* 1, 2013, 123.

²¹ Section 3(2), *Judicature Act* (No. 16 of 1967).

²² *Prevention of Cruelty to Animals Act* (Act no.12 of 2012).

²³ Arudra Barra, *What is Colonial about Colonial Laws*, American University International Law Review, 31, 2, 138.

into the viability of this law is necessary as it is the only legislation whose primary end is the protection of domestic animals in Kenya.²⁴

In recent years, wildlife conservation in Kenya has taken the frontline in matters of animal welfare.²⁵ Since 2014, Wildlife Direct, an NGO that deals exclusively in wildlife conservation has put out annual reports on the state of wildlife crimes in Kenya.²⁶ On the other hand, the law protecting domestic animals has remained mostly unaltered for 57 years, indicative of the fact that domestic animals have received little legal attention. It is interesting to note that this is the case despite the fact that majority of Kenyans encounter domestic animals daily, even if remotely.²⁷

Through article 69 of the constitution of Kenya, there are novel obligations in respect to the environment, one of which is to protect genetic resources and biological diversity.²⁸ If for nothing else, this provision should be reason enough to engage in an inquiry as to the legal framework protecting domestic animals, to ensure they are protected. Furthermore, the very aim of the PCA as stated in its perambulatory statement, is to make better provisions for the prevention of cruelty to animals.²⁹ As such, assessing the effectiveness of the term ‘unnecessary suffering’ as a standard of animal welfare, is tantamount to assessing whether the spirit of this law is in tandem with its letter.

The onus of deciding when suffering in animals is necessary is on human beings.³⁰ This is only rational, as human beings are the only known species with intellect, capable of understanding suffering.³¹ However, human being’s perception of animals is to a large degree subjective, and therefore varied.³² While this is the case, the fact of suffering in animals is based on objective truth posited by scientists.³³ As such, it is problematic to have unnecessary suffering, as the standard of animal welfare in Kenya, and not have a definition of the term.³⁴ It allows for unpoliced discretion, which goes against the spirit of the law (the PCA) itself.³⁵ Where varied

²⁴ General History of Africa, Vol 2, UNESCO.

²⁵ Wildlife Direct Annual Report of Wildlife Crimes (generally compared to Domestic Animals).

²⁶ <https://wildlifedirect.org/> on 10 February 2019.

²⁷ *Cattle Complex in East Africa*, 361, 28, 1926, Melville Herskovits, American Anthropologist.

²⁸ Article 69, *Constitution of Kenya*.

²⁹ *Prevention of Cruelty to Animals Act* (Act no.12 of 2012)

³⁰ *New Jersey Society for the Prevention of Cruelty to Animals v Board of Education* (2007), Superior Court of New Jersey.

³¹ <https://www.theguardian.com/books/2018/sep/21/human-instinct-why-we-are-unique> The Guardian, *The Human League: What separates us from other animals?* 21 September 2019, Adam Rutherford.

³² Gary L. Francione, *Animals as Property*, 2 *Animal Law Journal*, 1, 2.

³³ Gary L. Francione, *Animals as Property*, 2 *Animal Law Journal*, 1, 2.

³⁴ See A, ‘Animal Protection laws of Singapore and Malaysia’ 13 *Singapore Journal of Legal Studies* 2, 2013, 136.

³⁵ Sohn L, ‘The Definition of Aggression’ 45 *Virginia Law Review* 5, 1959, 698.

views are likely, but a factual risk is present, a well-defined, objective, and reasonable standard should be applied.³⁶ This ensures that the law sufficiently provides, at least in its wording, for the attainment of its goal.³⁷

1.2 Statement of the problem

The law in Kenya provides legal protection for domestic animals as required by the constitution of Kenya. The main legislation for the protection of domestic animals in accordance with the constitution, is the Prevention of Cruelty to Animals Act of 2012. Section 3 of this act expressly states that it is a crime to cause an animal unnecessary suffering. This term, however, is not defined, effectively giving broad discretion to courts to define the term. This lack of definition of a term so central to animal welfare, renders the legal framework ineffective. A definition of the term is therefore a necessary first step to achieving domestic animal welfare.

1.3 Significance of the study

As earlier stated, animals are an important resource for human life.³⁸ In Kenya, domestic animals not only have cultural currency, being commonly exchanged as dowry in marriages³⁹, but they also contribute greatly to our economic sphere.⁴⁰ Poultry farming, livestock keeping, and dairy farming contribute to 4% of our GDP according to a study done by the IGAD Centre for Pastoral Areas & Livestock Development.⁴¹ These animals, are sentient beings, and are therefore capable, as a matter of fact, of suffering.⁴² This study aims to demonstrate that Kenya's law on the prevention of cruelty to animals, as it exists, may be more harmful to animals than helpful. This is due to the two words, 'unnecessary suffering' which allows human subjectivity in deciding when suffering is necessary in animals.⁴³

In allowing such great discretion in the interpretation of unnecessary suffering, the law cannot possibly satisfy its aim. The aim of this paper is not to claim that animals should be the ones to decide when suffering is necessary for them, as that is impossible. Rather, it suggests that a

³⁶ In matters such as assessing whether global warming, a proven scientific phenomenon, subjective opinions as to whether global warming is occurring is not taken seriously. In the same way, the fact of animals suffering does not cease to be suffering based on an individual's or a society's perception of it.

³⁷ Sohn L, 'The Definition of Aggression' 45 *Virginia Law Review* 5, 1959, 698.

³⁸ Man and Animals, Enicuola.net http://www.eniscuola.net/wp-content/uploads/2011/03/pdf_animals_man_animaldoc.pdf on 7 February 2019.

³⁹ *Cattle Complex in East Africa*, 361, 28, 1926, Melville Herskowitz, American Anthropologist.

⁴⁰ Lusk J, Norwood F, 'Animal Welfare Economics' 464.

⁴¹ The Contribution of Livestock to the Kenyan Economy, IGAD Centre for Pastoral Areas & Livestock Development (ICPALD), Policy Brief Series.

⁴² The Cambridge Declaration on Consciousness states, 'humans are not unique in possessing the neurological substrates that generate consciousness. Nonhuman animals, including all mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates.' This document has been dubbed, the Universal Declaration of Animal Sentience.

⁴³ See A, 'Animal Protection laws of Singapore and Malaysia', 136.

single definition of unnecessary suffering should be put in law, that ensures certain protections for the animal, based on sentience. In truth, there is a benefit to having wide discretion, which is that, where perhaps a judge is particularly attentive to the plight of animals, they are likely to consider less-grave harms to the animal as unnecessary.⁴⁴ However, it also allows for a judge who is say intolerant of animals, to consider even the gravest harm to an animal as necessary, therefore justifiable. Due to this, it is important to introduce objectivity in the definition of unnecessary suffering in animals.

1.4 Statement of Objectives

1. To evaluate the adequacy of Kenya's legal framework for the protection of domestic animals.
2. To demonstrate the special nature of animals as property in contrast with other forms of property.
3. To determine the meaning of unnecessary suffering for use under the Prevention of Cruelty to Animals Act of Kenya of 2012.

1.5 Research questions

1. Does Kenya's legal framework adequately and effectively provide for the protection of domestic animals?
2. What are the implications of the concept of animals as property?
3. What is the meaning of unnecessary suffering under the Prevention of Cruelty to Animals Act of Kenya of 2012?

1.6 Hypothesis

The hypothesis in the study is that domestic animals are not effectively protected under the laws of Kenya. Animals, though owned as property are not the same as other forms of property such as land as they are sentient beings. Therefore, they require a greater degree of protection by the law, which can be achieved through setting an effective standard of animal welfare.

1.7 Literature Review

In the paper *Animals as Property*, Gary L. Francione states that social attitudes about animals are hopelessly confused.⁴⁵ Further, he states that human beings embody what he calls 'moral schizophrenia', where they treat certain animals differently from others.⁴⁶ Francione states that there are several reasons for this. Mainly, he states three; historical reasons, economic reasons

⁴⁴ See A, 'Animal Protection laws of Singapore and Malaysia', 136.

⁴⁵ Francione G, 'Animals as Property' 44 *Rutgers Animal Law Review* 8, 2000, 37.

⁴⁶ Francione G, 'Animals as Property' 721.

and culture.⁴⁷ On this matter, this study partly differs from Francione's views. Whereas the point is the same, this study asserts that history and economic activities are inextricably linked to culture.⁴⁸ As such, all three of these facets can be collapsed into culture.

In the book *'Animal Law in a Nutshell'*, Pamela D. Frasch outlines the evolution of the term 'unnecessary suffering' in the united states.⁴⁹ Further, Frasch demonstrates the different court interpretations of the term.⁵⁰ Interestingly, Frasch demonstrates a link between the respective judges' religious views on animals and their interpretation of 'unnecessary suffering'.⁵¹ In the paper *'Realizing Animal Rights And Welfare'*, Abel Kimani proposes that a human- centred approach should be adopted in realizing animal welfare.⁵² Kimani quotes John Locke stating that cruelty against animals should be prevented not because of the harm to the animal but rather the effect of the cruelty on the person.⁵³ Though this is a plausible position, it assumes that the particular form of cruelty will be considered cruelty by all.⁵⁴ This study aims to show that the very perception of suffering in animals is subjective and therefore cannot be assumed.

In *Domestic Animals as Property: A Critique on Animal Rights in Kenya*, Nyokabi Njoroge proposes the abolition of the concept of animals as property.⁵⁵ She states that though the prevention of cruelty to animals act attempts to protect animals by making cruelty a crime, it fails to do so effectively by allowing animal ownership be the basis of such protection. Ultimately, she opines, animals can only be protected when they are viewed as beings with less mental capacity than humans, rather than as property. This study differs from Njoroge's on this point. This study proposes that better protection can be afforded to animals when they are viewed as property. This will be discussed in the fourth chapter.

⁴⁷ Gary L. Francione, 'Animals, Property and Legal Welfarism: Unnecessary Suffering and the Humane Treatment of Animals' 46 *Rutgers Law Review* 2, 1994, 723.

⁴⁸ In this study, culture is used to mean a people's way of life, encompassing their beliefs, hence religion. Further, in history, culture is central to human beings.

⁴⁹ Frasch P, *Animal Law in a Nutshell*, West Academic Publishing, Oregon, 1st edition, 36-47.

⁵⁰ Frasch P, *Animal Law in a Nutshell*, 40.

⁵¹ Frasch P, *Animal Law Cases and Materials*, West Academic Publishing Oregon, 5th edition, 42-57.

⁵² Kimani A, *Realizing Animal Rights and Welfare: An Analysis of The Effectiveness of Laws on The Protection of Domestic Animals in Kenya*, Strathmore University Law School, 5. This is an undergraduate dissertation submitted in 2016.

⁵³ Kimani A, *Realizing Animal Rights and Welfare: An Analysis of The Effectiveness of Laws on The Protection of Domestic Animals in Kenya*, Strathmore University Law School, 5.

⁵⁴ Blosh M, 'The history of animal welfare law and the future of animal rights', Unpublished LLM Thesis University of Western Ontario London, Ontario, Canada, 2012, 14.

⁵⁵ Njoroge N, *Domestic Animals as Property: A Critique on Animal Rights in Kenya*, Strathmore University Law School, 16.

1.8 Research Design and Methodology

The mode of research that will be used in this study will be text-based, desktop research. This mode is chosen because with the lack of focus on domestic animal law jurisprudence, scholarly input is critical to understanding the best strategies for domestic animal welfare. On the specific matter of animal welfare, the Kenyan jurisdiction has little material outside of the statute itself.⁵⁶ As such, both primary and secondary sources will be used in this study. The primary sources will include the Constitution of Kenya, Acts of Parliament and case law while the secondary sources will include journal articles, reports and other internet sources.

The main challenge anticipated in carrying out this study is a likely insufficiency of material on the matter, especially from Kenya.

1.9 Chapter Breakdown

The first chapter of this study sets out the basic concepts within the study. It contains the introduction and background, the problem statement, the statement of objectives, the research questions as well as the hypothesis. It also briefly outlines the theoretical framework of the study and summarises the literature on the topic.

The second chapter will comprehensively discuss the theoretical underpinnings of the study. The theories mentioned in the first chapter will be analysed and their implications to the study explained.

The third chapter will set out the legal framework for the protection of domestic animals in Kenya. Both national and international legislation will be discussed and its implication on animal welfare assessed.

The fourth chapter will entail a discussion on animals as property. Therein, a comparison will be done between animals and other forms of property with an aim of placing animals as a special kind of property. This chapter will also entail a discussion on necessity for the purposes of unnecessary suffering. This is an attempt at setting out a definition of necessity that can be included in the PCA to effectively set a standard for animal welfare.

Finally, the fifth chapter will contain recommendations to be implemented towards an effective animal welfare standard, and a conclusion of this study.

⁵⁶ Gathanga P, Factors Influencing The Effectiveness Of Animal Welfare Programmes In Kenya A Case Of Kenya Society For The Protection And Care Of Animals (KSPCA).

2.0 CHAPTER TWO: THEORETICAL FRAMEWORK

2.1 Introduction

In this chapter, the theoretical underpinnings of this study will be discussed. First, the two main theories that inform the study will be stated and their implication on the same will be explained. The theoretical basis of this study is a conflation of two theories, the theory of Legal Realism as espoused by Oliver Wendell Holmes, and the Practical Ethics Theory as espoused by Peter Singer. These theories, and their implication(s) on the study will be discussed. Secondly, the definition of certain key terms that feature in the study will be provided and a brief discussion on their importance to the study will follow. The reason for this is that by their nature, these terms have different meanings based on the way they are used and the contexts within which they are used. For this reason, it is important to clarify their meanings as used in this study.

2.2 Theory of Legal Realism

The theory of legal realism holds that legal rules are to benefit the larger society and public policy based on judicial decisions.⁵⁷ This is contrasted with the view that legal rules are to be obtained from the strict interpretation of written law.⁵⁸ It is important to note that the theory of legal realism is posited by many scholars, who focus on different aspects of law, and therefore their interpretation varies.⁵⁹ Historically, there have been two self-styled jurisprudential legal realist movements; Scandinavian and American.⁶⁰ The unifying factor that anchors their different perspectives in the theory of legal realism, is the idea that law is, to an extent, indeterminate.⁶¹ While critiquing the theory, H.L.A Hart succinctly describes legal realism by stating that legal realists hold that judges decide cases on the basis of no-legal considerations.⁶² Some notable legal realists include; Karl Llewelyn, Jerome Frank, Herman Oliphant, Felix Cohen, and Oliver Wendell Holmes.⁶³ In this study, the theory of legal realism as espoused by Oliver Wendell Holes will be the focus, rather than the entirety of the theory of legal realism.

⁵⁷ Black's Law Dictionary, 2 ed.

⁵⁸ Green S, 'Legal realism as theory of law', 46 *William and Mary Law Review* 6, 2005, 1921.

⁵⁹ Green S, 'Legal realism as theory of law', 46 *William and Mary Law Review* 6, 2005, 1921.

⁶⁰ Alexander G, 'Comparing the Two Legal Realisms- American and Scandinavian' 50 *American Journal of Comparative Law*, 2002, 131.

⁶¹ Kalman L, *Legal Realism at Yale 1927-1960*, 1 ed, The Lawbook Exchange ltd, Connecticut, 1986, 229.

⁶² Hart H, *The Concept of Law*, 2 ed, Oxford University Press, Oxford, 1961, 1.

⁶³ Kalman, *Legal Realism at Yale 1927-1960*, 127.

In his book *'The Common Law'*, Oliver Wendell Holmes Jr., an American Jurist of the 19th Century states;

“The life of the law has not been logic, rather, it has been he felt necessities of the time, the experience. This includes; the prevalent moral and political theories, intuitions of public policy, the prejudices which judges share with their fellowmen, both avowed and unconscious. These have had a good deal more to do than the syllogism, in determining the rules by which men should be governed.”⁶⁴

This statement by Holmes, provides a comprehensive summary of his jurisprudential position. The reason why people pay lawyers to argue for them or to advise them, he explains in *'The Path of Law'*, is that they have been trained to predict what the judge may decide and find a way to alter the predicted outcome to bring forth one desirable to the client.⁶⁵ In common law societies, the command of the public force is entrusted on judges through the instrumentality of the courts, Holmes states.⁶⁶ Further, he highlights an aspect of the judicial system that has been discussed by many scholars, legal realists or not; the fact of inescapable personal bias in judges.⁶⁷ In deciding cases, judges have access to multiples sources of law; statute, precedence, acts of parliament, international treaties etc.⁶⁸ Usually, there is a normative hierarchy of these sources of law, for example, where there is an act of parliament that contradicts the constitution, the constitution will be followed.⁶⁹ It seems straight-forward and almost obvious. However, it is far more common to find instances where there are various conflicting laws, with their sources not being of obvious hierarchical positions against each other.⁷⁰ If this were not the case, there would never be an instance of dissenting opinions among judges of the same bench.⁷¹ These judges have had the same interaction with the legal representatives of both sides. They have similarly been presented with the same legal arguments and been provided with the same evidence. At the point of the court session therefore, there is no imbalance

⁶⁴ Holmes O, *The Common Law*, 1 ed, Little Brown Publisher, Boston, 1881, 1.

⁶⁵ Holmes O, *'The Path of Law'* 10 *Harvard Law Review* 8, 1897, 3.

⁶⁶ Holmes, *The Common Law*, 26.

⁶⁷ Holmes, *The Common Law*, 26.

⁶⁸ Noyes J, Tanis M, Zoller E, Butler W, *'The Common Law Tradition'* 83 *American Society of International Law* 1, 1989, 550.

⁶⁹ Njoroge C, Kabau T, *'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the harmonization of the legal system'* 44 *The Comparative and International Law Journal of Southern Africa* 3, 2011, 294.

⁷⁰ Alschuler A, *'The Descending Trail: Holmes' Path of the Law One Hundred Years Later'* 49 *Florida Law Review* 3, 1997, 366.

⁷¹ Niblett A, *'Case-by-Case Adjudication and the Path of the Law'* 42 *The Journal of Legal Studies* 2, 2013, 306.

between the judges.⁷² Despite this, judicial officers reach different conclusions, oftentimes conclusions which are polar opposites of each other.⁷³ There are many reasons for this, Holmes states, and one of them is the personal bias of the judges.⁷⁴ This personal bias affects much more than the conclusion reached.⁷⁵ It affects the interpretation of statute, the choice of case law relied on, and even the assessment of evidential weight, where evidence is adduced.⁷⁶ To canvas this point, I refer to one of the most important cases in animal law litigation; *Robert Lee Allen v. Pennsylvania Society for the Prevention of Cruelty to Animals*.⁷⁷

For thirty years, Robert Lee Allen ran a farmer in the business of purchasing and rehabilitating livestock and horses.⁷⁸ The animals he acquired for rehabilitation purposes were underweight and suffered a myriad of medical issues. Some animals were rehabilitated and resold, while others were euthanized, slaughtered, or auctioned for slaughter. On 31 January 2004, Witmer, a humane society police officer, received a telephone complaint regarding the condition of the horses and other livestock on the accused's farm. The next day, Witmer and Hopkins, who is also a humane society police officer, visited the accused's farm to investigate allegations that his animals were treated cruelly. During the visit, Hopkins informed Allen opinion that the horses needed to be evaluated and treated by a veterinary officer. Neither Witmer nor Hopkins inquired the duration of time Allen had owned the animals, or what care and medications, if any, were being provided to them. Shortly afterwards, a warrant to seize eight horses, four goats, and two pigs was executed, after which Allen sought judicial redress for unlawful seizure. The Pennsylvania Society for the prevention of cruelty to animals (PSPCA) filed a criminal suit against Allen claiming cruelty to animals in violation of the laws of the state. He was convicted and later appealed. Before a three-judge bench, the district court, on a two to three majority held that Allen was unlawfully searched and but was still guilty of the crime in question. The conviction was therefore upheld.

The significance of this case is not its substantive holding, but the differing nature of the judge's opinions. Though two judges arrived at the same conclusion, their reasons for the same were different. Justice Schulenberger, one of the two judges stated that the PSPCA was acting under

⁷² Niblett A, 'Case-by-Case Adjudication and the Path of the Law' 42 *The Journal of Legal Studies*

⁷³ Niblett A, 'Case-by-Case Adjudication and the Path of the Law' 42 *The Journal of Legal Studies*

⁷⁴ Holmes, 'The Path of Law', 461.

⁷⁵ Holmes, *The Common Law*, 26.

⁷⁶ Holmes, *The Common Law*, 26.

⁷⁷ *Allen v Pennsylvania Society for the Prevention of Cruelty to Animals* (2007) United States District Court.

⁷⁸ *Allen v Pennsylvania Society for the Prevention of Cruelty to Animals* (2007) United States District Court.

the authority of the state, hence justifying the search.⁷⁹ This was his reason for upholding the conviction. Justice Bender, while also upholding the conviction, gave a different reason. He stated that the question before the court was not the search, but the allegation of cruelty to animals which had been proven beyond reasonable doubt.⁸⁰ Whereas both judges arrived at the same conclusion, their reasons for doing so differ, regardless of their sitting on the same bench, and assessing the same evidence.⁸¹

“Judges entertaining the competing claims of parties, constantly have to form an opinion, and, from objective criteria and conviction, eliminate the credible from the incredible, the truth from the untruth.”⁸²

This statement rightly implies that ultimately, the opinion formed by a judicial officer must be a product of conviction. The Merriam Webster dictionary defines conviction as; the state of being convinced or holding a strong persuasion or belief.⁸³

2.2.1 Legal Realism and the PCA

As stated earlier, the PCA considers it cruelty to animals when an animal is made to suffer unnecessarily.⁸⁴ Though this law purports to set a standard for animal welfare, it fails to do so effectively. Rather, it provides great discretion for a judge to rely solely on his/her conviction as to what suffering is, and when it should be necessary.⁸⁵ When hearing a case involving allegations of cruelty to animals, the judge will form an opinion based on their conviction as to whether the animal in question has undergone unnecessary suffering.⁸⁶ This is the main challenge which will inevitably face any lawyer attempting to rely on the PCA in a court of law. In Kenya, there is no case in which the meaning of unnecessary suffering has been directly interpreted by the courts.⁸⁷ Though one may decide to rely on cases from another jurisdiction for an interpretation of the same, the cultural nuances of the human-animal relationship may not be properly catered for.⁸⁸ Furthermore, the end of the PCA is to prevent cruelty to animals.⁸⁹

⁷⁹ *Allen v Pennsylvania Society for the Prevention of Cruelty to Animals* (2007) United States District Court.

⁸⁰ *Allen v Pennsylvania Society for the Prevention of Cruelty to Animals* (2007) United States District Court.

⁸¹ *Allen v Pennsylvania Society for the Prevention of Cruelty to Animals* (2007) United States District Court.

⁸² *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (2017) eKLR.

⁸³ Merriam Webster Dictionary, 4 ed.

⁸⁴ Preamble, *Prevention of Cruelty to Animals Act* (No 12 of 2012).

⁸⁵ Rubin P, Higgins R, ‘Judicial Discretion’ 9 *The Journal of Legal Studies* 1, 1980, 129.

⁸⁶ Hoffmaster B, ‘Understanding Judicial Discretion’ 1 *Law and Philosophy* 1, 1982, 24.

⁸⁷ There have been cases on cruelty but the question of the meaning of unnecessary suffering has not been dealt with by the courts.

⁸⁸ Francione G, ‘Animals as Property’, 2 *Animal Law Journal* 1, 1995, 2.

⁸⁹ Preamble, *Prevention of Cruelty to Animals Act* (No 12 of 2012).

In failing to define unnecessary suffering, the act fails in its end as it shifts the authority of setting an ethical standard, to the judge. It therefore lacks legal authority and becomes a dead document, referred to only for its statutory sophistication and not for its practical applicability.⁹⁰

2.3 Practical Ethics Theory

The practical ethics theory was proposed by one of the most influential applied ethicists of the 20th and 21st century, Peter Singer, in his book *Practical Ethics*.⁹¹ In the book, he begins by explaining the nature of ethics, primarily by negating three widely accepted beliefs about ethics.⁹²

The first is that ethics is an ideal system that is noble in theory but is no good in practice.⁹³ Singer states that many believe ethics is inapplicable to the real world as they regard it as a series of simple rules such as ‘do not kill’ and ‘do not steal’.⁹⁴ It follows therefore, that those who believe this to be the nature of ethics find that these simple rules are not applicable to every situation.⁹⁵ Worse even, in attempting to sticking to the simple rules without assessing their consequences and responding the nuances of the specific case, one may find that the result is disastrous.⁹⁶ Take a terrorist attack for example. If one were to follow the simple rule of ethics ‘do not kill’, ignoring the repercussions of the same in the specific context, this will likely lead to the mass killing of innocent hostages whose lives would have otherwise been preserved by the death of the attackers.⁹⁷ This is not to say that there is no sense in simple rules such as these, rather, it is to say that these rules are general in nature and are meant to be a guiding principle.⁹⁸ They always have and always will be applied in a context, which may alter the moral value of an action.⁹⁹

⁹⁰ Lawrence E, ‘Human Perceptions of Animals and Animal Awareness: The Cultural Dimension’ 86 *Animal Studies Repository* 2, 1985, 285.

⁹¹ Singer P, *Practical Ethics*, 2 ed, Cambridge University Press, Cambridge, 1979, 4.

⁹² Singer P, *Practical Ethics*, 4.

⁹³ Singer P, *Practical Ethics*, 6.

⁹⁴ Singer P, *Practical Ethics*, 4.

⁹⁵ Singer P, ‘The Globalisation of Animal Welfare: More Food Does not Require More Suffering’ *Foreign Affairs*, 19, 2012, 126.

⁹⁶ Singer P, *Practical Ethics*, 7.

⁹⁷ Schwenkenbecher A, ‘Terrorism, Supreme Emergency and Killing the Innocent’ 17 *Institute of International Relations Perspectives* 1, 2009, 105.

⁹⁸ Singer P, *Practical Ethics*, 6.

⁹⁹ Singer P, *Practical Ethics*, 6.

The second idea about ethics disputed by Singer is the belief that ethical standards cannot exist outside of religion.¹⁰⁰ Singer makes the bold assertion that ethics is not intelligible only in the context of religion.¹⁰¹ Ethics, he states is not dependent on religious context or relative belief.¹⁰² Instead, ethical reasons are universal.¹⁰³ They go beyond one's own likes and dislikes, and rise to the standpoint of the impartial spectator or the ideal observer.¹⁰⁴ In critiquing his theory, some theists stated that ethics cannot do without religion as the very meaning of good is that which is approved by God.¹⁰⁵ Singer refutes this by quoting Plato stating;

“If the gods approve of some actions it must be because those actions are good, in which case it cannot be the gods' approval that makes them good. The alternative view makes divine approval entirely arbitrary: if the gods had happened to approve of torture and disapprove of helping our neighbours, torture would have been good and helping our neighbours bad.”¹⁰⁶

The third and final claim that Singer rejects, is that ethics is relative and subjective.¹⁰⁷ Understanding the likely criticism he would receive for this assertion, Singer clarifies that he rejects the idea of a relative ethics only in some ways in which it is presented.¹⁰⁸ In demonstrating what he means by this, he gives the example of the oft-asserted idea that ethics is relative to the society one lives in.¹⁰⁹ In the context of a society, he admits, there is relativism, but it is only a superficial relativism.¹¹⁰ For example, if one were to say; the worship of a physical god is wrong, this would be taken as a true ethical statement by a majority Christian society. A majority Hindu society would disagree with this statement, and perhaps even consider the statement ethically wrong.

¹⁰⁰ Singer P, *Practical Ethics*, 6.

¹⁰¹ Singer P, *Moral Ethics' Oxford Journals, Vol 32, Issue 4, 23.*

¹⁰² Singer P, 'The Fable of the Fox and the Unliberated Animals' *Journal of Ethics*, 88,1978, 121.

¹⁰³ Singer P, *Practical Ethics*, 12.

¹⁰⁴ Singer P, 'Moral Ethics' *Oxford Journals, Vol 32, Issue 4, 23.*

¹⁰⁵ Singer P, *Practical Ethics*, 23.

¹⁰⁶ Euthyphro, by Plato, is a Socratic dialogue whose events occur in the weeks before the trial of Socrates, between Socrates and Euthyphro.

¹⁰⁷ Singer P, *Practical Ethics*, 14.

¹⁰⁸ Kuhse H, 'Resolving Arguments about the Sanctity of Life: A Response to Long' *Journal of Medical Ethics*, 14, 2998, 198.

¹⁰⁹ Singer P, *Practical Ethics*, 2

¹¹⁰ Singer P, 'Moral Ethics' *32 Oxford Journals 4, 1992, 23.*

Singer distinguishes between those who breach ethical standards, and those who hold unconventional ethical beliefs and follow them.¹¹¹ In demonstrating the danger of adopting a relativistic approach to ethics, he states;

“The notion of living according to ethical standards is tied up with the notion of defending the way one is living, of giving a reason for it, of justifying it. Thus, people may do all kinds of things we regard as wrong, yet still be living according to ethical standards, if they are prepared to defend and justify what they do. We may find the justification inadequate, and may hold that the actions are wrong, but the attempt at justification, whether successful or not, is enough to bring the person's conduct within the domain of the ethical as opposed to the non-ethical. When, on the other hand, people cannot put forward any justification for what they do, we may reject their claim to be living according to ethical standards, even if what they do is in accordance with conventional moral principles.”¹¹²

Having debunked the oft-asserted notions of ethics, he presents the practical ethics theory by stating; “In assessing the ethical implication of a human action, there must be equal consideration of interests of those affected by the decision.”¹¹³ In this statement, ‘those’ refers to all flora, fauna, and all other organisms in the eco-systems that can reasonably be said to have interests.¹¹⁴ Singer unapologetically declares his theory a consequentialist theory of ethics.¹¹⁵ In fact, he states that by its nature, ethics is consequential, as without consequences, the significance of seeking to do good would be lost.¹¹⁶

In demonstrating the application of the theory, Peter Singer confronts ethics in various topics; sexuality, politics and governance, reproductive rights, and animal welfare.¹¹⁷ Singer has made a significant contribution to the animal welfare discourse, his most read work being his book ‘Animal Liberation: A new ethics for our treatment of animals’, published in 1975.¹¹⁸ Though

¹¹¹ Singer, *Practical Ethics*, 23.

¹¹² Singer, *Practical Ethics*, 23.

¹¹³ Peter S, ‘The Triviality of the Debate over ‘Is-ought’ and the Definition of ‘Moral’ American Philosophical Quarterly, 10, 1973, 52.

¹¹⁴ Singer, *Practical Ethics*, 23.

¹¹⁵ Singer, *Practical Ethics*, 6.

¹¹⁶ Singer P, ‘Ethics and Socio-biology’ Philosophy and Public Affairs, 11, 1, 1982, 62.

¹¹⁷ Singer, *Practical Ethics*, 32.

¹¹⁸ Singer P, *Animal Liberation: A new ethics for our treatment of animals*, 1 ed, Harper Collins Publisher, United States, 1975, 12.

this book was published before ‘Practical Ethics’ was, his theoretical standpoint is the same. In the next section, the practical ethics theory as it applies to animal welfare will be discussed.

2.3.1 Ethical treatment of Animals

*“All the arguments to prove man's superiority cannot shatter this hard fact: in suffering the animals are our equals.”*¹¹⁹

The root cause of all human cruelty to animals is speciesism, Singer states.¹²⁰ Speciesism generally, is the prejudice or bias in favour of the interests of members of one's own species and against those of members of other species.¹²¹ Within the human-animal relationship, it is the idea that being human is good enough reason for human animals to have greater moral rights than non-human animals.¹²² Human beings, he states, in believing that their interests are more important than those of non-human animals, deprive other animals of their interests without considering the impact this has on them.¹²³ Singer asserts that there is a natural imbalance between humans and other animals.¹²⁴ Unlike other animals, human beings have rational faculties that enable them to inquire into the nature of an action and decide to either undertake the action, or refrain from doing so.¹²⁵ One may argue that the fact of lacking intellect and will constitutes a lack of interests in other animals.¹²⁶ This, Singer argues, is biologically wrong.¹²⁷ All animals have interests as a result of their nutritive and sensible capacities.¹²⁸ These nutritive and sensible capacities are derived from Aristotle's classification of souls. In all living organisms, there is a physical capacity to their being, and an intangible capacity, the soul.¹²⁹ Aristotle posited that there are three types of souls, nutritive, sensible, and rational.¹³⁰ The nutritive soul is found in all living organisms and enables the process of nutrition, reproduction, and excretion.¹³¹ The sensible soul is found in animals (human and non-human) and pertains the senses such as sight, and allows the organism to perceive the world.¹³² Finally,

¹¹⁹ Singer, *Practical Ethics*, 6.

¹²⁰ Singer, *Animal Liberation: A new ethics for our treatment of animals*, 26.

¹²¹ Singer, *Animal Liberation: A new ethics for our treatment of animals*, 26.

¹²² Singer, *Animal Liberation: A new ethics for our treatment of animals*, 26.

¹²³ Singer, *Practical Ethics*, 7.

¹²⁴ Singer, *Animal Liberation: A new ethics for our treatment of animals*, 26.

¹²⁵ Singer, *Animal Liberation: A new ethics for our treatment of animals*, 26.

¹²⁶ Francione G, ‘Animal Welfare and the Moral Value of Nonhuman Animals’, 3.

¹²⁷ Singer, *Animal Liberation: A new ethics for our treatment of animals*, 28.

¹²⁸ Singer, *Animal Liberation: A new ethics for our treatment of animals*, 26.

¹²⁹ Aristotle, *On the Soul*, Aeterna Press, Rome, 1952, 124.

¹³⁰ Aristotle, *On the Soul*, 123.

¹³¹ Miller F, ‘Aristotle's Philosophy of Soul’ 53 *The Review of Metaphysics* 2, 1999, 316.

¹³² Aristotle, *On the Soul*, 123.

the rational soul, which is found only in human beings and contains the capacity for rational thought.¹³³ From this classification, all organisms have interests, only to varying degrees depending on the needs of the particular organism's soul.¹³⁴

For animals, the fact of having a nutritive and sensible soul implies the presence of certain interests pertaining to their nutritive and sensible capacities.¹³⁵ Where one keeps a pet, for example, they are obligated to feed the pet, an interest required by the nutritive soul.¹³⁶ Further, they are expected to provide proper shelter for the animal, considering the specific needs of the animal.¹³⁷ A reptile for example, would require different environmental conditions from say, a cat. These interests are informed by the animal's sensible soul.¹³⁸

Owing to its consequentialist approach to ethics, the practical ethics theory requires that in every human action affecting an animal, an assessment of the interests of the animal must be done.¹³⁹ He terms this the principle of equal consideration of interests. Singer states,

“The essence of the principle of equal consideration of interests is that we give equal weight in our moral deliberations to the like interests of all those affected by our actions. This means that if only X and Y would be affected by a possible act, and if X stands to lose more than Y stands to gain, it is better not to do the act.”¹⁴⁰

In the PCA, the subject for whom protection is sought is the animal.¹⁴¹ It is only reasonable, I propose, that the interests of the animal are assessed, with the animal's nutritive and sensible capacities as the basis. It is no good to assess the necessity of suffering in animals, with human interests as the basis.

2.4 Animal Suffering

According to the Cambridge Dictionary, to suffer is to experience mental or physical pain.¹⁴²

In speaking of suffering in animals, there is the danger of presuming that everyone understands

¹³³ Aristotle, *On the Soul*, 123.

¹³⁴ Miller F, 'Aristotle's Philosophy of Soul' 320.

¹³⁵ Singer, *Practical Ethics*, 6.

¹³⁶ Miller F, 'Aristotle's Philosophy of Soul' 323.

¹³⁷ Kullman W, 'Aristotle as a Natural Scientist' 34 *Acta Classica* 1, 1991, 142.

¹³⁸ Kullman W, 'Aristotle as a Natural Scientist' 34 *Acta Classica* 1, 1991, 142.

¹³⁹ Singer, 'The Globalization of Animal Welfare: More Food Does Not Require More Suffering' *Foreign Affairs Journal*, 19, 2012, 126.

¹⁴⁰ Singer, *Practical Ethics*, 8.

¹⁴¹ Preamble, *Prevention of Cruelty to Animals Act* (Act no. 12 of 2012).

¹⁴² Cambridge Dictionary, 2 ed.

what suffering in animals entails.¹⁴³ In *'Unnecessary Suffering: Definition and Evidence'*, Hurnik and Lehman stated that some believe that animals are incapable of suffering, often posing the question, "how do we know animals suffer?"¹⁴⁴ In rebutting this claim, they propose the use of the same method, posing the question, 'how does one human know that other human beings suffer?'¹⁴⁵ One might ask such a person to offer evidence that supports their claim that other human beings suffer. Not being capable of physically feeling the pain of another human being, the person will likely offer the hypothesis of pain as the explanation for certain kinds of behaviour observed. An example Hurnik and Lehman provide, is that of a limping woman. In attempting an explanation as to the reason for her limping, one may say that the pain of exerting pressure on one leg has led to the avoidance of the same, hence the limp.¹⁴⁶ Physically, only the woman experiences the pain (and knows of the truth of its existence), but the hypothesis that avoidance of pain is the reason for her behaviour is a likely majority assumption. In the same way, when one witnesses a dog standing on three limbs, with the fourth limb slightly raised, a hypothesis that the avoidance of pain from exertion of pressure is not implausible. In this case behavioural observation has led to the hypothesis that the animal in question is suffering.¹⁴⁷ This pertains not only to evidence of physical suffering but to psychological distress as well. Where a cat flees from a dog, for example, one can infer fear. The animal's behaviour in response to its environment has led to a certain hypothesis. This is not to say that animals have capacities of the rational soul. Rather, animals, in bid to preserve their nutritive and sensible interests, may behave in a manner telling of its state physical and/or non-physical state.¹⁴⁸ Therefore, in referring to the psychology of the animal, Hurnik and Lehman simply mean the animal's nutritive and sensible capacities.

An animal is said to be suffering, therefore, when the animal experiences that which is against its interests as required by its nutritive and sensible soul.¹⁴⁹ In assessing suffering, the possible justifications for suffering that may lead to claims of its necessity are not relevant.¹⁵⁰ The fact of suffering remains just that, regardless of its specific nuances.¹⁵¹

¹⁴³ Hurnik F, Lehman H, 'Unnecessary suffering: Definition and evidence' 3 *International Journal for the Study of Animal Problems*, 2, 1982, 131-137.

¹⁴⁴ Hurnik F, Lehman H, 'Unnecessary suffering: Definition and evidence', 137.

¹⁴⁵ Hurnik F, Lehman H, 'Unnecessary suffering: Definition and evidence', 134.

¹⁴⁶ Hurnik F, Lehman H, 'Unnecessary suffering: Definition and evidence', 136.

¹⁴⁷ Hurnik F, Lehman H, 'Unnecessary suffering: Definition and evidence', 137.

¹⁴⁸ Singer, *Animal Liberation: A new ethics for our treatment of animals*, 26.

¹⁴⁹ Singer, *Practical Ethics*, 6.

¹⁵⁰ Perret R, 'The Analogical Argument for Animal Pain' 14 *Journal of Applied Philosophy* 1, 1997, 49-50.

¹⁵¹ Perret R, 'The Analogical Argument for Animal Pain', 49-50.

3.0 CHAPTER THREE: LEGAL FRAMEWORK FOR THE PROTECTION OF DOMESTIC ANIMALS

3.1 Introduction

In this chapter, the legal framework for the protection of domestic animals in Kenya will be discussed. This is necessary to demonstrate the insufficiencies within the law and to understand the possible areas for improvement of the same. First, the constitutional provisions that provide for the protection animals in Kenya will be mentioned and analysed. Secondly, the acts of parliament that deal with the protection of domestic animals will be canvassed and similarly analysed. Finally, the international treaties and conventions on animal welfare standards will be outlined and analysed. Finally, based on a brief comparison of the international legal standards and the laws of Kenya on domestic animal welfare, the missing link in the Kenyan law will be outlined and will form a basis for this study.

3.2 The Constitution of Kenya

The constitution of Kenya is the supreme law of the land, its *grund* norm in accordance with Kelsen's legal theory.¹⁵² As such, when discussing the legal protection of domestic animals, the constitution is the first point of call, as its provisions ultimately override those of any other law in conflict with it.¹⁵³ In the following section, the specific constitutional provisions that affect domestic animals, both on large and small scales will be discussed. This caveat is important as there are certain articles which may seem not to involve domestic animals, or animals in general, even in the least. Where this seems the case, the reason for the inclusion of such article shall be discussed prior to a substantive assessment of its contents. It should be noted that the constitution does not directly mention animals as property. However, the Prevention of Cruelty to Animals Act refers to an animal's owner, implying that animals are property.¹⁵⁴ As such, the mention of the PCA under this section is done to illustrate the legal basis of animals as property in Kenya.

Protection of Right to Property (Article 40)

Under this article, the constitution of Kenya provides that every person has the right to acquire, and own property, of any description and in any part of Kenya, subject to article 65.¹⁵⁵

¹⁵² Kelsen H, Pure Theory of Law, <https://plato.stanford.edu/entries/lawphil-theory/> on 27 September 2019.

¹⁵³ Njoroge C, Kabau T, 'The Application of International Law in Kenya under the 2010 Constitution: Critical Issues in the harmonization of the legal system' 294.

¹⁵⁴ Section 2, *Prevention of Cruelty to Animals Act* (Act no. 12 of 2012).

¹⁵⁵ Article 40, *Constitution of Kenya* (2010).

Both within and beyond Kenya, animals are considered property under the law.¹⁵⁶ In Kenya, the Prevention of Cruelty to animals act, which shall be discussed in detail later, explicitly states that any person having the charge, custody or control of an animal is its owner.¹⁵⁷ Further, under article 260 of the constitution, property is defined as including any vested or contingent right to, or interest in or arising from goods of personal property.¹⁵⁸ According to Black's Law Dictionary, personal property refers to the belongings of an individual, excluding any real estate property or other buildings.¹⁵⁹ It is important to reiterate at this point that this study's scope pertains only to domestic animals. This is important due to the differentiated ownership models between domestic animals and wild animals.¹⁶⁰ Wild animals, though having the legal status of property, do not form part of personal property, as they are owned by the state under the management of the Kenya wildlife service.¹⁶¹ The mention of animals hereinafter, though true for both domestic and wild animals, will pertain only to domestic animals as they are a proper object of protection under article 40.¹⁶² From the explicit mention of an owner as the person in charge of animal, read together with the definition of personal property, animals are included in the definition of property under article 260.¹⁶³ As such, citizens have a right to own animals under article 40.¹⁶⁴

Analysis

With human beings having a constitutional right to own and use an animal, a question may arise as to the significance of this right for animal welfare.¹⁶⁵ Though it may seem, *prima facie*, that this article offers no constitutional protection for animals, it does in fact do so in the following two ways.

First, within the confines of ownership, animals are more likely to receive requisite sustenance such as food, shelter, and medicine where necessary.¹⁶⁶ Granted, the mere ownership of animals does not connote absolute welfare for the animals in question.¹⁶⁷ It would be utopic and

¹⁵⁶ Adams W, 'Human Subjects and Animal Objects: Animals as 'Other' in Law' 3 *Journal of Animal Law and Ethics* 29, 2010, 56.

¹⁵⁷ Section 2, *Prevention of Cruelty to Animals Act* (Act no. 12 of 2012).

¹⁵⁸ Article 260, *Constitution of Kenya* (2010).

¹⁵⁹ Black's Law Dictionary, 11 ed.

¹⁶⁰ Section 2, *Kenya Wildlife Conservation and Management Act* (Act no. 47 of 2013).

¹⁶¹ Section 2, *Kenya Wildlife Conservation and Management Act* (Act no. 47 of 2013).

¹⁶² Article 40, *Constitution of Kenya* (2010).

¹⁶³ Article 260, *Constitution of Kenya* (2010).

¹⁶⁴ Article 40, *Constitution of Kenya* (2010).

¹⁶⁵ Korsgaard C, 'Kantian Ethics, Animals, and the Law' 33 *Oxford Journal of Legal Studies* 4, 2013, 649.

¹⁶⁶ Singer, 'The Globalization of Animal Welfare: More Food Does Not Require More Suffering' *Foreign Affairs Journal*, 19, 2012, 126.

¹⁶⁷ Singer, 'The Globalization of Animal Welfare: More Food Does Not Require More Suffering' *Foreign Affairs Journal*, 19, 2012, 126.

unreasonable to state that no cruel action can be done by a human being to an animal they themselves own.¹⁶⁸ This is possible, yet still, it presents a higher likelihood of welfare than the alternative, which is feral existence.¹⁶⁹ In advocating against the legal status of animals as property, many, if not majority of animal rights activists fail to appreciate the inherent benefit that animals gain from having a human owner.¹⁷⁰ Within the confines of ownership, a human being can be held accountable where they fail to perform certain actions such as feeding.¹⁷¹ Essentially, where a human being owns an animal, they become the liability bearing entity in any case of harm brought to that animal.¹⁷² Further, the animal in question is more likely to receive requisite sustenance as they are under the control and care of the owner in question.¹⁷³ Though there are inherent benefits gained from the ownership model, there is still a need for the limitation of the right to property.¹⁷⁴ The constitution comprehensively provides for the limitation of rights under article 24.¹⁷⁵ It states that a right or fundamental freedom may be limited where the limitation is reasonable and justifiable in an open and democratic society.¹⁷⁶ The right to property, not being a right that may not be limited under article 25, can therefore be limited in accordance with the constitution.¹⁷⁷ The implication of this is that it mitigates the absolute nature of human power with regard to property, here being animals.

The Fourth Schedule

The fourth schedule of the constitution sets out the specific functions of the national and county governments.¹⁷⁸ Here, the functions of both the national and county governments with regards to domestic animals will be stated and analysed.

¹⁶⁸ Singer, 'The Globalization of Animal Welfare: More Food Does Not Require More Suffering' 6 *Foreign Affairs Journal* 19, 2012, 126.

¹⁶⁹ Singer, 'The Globalization of Animal Welfare: More Food Does Not Require More Suffering' 126.

¹⁷⁰ Peter Singer, 'Animal Suffering and Rights: A Reply to Singer and Reagan' *Journal of Ethics*, 1978, 2, 133.

¹⁷¹ Korsgaard C, 'Kantian Ethics, Animals, and the Law' 630.

¹⁷² Epstein R, 'Animals as Objects, or Subjects, of Rights' Coase Sandor Institute for Law and Economics, John M Olin Program in Law and Economics Working Paper no. 171, 2D Series, 2002, 10

https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1052&context=law_and_economics on 10 November 2019.

¹⁷³ Epstein R, 'Animals as Objects, or Subjects, of Rights' Coase Sandor Institute for Law and Economics, 10/2002.

¹⁷⁴ Epstein R, 'Animals as Objects, or Subjects, of Rights' Coase Sandor Institute for Law and Economics, 10/2002.

¹⁷⁵ Article 24, *Constitution of Kenya* (2010).

¹⁷⁶ Article 24, *Constitution of Kenya* (2010).

¹⁷⁷ Article 24, *Constitution of Kenya* (2010).

¹⁷⁸ Fourth Schedule, *Constitution of Kenya* (2010).

Obligations of the National Government¹⁷⁹

1. Protection of Animals and Wildlife¹⁸⁰

Section 22(b) of the fourth schedule provides that the national government has the duty to protect the environment and natural resources with a view to establishing a sustainable system for the protection of animals and wildlife.¹⁸¹ In analysing this provision, it is important to inquire into the meaning of the word protection with regard to governmental obligation. The question is; what constitutes effective protection of animals?

According to the Cambridge dictionary, to protect something means to guard, cover or shield from danger, or otherwise take measures to prevent harm.¹⁸² From the definition of the word alone, the word protect implies taking active steps to prevent harm or damage to the object in question. This is opposed to a duty such as say, that of respecting the environment. Such a duty, from the word itself entails the simple absence of interference with the environment, hence imposing a negative obligation on the subject.¹⁸³ Some of the active steps that can be taken in fulfilment of the obligation to protect are as follows. First, the national government can enact legislation setting out the particular restrictions on human actions towards animals.¹⁸⁴ In Kenya, the Prevention of Cruelty to Animals Act sets out to protect domestic animals, while the Kenya Wildlife Conservation and Management Act sets out to protect wild animals.¹⁸⁵ It would not be reasonable to have all the detailed particulars of different laws being specified in the constitution, hence the need for separate and therefore specialised legislation. Secondly, the national government can ensure effective monitoring of implementation of laws through organisations such as the Kenya Society for the Protection of Animals, for domestic animals, and the Kenya Wildlife Service, for wild animals.

2. Agricultural Policy

Agricultural policy describes a set of legal provisions relating to domestic agriculture and imports of foreign agricultural products.¹⁸⁶ In Kenya, agricultural policy focuses on increasing productivity and income growth, especially for enhanced food security and equity and on

¹⁷⁹ Fourth Schedule, *Constitution of Kenya* (2010).

¹⁸⁰ Fourth Schedule, *Constitution of Kenya* (2010).

¹⁸¹ Section 22(b) Fourth Schedule, *Constitution of Kenya* (2010).

¹⁸² Cambridge Dictionary, 8 ed.

¹⁸³ Alnami A, 'Duty to Respect' *Journal of Humanitarian Law*, 24, 2010, 20.

¹⁸⁴ Article 187, *Constitution of Kenya* (2010).

¹⁸⁵ Kenya Agricultural Policy, Ministry of Agriculture, Livestock and Fisheries.

¹⁸⁶ Kenya Agricultural Policy http://www.fao.org/fileadmin/user_upload/fsn/docs/Ag_policy_Kenya.pdf on 27 September 2019.

stability of agricultural output.¹⁸⁷ Domestic animals are integral to the agricultural sector, both as material resources, and as labour resources.¹⁸⁸ Animal agriculture is the practice of breeding animals or the production of animal products.¹⁸⁹ Meat, milk, ghee, butter, silk, leather, and wool are all sourced from animals.¹⁹⁰ Another, perhaps less obvious way through which animals impact the agricultural sector is through organic fertilizers which contain animal ingredients such as bone meal, blood meal, chicken feather meal and manures.¹⁹¹ Further, animals such as oxen and donkeys, provide labour on small-scale farms, which create agricultural produce through farming.¹⁹²

In these three ways, providing animal produce such as milk and meat, providing labour on farms, and producing ingredients for the making of fertilizers, animals are integral to the agricultural sector.¹⁹³ As such, it is important that the agricultural policy set out by the National Government include provisions that protect the interests of animals.¹⁹⁴ For example, provisions should be put in place against the cruel killing of animals for purposes of meat production, especially on a large scale such as is done by the Kenya Meat Commission.¹⁹⁵ Secondly, a provision should be included that prohibits the over-working of beasts of burden such as donkeys and set out sanctions for breach of the same.¹⁹⁶

Many times, in speaking of agriculture, animals are not considered to the extent that they should be due to the main agricultural exports being crop products.¹⁹⁷ Noting their contribution to agriculture, this should be rethought, and animals given requisite protection under agricultural policy.

3. Veterinary Policy

¹⁸⁷ Kenya Agricultural Policy http://www.fao.org/fileadmin/user_upload/fsn/docs/Ag_policy_Kenya.pdf on 27 September 2019.

¹⁸⁸ Kenya Agricultural Policy http://www.fao.org/fileadmin/user_upload/fsn/docs/Ag_policy_Kenya.pdf on 27 September 2019.

¹⁸⁹ Kenya Agricultural Policy http://www.fao.org/fileadmin/user_upload/fsn/docs/Ag_policy_Kenya.pdf on 27 September 2019.

¹⁹⁰ Taylor A, Hurnik F, Lehman H, 'The Application of Cost-Benefit Dominance Analysis to the Assessment of Farm Animal Quality of Life', 323.

¹⁹¹ Kenya Agricultural Policy http://www.fao.org/fileadmin/user_upload/fsn/docs/Ag_policy_Kenya.pdf on 27 September 2019.

¹⁹² Kenya Agricultural Policy http://www.fao.org/fileadmin/user_upload/fsn/docs/Ag_policy_Kenya.pdf on 27 September 2019.

¹⁹³ Article 24, *Constitution of Kenya* (2010).

¹⁹⁴ Article 24, *Constitution of Kenya* (2010).

¹⁹⁵ The Kenya Meat Commission has the slaughter capacity of 1,250 large animals a day, and 2,000 small stocks according to the commission website <http://www.kenyameat.co.ke/> on 19 November 2019.

¹⁹⁶ Craig J, 'Kenya's donkeys finally receive some protection' 29 February 2012

<https://www.voanews.com/archive/kenyas-donkeys-finally-receive-some-protection> on 19 November 2019.

¹⁹⁷ Peter Singer, 'Animal Suffering and Rights: A Reply to Singer and Reagan' *Journal of Ethics*, 1978, 2, 133.

Veterinary policy is a legal document that contains detailed provisions on the animal resource industry, including the key challenges facing the industry and guidelines for the possible ways of counteracting these challenges.¹⁹⁸ Of the three duties provided under the fourth schedule for National Governments, veterinary policy is most closely and primarily related to domestic animals. The 2015 Kenya Veterinary Policy by the Ministry of Agriculture, Livestock and Fisheries contains specific provisions for meat and milk production, companion animals, emerging livestock and even donkeys and horses.¹⁹⁹

Obligations of County Governments

1. Animal Husbandry

Animal husbandry is a branch of agriculture that deals with animals that are kept for meat, eggs, fibre, milk and other naturally produced products.²⁰⁰ The county government is therefore mandated to ensure that within their counties, animal husbandry practices are well managed and regulated.

2. Livestock Sale Yards

A livestock sale yard is an event during which domestic animals are sold, often to the highest bidder, through auctions.²⁰¹ Certain counties in Kenya, such as Samburu County have enacted legislation within the county to manage the conduction of livestock sale yards.²⁰²

3. County Abattoirs

Abattoirs are establishments within which animals for purposes of produce are kept and slaughtered.²⁰³ The county government is required to set in place laws that set out the conditions within which the animals are to be held. This is required to be in line with the PCA.

4. Animal Disease Control

The county government is required to effectively manage animal disease within the county.²⁰⁴ This includes veterinary services for animals and animal care and burial

¹⁹⁸ Kenya Veterinary Policy, Ministry of Agriculture, Livestock and Fisheries, 2015
<https://www.kenyamarkets.org/wp-content/uploads/2016/06/Kenya-Veterinary-Policy-January-2015-Draft.pdf>
on 27 September 2019.

¹⁹⁹ Kenya Veterinary Policy, Ministry of Agriculture, Livestock and Fisheries, 2015
<https://www.kenyamarkets.org/wp-content/uploads/2016/06/Kenya-Veterinary-Policy-January-2015-Draft.pdf>
on 27 September 2019

²⁰⁰ Fourth Schedule, *Constitution of Kenya* (2010).

²⁰¹ Fourth Schedule, *Constitution of Kenya* (2010).

²⁰² Fourth Schedule, *Constitution of Kenya* (2010).

²⁰³ Fourth Schedule, *Constitution of Kenya* (2010).

²⁰⁴ Kenya Veterinary Policy, Ministry of Agriculture, Livestock and Fisheries, 2015
<https://www.kenyamarkets.org/wp-content/uploads/2016/06/Kenya-Veterinary-Policy-January-2015-Draft.pdf>
on 27 September 2019

facilities.²⁰⁵ This is done through ensuring proper licensing of dog ownership as it creates a duty-holder toward the animal. Animals without owners will be difficult to manage for purposes of disease as there is not clear account of the animal's medical history. This is likely to create risks of disease for both humans and other animals.

Obligations in respect of the environment (Article 69)

Article 69 of the constitution is the main provision in which the constitution declares the rights of the environment, and the duties arising there from.²⁰⁶ Throughout the article, the term 'natural resources' is used to describe the subject of the rights.²⁰⁷ Article 260 defines natural resources as the physical non-human factors and components, whether renewable or non-renewable, including sunlight, surface and groundwater, forests, biodiversity and genetic resources, and rocks, minerals, fossil fuels and other sources of energy.²⁰⁸ Domestic animals are included in the definition of natural resources under the term biodiversity which is defined as the variety and variability of life on Earth.²⁰⁹

In article 69(e), the constitution states that the state shall protect genetic resources and biological diversity.²¹⁰ On citizens, it confers the duty to co-operate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.²¹¹

Though seemingly simple, this article greatly elevates the importance of animal welfare when compared to its importance under the independence constitution.²¹²

In placing the obligation of animal welfare in the constitution, the implications for the failure to protect animals ceases to be a mere violation of law, and becomes a constitutional violation.²¹³

²⁰⁵ Kenya Veterinary Policy, Ministry of Agriculture, Livestock and Fisheries, 2015 <https://www.kenyamarkets.org/wp-content/uploads/2016/06/Kenya-Veterinary-Policy-January-2015-Draft.pdf> on 27 September 2019

²⁰⁶ Article 69, *Constitution of Kenya*.

²⁰⁷ Article 69, *Constitution of Kenya*.

²⁰⁸ Article 260, *Constitution of Kenya*.

²⁰⁹ Oxford Dictionary, 2nd ed.

²¹⁰ Article 69 (e), *Constitution of Kenya*.

²¹¹ Article 69(2), *Constitution of Kenya*.

²¹² Kenya Society for the Protection and care of animals 'Kenya's Constitution on Animal Rights and the Prevention of Cruelty to Animals' 18 February 2019 <https://kspca-kenya.org/kenyas-constitution-on-animal-rights-and-prevention-of-cruelty-to-animals/> on 19 November 2019

²¹³ Coenen M, 'Constitutional Privileging' 99 *Virginia Law Review* 4, 2013, 684.

3.3 National Legislation

Prevention of Cruelty to Animals Act

The PCA is the main act in Kenya that directly and exclusively aims at the protection of animals against cruelty. In its preamble, it is stated that its aim is to make better provisions for the prevention of cruelty to animals.²¹⁴

Sections 3-12 set out the actions or omissions which amount to cruelty to animals and further criminalises the same.²¹⁵ In these sections lies the strengths and weaknesses of this act, and ultimately, the problem that this study aims to bring to light and begin to solve. To demonstrate this, I will outline a few of the provisions in these sections. Section 3 states; a person shall be guilty of an offence of cruelty if he;

conveys, carries, confines or impounds an animal in a manner or position as to cause that animal unnecessary suffering; without sufficient cause, starves, underfeeds or denies water to an animal; being the owner of an animal, without reasonable cause or excuse, abandons it, whether permanently or not, in circumstances likely to cause the animal unnecessary suffering hunts, kills or destroys any animal in such a manner as to cause that animal more suffering than is necessary; or being the owner of any animal, without reasonable cause or excuse, does or omits to do an act which causes unnecessary suffering to the animal.²¹⁶

The recurrent sequence within this section, is that it mentions various actions which are normally performed to animals or which animals are normally caused to perform by their owners such as feeding, loading, and transporting, and then stating that this will amount to cruelty when done to the point of causing unnecessary suffering to the animal.

In effect therefore, the act recognizes, rightly so, that all these actions when over-done, in the case of loading an animal for example, or under-done, in the case of feeding an animal, can result in the suffering of an animal. The distinguishing factor, a sieve of sorts, between suffering that is acceptable and suffering that is unacceptable is the necessity factor.

The question at any point therefore will be; Is it necessary for this animal to suffer for the intended action to be undertaken?

Presumably, the intended action for which the animal is utilised provides a certain form of benefit for the human being, monetary or otherwise.²¹⁷ Due to the presence of this benefit, it is

²¹⁴ Preamble to the *Prevention of Cruelty to Animals Act* (Act no. 12 of 2012).

²¹⁵ Sections 3-12, *Prevention of Cruelty to Animals Act* (Act no. 12 of 2012).

²¹⁶ Section 3, *Prevention of Cruelty to Animals Act* (Act no. 12 of 2012).

²¹⁷ Adams W, 'Human Subjects and Animal Objects: Animals as 'Other' in Law' 3, 57.

possible to extrapolate the meaning of necessary to great lengths. Thus, the irony of ‘unnecessary suffering’. In effect, the seemingly good standard ‘unnecessary suffering’, becomes a tool of justification for any and all actions done to or imposed on animals. The PCA, therefore, in an honest attempt to set a standard for animal welfare, works against itself due to its failure to define what the standard it sets means. The question of necessity will be discussed further and in greater detail in the next chapter.

3.4 Case Law

There have been numerous cases on cruelty to wildlife and crimes against wildlife that have led to convictions.²¹⁸ For domestic animals, however, this has not been the case.²¹⁹ This is perhaps a symptom of the greater problem with the PCA explained previously.

In *Joseph Wanjogu Kungu v Republic*, the appellant was charged and convicted with the crime of being cruel to an animal contrary to section 3(1)(k) of the Prevention of Cruelty to animals act.²²⁰ The particulars of the offence were that on 18th of January 2000, the appellant was found being cruel to an animal by killing it, the property of Christopher Njoroge Kimani. The appellant pleaded not guilty to the charge and proceeded to be tried. After a full trial the appellant was found guilty. He was sentenced to pay a fine of three hundred shillings or in default he was to serve one month’s imprisonment. The appellant was aggrieved by the said conviction and sentence and filed an appeal.

The prosecution was mandated to prove that the appellant had with cruelty, killed the dog belonging to the complainant. The only eye-witness account which was offered by the prosecution is that of PW4.

He testified that on the material day at about 3.00 pm, he saw the appellant cut the dog using a machete. The children of the appellant were also allegedly seen stoning the dog. PW4 testified that he witnessed the appellant and his children kill the dog. PW4 however contradicted himself when in his testimony he gave a different date that he alleged to have seen the appellant kill the dog.²²¹ While the other witnesses testified that the dog was killed on the 18th of January 2000, PW4 testified that the dog was killed on 1st of January 2000.²²² The evidence of PW4

²¹⁸ Shamini Jayanathan, *Conduction Court surveys on the handling of wildlife crime*, Space for Giant, Eyes in the Courtroom, 6, 2017.

²¹⁹ Baraza I, ‘Animal Rights and Welfare in Kenya’, Baraza Insights, 7 July 2014 <https://barazainsights.wordpress.com/2014/07/07/animal-rights-and-welfare-in-kenya/> on 19 November 2019.

²²⁰ *Joseph Wanjogu Kungu v Republic* (2005) eKLR

²²¹ *Joseph Wanjogu Kungu v Republic* (2005) eKLR

²²² *Joseph Wanjogu Kungu v Republic* (2005) eKLR

was further contradicted by the evidence of PW3 who testified that he found the dog having been killed at about 1.00 p.m. PW4 testified that the dog was killed at 3.00 p.m.

On appeal, Justice Kimaru re-evaluated the evidence adduced both by the prosecution and the defence. He stated that it was not disputed that the dog belonging to the complainant was killed. The issue for determination by the court, he said, was whether the prosecution established beyond any reasonable doubt that it was the appellant who had killed the dog.²²³ It was found that the narration of events as stated by PW4 was not supported by the evidence of the other witnesses.²²⁴ The conviction was consequently quashed and a refund of the fine ordered.²²⁵

At no point in the case was the question of what unnecessary suffering amounted to discussed. The problem with this is that, there may be cases where cruelty is not obvious.²²⁶ In such a case as the killing of an animal, there is a higher likelihood of obvious cruelty against an animal.²²⁷ However, in a case where the animal is locked in a cage, for example, it may or may not cause suffering in the animal.²²⁸ Further, simply proving that the dog was killed, does not amount to unnecessary suffering.²²⁹ Section 3(1) of the PCA states that a person will be found to have been cruel to an animal where they kill the animal in a manner that causes the animal unnecessary suffering.²³⁰ As such, simply showing that the animal was killed does not satisfy the requirements of this section. As such, a definition of the term unnecessary suffering is required to ensure animal welfare is ensured in all circumstances.

3.5 International Law

Having discussed the national legislation regarding animal welfare, it is important to discuss the international standards for animal welfare, through treaties, declarations and conventions. Those treaties and conventions ratified by Kenya which directly inform domestic animal welfare will be mentioned and analysed. It should be noted that, as in all preceding sections, domestic animals will be the focus and the extent of the scope. Even where the international law applies to all animals, both wild and domestic, discussions will only focus on domestic animals.

²²³ *Joseph Wanjogu Kungu v Republic* (2005) eKLR

²²⁴ *Joseph Wanjogu Kungu v Republic* (2005) eKLR

²²⁵ *Joseph Wanjogu Kungu v Republic* (2005) eKLR

²²⁶ Regan T, 'Cruelty, Kindness, and Unnecessary Suffering' 55 *Royal Institute of Philosophy* 214, 1980, 537.

²²⁷ Regan T, 'Cruelty, Kindness, and Unnecessary Suffering' 55, 538.

²²⁸ Regan T, 'Cruelty, Kindness, and Unnecessary Suffering' 55, 538.

²²⁹ The Prevention of cruelty to animals act does not state it is wrong to kill an animal.

²³⁰ Section 3(1), *Prevention of Cruelty to Animals Act* (Act no. 12 of 2012).

Declaration of the United Nations Conference on the Human Environment

In 1972, during a meeting in Stockholm, a declaration was made in which common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment were declared.²³¹ The Stockholm declaration, hereinafter known as ‘the declaration’, became the first ever instance in which humans conferred rights to the environment as well as conferred on human beings rights in relation to their environment.²³²

The declaration speaks to both living and non-living aspects of the environment.

The declaration sets out twenty-six principles that inform the relationship between human beings and the environment. Domestic animals, being Fauna, are directly included through the provisions of the second principle which states;

‘The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded to ensure that both present generations and future generations benefit from them. This is done through careful planning or management, as appropriate.’²³³

This principle presents a good implication for the animal welfare discourse, as it legitimizes animals as a part of the environment. In dealing with the environment, therefore, animals must always be considered and protected.

Convention on Biological Diversity²³⁴

Opened for signature at the Earth Summit in Rio de Janeiro on 5 June 1992 and entered into force on 29 December 1993, the convention on biological diversity is a multilateral treaty created for three main goals.²³⁵ These are, the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising from genetic resources.²³⁶ To demonstrate how this convention relates to domestic animals, it is important to have a definition of biological diversity (biodiversity). According to the Centre for Biodiversity and Conservation, the term of biological diversity refers to the variety of life on Earth at all its levels, from genes to ecosystems, and can encompass the evolutionary, ecological, and cultural processes that sustain life.²³⁷ Biodiversity does not only include species considered rare, threatened, or endangered, but includes every living thing, including big five

²³¹ Declaration of the United Nations Conference on the Human Environment.

²³² Declaration of the United Nations Conference on the Human Environment.

²³³ Declaration of the United Nations Conference on the Human Environment.

²³⁴ *Convention on Biological Diversity*.

²³⁵ *Convention on Biological Diversity*.

²³⁶ Preamble, *Convention on Biological Diversity*.

²³⁷ Centre for Biodiversity and Conservation <https://www.biologicaldiversity.org/> on 27 September 2019.

animals such as lions, domestic animals such as sheep, and other organisms such as microbes, fungi and invertebrates.²³⁸

Further, the convention on biological diversity specifically provides that domesticated and cultivated species are those species which the evolutionary process has been influenced by humans to meet their needs, and form part of biological diversity.²³⁹

Having established domestic animals as viable subjects for protection under this convention, the specific protections accorded to them can be discussed.

Article 8 sets out the provisions for in-situ conservation, which means the conservation of ecosystems and natural habits of species in their natural surroundings, and for domesticated or cultivated species, in the surrounding where they have developed their distinctive properties.²⁴⁰

It states that each contracting party shall, as far as possible and as appropriate endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components.²⁴¹

The state has a duty, therefore, under this convention to ensure that the present uses of domestic animals are conducted in a manner that is sustainable to ensure conservation of their species.

According to the Cambridge Dictionary, to conserve something is to keep and protect something from damage, change or waste.²⁴² This implies that conservation is not limited only to the prevention of extinction. Whereas this is the case with endangered species, conservation is also done to maintain status quo for example with trees. In speaking of conservation of trees, there is a direct desire to maintain the forest cover of a certain area, not necessarily an indication of total annihilation of forest cover, only a substantial reduction.

Domestic animals, such as donkeys have, in recent years, become a product of sale from donkey abattoirs.²⁴³ This creates a threat of a substantial reduction in the population of this animal.

African Convention on the Conservation of Nature and Natural Resources²⁴⁴

Adopted by Kenya on 17th January 1969, the African Convention on the Conservation of Nature and Natural Resources has three objectives; to enhance environmental protection, to foster the conservation and sustainable use of natural resources; and to harmonize and coordinate policies

²³⁸ Article 8, *Convention on Biological Diversity*.

²³⁹ Article 8, *Convention on Biological Diversity*.

²⁴⁰ Article 8, *Convention on Biological Diversity*.

²⁴¹ Article 8, *Convention on Biological Diversity*.

²⁴² Cambridge Dictionary, 8th ed.

²⁴³ Andae G, How Farmers Lose billions in Donkey Meat Export Craze, <https://www.businessdailyafrica.com/> on 27 September 2019.

²⁴⁴ *African Convention on the Conservation of Nature and Natural Resources*.

in this field.²⁴⁵ Section 9(2), on species and genetic diversity states that parties shall ensure the conservation of species and their habitats to preserve as many varieties of domestic or cultivated species as possible.²⁴⁶ This explicitly provides for protection of domestic animals.

World Organisation for Animal Health (OIE) Sub-Regional Representation for Eastern and the Horn of Africa

In 2009, the Government of Kenya signed the OIE Sub-regional Representation for Eastern and The horn of Africa, which imposes the OIE's animal welfare standards on Kenya.²⁴⁷ The provisions of the agreement are similar to the provisions already set out in Kenya's prevention of cruelty to animals act under section 8, which prohibits inhumane slaughter.²⁴⁸

However, the current legislation does not include specific regulations for beef cattle and broiler chicken production systems.

The OIE standards provide for the inclusion of the five freedoms as part of animal welfare statute.²⁴⁹

These are, freedom from hunger or thirst, freedom from discomfort, freedom from pain, injury or disease, freedom to express normal behaviour and freedom from fear and distress.²⁵⁰

Further, In matters of animal research, it proposes that the three Rs principle of replacement, reduction and refinement be followed to ensure humane experimental techniques.²⁵¹

The importance of outlining the international conventions that concern animals, is to demonstrate the absence of elaborate International Law adopted by Kenya that relates to domestic animals. In *Laying the Foundations for an International Animal Protection Regime*, Otter and Sullivan state;

‘The examination of the most prominent international domestic animal regulatory instruments reveals that a transnational animal protection regime does not exist at present, but that the global community is capable of regulating animals internationally.’²⁵²

²⁴⁵ Section 2, *African Convention on the Conservation of Nature and Natural Resources*

²⁴⁶ Section 9(2), *African Convention on the Conservation of Nature and Natural Resources*.

²⁴⁷ Kenya World Animal Protection Organisation, <https://api.worldanimalprotection.org/country/kenya> on 27 September 2019.

²⁴⁸ Section 8, *Prevention of Cruelty to Animals Act*.

²⁴⁹ World Organisation for Animal Health, OIE Animal Welfare Standards, <https://www.oie.int/animal-welfare/an-international-network-of-expertise/> on 27 September 2019.

²⁵⁰ Farm Animal Welfare Council, ASPCA.

²⁵¹ Farm Animal Welfare Council, ASPCA.

²⁵² Otter C, O'Sullivan S, Ross S, *Laying the Foundations for an International Animal Protection Regime*, Journal Animal Ethics, 1, 2, 2012.

3.6 CONCLUSION

The legal framework for the protection of domestic animals in Kenya, set out in the national legislation and in international law sets the standard of animal welfare, simply as unnecessary suffering. Provided that unnecessary suffering is not caused on an animal, virtually any action done to the animal is legally allowed.

The difficulty in this, is that necessity, for purposes of animal suffering is not defined. The import of this is that the definition for the same would have to depend on the specific judicial officer to whom a case on animal suffering is brought.

This creates legal impasse, as the law purports to set a standard, but the standard, being unenforceable, then ceases to be a standard.

4.0 CHAPTER FOUR: UNNECESSARY SUFFERING

4.1 Introduction

In previous chapters, the analysis of the law when coupled with the theory of legal realism poses a problem that can only begin to be solved by attempting to define unnecessary suffering. In this chapter, the question of what necessity means in the context of unnecessary suffering will be discussed. However, suffering is not a subjective condition that requires a definition. The question of suffering is a matter of fact rather than a question of opinion.²⁵³ This is somewhat similar to the limitation of rights for humans. Where a right is limited, the limitation of the right is a matter of fact whereas the aim of the limitation may be deemed as legitimate or otherwise.²⁵⁴ This discussion will begin with tackling the legal reality of animals as property, and the importance of this in determining necessity. This will be followed by a discussion of necessity, where the different factors that are proposed to be considered in determining whether suffering is necessary or not will be stated and qualified comprehensively.

4.2 Animals As Property

Among animal rights scholars and activists, one of the most despised aspects of the human-animal relationship as it exists, is that animals exist as property, both legally and socially.²⁵⁵ In this paper, however, the existence of animals as property is not taken as a bad thing at all, and its possible existential meaning is not of interest in this study. However, the kind of property that animals are classified as is of interest in scoping the definition of unnecessary suffering.²⁵⁶ Land is property.²⁵⁷ Literary works, artistic works, patents and trade secrets are all recognised in law as intellectual property.²⁵⁸ Animals, like all these, are property as well.²⁵⁹ The importance of understanding what kind of property animals are under the law is simply a question of rights.²⁶⁰

²⁵³ Fordyce P, 'Suffering in Non-Human Animals: Perspectives from Animal Welfare Science and Animal Welfare Law' 5 *Global Journal of Animal Law* 1, 2017, 13.

²⁵⁴ Derr T, 'Animal Rights, Human Rights', *First Things*, 1992, 3

<https://www.firstthings.com/article/1992/02/animal-rights-human-rights> on 7 November 2019.

²⁵⁵ Nobis N, 'Tom Regan on 'Kind' Arguments Against Animal Rights and For Human Rights' 2 *The Humane Society Institute for Science and Policy Animal Studies Repository* 4, 2015, 2.

²⁵⁶ Waintraub E, 'An analysis of the Legal Classification of Animals: Toward a Step-wise Deconstruction of the Property Status of Animals' 6 *Journal of Philosophy, Science and Law* 1, 2009, 1-3.

²⁵⁷ Kariuki F, Ouma S, Ng'etich R, 'Land as Property' in Kariuki F, Ouma S, Ng'etich R (eds) *Property Law*, 1 ed, Strathmore University Press, 2016, 153.

²⁵⁸ Kariuki, Ouma, Ng'etich, *Property Law*, 1 ed, Strathmore University Press, Nairobi, 2016, 112-120.

²⁵⁹ Sparkling J, *Understanding property law*, 2 ed, Matthew Bender, New Jersey, 2007,8.

²⁶⁰ Waintraub E, 'An analysis of the Legal Classification of Animals: Toward a Step-wise Deconstruction of the Property Status of Animals' 6 *Journal of Philosophy, Science and Law* 1, 2009, 1-3.

In the paper *'Against Moral Rights'*, Adler gives the example of one who buys a chair and another who buys a work of art.²⁶¹ Having transferred property rights, the new owner of the chair can use it, sell it and even destroy it.²⁶² This is not the case for the owner of the artwork. Though they have purchased the art and now legally own it, the creator of the art has moral rights to the art.²⁶³ Moral rights allow an artist to control what can be done to his/her work of art even after it is sold.²⁶⁴ This is an illustration of the importance of legal classification as property. Simply put, a difference of classification may mean a difference of rights.

For animals, what sets them apart from land, artistic works or chairs and other chattels, is sentience.²⁶⁵ According to World Animal Protection, sentience is the capacity to have subjective sensory experience, including pain, distress, suffering and pleasure.²⁶⁶ This is different from complex cognition and self-consciousness which is possible for human beings.²⁶⁷ In 2000, a group of animal welfare organisations drafted the Universal Declaration on Animal Welfare, a proposed inter-governmental agreement to recognise that animals are sentient, prevent cruelty, and reduce animal suffering.²⁶⁸ In 2003, during the Manila Conference on Animal Welfare, 19 government delegates with the European Council, United States, and Saipan agreed to the foundation text which included core principles of animal welfare.²⁶⁹ This was the beginning of formal government support to the document and its spirit. In 2005, a UDAW steering committee was formed with representative from Kenya, India, Costa Rica, Czech Republic and Republic of Philippines.²⁷⁰ In the following years, many governments have formally stated support for the document including Cambodia, Fiji, Latvia, New Zealand, Poland, Slovenia, Tanzania and the UK.²⁷¹

²⁶¹ Adler A, 'Against Moral Rights' 97 *California Law Review* 263, 2009, 264.

²⁶² Kariuki, Ouma, Ng'etich, *Property Law*, 3.

²⁶³ Kwall R, 'Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul' 81 *Notre Dame Law Review* 4, 1986, 75.

²⁶⁴ Liemer S, 'Understanding Artists' Moral Rights: A Primer' 7 *Boston University Public Interest Law Journal* 41, 41-42.

²⁶⁵ Favre D, 'Self-ownership for Animals' 50 *Duke Law Journal* 2, 2000, 474.

²⁶⁶ Universal Declaration on Animal Welfare, 2000, 4

https://www.worldanimalprotection.ca/sites/default/files/ca_-_en_files/case_for_a_udaw_tcm22-8305.pdf on 7 November 2019.

²⁶⁷ Universal Declaration on Animal Welfare, 4.

²⁶⁸ Universal Declaration on Animal Welfare https://www.worldanimalprotection.ca/sites/default/files/ca_-_en_files/case_for_a_udaw_tcm22-8305.pdf on 7 November 2019.

²⁶⁹ Manila Declaration 2004, Animal Legal and Historical Center, <https://www.animallaw.info/statute/manila-conference-animal-welfare> on 8 November 2019.

²⁷⁰ Gibson M, 'The Universal Declaration of Animal Welfare' 16 *Deakin Law Review* 2, 2011, 542.

²⁷¹ Gibson M, 'The Universal Declaration of Animal Welfare', 543.

As of 2014, the declaration had the support of 46 countries in principle, and since then 17 other countries have expressed support for the declaration.²⁷² Given the support the declaration of animal welfare has from different governments, the idea of animal sentience is seemingly not novel or disputed.²⁷³ However, though the sentience of animals is not denied, its consequences on the human-animal relationship are not comprehensively taken into account, at least in practice.²⁷⁴

The fact of being sentient inevitably carries consequences for what is ethical treatment toward a sentient being.²⁷⁵ For example, whereas it would not be unethical to break a table one owns, it would surely be unethical to break an animal's legs simply because one is the owner of the animal.²⁷⁶ Both are property, but one object is sentient and the other is not. Therefore, though in the law there does not explicitly exist a category of property named 'sentient property' or any other similar category, there does as a matter of fact.²⁷⁷ By virtue of having sentience, animals have higher moral claims against human beings than other property.²⁷⁸

The law ought to protect animal interests necessitated by sentience.²⁷⁹ The fact of having laws against animal cruelty demonstrates that states recognize the importance of protecting animals.²⁸⁰ The effectiveness of these laws must be interrogated to ensure that animals are protected against cruelty. This requires in the least that the law states what actions are allowable towards animals, and to what extent they are allowable.²⁸¹ Further, it requires that there be consequences for breach of the law, here being either performing an action toward an animal that is not allowed, or exceeding the allowable extent.²⁸² Unnecessary suffering, as a standard, implies that there is suffering that is necessary and therefore allowable. In the following section, the meaning of necessity will be discussed based on International Case Law and works of various animal welfare scholars. The definition of necessity sets out the extent to which animal suffering is either legal or illegal and is therefore the crux of all matters animal welfare.

²⁷² Gibson M, 'The Universal Declaration of Animal Welfare', 543.

²⁷³ Gibson M, 'The Universal Declaration of Animal Welfare', 545.

²⁷⁴ Francione G, *Rain Without Thunder: The Ideology of the Animal Rights Movement*, 1 ed, Temple University Press, Philadelphia, 1996, 198.

²⁷⁵ Gibson M, 'The Universal Declaration of Animal Welfare', 545.

²⁷⁶ See A, 'Milestones for Animal Welfare: Public Prosecutor v Ling Chung Yee Roy' 1 *Singapore Journal of Legal Studies* 1, 2014, 242.

²⁷⁷ Francione G, 'Animals: Property or Persons?' 2 *Rutgers (Newark) Law School Repository* 21, 2004, 2.

²⁷⁸ Wicklund P, 'Abrogating Property Status in the Fight for Animal Rights' 107 *Yale Law Journal* 2, 1997, 573.

²⁷⁹ Francione G, *Rain Without Thunder: The Ideology of the Animal Rights Movement*, 160.

²⁸⁰ Francione G, *Rain Without Thunder: The Ideology of the Animal Rights Movement*, 160.

²⁸¹ Francione G, *Rain Without Thunder: The Ideology of the Animal Rights Movement*, 198.

²⁸² Nagin D, 'Deterrence in the Twenty-First Century' 42 *Crime and Justice in America* 1, 2013, 200.

4.3 Necessity

Unnecessary suffering, as a standard for animal welfare, has proven a difficult term to define.²⁸³ Many animal rights and welfare scholars, both in ethics and law, have attempted to define the term, others opting against the use of the term altogether.²⁸⁴ In his paper *'Happy Pigs are Dirty: Conflicting Perspectives on Animal Welfare'*, bioethicist Lassen J states that the term unnecessary suffering provides a one-dimensional perspective for animal welfare.²⁸⁵ In his view, the absence of unnecessary suffering, which he does not define, does not automatically mean animal welfare is optimised.²⁸⁶ Lassen is one of many scholars who advocate for a more rights-centered approach to animal welfare.²⁸⁷ Another animal welfare activist whose contributions to the unnecessary suffering debate are of note is Cora Diamond who questions the capability of animal suffering. In *'Eating Meat and Eating People'*, she states;

*If we appeal to people to prevent suffering, and we, in our appeal, try to obliterate the distinction between human beings and animals and just get people to think of 'different species of animal', there is no footing left from which to tell us what we ought to do, because it is not members of one among species of animals that have moral obligations to anything.*²⁸⁸

This statement amounts to a denial of animal suffering, claiming it is a mere projection of subjective moral conviction. Both above-named scholars, Diamond and Lassen, advocate for the abandonment of the term unnecessary suffering altogether. This approach, however, in the absence of an alternative, leaves animal welfare in jeopardy. While several states have unnecessary suffering as the standard, it is important that scholars, both legal and otherwise, embark on continued efforts to define the term. Failure to do this would result in the continued existence of unenforceable anti-cruelty laws. Further, different jurisdictions may require different definitions for the term, depending on the social and cultural views of its inhabitants. Having mentioned some scholars who have suggested the abolishing of the term unnecessary suffering, and stated the weakness of this approach, it is important to analyse various suggested definitions or approaches to the definition of unnecessary suffering.

²⁸³ Regan T, 'Cruelty, Kindness, and Unnecessary Suffering', 537.

²⁸⁴ Francione G, *Rain Without Thunder: The Ideology of the Animal Rights Movement*, 160.

²⁸⁵ Lassen J, 'Happy Pigs are Dirty: Conflicting Perspectives on Animal Welfare' 103 *Livestock Science* 4, 2006, 221.

²⁸⁶ Lassen J, 'Happy Pigs are Dirty: Conflicting Perspectives on Animal Welfare', 221.

²⁸⁷ Nobis N, 'Tom Regan on 'Kind' Arguments Against Animal Rights and For Human Rights' 2 *The Humane Society Institute for Science and Policy Animal Studies Repository* 4, 2015, 2.

²⁸⁸ Diamond C, 'Eating Meat and Eating People' 53 *Royal Institute of Philosophy* 206, 1978, 467-469.

In ‘*Cruelty, Kindness and Unnecessary Suffering*’, Philosopher Tom Regan proposes a Holfeldian approach. He states that unnecessary suffering, as a standard, imposes on human beings a duty to prevent unnecessary suffering, awarding animals a *de facto* right as against this duty.²⁸⁹ Regan emphasizes that the right is not a right in law per se but is a right as a matter of fact.²⁹⁰ This welfare-based approach is the same approach taken in this research, making Regan’s contribution more fitting for this paper. Considering the right-duty correlation, he states that the duty to prevent unnecessary suffering has two aspects;

- (a) to prevent all suffering caused or allowed in pursuit of any goal that is itself morally unjustified, and
- (b) to prevent any suffering over and above what is factually necessary which is caused or allowed in pursuit of a morally justifiable goal.²⁹¹

Regan proposes that for suffering to be deemed necessary, it must be for a morally justifiable reason, and exercised only to the extent that is factually necessary in pursuit of the morally justifiable reason.²⁹² This view has two implications. The first is that some degree of animal suffering is allowed under the law, if it is pursuit of an aim deemed legitimate. This is a similar approach taken in human rights, where limitation of human rights is allowed where there is a legitimate aim under the law.²⁹³ In this case, Regan fails to state whether the aim must be stated in law or may be assessed on a case to case basis.²⁹⁴

This paper is of the view that the legitimacy of the aim must be stated in law for it to possibly warrant necessary suffering. Looking at Kenya, the PCA states explicitly certain activities that owners may subject animals.²⁹⁵ These are;

- a) slaughtering for purposes of food and other produce such as hide and skin²⁹⁶,
- b) Training²⁹⁷,
- c) Experimentation by a licensed person²⁹⁸,
- d) Transportation²⁹⁹,

²⁸⁹ Regan T, ‘Cruelty, Kindness, and Unnecessary Suffering’, 540.

²⁹⁰ Regan T, ‘Cruelty, Kindness, and Unnecessary Suffering’, 540.

²⁹¹ Regan T, ‘Cruelty, Kindness, and Unnecessary Suffering’, 541.

²⁹² Regan T, ‘Cruelty, Kindness, and Unnecessary Suffering’, 537.

²⁹³ Derr T, ‘Animal Rights, Human Rights’, *First Things*, 1992, 3.

²⁹⁴ Tannenbaum J, ‘Animals and the Law: Property, Cruelty, Rights’ 62 *Social Research* 3, 1995, 575.

²⁹⁵ Part 2, *Prevention of Cruelty to Animals Act* (Act No 12 of 2012).

²⁹⁶ Section 8, *Prevention of Cruelty to Animals Act* (Act No 12 of 2012).

²⁹⁷ Section 9, *Prevention of Cruelty to Animals Act* (Act No 12 of 2012).

²⁹⁸ Part 3, *Prevention of Cruelty to Animals Act* (Act No 12 of 2012).

²⁹⁹ Section 3, *Prevention of Cruelty to Animals Act* (Act No 12 of 2012).

- e) Animal Husbandry³⁰⁰, and
- f) Treatment by veterinary practitioners under the Veterinary Surgeons Act.³⁰¹

Should the legitimacy of actions towards animals be solely assessed on a case to case basis, the likelihood of increased suffering, whether unnecessary or necessary would be higher.³⁰² The law, therefore, would have little to no authority over people's behaviour and the aim of achieving animal welfare would be further from our realisation.

The second implication, and perhaps the more controversial one from Regan's definition, is that even where the aim is legitimate, there is a limit beyond which suffering cannot be allowed.³⁰³ The reason this is a controversial implication is that it carries a higher moral claim thereby presenting the possibility of subjective bias.³⁰⁴ Whereas it is easier to enforce that which is set by the law in terms of what can and cannot be done to animals, the extent of suffering is impossible to assess except on a case to case basis.³⁰⁵ One of the aims of this research is to set out certain parameters that can be used to measure or assess necessity of extent of suffering. Without such parameters, excessive suffering may be justified simply because of its connection to a legitimate aim.

Perhaps one of the most comprehensive publications on unnecessary suffering is the paper '*Unnecessary Suffering: Definition and Evidence*', by Frank Hurnik and Hugh Lehman. In the paper, Hurnik and Lehman present two common definitions for unnecessary suffering. The first is that suffering is unnecessary if it avoidable, and the second is that suffering is unnecessary if it brought about purposefully.³⁰⁶ They proceed to state that both of these definitions are unsatisfactory and give the following reasons.³⁰⁷ A great deal of suffering, that is both avoidable and caused purposefully is necessary suffering.³⁰⁸ For example, a scientist doing research on the effectiveness of a certain drug or treatment, causes both avoidable suffering, in that they could opt out of doing the research altogether, and is done of purpose.³⁰⁹

³⁰⁰ Section 3, *Prevention of Cruelty to Animals Act* (Act No 12 of 2012).

³⁰¹ Section 3 and 16, *Prevention of Cruelty to Animals Act* (Act No 12 of 2012).

³⁰² Tannenbaum J, 'Animals and the Law: Property, Cruelty, Rights' 62 *Social Research* 3, 1995, 576.

³⁰³ Regan T, 'Cruelty, Kindness, and Unnecessary Suffering', 541.

³⁰⁴ Tannenbaum J, 'Animals and the Law: Property, Cruelty, Rights', 576.

³⁰⁵ Regan T, 'Cruelty, Kindness, and Unnecessary Suffering', 541.

³⁰⁶ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence' 3 *International Journal for the Study of Animal Problems* 2, 1982, 133.

³⁰⁷ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 133.

³⁰⁸ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 133.

³⁰⁹ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 134.

Purpose here does not mean intent to cause suffering, but the knowledge that the animal would suffer, and proceeding with the research anyway.³¹⁰ However, when assessed, it seems prima facie that the suffering caused is necessary, pending the assessment of any particulars. The PCA allows the use of animals in scientific research under section 13, which means that the aim is legitimate under the law.³¹¹ Whether suffering is caused purposefully, or is avoidable are important questions to ask, but they do not comprehensively answer the question of what unnecessary suffering is.³¹²

Hurnik and Lehman propose an interesting approach to the assessment of whether suffering is necessary or unnecessary. They state that the determination of the necessity of suffering is directly related to the examination of the purpose for which the suffering is caused and the avoidability of such suffering in achieving the purpose.³¹³ This view seems similar to Regan's view discussed previously, but it varies slightly. Both views propose an investigation into the reason for suffering. However, Regan only proposes that there be a legitimate aim, a morally justifiable reason. Hurnik and Lehman propose an examination of the purpose, requiring a more intrusive process.³¹⁴ In practice, this could mean perhaps providing evidence of a license to carry out scientific research rather than simply the claim that the aim in question is scientific research. On the second limb again, similarities between the two views are present. Whereas Regan proposes a limit to the extent of suffering, Hurnik and Lehman draw the line at avoidability of suffering. Essentially, according to Hurnik and Lehman, where the examination of the purpose of suffering illustrates that certain suffering is avoidable in pursuit of the purpose, then that suffering which is avoidable constitutes unnecessary suffering.³¹⁵ This is a more full-proof approach than the limit-based approach suggested by Regan. Avoidability requires an inquiry into the facts of each case.³¹⁶ Something that might be avoidable in one circumstance, may not be avoidable in another. Further, avoidance connotes an active action on the part of a person. It may involve taking measures to prevent suffering or refraining from a certain action due to the suffering it would cause an animal. The limited extent approach however, implies that provided legitimate aim is being sought, suffering can be caused to the extent that it does not exceed a certain limit. This also implies that even where a certain degree

³¹⁰ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 133.

³¹¹ Section 13, *Prevention of Cruelty to Animals Act* (No. 12 of 2012).

³¹² Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 133.

³¹³ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 133.

³¹⁴ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 134.

³¹⁵ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 133.

³¹⁶ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 133.

of suffering is not required for the achievement of a certain aim, it is allowable as long as it is within the limit. This limit is precisely what this paper aims to understand in questioning the meaning of necessity. Reference to an undefined limit, therefore, is no more than an alternative wording of unnecessary suffering. Rather than require a person to prove that they truly needed to cause certain suffering in an animal to achieve a certain goal, it requires the person to prove only that they did not exceed a certain limit. This is a weaker standard on all accounts. It is both uncertain and allows for collateral suffering which falls within the limit. With the avoidance approach, the question is clear. Could the aim, found in law, and examined in the particular case have been achieved in a manner that could cause less suffering to the animal in question? There is a balance struck between the aim sought, the available means of achieving the aim, the particulars of the case, and the effects of all these on the animal. Consequently, the possible avoidance of suffering is questioned such that any excessive suffering, that which was not required for the aims to be achieved in that case, is deemed unnecessary suffering and in breach of the animal welfare standard.

To further illustrate the merit of Hurnik-Lehman view, take the case of *Public Prosecutor v Ling Chung Yee Roy*.³¹⁷ This is a landmark case in animal law in Singapore, as it is the first case in which the court was faced with a cruelty case in which the accused's actions were not obviously cruel.³¹⁸ This was stated explicitly in the judgment by the presiding judge, Justice Ng Peng Hong. In this case, the accused was the owner of a Border Collie dog name Hugo.³¹⁹ Hugo was kept on the balcony of the accused's flat for a period exceeding six months, both day and night. The balcony measured 3m in length and 1.5 m in width and had little to no shelter.³²⁰ Over the period, Hugo was exposed to rain and sunlight with no intervention by the accused. Following a complaint by concerned neighbours to the Singapore Society for the Prevention of Cruelty to Animals (SSPCA), a warrant was sought and granted by the society.³²¹ Following a veterinary check-up, Hugo was found to be underfed and in a poor state of health.³²² The SSPCA referred the case to the Agri-food and Veterinary Authority (AVA) which proceeded to commence prosecution on the matter. The accused was charged and found guilty under section 42(1)(e) of the Animals and Birds Act which provides;

³¹⁷ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³¹⁸ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³¹⁹ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³²⁰ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³²¹ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³²² *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

"any person who causes, procures or, being the owner, permits to be confined, conveyed, lifted or carried any animal in such a manner or position as to subject it to unnecessary pain or suffering... shall be guilty of an offence."³²³

Although the SSPCA and AVA had sufficient evidence to prove Hug was deprived of food and water, which is a more obvious form of cruelty, this charge was not brought against the accused under section 42(1)(c).³²⁴ This charge would likely have succeeded as the section does not require that unnecessary suffering be proven in a case of an under fed animal. Instead, the prosecution relied on the claim that the conditions in which Hugo was kept, coupled with the period of time caused him unnecessary suffering. Due to the prosecution's charge of choice, the court had to grapple with the concept of unnecessary suffering which, as is the case in Kenya's PCA, is not defined in the Animals and Birds Act. Justice Hong stated that the first point of call in defining unnecessary suffering is to determine what constitutes suffering.³²⁵ This is unlike the two views discussed previously, the Hurnik-Lehman and Reagan views, where suffering was not defined. In the case, the defence argued that for suffering to be found, it must be shown that the animal was ill or injured by virtue of being on the balcony.³²⁶ This meant that the prosecution had to prove that Hugo suffered either heatstroke, dehydration or sunburn due to being kept on the balcony.³²⁷ In response to this, the court stated that the welfare of the dog was not dependent on whether the dog was healthy or not.³²⁸ Suffering was deemed to exist where the actions of the accused had a negative impact on the animal's well-being.³²⁹ In stating this, the court essentially acknowledged that absence of overt physical harm did not amount to well-being. A similar position was taken by the court in the Scottish case of *Patchett v Macdougall* where Lord Hunter stated that the concept of unnecessary suffering imports the idea of the animal undergoing, for however brief a period, unnecessary pain, distress or tribulation.³³⁰

The inclusion of distress and tribulation in Lord Hunter's definition of unnecessary suffering connotes a broader view of animal welfare. In essence, health is not synonymous with well-

³²³ Section 42 (1) (e), *Animals and Birds Act* (Singapore).

³²⁴ See A, 'Milestones for Animal Welfare: Public Prosecutor v Ling Chung Yee Roy' 1 *Singapore Journal of Legal Studies* 1, 2014, 242.

³²⁵ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³²⁶ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³²⁷ See A, 'Milestones for Animal Welfare: Public Prosecutor v Ling Chung Yee Roy' 1 *Singapore Journal of Legal Studies* 1, 2014, 242.

³²⁸ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³²⁹ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³³⁰ *Patchett v Macdougall* (1984) Justiciary Case, Scottish Law Times.

being, but it is a requirement for well-being.³³¹ Further, the idea that suffering need not only pertain to health is acknowledged in the PCA. Section 8 of the PCA states;

*Any person who whether in a slaughterhouse or abattoir or in any place other than a slaughterhouse or abattoir, and whether for human consumption or not, slaughters an animal, (a) in such a manner as to cause it more suffering than is necessary; or (b) in the sight of any other animal awaiting slaughter, shall be guilty of an offence.*³³²

The rationale for criminalizing the slaughtering of an animal in the sight of another is to avoid mental distress in the animal.³³³ There is no physical harm done to the animal that witnesses the slaughter of another. Therefore, assuming that the animal is in good health at the time, their physical health would not be compromised.

Similarly, under section 42(1)(a) of Singapore's Animals and Birds Act, it is an offence to cruelly ill-treat an animal by infuriating or terrifying it or acting in any manner as to cause an animal distress.³³⁴ In light of such provisions, and the growing support for the Universal declaration on animal welfare, the absence of injury or illness does not amount to well-being. On the question of necessity, Justice Hugo proposed that the objective reasonableness test be used which he explained as the standard of a 'reasonably caring, reasonably competent owner'. In deciding the case, this test was used, with Justice Hong agreeing with multiple witnesses who stated that any reasonable person would conclude what Hugo experienced constituted unnecessary suffering.³³⁵ In discussing the case in his paper '*Milestones for Animal Welfare*', Prof. See states that the use of this test in determining whether suffering is necessary or not has one significant implication.³³⁶ It implicitly does away with the requirement of *mens rea* such as intention to cause suffering or knowledge that suffering has been caused.³³⁷ This is important to mention because *mens rea* is often assumed as a requirement in all criminal cases.³³⁸ Under the PCA, however, there is no mention of a requirement to prove intention or knowledge, making offences under the PCA strict liability offences.³³⁹ In the Ling Chung Yee Roy case, the accused argued that he was not aware of possible negative effects Hugo would have

³³¹ Regan T, 'Cruelty, Kindness, and Unnecessary Suffering', 541.

³³² Section 8, *Prevention of Cruelty to Animals Act* (No. 12 of 2012).

³³³ Feinberg J, 'The Rights of Animals and Unborn Generations' in Blackstone W (ed) *Philosophy and Environmental Crisis*, University of Georgia Press, Athens, 1974, 234.

³³⁴ Section 42 (1) (a), *Animals and Birds Act* (Singapore).

³³⁵ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Court.

³³⁶ See A, 'Milestones for Animal Welfare: Public Prosecutor v Ling Chung Yee Roy', 241-242.

³³⁷ See A, 'Milestones for Animal Welfare: Public Prosecutor v Ling Chung Yee Roy', 242.

³³⁸ See A, 'Milestones for Animal Welfare: Public Prosecutor v Ling Chung Yee Roy', 242.

³³⁹ *Prevention of Cruelty to Animals Act* (No. 12 of 2012).

experienced from continued rain and sunlight, and was therefore unaware of possible suffering.³⁴⁰ Seeing as the accused was found guilty, it is clear that mens rea is not a requirement to prove unnecessary suffering.³⁴¹ The same was held in the case of *Duncan v Pope* where Justice Lawrence stated that the only question of interest to the court is whether there was ‘suffering in fact’, and not whether the owner had ill intention to harm the animal.³⁴² Similarly, in the case of *Ford v Wiley*, the court rejected the view that an accused person could escape liability by pleading ignorance, for to allow so would render animals suffering victim of gross ignorance.³⁴³

4.4 Unnecessary Suffering: Bringing it Together

Based on the discussion above, this study proposes the following 5 questions be asked in determining unnecessary suffering.

The first is whether the actions done toward an animal are allowable under the PCA. Where the actions are not provided for under the PCA, such actions should be rendered unlawful even where suffering is not caused.

The second is whether the actions are provided for under the PCA, whether such action caused ‘suffering-in-fact’ to an animal, suffering here meaning there was a negative impact the well-being of the animal.

Where suffering is found, the third inquiry is whether the suffering was avoidable in pursuit of the aim sought in accordance with the first question.

The fourth inquiry is a determination of avoidability, to be assessed by the standard of a ‘reasonably caring, reasonably competent owner, or simply the standard of objective reasonableness.

Finally, where suffering is found to be avoidable as per the third and fourth aspects above, it will be deemed to have been unnecessary suffering. These five aspects combine the propositions of Hurnik, Lehman and Regan, as well as the court’s interpretation of the term unnecessary suffering in various cases.

4.5 Proving Unnecessary Suffering: PCA and the Law of Evidence

Throughout this paper, the ultimate end of the study has been stated and emphasized; to make for a more effective standard of animal welfare through making the law more clear and

³⁴⁰ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Courts.

³⁴¹ See A, ‘Milestones for Animal Welfare: Public Prosecutor v Ling Chung Yee Roy’, 242. The same was mentioned by Hurnik and Lehman in ‘Unnecessary Suffering: Definition and Evidence’, 133.

³⁴² *Duncan v Pope* (1899), 63 Scotland Justice for the Peace Reports 217.

³⁴³ *Ford v Wiley* (1889), United Kingdom Queen’s Bench Division (Divisional Court).

complete. Effectiveness being the goal, there is a need to go further than the definition of unnecessary suffering, and into the practicality of litigation of crimes under the prevention of cruelty to animals act.³⁴⁴ This section seeks to pre-emptively answer possible questions that may arise out of the application of the test set out. For example, how can suffering be proven?³⁴⁵ Section 48 of the Evidence Act of Kenya provides that when the court has to form an opinion upon a point of science or art, opinions upon that point are admissible if made by persons specially skilled in such science or art, and such persons shall be called experts.³⁴⁶ As earlier stated, suffering in animals, is a matter of fact.³⁴⁷ For purposes of unnecessary suffering, suffering is found where one's action causes a negative impact to the well-being of an animal.³⁴⁸ In determining whether an animal suffered, the court may therefore call on expert evidence to either prove or disprove the fact.³⁴⁹ The expert in question, as was seen in the case of *Public Prosecutor v Ling Ching Yee Roy*, may be a veterinary officer or any other person whose expertise can be proven to equip them requisite knowledge to determine the scientific question.³⁵⁰

In adducing evidence to prove unnecessary suffering was caused and seeking a subsequent finding of cruelty, it may also be anticipated that proof of the actual action, the *actus reus*, will be required.³⁵¹ In adducing evidence of *actus reus*, evidence may be oral evidence, as provided for under section 63 of the evidence act, and or documentary evidence as provided for under section 65, 66 and 78A of the evidence act.³⁵² In the case of *Joseph Wanjogu Kungu v Republic*, the court decided the matter based on oral evidence given by the prosecution witnesses.³⁵³

Due to inconsistencies in the prosecution witnesses' testimonies, the accused's conviction was quashed on appeal, as the *actus reus* was not proven beyond reasonable doubt.³⁵⁴

Another possible question, and perhaps the most controversial matter for practical consideration is the requirement, or lack thereof, of *mens rea*.³⁵⁵ Cruelty to animals is after all, a crime, and as a general rule, crime has two elements; a criminal act (*actus reus*), and a

³⁴⁴ Ingram P, 'Effectiveness' 69 *Archives for Philosophy of Law and Social Philosophy* 4, 1983, 484.

³⁴⁵ Hurnik F, Lehman H, 'Unnecessary Suffering: Definition and Evidence', 133.

³⁴⁶ Section 48, *Evidence Act* (Act no. 19 of 2014).

³⁴⁷ Perret R, 'The Analogical Argument for Animal Pain', 49-50.

³⁴⁸ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Courts.

³⁴⁹ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Courts.

³⁵⁰ *Public Prosecutor v Ling Chung Yee Roy* (2013), Singapore District Courts.

³⁵¹ *Joseph Wanjogu Kungu v Republic* (2005) eKLR.

³⁵² Section 63, 65, 66 and 78A, *Evidence Act* (Act no. 19 of 2014).

³⁵³ *Joseph Wanjogu Kungu v Republic* (2005) eKLR.

³⁵⁴ *Joseph Wanjogu Kungu v Republic* (2005) eKLR.

³⁵⁵ Sankoff P, 'The Mens Rea for Animal Cruelty after R. v Gerling: A Dog's Breakfast' 3 *Alberta Law Review* 6, 2015, 267.

criminal intent (*mens rea*).³⁵⁶ In the paper *The Mens Rea for Animal Cruelty: A Dog's Breakfast*, Peter Sankoff discusses the Canadian case of *R v Gerling*.³⁵⁷ In *Gerling*, the accused operated a dog breeding facility in a manner that caused significant harm to the animals due to his failure to provide appropriate veterinary care.³⁵⁸ He was then charged with violating section 445.1(a) of the Canadian Criminal Code which criminalizes wilfully causing unnecessary suffering and wilfully neglecting an animal.³⁵⁹ At the court of first instance, the judge ignored the *mens rea* elements of the provision and focussed narrowly upon the facts stating that he was unimpressed with Gerling's evidence in which he stated that he simply did not know the animals were suffering.³⁶⁰ Gerling was found guilty and convicted. On appeal, Gerling stated that the trial judge had improperly construed the *mens rea* required for the offences as both charges used the word 'wilfully', hence requiring subjective awareness.³⁶¹ The appellate court rejected the appeal in a remarkably brief fashion. Justice Chiasson stated;

*"In my view, where there is no evidence to the contrary, the test under s. 445.1(a) is objective. Determining whether there is an absence of reasonable care or supervision is an objective exercise. Where there is evidence to the contrary, the Crown must prove wilful conduct."*³⁶²

The effect of this statement, is that it permits the tier of fact to infer the existence of the necessary *mens rea*, the intention of recklessness to cause suffering, absent evidence to the contrary.³⁶³ In essence, the inclusion of the word 'wilful' is pointless as the court infers intention to harm in the absence of evidence to the contrary.³⁶⁴

Subsequently, a Private Member's Bill, Bill C-246, was tabled to modernize the cruelty to animals' provisions and eliminate obsolete terms like 'wilful neglect'.³⁶⁵

³⁵⁶ Musyoka W, *Criminal Law*, LawAfrica Publishing Ltd, Nairobi, 1 ed., 2013, 27, Section 3, *Prevention of Cruelty to Animals Act* (Act no. 12 of 2012).

³⁵⁷ Sankoff P, 'The Mens Rea for Animal Cruelty after *R. v Gerling: A Dog's Breakfast*', 268.

³⁵⁸ *R v Gerling* (2016), British Columbia Court of Appeal.

³⁵⁹ Section 445.1(a), *Criminal Code* (Canada).

³⁶⁰ Sankoff P, 'The Mens Rea for Animal Cruelty after *R. v Gerling: A Dog's Breakfast*', 268.

³⁶¹ Sankoff P, 'The Mens Rea for Animal Cruelty after *R. v Gerling: A Dog's Breakfast*', 268.

³⁶² Sankoff P, 'The Mens Rea for Animal Cruelty after *R. v Gerling: A Dog's Breakfast*', 268.

³⁶³ Sankoff P, 'The Mens Rea for Animal Cruelty after *R. v Gerling: A Dog's Breakfast*', 268.

³⁶⁴ Sankoff P, 'The Mens Rea for Animal Cruelty after *R. v Gerling: A Dog's Breakfast*', 268.

³⁶⁵ Sankoff P, 'The Mens Rea for Animal Cruelty after *R. v Gerling: A Dog's Breakfast*', 268.

Kenya's PCA, does not require proof of 'wilfully caused unnecessary suffering'.³⁶⁶ A strict reading of the act therefore seems to allow a finding of cruelty without a requirement of *mens rea*.³⁶⁷

4.6 Goodwill: The Limiting Factor

An aspect of domestic animal welfare that this paper cannot directly impact, is the fact that enforceability of the prevention of cruelty to animals act relies heavily on the goodwill of the public.³⁶⁸ This paper addresses a shortfall within the law itself, and seeks to offer clarity on the matter toward the effective enforcement of the law. However, before the matter is taken to court, there must have been a perception, in the eyes of one or more people, that an animal was suffering by the action or omission of a person.³⁶⁹ In the case of *Public Prosecutor v Ling Chung*, it was the goodwill of the Singapore Society for the Protection and Care of Animals informed by the accused's neighbours, while in *Joseph Wanjogu Kungu v Republic*, it was the personal interest of the dog's owner.³⁷⁰ In any case, there must be an initial perception of cruelty or suffering by a person or multiple persons for a matter to be brought under the PCA. This is a limitation to domestic animal welfare, as in cases where no-one perceives even the harshest forms of cruelty as such, animal welfare will not be achieved. Nonetheless, this study aims to ensure that where a matter is taken to the courts, it shall be dealt with in accordance with the ends of the Prevention of Cruelty to Animals Act.

CONCLUSION

In this chapter, the question of what constitutes unnecessary suffering was discussed, through an interrogation of various proposed definitions by scholars and interpretations by courts. Though the term naturally requires a degree of inquiry into the specifics of each case to determine whether suffering is necessary, there are certain parameters that can be use in determining the same. In the next chapter, the overall findings of the study will be stated, followed by recommendations and a conclusion of the study

³⁶⁶ Section 3 , *Prevention of Cruelty to Animal Act* (Act no. 12 of 2012).

³⁶⁷ Hall L, 'Strict or Liberal Construction of Penal Statutes' 48 *Harvard Law Review* 5, 1935, 749.

³⁶⁸ Lusk J, Norwood F, 'Animal Welfare Economics' 33 *Agricultural and Applied Economics Association* 4, 2011, 464.

³⁶⁹ Welch K, 'Animal Cruelty Cases' 26 *Animal Law* 5, 2009, 67.

³⁷⁰ *Public Prosecutor v Public Prosecutor v Ling Chung Yee Roy (2013)*, Singapore District Courts, *Joseph Wanjogu Kungu v Republic* (2005) eKLR.

5.0 CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Findings

In the first chapter of this paper, an introduction to the topic was provided which included a statement of the problem sought to be tackled and a brief background on the topic. It canvassed the problem and set out the hypothesis of the study. Its importance to the study is that it provides a general overview of the problem and justifies the need for this study.

In the second chapter, the theoretical framework that both informed and guided this research was provided and explained. The two theories, that of legal realism and of practical ethics were explained and their significant implications for the topic were stated. These theories, specifically the theory of legal realism also greatly contributed to the approach taken in the fourth chapter where a substantive discussion of the problem was given.

The third chapter comprehensively covered the legal framework for the protection of domestic animals in Kenya. This included constitutional provisions, acts of parliament and international law. In that chapter, the term ‘unnecessary suffering’ was encountered, as it is stated in the PCA, and was demonstrated as the ultimate standard of animal welfare in Kenya. In the third chapter, it was found that the PCA offers no definition of the term unnecessary standard, making the standard of animal welfare a non-standard. It was found to offer no authority with which to determine when suffering in animals was necessary or not.

As such, the fourth chapter contained a discussion of the term unnecessary suffering, specifically on what necessity means in the context of animal suffering. The arguments of different scholars and the opinions of different courts were presented, and a possible definition for the term proposed.

In this chapter, certain recommendations will be provided that could possibly strengthen the legal framework in Kenya for the protection of domestic animals. This will be followed by a conclusion of the research.

5.2 Recommendations

In pursuit of a solution to the problem of uncertainty to the standard of animal welfare in Kenya, and more broadly to the problem of insufficient protection of domestic animals in Kenya’s laws, this study makes the following recommendations.

5.2.1 Inclusion of a Definition of Unnecessary Suffering in the PCA

The inclusion of a definition of unnecessary suffering in the Prevention of Cruelty to Animals Act would strongly improve the prospects of growth in domestic animal law litigation in the country. The importance of the term cannot be belaboured as it is the defining standard for

animal welfare.³⁷¹ This definition need not be a comprehensive one such that it attempts to cover all areas of animal cruelty. Instead, the definition should be such as to offer guidance to citizens, legal practitioners, animal welfare organisations, and judicial officers for parameters to inquire into and minimum standards to be considered in assessing animal suffering. This study has claimed that the absence of such definition for over 50 years of the statute's existence may be part of the reason for a complete lack of domestic animal law litigation. The uncertainty of the terms cripples the statute, and this can be resolved by a fleshing out of the term within the statute.

Specifically, this study proposes that the following be considered;

- 1) Whether the actions done toward an animal are allowable under the PCA. Where the actions are not provided for under the PCA, such actions should be rendered unlawful even where suffering is not caused.
- 2) If the actions are provided for under the PCA, whether such action caused 'suffering-in-fact' to an animal, suffering here meaning there was a negative impact the well-being of the animal.
- 3) Where suffering is found, whether the suffering was avoidable in pursuit of the aim sought in accordance with (1) above.
- 4) The determination of avoidability is to be assessed by the standard of a 'reasonably caring, reasonably competent owner, or simply the standard of objective reasonableness.
- 5) Where suffering is found to be avoidable as per (3) and (4) above, it will be deemed to have been unnecessary suffering.

5.2.2 Formal Adoption Of The Universal Declaration On Animal Welfare

According to the World Animal Protection Animal Protection Index, Kenya has not formally communicated its support the Universal Declaration on Animal Welfare.³⁷² Though the PCA recognises that animal can suffer, the adoption of UDAW can offer a much more comprehensive protection model for animals. UDAW has the following aspects that are lacking in the PCA;

- 1) It categorically declares animal sentience³⁷³,

³⁷¹ Francione G, *Rain Without Thunder: The Ideology of the Animal Rights Movement*, 1 ed, Temple University Press, Philadelphia, 1996, 198.

³⁷² World Animal Protection Animal Protection Index <https://www.worldanimalprotection.org/our-work/help-protect-animals-globally/review-animal-welfare-standards-around-world> on 8 November 2019.

³⁷³ Gibson M, 'The Universal Declaration of Animal Welfare' 16 *Deakin Law Review* 2, 2011, 542.

- 2) It provides protection measures to be taken by states regarding the use of animals in various practices such as experimentation and scientific study, large-scale slaughterhouses and abattoirs and large-scale husbandry facilities³⁷⁴,
- 3) It discusses the impact of animal welfare on human health and well-being³⁷⁵,
- 4) It proposes rehabilitation techniques for animal offenders such as longer term of imprisonment and restricted ownership of animals before and after conviction³⁷⁶,
- 5) It presents the possible environmental benefits that could arise from increased animal welfare measures³⁷⁷, and
- 6) It sets out the relevance of animal welfare in the pursuit and eventual achievement of the sustainable development goals.³⁷⁸

5.2.3 Use of County Governments to Ensure Compliance by small-scale slaughterhouses

This recommendation pertains to large-scale producers of meat, milk, and other animal produce. In Kenya, this includes organisations such as Kenya Meat Commission and Kenya Cooperative Creameries, abattoirs such as Export Slaughterhouses, and butchereries.³⁷⁹ In recent years, there have been improvements in compliance with animal cruelty laws in slaughterhouses. This was brought about by a requirement by the National Environmental Management Authority, that all owners of slaughter-house owners must hold licenses.³⁸⁰ Since then, animal welfare organisations such as KSPCA and World Animal Protection have carried out educative programmes on humane methods of slaughtering animals. Nonetheless, many slaughter animals on a smaller scale and use the meat and produce either for personal consumption or for sale.³⁸¹ It is more difficult to monitor and ensure compliance by such persons.³⁸² Not only is there a possibility that many animals suffer in such circumstances, there is also a human health risk. For these reasons, county governments should put in place measures such as further licensing, and spontaneous inspections. Though this is admittedly a harder to

³⁷⁴ Gibson M, 'The Universal Declaration of Animal Welfare', 542.

³⁷⁵ Gibson M, 'The Universal Declaration of Animal Welfare', 543.

³⁷⁶ Gibson M, 'The Universal Declaration of Animal Welfare', 543.

³⁷⁷ Gibson M, 'The Universal Declaration of Animal Welfare', 543.

³⁷⁸ Gibson M, 'The Universal Declaration of Animal Welfare', 544.

³⁷⁹ Food and Agriculture Organization of the United Nations, *Africa Sustainable Livestock 2050*, 'Livestock Production Systems Spotlight Kenya: Cattle and Poultry Sectors', 2018, 2.

³⁸⁰ Nairobi County Veterinary Services e-regulations

<https://eregulations.invest.go.ke/procedure/375/268/step/1422?l=en> on 8 November 2019.

³⁸¹ Food and Agriculture Organization of the United Nations, 'Livestock Production Systems Spotlight Kenya: Cattle and Poultry Sectors', *Africa Sustainable Livestock 2050*, 2018, 2.

³⁸² Food and Agriculture Organization of the United Nations, 'Livestock Production Systems Spotlight Kenya: Cattle and Poultry Sectors', *Africa Sustainable Livestock 2050*, 2018, 3.

execute recommendation than the first two, it is likely to have more immediate effects than the first two.

5.2.4 Introduction of Stricter Sanctions for offences against animals

Under section 8, the PCA provides a sanction of a fine of three thousand shillings or a jail term of not more than six months where a person; cruelly beats, kicks, ill-treats or terrifies an animal.³⁸³

The sanctions in place in the PCA have not changed since its initial entering into force as law in Kenya in 1967. Due to reduction in purchasing power caused by inflation, three thousand shillings, which is approximately 30 US dollars, is the equivalent of 225.55 dollars in purchasing power according to the consumer price index inflation calculator.³⁸⁴ Three thousand shillings, as a sanction, has less sanctioning power than it did 52 years ago. As such, this study recommends the removal of a monetary sanction, with only a retaining of the jail term as a sanction for animal cruelty. Alternatively, the monetary sanction should be increased to either match or exceed the purchasing power of the initial sanction of 3,000 shillings in the year 1967. Sanctions are a deterrent of crime only when they are effective.³⁸⁵ As such, putting in place more stringent sanctions for offences against animals could act as a deterrent against animal cruelty.

5.3 CONCLUSION

In sum, this research concludes that domestic animal welfare in Kenya has been back-burnered with focus being on wild animal welfare. In remedying this, the first action to be taken is a review of the national law protecting domestic animals, in order to correctly diagnose any possible shortcomings within the law. The main legislative tool for the protection domestic animals in Kenya, is the prevention of cruelty act. This legislation provides that one can be found to have committed an offence under the act where they cause an animal unnecessary suffering. However, the act does not mention what constitutes unnecessary suffering such that from a reading of the act, one would not be able to explain what necessary suffering is as opposed to unnecessary suffering. The definition of this term, therefore, is the first step toward achieving domestic animal welfare in Kenya.

Through the cumulation of ideas of different scholars and judges, this study proposed a sort of definition of the term unnecessary suffering. Though the term cannot be defined completely

³⁸³ Section 8, *Prevention of Cruelty to Animals Act* (Act no. 12 of 2012).

³⁸⁴ <https://unstats.un.org/unsd/EconStatKB/KnowledgebaseArticle10352.aspx> on 8 November 2019.

³⁸⁵ Shavell S, 'Criminal Law and the Optimal Use of Non-monetary sanctions as a deterrent' 13 *Harvard Journal of Law and Economics* 86, 1979, 12.

and comprehensively, certain questions must be asked by judicial officers in matters concerning animal welfare. More importantly, the question of unnecessary suffering must always be aimed at the protection of the animal which is the subject of suffering. Rather than an anthropocentric approach which elevates the human goals achieved through animal suffering, a biocentric approach always be taken in order to protect animals. Furthermore, the aim of anti-cruelty law is not to facilitate human gain in animal suffering but to protect animals against suffering caused for human gain.

Ultimately, animals are at the mercy of human beings and without enforceable laws to protect against excessive human exploitation, animal welfare will never be achieved.

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