

*NO MONKEYS IN MY CIRCUS: PHILOSOPHICAL
PERSPECTIVES TOWARDS A LEGAL BAN OF CIRCUS
ANIMALS IN SOUTH AFRICA*

EN MI CIRCO NO HAY MONOS: PERSPECTIVAS
FILOSÓFICAS HACIA UNA PROHIBICIÓN LEGAL DE
CIRCOS CON ANIMALES EN SUDÁFRICA

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ABSTRACT

Even though South Africa has on occasion served as a sanctuary for retired circus animals from other parts of the world, it remains legal to have animals in circuses in this country. This paper explores the scientific evidence about animal in circuses, suggesting that animals in circuses have lives that are not “worth living”. Several philosophical reasons are discussed that sustain an argument for a ban on using all animals in circuses. The paper then argues for either amending the primary or subordinate legislation to effectively ban circus animals in South Africa.

KEY WORDS

Circus animals, animal law, South Africa, animal protection, animal law reform.

RESUMEN

Aunque Sudáfrica ha servido, en ocasiones, como santuario para animales de circo jubilados de otras partes del mundo, en este país sigue siendo legal tener animales en los circos. Este artículo explora la evidencia científica acerca de los animales en los circos, sugiriendo que tienen vidas que “no valen la pena”. Se discuten varias razones filosóficas que sustentan un argumento a favor de la prohibición del uso de todos los animales en circos. El documento aboga, en consecuencia, por enmendar la legislación primaria o secundaria para prohibir de manera efectiva los circos con animales en Sudáfrica.

PALABRAS CLAVE:

Animales de circo, derecho animal, Sudáfrica, protección animal, reforma del derecho animal.

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1. INTRODUCTION¹

Circuses used to be synonymous with animal performances — elephants standing on balls, tigers jumping through hoops of fire, and bears riding small bicycles. As perceptions about animals have shifted in the past few decades in especially countries in the Global North, so too has the sentiment about circus animals shifted. Across the world, countries have banned the use of circus animals. Countries like Cyprus,² Greece,³ Malta⁴ and Bolivia⁵ have nationwide bans on all animals in circuses, while others,

¹ I want to thank the two anonymous reviewers for their robust engagement and constructive feedback on this paper.

² MICHAEL CHAMBERS & CO. Animal Welfare Legislation in Cyprus (2016), at <https://www.chambers.law/animal-welfare-legislation-in-cyprus-2/> [Last consulted: 1 June 2023].

³ ANIMAL ACTION GREECE, Banning Animal Circuses in Greece (2021), at <https://www.animalactiongreece.org/project/banning-animal-circuses/> [Last consulted: 1 June 2023].

⁴ CORDINA, J. The end of animal circuses: amendments to Animal Welfare Act pass final parliamentary vote (2014), at <https://www.independent.com.mt/articles/2014-10-15/local-news/The-end-of-animal-circuses-amendments-to-Animal-Welfare-Act-pass-final-parliamentary-vote-6736123808> [Last consulted: 1 June 2023].

⁵ ANIMAL DEFENDERS INTERNATIONAL. The Perfect Storm: How the Bolivian Ban on all Animal Circuses was won (n.d.), at <https://www.stopcircussuffering.com/news/latin-america/perfect-storm-bolivian-ban-animal-circuses-won/> [Last consulted: 1 June 2023].

including, but not limited to, Austria,⁶ Croatia,⁷ Colombia,⁸ Peru,⁹ and Israel,¹⁰ have banned wild animals in circuses. Other countries have banned certain species (e.g., Belgium,¹¹ Denmark,¹² India,¹³ ¹⁴ Portugal¹⁵), while others have regions which have banned animals in circuses¹⁶. The bans follow significant concerns that circuses particularly “fail to provide some of the most basic social, spatial and feeding requirements of wild animals”.¹⁷ If any practice cannot meet an animal’s basic welfare needs, serious ethical questions must be raised around the practice. Legal reform has been one way in which the ethical worry has been officially addressed — according to one report “the rationale for implementing a ban ... was primarily for animal welfare/protection”.¹⁸

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- ⁶ Austria, Federal Act on the Protection of Animals (2020), at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2004_1_118/ERV_2004_1_118.html [Last consulted: 1 June 2023].
- ⁷ Animal Friends Croatia, Animal Protection Act (2017), at <https://www.prijatelj-zivotinja.hr/index.php?id=470> [Last consulted: 12 September 2022].
- ⁸ ANIMAL DEFENDERS INTERNATIONAL. Colombia Bans Wild Animals in Circuses (2013), at https://www.ad-international.org/animals_in_entertainment/go.php?id=3179 [Last consulted: 1 June 2023].
- ⁹ ANIMAL DEFENDERS INTERNATIONAL. History in the Making — Wild Animals Say Goodbye to the Circus in Peru (2014), at <https://www.stopcircussuffering.com/news/latin-america/history-making-wild-animals-say-goodbye-circus-peru/> [Last consulted: 1 June 2023].
- ¹⁰ ANIMALS NOW. About Us (n.d.), at <https://animals-now.org/en/about/> [Last consultation: 1 June 2023].
- ¹¹ NETHERLANDS. Minister van Volksgezondheid, Koninklijk besluit tot Wijziging van het Koninklijk Besluit van 2 September 2005 betreffende het Welzijn van Dieren gebruikt in Circussen En Rondreizende Tentoonstellingen (2014), at https://etaamb.openjustice.be/nl/koninklijk-besluit-van-11-februari-2014_n2014024068 [Last consulted: 1 June 2023].
- ¹² ANIMAL DEFENDERS INTERNATIONAL. Denmark set to Ban all Wild Animal Circus Acts! (n.d.), at <https://www.stopcircussuffering.com/news/europe/denmark-set-to-ban-all-wild-animal-circus-acts/> [Last consulted: 1 June 2023].
- ¹³ ANIMAL WELFARE BOARD OF INDIA. Study Report on Why use of Elephants in Circuses and other Performances Should be Banned. India: Ministry of Environment, Forests and Climate Change (2016), at https://www.petaindia.com/wp-content/uploads/2016/09/STUDY-REPORT-ON-WHY-A-BAN-ON-USE-OF-ELEPHANTS-FOR-PERFORMANCE-IS-NECESSARY_20.06.2016.pdf [Last consulted: 1 June 2023].
- ¹⁴ SHEKHAR, S. In welcome move, no circus in India can now make wild animals perform tricks, in *India Today*. (27 October 2017), at <https://www.indiatoday.in/mail-today/story/wild-animals-performance-in-circus-ban-india-central-zoo-authority-1070867-2017-10-27> [Last consulted: 1 June 2023].
- ¹⁵ MCCARTHY, J. Portugal announces ban on using wild animals in circuses, in *Global Citizen*, November 2 (2018), at <https://www.globalcitizen.org/en/content/portugal-bans-circus-animals/> [Last consulted: 1 June 2023].
- ¹⁶ CASAMITJANA, J. Many Countries Have Banned Wild Animals in Circuses ... but Who’s Lagging Behind? (2015), at <https://www.onegreenplanet.org/animalsandnature/banning-wild-animals-in-circuses/> [Last consulted: 1 June 2023].
- ¹⁷ HARRIS, S., IOSSA, G., SOULSBURY, C.D. A Review of the Welfare of Wild Animals in Circuses. (Bristol 2006), at <https://www.rspca.org.uk/documents/1494939/7712578/A+review+of+the+welfare+of+wild+animals+in+circuses+%282006%29+%28PDF+632KB%29.pdf> [Last consulted 1 June 2023]. 24.
- ¹⁸ EUROGROUP FOR ANIMALS. Ethological needs and welfare of wild animals in circuses (2015), at https://www.lav.it/cpanelav/js/ckeditor/kcfinder/upload/files/files/Ethological%20Need_EN.pdf

As circuses closed in places like Peru and Colombia, there was a problem of large carnivores with no place to go, and many of those animals were relocated to South African sanctuaries. The irony of South Africa serving as a sanctuary for some foreign retired and rescued circus animals should not escape us — lions (and many other animals) are still legally used as circus animals in this country. Considering the colonial history of circus animals, this is especially noteworthy, since many animals like lions and elephants were routinely taken from colonised countries (like South Africa) to colonial powers for circuses and zoos, starting in the late 1800s. As Marianna Szczygielska argues, “[e]xotic animals on display and their bodily parts, circulating in global economies as raw materials, carry meanings connected to colonialism and imperial power”.¹⁹ Elephants especially were considered “prime symbols of the power and triumph of the colonial empire” of North America and Western Europe.²⁰ It was not only animals that were exported for circuses, but also humans. ‘Ethnic theme parks’ exhibited humans from the colonies as tourist attractions.²¹ In the South African context, Sara Baartman, a Khoikhoi woman, was taken and exhibited as ‘Hottentot Venus’ in 19th Century Europe.²² In addition, as will be seen in Section 2, circuses in South Africa are a product of colonial importation — there are no circuses documented in South Africa before 1810, and those that were established thereafter were established by mostly English colonisers.

Although South Africa has had many circuses throughout the years, there remains only one traditional travelling circus that uses wild animals: the McLaren Circus.²³ David McLaren started the circus in 2005.²⁴ This is a permanently travelling circus — entailing that it is on the move 12 months a year and has no permanent facility. This circus proclaims that it has “poodles, goats, miniature horses, camels, Welsh ponies, Friesian horses, Arabian stallions, pythons, alligators and lions”²⁵ but there is some documentary

[Last consulted: 1 June 2023]. 12.

¹⁹ SZCZYGIELSKA, M. *Elephant Ivory, Zoos, and Extinction in the Age of Imperialism (1870s-1940s)* (2019), at <https://www.mpiwg-berlin.mpg.de/feature-story/elephant-ivory-zoos-and-extinction-age-imperialism-1870s-1940s> [Last consulted: 1 June 2023].

²⁰ SZCZYGIELSKA, M. *Elephant empire: zoos and colonial encounters in Eastern Europe*, in *Cultural Studies*, 34/5 (2020) 789-810. DOI: 10.1080/09502386.2020.1780280. 789.

²¹ TRUPP, A. *Exhibiting the ‘Other’ then and Now: ‘Human Zoos’ in Southern China and Thailand*, in *Austrian Journal of South-East Asian Studies*, 4/1 (2011) 139-149.

²² CRAIS, C., SCULLY, P. *Sara Baartman and the Hottentot Venus: A Ghost Story and a Biography* (Princeton 2021) <https://doi.org/10.1515/9780691238357>.

²³ According to Ban Animal Trading (n.d.) there is another circus, namely Circus Royal, who uses domestic animals, but no further information could be found on this circus.

²⁴ MCLAREN CIRCUS. *The McLaren Circus story* (2019a), at <https://mclarencircus.co.za/our-history/> [Last consulted: 4 July 2022]; SMIT, T. *McLaren Circus back in town*, in *Boksburg Advertiser* (2021, March 29), at <https://boksburgadvertiser.co.za/408373/mclaren-circus-back-in-town/> [Last consulted: 1 June 2023].

²⁵ MCLAREN CIRCUS. *Our animal friendly loving circus* (2019b), at <https://mclarencircus.co.za/animal-care/> [Last consulted: 1 June 2023].

evidence that there are also tigers on their premises.²⁶ While McLaren Circus has faced criticism from especially activist groups like Ban Animal Trading²⁷ and Beauty Without Cruelty,²⁸ it must be noted that the McLaren Circus is legally allowed to have animal performers in its circus. There is currently no legislation prohibiting the use of animals for entertainment such as circuses. However, given the international bans on circus animals, the following research questions can be asked: Are there convincing reasons to condemn the use of circus animals in South Africa? And, if there are convincing reasons, how could this be implemented legally?

Given the above context, in this paper, I examine the state of circus animals in South Africa, focusing on the legal provisions of performing animals. I do so to consider how law can be reformed to improve the lives of those animals forced to perform in circuses in South Africa. I begin by providing a brief history of animal circuses in South Africa. Then, I review scientific and philosophical perspectives on circus animals. I examine some alternatives to the traditional travelling circus that might lead to improved animal welfare but conclude that although these alternatives might lead to marginal improvement, they fall short of substantial reform needed. Thereafter, I consider the current state of legislation governing animal performances, paying special attention to the Performing Animals Protection Act. I argue that, in light of inadequate alternatives, there are convincing reasons to institute a legal ban the use of animals in circuses in South Africa. I conclude this article by considering some legal reforms that could facilitate such a legal ban.

2. CIRCUSES AND ANIMALS IN SOUTH AFRICA — A SHORT HISTORY

Traditional travelling circuses are those with a big top tent going from town to town, usually relying on animal acts to draw crowds. Circuses have strong colonial roots.²⁹ Colonialism both “created new markets abroad and served as a source of new talent”.³⁰ Circuses therefore reflect a particular view of nature — the view typical of the West. Nature was seen as something apart from humans, given their perceived status as the only rational beings.³¹ The West set out to ‘systemise’ nature, serving to separate Western civilisation

²⁶ CARTE BLANCHE. The circus comes to town (2022, March 29), at <https://www.youtube.com/watch?v=QjMywfMIXwM> [Last consulted: 1 June 2023].

²⁷ BAN ANIMAL TRADING. Animal Circuses (n.d.), at Ban Animal Trading: <https://www.bananimaltrading.org/why-we-exist/2020-05-05-10-43-48/animal-circuses> [Last consulted: 1 June 2023].

²⁸ BEAUTY WITHOUT CRUELTY. The Animal Circus (2017, June 2), at <http://bwcsa.co.za/the-animal-circus/> [Last consulted: 1 June 2023].

²⁹ ARRIGHI, G. Circus, Colonialism, and Empire: The Circus in Australasia and Asia, in *The Cambridge Companion to the Circus* (Cambridge 2021) 48-62. doi:10.1017/9781108750127.004.

³⁰ WITTMANN, M. The Origins and Growth of the Modern Circus in *The Cambridge Companion to the Circus* (Cambridge 2021) 19-34. doi:10.1017/9781108750127.002. 32.

³¹ JOHNSON, J.T., MURTON, B. Re/placing Native Science: Indigenous Voices in Contemporary Constructions of Nature in *Geographical Research*, 45/2 (2007) 121-129. 122.

from nature.³² While it falls outside the scope of this paper to give a full historical reflection on the role of colonisation in the creation of circuses, it must be acknowledged that a circus that uses animals reflect a particular, non-universal view of nature, and, specifically, animals, that is not congruent with many indigenous ways of viewing nature.

Returning to the historical overview, while there are not currently many traditional travelling circuses in South Africa, the country nevertheless has a history of circuses. Though there have been many smaller circuses in South Africa, three prominent ones stand out over the past 120 years: the Boswell (later Boswell-Wilkie), the Brian Boswell, and the McLaren circuses. All three of these circuses made use of animal acts; however, the Boswell-Wilkie and Brian Boswell circuses no longer exist.³³

For nearly a century (from around 1911 to the early 2000s), the Boswell Circus was perhaps the most well-known traditional travelling circus. The circus was named after J.C. Boswell, who travelled to South Africa from the UK in 1911.³⁴ In 1912, the ‘Boswell Troupe’ was introduced to the country with ‘six performing Shetland ponies’.³⁵ Twenty years later, in the 1930s, the Boswell Circus had increased its animal division and was travelling with ponies, horses, monkeys, lions, kangaroos, camels and elephants.³⁶ Ricketts notes, “Jim’s [Boswell] training method for all his animals was very simple. He believed in gaining the animal’s confidence by keeping his voice low but authoritative, and could often be seen talking quietly to his charges”.³⁷

By the 1960s, the Boswell brothers had morphed into the Boswell-Wilkie Circus. By 1966, this circus was travelling the country with lions, tigers, and bears. The Boswell-Wilkie Circus enjoyed a couple of decades of fame, but by 2001, their travelling side stopped, and they established a permanent site. This permanent site’s website mentions horses, ponies, dogs, and several farm animals”.³⁸ However, what happened to the wild animals that used to perform in their travelling circus remains unclear. This permanent site also closed in 2015, seeing the end of the Boswell-Wilkie era.

In 1973, Brian Boswell and his wife Jane (née Chipperfield of the United Kingdom-based Chipperfield Circus) established the Natal Lion Park, and “started training animals for various South African circuses, for the Boswell-Wilkie Circus as well as the Continental Circus

³² JOHNSON and MURTON, *supra* note 31 at 122.

³³ BOSWELL WILKIE CIRCUS, History (n.d.), at <https://www.circus.co.za/history.html> [Last consultation: 4 July 2022]; RICKETTS, C. The Boswells: The Story of a South African Circus. (Amanzimtoti 2003); SMIT *supra* note 24.

³⁴ RICKETTS *supra* note 33, at 3.

³⁵ RICKETTS *supra* note 33, at 4.

³⁶ RICKETTS *supra* note 33, at 9.

³⁷ RICKETTS *supra* note 33, at 9.

³⁸ BOSWELL WILKIE CIRCUS *supra* note 33.

Berlin owned by Boet Fritz”.³⁹ They also trained many animals for films and advertising, including elephants, lions, tigers, leopards, “ostrich, crocodiles, snakes, chimpanzees, orangutan [sic], parrots, macaws and cockatoos, a sea lion, and even a leguaan”.⁴⁰ In 1982, the Brian Boswell Circus had its first performance, and continued to focus heavily on acts using animals for decades. However, eventually, “[t]he circus faced allegations of animal abuse and cruelty that came with the upsurge of global revulsion against animals being used in circuses”.⁴¹ This circus closed around 2016 due to pressure from animal rights organisations, and Brian Boswell passed away in 2021.⁴² From what could be established, the Natal Lion Park still exists with lions, tigers, a liger, and many other animals.⁴³

Currently, only the McLaren circus remains, boasting a variety of animal acts while it permanently travels the country. According to the McLaren website, animals receive a high standard of care, with particular attention given to their diet, exercise, and stimulation. They maintain that their animals are trained using only positive reinforcement, time, patience, and repetition.⁴⁴ The owner of the circus proclaims to care deeply for the animals and would never do anything to harm them. However, there is evidence that circus life is fundamentally unsuited to animals,⁴⁵ entailing that despite good intentions, animals almost always suffer in circuses, a statement that will be unpacked in the following section.

3. CIRCUS ANIMALS — WHAT DOES THE SCIENCE SAY?

As one journalist points out, there has been ‘global revulsion’⁴⁶ against animals in circuses. This is also evident in the number of countries that are banning animals in circuses, as mentioned earlier. However, it is also the case that emotional responses and public sentiment do not equal scientific consensus. When considering changing legal provisions, it would be wise to understand scientific perspectives on circus animals, so that any proposal for legal change would have a rational basis in science. In what follows, I consider scientific data about the welfare of circus animals. It should be noted that much of the literature below focuses on ‘wild animals’, such as pachyderms, large

³⁹ RICKETTS *supra* note 33, at 13.

⁴⁰ RICKETTS *supra* note 33, at 13.

⁴¹ CAPITAL NEWSPAPERS. End of an era as curtain closes on circus magnate (2021, January 22), at <https://www.news24.com/News24/brian-boswell-circus-fights-laws-that-protect-elephants-2016120> [Last consulted: 1 June 2023].

⁴² SMIT *supra* note 24.

⁴³ See here <https://natalzoo.co.za/>

⁴⁴ MCLAREN CIRCUS *supra* note 25.

⁴⁵ HARRIS ET AL. *supra* note 17.

⁴⁶ CAPITAL NEWSPAPERS *supra* note 41.

carnivores, and even sea animals like seals. However, later in this paper, I also consider domesticated animals such as dogs and ponies.

In a paper titled ‘Are Wild Animals Suited to a Travelling circus life?’, researchers at the University of Bristol reviewed “the welfare of non-domesticated animals in circuses and their suitability to a circus life”.⁴⁷ The authors examined circus animal welfare and concluded: “the species of non-domesticated animals commonly kept in circuses [e.g., elephants and large carnivores] appear the least suited to a circus life”.⁴⁸ They reached this conclusion after studying the common stressors faced by circus animals. There are multiple sources of stress for circus animals. For example, the animals are often restrained or suffer from significant space constraints.⁴⁹ Circus animals have limited social interactions with other animals. Furthermore, there is stress because of training and performing.⁵⁰ Circus animals also suffer stress resulting from frequent travelling.⁵¹ Animals also experience limited time to move and feed and might not have proper diets”.⁵² These stressors often result in stereotypies (repetitive, aimless behaviours), an observable indication of stress in animals.⁵³ While any captivity induces poor welfare, “circuses, in particular, fail to provide some of [non-domesticated animals] most basic social, spatial, and feeding requirements”.⁵⁴ They further state that, despite some perceived ‘positives’ like lack of predation and food provisions, circus animals nevertheless experience “poorer welfare than animals of the same species living free”.⁵⁵

⁴⁷ IOSSA, G., SOULSBURY, C.D., HARRIS, S. Are wild animals suited to a travelling circus life?, in *Animal Welfare*, 18/2 (2009) 129-140. 136.

⁴⁸ IOSSA ET AL. *supra* note 47 at 129.

⁴⁹ SCHMID, J. Keeping circus elephants temporarily in paddocks — the effects on their behaviour, in *Animal Welfare*, 4 (1995) 87-101; SCHMIDT-BURBACH, J. Taken for a Ride: The Conditions for Elephants Used in Tourism in Asia, (2017), at https://www.worldanimalprotection.org.au/sites/default/files/media/au_files/taken_for_a_ride_report.pdf [Last consulted: 1 June 2023].

⁵⁰ MOTA-RAJOS, D., GHEZZI, M.D., DOMÍNGUEZ-OLIVA, A., DE LE VEGA, L.T., BOSCATO-FUNES, L., TORRES-BERNAL, F., MORA-MEDINA, P. Circus animal welfare: analysis through a five-domain approach, in *Journal of Animal Behaviour and Biometeorology*, 10 (2022) 2221. <http://dx.doi.org/10.31893/jabb.22021>. 40.

⁵¹ FRIEND, T.H. Behavior of picketed circus elephants, in *Applied Animal Behaviour Science*, 62/1 (1999) 73-88. [https://doi.org/10.1016/S0168-1591\(98\)00210-X](https://doi.org/10.1016/S0168-1591(98)00210-X); GRUBER, T.M., FRIEND, T., GARDNER, J.M., PACKARD, J.M., BEAVER, B., BUSHONG, D. Variation in stereotypic behavior related to restraint in circus elephants, in *Zoo Biology*, 19 (2000) 209-221. [https://doi.org/10.1002/1098-2361\(2000\)19:3<209::AID-ZOO4>3.0.CO;2-7](https://doi.org/10.1002/1098-2361(2000)19:3<209::AID-ZOO4>3.0.CO;2-7).

⁵² IOSSA ET AL. *supra* note 47.

⁵³ NEVILL, C.H., FRIEND, T.H. The behaviour of circus tigers during transport, in *Applied Animal Behaviour Science*, 82/4 (2003) 329-337. DOI: 10.1016/S0168-1591(03)00066-2.; FRIEND *supra* note 51.; TOSCANO, M.J., FRIEND, T.H., NEVILL, C.H. Environmental conditions and body temperature of circus elephants transported during relatively high and low temperature conditions, in *Journal of the Elephant Managers Association*, 12 (2001) 116-149.

⁵⁴ IOSSA ET AL. *supra* note 47 at 136.

⁵⁵ IOSSA ET AL. *supra* note 47 at 137.

In 2015, a group of almost 30 of the world's leading scientists who study animal behaviour, also known as ethologists, released a statement on 'Ethological needs and welfare of wild animals in circuses'.⁵⁶ Led by renowned ethologist Marc Bekoff, in this statement, they refute the common argument given by circuses that, since circus animals are primarily born in captivity, they "do not possess the same behavioural and physiological needs as their wild counterparts".⁵⁷ The ethologists argue that there is a crucial distinction between 'tamed' and 'domesticated', and that wild animals in circuses are tamed, but cannot be domesticated.⁵⁸ Like Iossa et. al.,⁵⁹ Bekoff et. al. discuss the welfare implications of circus life for wild animals. They discuss limited space availability, maternal separations, restricted social interactions, frequent travelling, and training and performances as being wholly negative and having significant negative consequences for animal welfare and stress levels.⁶⁰ They conclude "that circuses are an unsuitable environment for wild animals".⁶¹

The findings above are reiterated in a report by EuroGroup for Animals. After extensive consultation and research, the report concluded that "[l]ife for wild animals in circuses does not appear to constitute either a 'good life' or a 'life worth living'".⁶² A Welsh report reached similar conclusions. Dorning et al.⁶³ consulted 658 experts and organisations about circus animal welfare in writing this report. They concluded that "the welfare of wild animals is sub-optimal in circuses and travelling animal shows" and that captive wild animals' behaviour is adversely affected. Finally, they recommended a "ban on using wild animals in travelling circuses and mobile zoos on animal welfare grounds".⁶⁴

The above presents a sample of reports that conclude that circuses cannot meet the natural needs of wild animals and that circuses have particular challenges when it comes to accommodating specific needs of wild animals.⁶⁵ There are many reports from across the world that share the sentiments expressed in the above reports. These reports include, for example, a report by the Federation of Veterinarians of Europe,⁶⁶ a

⁵⁶ BEKOFF, M. et al., Ethological needs and welfare of wild animals in circuses (2015), at https://www.lav.it/cpanelav/js/ckeditor/kcfinder/upload/files/files/Ethological%20Need_EN.pdf [Last consulted: 1 June 2023].

⁵⁷ BEKOFF *supra* note 56 at 1.

⁵⁸ BEKOFF *supra* note 56 at 1.

⁵⁹ IOSSA ET AL. *supra* note 47.

⁶⁰ BEKOFF *supra* note 56 at 2.

⁶¹ BEKOFF *supra* note 56 at 2.

⁶² EUROGROUP FOR ANIMALS *supra* note 18 at 32.

⁶³ DORNING, J., HARRIS, S., PICKETT, H. The Welfare of Wild Animals in Travelling Circuses. Welsh Government (2016), at https://www.ispca.ie/uploads/The_welfare_of_wild_animals_in_travelling_circuses.pdf [Last consulted: 1 June 2023].

⁶⁴ DORNING *supra* note 63 at 4.

⁶⁵ HARRIS ET AL. *supra* note 17 at 24.

⁶⁶ FEDERATION OF VETERINARIANS OF EUROPE. FVE Position on the Use of Animals in Travelling Circuses. (Brussels 2015), at https://uevp.fve.org/cms/wp-content/uploads/2015_the_travelling_circuses.pdf [Last consulted: 1 June 2023].

report by the Secretary of State for Environment, Food and Rural Affairs in the United Kingdom,⁶⁷ and a report by India's Animal Welfare board.⁶⁸ While it is not possible to discuss all these reports in depth, it nevertheless suggests that there are ample scientific findings that support the view that a circus life is not a good life for wild animals.

While there seems to be some scientific consensus it is also the case that some sources argue that wild animals can, safely and humanely, be trained to perform in circuses.⁶⁹ It is worth noting, however, that this position has substantially less support in the literature — both scientific and otherwise. The support is also often from non-scientific sources, for example, one vocal supporter of animals in circuses is entertainment journalist Douglas McPherson, author of *Circus Mania*.⁷⁰ It is not clear what, besides his status as an entertainment journalist, qualifies him to speak on the welfare of circus animals. Nevertheless, he argues that “the show — with animals — should go on”.⁷¹ He holds the view that, since circuses have strict guidelines, vets regularly see the animals and that animals have a longer life expectancy in captivity compared to the wild, it follows that the welfare of animals can be safeguarded in circuses. McPherson also argues that animals can lead rewarding and enriched lives and that children are “enthralled” by circus animals. He says, furthermore, that “it’s what the public wants to see”, and that the actions of a few bad trainers unfairly impact the profession. He worries that soon after circus animals are banned, so too will zoos and aquariums, horseracing, meat consumption, and wool and leather wearing be banned. He concludes that the circus is a 250-year-old artform and should be kept alive in its ‘pure form’.⁷² McPherson’s arguments are mostly anthropocentric — considering the human circus spectators, rather than the animal performers. Consequently, his arguments do not particularly negate the serious welfare concerns raised in many scientific reports discussed before.

Perhaps more convincingly, McPherson quotes an early study by ethologist Marthe Kiley-Worthington⁷³ who argued that animals suffer no stress during circus performances. This study is one of the few scientific studies that has argued in favour of keeping animals in circuses. In this book, Kiley-Worthington acknowledges that circus animals

⁶⁷ UNITED KINGDOM. Secretary of State for Environment, Food and Rural Affairs, Wild Animals in Circuses. (2013), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228862/8538.pdf [Last consulted: 1 June 2023]

⁶⁸ ANIMAL WELFARE BOARD OF INDIA *supra* note 13.

⁶⁹ MCPHERSON, D. Circus Mania. (London 2010).; MCPHERSON, D. Circus animals — 10 reasons the show must go on, in Huffington Post (5 May 2015), at https://www.huffingtonpost.co.uk/douglas-mcpherson/circus-animals-10-reasons_b_6768110.html [Last consulted: 5 June 2023].; KILEY-WORTHINGTON, M. Animals in Circuses and Zoos: Chiron’s World? (Essex 1990).

⁷⁰ MCPHERSON (2010) *supra* note 69.

⁷¹ MCPHERSON (2015) *supra* note 69.

⁷² MCPHERSON (2015) *supra* note 69.

⁷³ KILEY-WORTHINGTON *supra* note 69.

show signs of distress, but at the same time concluded that “there is little evidence of physical maltreatment and cruelty in the husbandry, training and performing of circus animals”.⁷⁴ She argues in the same book that “[i]t is true to say that there was evidence of prolonged distress and abnormal behaviour found in both zoos and circuses, but it is equally true to say this is the case with almost any animal husbandry system today”.⁷⁵ Interestingly, this study was initially commissioned by the RSPCA, but they refused to publish it after disagreeing with her conclusion that circus animals do not suffer.⁷⁶ Kiley-Worthington nevertheless proceeded to publish her findings in a book through ‘Little Eco-Farms Publishing’ and this book is currently distributed by Aardvark Publishing in Essex. Neither of these publishing houses appear to be academic publishers, so, as far as can be established, this study has not been peer-reviewed in the traditional academic sense,⁷⁷ although it remains an often-cited source in the literature. Peer review ensures credibility and veracity of scientific findings, and so a failure to peer review brings into question the findings of her study.

At this juncture, it is important to reflect on the information presented thus far. Most reports seem to provide substantial support for the position that animals cannot live good lives in circuses. There are a few texts that argue contrarily, however, these reports are either not conducted by ethologists, or are, at best, scientifically questionable. If there are further scientific reports that support the view that circus animals do not suffer, these are not easily found on either general search engines, or scientific databases, despite conducting diligent and repeated searches.

I was only able to find one report with mixed findings regarding circus animals. Written by Dutch animal welfare scientist Hans Hopster and ethologist Ingrid de Jong, this report looked specifically at the welfare of sea lions in travelling circuses.⁷⁸ It concluded that while experts largely agreed that there are significant hazards that face

⁷⁴ KILEY-WORTHINGTON *supra* note 69.

⁷⁵ KILEY-WORTHINGTON *supra* note 69.

⁷⁶ ZOOCHECK. A Response to Animals in Circuses and Zoos, Chiron’s World?, A 1990 Report by Marthe Kiley-Worthington (2015), at http://www.zoocheck.com/wp-content/uploads/2015/04/campaigns_circuses_KileyWorthington.html [Last consulted: 1 June 2023].

⁷⁷ There might have been a peer review conducted of this study, but if it has, it is not overtly clear that this is the case. No online presence is found for ‘Little Eco-Farms Publishing’ and ‘Aardvark Publishing’, and the only site related to ‘Aardvark Publishing’ in Essex is a basic page with a dozen or so publications about circuses and zoos (see here http://the-shg.org/Kiley_Worthington/aardvark.htm#-contents). There is no publicly accessible peer review policies or editorial policies on these websites, so it is difficult to ascertain the level to which their publications are subjected to scrutiny by other scientists. Since this publication makes scientific claims about animal welfare, one would expect a peer review process. At face value, at least, these are not well known academic publishers, which, in turn, does not inspire confidence in the scientific findings.

⁷⁸ HOPSTER, H., DE JONG, I. Welfare of Sea Lions in travelling Circuses. (Lelystad 2014), at <https://edepot.wur.nl/326613> [Last consulted: 1 June 2023].

sea lions in travelling circuses, they nevertheless had divergent opinions on sea lion welfare.⁷⁹ They postulate that this seemingly contradictory finding could be a result of the ambiguity around conceptions such as ‘suffering’ and ‘life of quality’, and personal interests in the use of sea lions in travelling circuses.⁸⁰

From the above, it seems that there is some scientific consensus that wild animals’ physiological, mental, and social requirements cannot be adequately met in travelling circuses.⁸¹ McCulloch and Reiss hold that “[e]ntertainment—especially that specifically related to a circus—is unnecessary and does not justify causing suffering to sentient animals”.⁸² Most of the reports cited thus far arise from the European context (with one report from India). None of these reports deal directly with the South African reality, and from what could be established, no similar report currently exists from within this country. However, the findings of the above reports can be extrapolated since, in many instances, they deal with the same species of animal in very similar circumstances.

In addition to scientific reasons to reconsider the use of animals in circuses and promote appropriate law reform, I also engage with philosophical literature.

4. CIRCUS ANIMALS — WHAT DO THE PHILOSOPHERS SAY?

For millennia, philosophers have considered human-animal relationships — as far back as the 6th Century BCE, Pythagoras was against killing animals for food, for example. In the late 18th Century, Jeremy Bentham was the first to consider animal sentience seriously, as is evident in his famous quote: “The question is not, Can they reason?, nor Can they talk? but, Can they suffer?”.⁸³ Since then, there has been significant scientific corroboration of animal sentience, in at least “all vertebrate animals and some molluscs and crustaceans”.⁸⁴ The acknowledgement of animal sentences has resulted

⁷⁹ HOPSTER and DE JONG *supra* note 78 at 6.

⁸⁰ While South Africa does not really have ‘sea lions’, we have the closely related ‘seals’ and specifically the Cape fur seal. These seals are not used in circuses, however, they are used as performers at aquariums. According to the South African Association for Marine Biological Research, the seals at uShaka Marine World in Durban are mostly rescue animals and receive the highest level of care. Although it falls outside the scope of this paper to explicitly consider aquarium performers, it is also important to consider, in light of reports like the one by Hopster and de Jong, whether this practice should also be more closely scrutinised in the South African context. Many of the arguments presented in this paper would likely extend to this practice too. See SOUTH AFRICAN ASSOCIATION FOR MARINE BIOLOGICAL RESEARCH. Animal welfare (7 July 2022), at <https://www.saambr.org.za/animal-welfare/> [Last consulted: 1 June 2023].

⁸¹ FEDERATION OF VETERINARIANS OF EUROPE *supra* note 66 at 1.

⁸² MCCULLOCH, S.P., REISS, M.J. A proposal for a UK Ethics Council for Animal Policy: the case for putting ethics back into policy making, in *Animals*. 8 (88) (2018) 1-24. DOI: 10.3390/ani8060088. 5.

⁸³ BENTHAM, J. *An Introduction to the Principles of Morals and Legislation*. (Dover [1780]2007). 311.

⁸⁴ BROOM, D.M. Sentience and animal welfare: New thoughts and controversies, in *Animal Sentience*, 5 (2016) 11. DOI: 10.51291/2377-7478.1024. 2.

in a substantial body of literature being published in animal ethics, environmental ethics, critical animal studies, environmental philosophy and other proximate fields that consider human-animal/human-environment relationships. Philosophical thought is valuable when reflecting legally on animals since, as Iyan Offor⁸⁵ says, animal law relies on ethical thought to increase its legitimacy and effectiveness. In what follows, I focus on three concepts, as discussed in philosophical literature, and consider those in relation to circus animals. The first is ‘unnecessary suffering’, the second is ‘dignity’, and the third is ‘labour’. This section is not a comprehensive account of how philosophical thinkers have considered animals, but it provides an indication of which philosophical concepts might be helpful when considering circus animals.

4.1. Unnecessary suffering

Sentience, or the ability to suffer, is used by moral theorists and legislation alike when considering the treatment of animals, with legal systems worldwide relying on the concept ‘unnecessary suffering’ to consider when and how animals can be harmed. The concept ‘unnecessary’ denotes ‘suffering without good reason’. However, it might not be immediately clear when suffering can be imposed on animals with ‘good reason’ — ‘unnecessary’ is often not well explained or defined by policymakers.⁸⁶ The concept of ‘acceptable suffering’ relates to practices that are “unavoidable, impossible to prevent or prohibit, but possible to legally justify”, such as farming.⁸⁷ In the philosophical literature, a distinction is sometimes made between ‘instrumental suffering’ and ‘unnecessary suffering’.⁸⁸ An example of instrumental suffering is medical surgery i.e., the imposition of pain through surgery to promote eventual wellness.⁸⁹ Instrumental suffering can be justified if there are good moral reasons.

The discussion around suffering is not actually about what is ‘necessary’, but really what (or who) is worthy of moral concern.⁹⁰ While many agree that it is wrong to cause unnecessary suffering, there is not always agreement on when suffering is unnecessary — partly because people have different moral concerns. In order to provide an argument against a particular activity that involves animal suffering, we need to consider what

⁸⁵ OFFOR, I. Second wave animal ethics and (global) animal law: a view from the margins, in *Journal of Human Rights and the Environment*, 11/2 (2020) 268-296. <https://doi.org/10.4337/jhre.2020.02.06>. 269.

⁸⁶ LUNDMARK, F., BERG, C., RÖCKLINSBERG, H. ‘Unnecessary suffering’ as a concept in animal welfare legislation and standards, in *The Ethics of Consumption* (114-119) (Wageningen 2013). https://doi.org/10.3920/978-90-8686-784-4_18.

⁸⁷ LUNDMARK, BERG and RÖCKLINSBERG *supra* note 86 at 115.

⁸⁸ DIETERLE, J.L. Unnecessary suffering, in *Environmental Ethics*, 30/1 (2008) 51-67. <https://doi.org/10.5840/enviroethics200830117>.

⁸⁹ DIETERLE *supra* note 88 at 53.

⁹⁰ DIETERLE *supra* note 88 at 55.

“would be sacrificed if we were to give up a particular activity and whether those sacrifices would be of comparable moral importance to prevention of the pain or suffering they cause”.⁹¹

When considering animals in entertainment, like circus animals, “it is difficult to see how one could defend any pain or suffering caused for the purpose of entertainment” since “entertainment is not a morally weighty notion”.⁹² Unless one takes an extreme anthropocentric (i.e. human-centred) view, it is hard to see why a human’s desire for brief entertainment would be a significant enough moral consideration to justify the enduring suffering of circus animals. Anthropocentrism considers only human interests as morally relevant, and so completely discards the moral interests of other beings such as animals during moral deliberations (see Routley and Routley⁹³ for a seminal and still relevant discussion of the problem of anthropocentrism). As Jan-Harm de Villiers⁹⁴ reminds us “[t]here is undeniable congruence between law and anthropocentric culture,” which entails that animal subjugation is maintained. However, as Tom Regan holds, even if there are benefits to humans, these “never justify turning wild animals into performing animals”.⁹⁵

4.2. Dignity

There is another philosophical concept that can be employed to consider circus animals — that of dignity. In the philosophical literature, dignity is associated with moral worth.⁹⁶ To have dignity is to have inherent worth, to be treated (in the Kantian sense) as an ‘end’ and never as a ‘means’. Although Kant did not consider animals as having inherent moral worth, we can nevertheless consider how the concept of dignity applies to animals. It seems that dignity is something different from suffering — so one can have one’s dignity undermined, without necessarily being subjected to pain and suffering (although pain and loss of dignity often coincides).

Circus animals suffer a loss of dignity in at least three intertwined ways. In the first sense, an animal is kept captive, and suffers a loss of freedom. In the second sense, an

⁹¹ DIETERLE *supra* note 88 at 55.

⁹² DIETERLE *supra* note 88 at 66.

⁹³ ROUTLEY, R., ROUTLEY, V. ‘Against the inevitability of human chauvinism’, in *Ethics and the problems of the 21st century* (Notre Dame 1979) 38-59.

⁹⁴ DE VILLIERS, J.-H. Law and the question of the animal: a critical discussion of national society for the prevention of cruelty to Animals v Minister of Justice and Constitutional Development, in *The South African Law Journal*, 137/4 (2019) 207-223. 222.

⁹⁵ REGAN, T. *Empty Cages: Facing the Challenge of Animal Rights* (New York, NY 2004) 136.

⁹⁶ CATALDI, S.L. Animals and the concept of dignity: critical reflections on a circus performance, in *Ethics and the Environment*, 7/2 (2002) 104-126. 108.

animal is forced to act counter to their species-specific nature.⁹⁷ Circus animals are also dominated by humans, and this domination constitutes a third sense in which they are treated in an undignified manner.

In the first instance, circus animals, like most captive animals, lack freedom in multiple ways. In a basic sense of freedom, circus animals spend a large portion of their time confined. However, freedom is a concept that can be placed on a continuum — captive animals typically have some freedoms (like freedom from hunger) but lack other freedoms (such as movement or behavioural freedom).⁹⁸ While circus animals might have access to food and medical treatment, there are significant ways in which they lack freedom. Contrary to some zoos and sanctuaries, circus animals lack access to naturalistic housing and spacious accommodation, especially when they are part of travelling circuses. They also experience specific stressors due to their specific context — constant travelling in small spaces. By virtue of being carted from venue to venue and housed in small spaces, circus animals then experience a lack of dignity in ways that are even worse than other captive (but stationary) animals.

There is another related way in which circus animals suffer a loss of dignity. Recounting her experience watching circus bears in Russia, philosopher Suzanne Laba Cataldi had the distinct feeling that the entire performance was undignified. While she does not know if the bears had suffered in their training, or were suffering during the performance, she nevertheless felt like there was a loss of dignity that was unrelated to their possible suffering. However, some animals are, by nature playful, and might even enjoy performing. She traces the loss of dignity to the type of amusement when she says “[i]t is the ridiculous nature of the amusement, and its promotion of an irreverent, disrespectful attitude toward nature, that seems to be morally objectionable”.⁹⁹

Cataldi’s experience highlights another sense of dignity loss. Dignity relates to “decency and decorum”. A circus animal has neither of these as she performs — “[i]f circus performances deprive [animals] of their ability to lead biologically normal lives, they can be said to be harmed by these indignities, and the performances can be viewed as ethically wrong”.¹⁰⁰ A circus performance does not elevate animals, or celebrate their natural animalities. Rather, the circus performance detracts — wild animals are belittled in the process of being made ‘funny’, ‘silly’ or ‘laughable’.¹⁰¹ Making a tiger or a lion jump through a hoop, or a bear push a stroller is undignified because it subjects, it reduces, it weakens the animal.

⁹⁷ CATALDI *supra* note 96 at 113.

⁹⁸ BROWNING, H., VEIT, W. Freedom and animal welfare, in *Animals*, 11/4 (2021) 1148. <https://doi.org/10.3390/ani11041148>. 1.

⁹⁹ CATALDI *supra* note 96 at 111.

¹⁰⁰ CATALDI *supra* note 96 at 113.

¹⁰¹ CATALDI *supra* note 96 at 117-118.

There is a third sense in which the animal suffers a loss of dignity. The animal performing in a circus is not celebrated qua animal, as she might have been in a natural setting (like a national park). Rather she is dominated by ‘man’ — indeed, what else is a circus with dangerous animals if not an exhibition of ‘man’s’ domination of animal. The domination of animals is a deeply anthropocentric activity, and making them perform tricks reduces them even further. Circus animals are the embodiment of a problematic view-of-nature — humans asserting their entitlement to nature in a particularly garish way. Although there are many ways in which humans treat nature crudely, circuses treat them especially so.

Philosopher Martha Nussbaum relates dignity not to mere freedom, but rather to capabilities. Nussbaum relates her approach explicitly to animals.¹⁰² Known as the ‘capabilities’ approach, her approach sees an animal treated with dignity when she is able to flourish. An animal flourishes, then, when she is able to live according to a set of capabilities. Nussbaum lists ten of these capabilities: life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, engaging with other species, play and control over their environment.¹⁰³ While it falls outside of the scope of this paper to consider each of these capabilities explicitly to circus animals, one can see how circus animals are deprived of many of these capabilities. Circus animals do not, for example, have access to sources of pleasure to stimulate their senses, or have lives that allow them attachments to others, or access to other species as they would in natural settings. Importantly, they also lack control over their environment — an important aspect for a dignified life, according to this approach. David Bilchitz argues that adopting Nussbaum’s notion of flourishing allows that one to consider all those with the capacity to flourish as having ‘dignity’. He continues to say that the notion of dignity could be developed to remove the arbitrary exclusion of animals from the definition of ‘legal personhood’. He concludes that we should therefore revise the definition of ‘legal personhood’ to include animals and applies his argument to the South African reality.¹⁰⁴ Similarly, Offor¹⁰⁵ also uses Nussbaum’s notion of flourishing as a way to ground animal interests when reflecting on animal law.

Although not explicitly addressing circus animals, dignity is extensively discussed in African moral philosophy. Motsemai Molefe argues that African conceptions of human dignity has three properties: vitality, community and personhood.¹⁰⁶ Vitality inheres in

¹⁰² NUSSBAUM, M.C. *Frontiers of Justice: Disability, Nationality and Species Membership* (London 2006).

¹⁰³ NUSSBAUM *supra* note 102 at 393-400.

¹⁰⁴ BILCHITZ, D. *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals*, in *South African Journal on Human Rights*, 25/1 (2009) 38-72. DOI: 10.1080/19962126.2009.1186519.

¹⁰⁵ OFFOR *supra* note 85.

¹⁰⁶ MOLEFE, M. *Theories of Dignity in African Philosophy* (Cham 2022) DOI: 10.1007/978-3-030-93217-6_2.

humans as a spiritual energy emanating from God. Community is the ‘final good’ and is seen in various conceptualisations of the theory of *ubuntu*. Personhood identifies ‘morally sound adults’ — those leading virtuous or excellent lives.¹⁰⁷ Much of the literature considers human dignity, but Molefe asks whether there is place for animals in African conceptions of dignity. Although there are competing interpretations of dignity (varying from anthropocentric to non-anthropocentric), in some conceptualisations, dignity is extended to animals. Following the vitality perspective, animals are seen as having a purpose and mattering for their own sakes.¹⁰⁸ Metz argues that animals can form part of the moral community and argues that animals have moral status of the same kind as humans, but to differing degrees.¹⁰⁹ Considering a personhood-based view, Molefe holds a capacity-based view of human dignity, “where the capacity for virtue secures human dignity”.¹¹⁰ Molefe then argues that some animals have moral status since they can be objects of virtue. Given that there are at least some conceptualisations of African ethics that extend dignity to animals, the same arguments apply as above — circuses do not treat animals as beings with dignity.

The various ways in which circus animals suffer a loss of dignity provide convincing reasons to morally condemn the use of animals in circuses.

4.3. Labour

There is another concept philosophers use to consider animals, i.e., ‘labour’. Animals have many designations, but we seldom consider animals qua workers. Labour is often regarded as a uniquely human activity.¹¹¹ This is a noticeable oversight, considering that so many of our uses of animals constitute labour — horses pulling carriages, police dogs on active duty, oxen ploughing lands. As Jason Hribal states “[s]ince the 17th century, a great many animals have been put to work, they have produced large monetary profits, and they have received little to no compensation or recognition for their efforts”.¹¹²

Although working animals have played a central role in capitalism, they are seldom recognised in discussions around workers’ rights and labour justice.¹¹³ This oversight is a

¹⁰⁷ MOLEFE *supra* note 106 at 10-11.

¹⁰⁸ CHEMHURU, M. Using the African Teleological View of Existence to Interpret Environmental Ethics, in *Philosophia Africana*, 18/1 (2016) 41-51.; MOLEFE *supra* note 106 at 57.

¹⁰⁹ METZ, T. An African theory of moral status: a relational alternative to individualism and holism, in *Ethical Theory and Moral Practice*, 14 (2012) 387-402.; MOLEFE *supra* note 106 at 57.

¹¹⁰ MOLEFE *supra* note 106 at 61.

¹¹¹ BLATTNER, C., COULTER, K., KYMLICKA, W. *Animal Labour and the Quest for Interspecies Justice* (Oxford 2019).

¹¹² HRIBAL, J. Animals are part of the working class: a challenge to labor history, in *Labor History*, 44/4 (2003) 435-453. <https://doi.org/10.1080/0023656032000170069>. 436.

¹¹³ BLATTNER ET AL. *supra* note 111 at 2.

symptom of human exceptionalism inherent in a Western worldview, which encourages humans to consider animals as little more than ‘things’ and so the use of animals is not critically reflected upon. These oversights are built into most Western legal systems too — animals are seldom considered part of the workforce, and so their rights as workers have not been formally recognised.¹¹⁴ While human workers often enjoy extensive rights and are legally entitled to healthy and safe systems of work, working animals are exempted from these protections, and are, in many cases, actively excluded from even the slightest legal protection.¹¹⁵

Performing animals, such as circus animals, are also working animals. The relationship between animals, circuses and capitalism is especially relevant as we consider performing animals since they are, essentially, working for humans without being able to consent to their working conditions, enjoy the fruits of their labour, or organise their labour to promote better working conditions. Susan Nance explains how the circus (“the jovial circus elephant”) introduced Americans to a capitalism built of human supremacy — the human is the consumer; the animal is the consumed.¹¹⁶ As mentioned earlier, the colonial nature of circuses is also noteworthy, and relatedly, the extraction of ‘resources’ (in this case, animals), from colonised nations must also be considered. It is also the case that those countries “that have an abundance of [commodities], seem to be condemned to underdevelopment”,¹¹⁷ and so the extraction of animal from Africa (and other colonies) is another example of the Western world has dominated the Global South and impacted its development. In industrial capitalism, animals are machines — automatons that are consumed or discarded.¹¹⁸ Capitalism is, in many ways, premised on the mass consumption of animal bodies, and these animal bodies were often taken from colonised nations, so the capitalist, colonised nature of animals in circuses cannot be overlooked.

Performing animals, like circus animals, usually perform for economic ends — very few, if any, animal performances are free. Performing is also labour — especially considering that there is extensive training involved and the circus animals are often expected to act in ways that are contrary to their species-specific nature. When they enter circuses, humans pay to be entertained, while the animal is unable to enjoy the fruits of her labour. Although some of the revenue is surely used to provide basic care for the animals, it is not clear how their labour is directly rewarded.

¹¹⁴ SHAW, R. A case for recognizing the rights of animals as workers, In *Journal of Animal Ethics*, 8/2 (2018) 182-198. <https://doi.org/10.5406/janimalethics.8.2.0182>. 182.

¹¹⁵ SHAW *supra* note 114 at 183

¹¹⁶ NANCE, S. *Entertaining Elephants: Animal Agency and the Business of the American Circus* (Baltimore 2013) 5.

¹¹⁷ ACOSTA, A. Extractivism and Neoextractivism: Two sides of the same curse, in *Beyond Development: Alternative Visions from Latin America* (Luxemburg 2013) 61-86. 61.

¹¹⁸ PORCHER, J., ESTEBANEZ, J. *Animal Labor: A New Perspective on Human-Animal Relations*. (Bielefeld 2020) xii.

Not only does the use of animals for labour have ethical implications, but it speaks more fundamentally to how especially Western worldviews conceive ‘the animal’ in relation to ‘the human’. This view of ‘the animal’ is deeply entrenched in colonial legal systems. Ethically considering animals is, therefore, the first step when contemplating law reform. On a positive note, the Constitutional Court in South Africa has acknowledged animal interests and sentience. In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* [2016],¹¹⁹ the judgement acknowledged ancient Khoisan reverence to animals, and sees animals as ‘companions, friends and brothers’. This judgment “reflects a radical shift in the traditional legal approach to the animal, and could potentially facilitate much needed change in our treatment of animals”.¹²⁰ In *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008],¹²¹ constitutional court judge JA Cameron’s minority judgement acknowledged that animals “are sentient beings that are capable of suffering and of experiencing pain”. These developments take a step in the right direction by acknowledging animal interests, and hopefully paving the way to future law reform that reflect these interests. However, further philosophical reflections can also assist in thinking more deeply about human-animal/non-human-animal relations and the impact these relations might have on law reform.¹²² The philosophical themes discussed in this section, offer initial, non-exhaustive, philosophical starting points when considering animal law. Such discussions are already being had by philosophers, as seen in books like *Animal Rights: Current Debates and New Directions*,¹²³ in which philosophers consider animal rights.

5. CAN THERE BE ETHICAL CIRCUSES?

This paper has, thus far, provided both scientific arguments (Section 3) as well as philosophical arguments (Section 4) that consider not only animal welfare issues, but also engaged more deeply with the exploitation of animals generally, and circus animals

¹¹⁹ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* [2016] at <http://www.saflii.org/za/cases/ZACC/2016/46.html> [Last consulted 8 November 2022].

¹²⁰ DE VILLIERS *supra* note 94 at 207.

¹²¹ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] at <http://www.saflii.org/za/cases/ZASCA/2008/78.html> [Last consulted: 1 June 2023].

¹²² Something that falls outside the scope of this paper, but that is nevertheless interesting to consider, is the use of animals for other human ends that might not be economical — I think here of animals such as guide dogs, or dogs trained to detect seizures, cancer or allergens in food, rescue animals, therapy animals etc.

¹²³ SUNSTEIN, C.R., NUSSBAUM, M.C. *Animal Rights: Current Debates and New Directions* (New York, NY 2004).

specifically. Given these arguments, it seems that there are compelling reasons to reconsider the use of animals in a traditional travelling circus since it seems questionable that a travelling circus could ever provide a good life for wild animals. Circus animals are exploited in ways that surpass mere physical suffering — their dignity is violated, they are exploited as workers, and their suffering is considered as ‘necessary’ for mere human entertainment. This does not entail, however, that *all* circuses should be abolished. There might be alternatives to the traditional circus that allow for the continuation of circuses without the concomitant ethical and welfare concerns.

Throughout this paper, there has been a significant focus on wild animals (especially pachyderms and large carnivores). However, there are also domesticated circus animals, like horses, ponies and dogs, who are used in many circuses. Two of the reports cited in Section 3 found there might be some animals who might be suitable for circus life. Specifically, these are animals with low space requirements, who have low cognitive function, have simple social structures, non-specialist ecological requirements and who can be transported without adverse welfare effects.¹²⁴ Consequently, it might be that some reptiles, birds, small mammals, and other lower vertebrates could be used in circuses. While a circus that only uses domesticated animals might entail fewer welfare issues, the philosophical and ethical issues remain. Even if these types of animals are used, they will still be exploited as labourers, and their dignity remains at risk of being violated. Furthermore, while there might be fewer welfare issues, there remains an ethical concern about their physical and psychological suffering. It is not clear how using domesticated animals, or those with lower cognitive functions circumvent the issues presented in this article.

Another alternative could be ‘stationary’ circuses, potentially ameliorating the stressors related to inadequate space and environments and constant travelling. As with zoos, a permanent facility (or a complex captive environment) can also stimulate the animals with the presence of plants, objects and perches.¹²⁵ However, like zoos and other captive facilities, poor animal welfare remains likely since there are still significant welfare implications of training wild animals to perform and keeping animals in captivity. Animals have adapted to living in the wild, and so any captive situation needs to fully cater for an animal’s “physiological and psychological species-specific needs”.¹²⁶ The welfare of any wild animal in captivity is often dependent on how closely

¹²⁴ EUROGROUP FOR ANIMALS *supra* note 18.; IOSSA ET AL. *supra* note 47 at 137.

¹²⁵ HARRIS ET AL. *supra* note 17 at 22.

¹²⁶ SCHMIDT-BURBACH, J., RONFOT, D., SRISANGIAM, R., Asian elephant (*Elephas maximus*), pig-tailed Macaque (*Macaca nemestrina*) and Tiger (*Panthera tigris*) populations at tourism venues in Thailand and aspects of their welfare, in PLoS ONE. 10/9 (2015) e0139092 DOI:10.1371/journal.pone.0139092. 3.

their captive surroundings represent their natural ones.¹²⁷ Unfortunately, the reality is that “[m]eeting all of those needs is next to impossible in a captive environment, not only because it is difficult or too expensive to replicate the wild environment but also because we only have a rudimentary idea of the actual needs of most species”.¹²⁸ It is the case that any “wild animal in the circus is subjected to a monotonous routine in circumstances bearing no relation to life in a wild state”.¹²⁹ Therefore, animals will still suffer in a stationary circus. In addition, it is also not clear how a stationary circus would address the ethical concerns raised earlier. Animals are still exploited for economic gain, and they will still have their dignity violated in significant ways.

While it may seem that circuses are condemned, this is not the case. Many successful circuses do not use live animals. French circus L’Ecocirque (or Ecocircus) began using animal holograms as France announced a ban on wild animals in circus shows. Similarly, Cirque du Soleil has a 100% human circus that only uses “human physical talent, storytelling, and flamboyant visuals”.¹³⁰ Worldwide, other circuses like Germany’s Circus Roncalli and Brooklyn-based Hideaway Circus have explored technological avenues like virtual reality and holograms to remain relevant and cruelty-free.¹³¹ In South Africa, Zip Zap Circus is an example of how a circus can function in this country without using animals — not only is this circus animal-free, but it also has numerous outreach and youth programmes. It therefore uplifts the youth and offers classes free of charge to all participants, whilst entertaining the masses.¹³²

Circuses no longer need animals to ensure their continued existence — there are technological innovations and human talents that can provide compelling entertainment. Therefore, given a myriad of alternatives, it seems that there is no good reason for the continuation of using animals as circus performers, and that the practice should be abolished. Given this conclusion, many governments around the world have, correctly, banned animals in circuses. In the following section, I unpack the law that governs circus animals in South Africa.

¹²⁷ SCHMIDT-BURBACH ET AL. *supra* note 126 at 3.

¹²⁸ SCHMIDT-BURBACH ET AL. *supra* note 126 at 3.

¹²⁹ WILSON, D.A.H. Circus animals and the illusion of wildness, in *Early Popular Visual Culture*, 15/3 (2017) 350-366. <https://doi.org/10.1080/17460654.2017.1383018>. 361.

¹³⁰ ANGHEL, I. A circus finds a new animal trick: holographic lions, elephants, and whales, *Bloomberg Businessweek*, (2022, February 17) at <https://www.bloomberg.com/news/articles/2022-02-17/french-company-l-cocirque-wants-to-save-the-circus-with-holographic-animals?leadSource=uverify%20wall> [Last consulted: 21 February 2022].

¹³¹ ANGHEL *supra* note 130.

¹³² ZIP ZAP. About Zip Zap (2021), at <https://www.zip-zap.co.za/about-us/> [Last consulted: 1 June 2023].

6. SOUTH AFRICAN CIRCUS ANIMALS — WHAT DOES THE LAW SAY?

Sally Merry says, “[c]olonialism typically involved the large-scale transfer of laws and legal institutions from one society to another, each of which had its own distinct sociocultural organization and legal culture”.¹³³ South Africa also suffered this fate. South Africa’s legal system is influenced by both Roman Dutch and English laws, given its status as both Dutch and British colony. Although there have been many amendments to South African laws, especially after the end of Apartheid in 1994, many of its laws still carry colonial character. South Africa has two significant pieces of animal welfare legislation that pertain to animals, and both laws were created long before the end of Apartheid. As such, these laws were developed at a time when white domination over, and oppression of, the ‘other’ was the norm, and subsequently embedded in the law. There are two laws that pertain to animal interests in South Africa: the more general ‘Animals Protection Act No. 71 of 1962’¹³⁴ and the ‘Performing Animals Protection Act, 1935’,¹³⁵ which deals specifically with performing animals.

The Animals Protection Act (APA) governs all uses of animals, especially those in captivity. It also specifies which actions relating to animals constitute criminal offences. As such, this law applies to circus animals qua animals, however, it makes no specific mention of circus animals.¹³⁶ This Act nevertheless outlines, in Section 2, the actions that are criminal offences, such as overloading, beating, kicking (Section 2(a)), confining, chaining, or keeping animal in any place with inadequate space, protection, or shelter (Section 2(b)). It also outlines those actions causing unnecessary suffering (Section 2(e),(f),(m),(p),(r)) that constitute an offence. As has been shown above, circus animals do suffer, with many of the most popular circus animals like lions, tigers, bears, and elephants being particularly unsuited for the circus life.¹³⁷ Circus animals often spend significant time confined.¹³⁸ Training often includes physical punishment like

¹³³ MERRY, S.E. Law and Colonialism, in *Law & Society Review*, 25 (1991) 889-922. 890.

¹³⁴ South Africa, Animals Protection Act No. 71 of 1962, at https://www.gov.za/sites/default/files/gcis_document/201505/act-71-1962.pdf [Last consulted: 1 June 2023].

¹³⁵ South Africa, Performing Animals Protection Act of 1935. at https://www.gov.za/sites/default/files/gcis_document/201505/act24of1935.pdf [Last consulted: 1 June 2023].

¹³⁶ O’REGAN, V. Roll up, move up: Live circus entertainment is evolving — without animal captivity, in *Daily Maverick* (25 April 2022), at <https://www.dailymaverick.co.za/article/2022-04-25-roll-up-move-up-live-circus-entertainment-is-evolving-without-animal-captivity/> [Last consulted: 1 June 2023].

¹³⁷ BEKOFF *supra* note 56; DORNING *supra* note 63 at 4.; EUROGROUP FOR ANIMALS *supra* note 18; IOSSA ET AL. *supra* note 47 at 136.

¹³⁸ EUROGROUP FOR ANIMALS *supra* note 18.; IOSSA ET AL. *supra* note 47.; NEVILL C.H., FRIEND, T.H., A preliminary study on the effects of limited access to an exercise pen on stereotypic pacing in circus tigers, in *Applied Animal Behaviour Science*, 101 (2006) 355-361. <https://doi.org/10.1016/j.applanim.2006.02.012>.

kicking and beating,¹³⁹ as well as starvation.¹⁴⁰ Performing alone also creates significant stress, with the unnatural positions that animals are forced to exhibit (such as elephants balancing on their front legs) causing long term health problems.¹⁴¹ It is evident, therefore, that circus animals endure many actions that could be considered offences according to the APA.

The Performing Animals Protection Act (PAPA) more specifically addresses animals used for entertainment. In many countries, there is not a specific act that governs performing animals, and so this Act presents an opportunity to consider performing animals more specifically, rather than just relying on more general welfare acts. In this paper, I focus on the latter Act, namely the Performing Animals Protection Act, as this Act pertains more specifically to performing animals and so directly concerns circus animals.

The ‘Performing Animals Protection Act, 1935’¹⁴² was amended in 2016 and is now known as the ‘Performing Animals Protection Amendment Act, 2016’.¹⁴³ The basic function of the primary Act is to ‘regulate the exhibition and training of performing animals’. The 2016 amendments remain true to this basic function. The main objective of the amendments, as stated at the beginning of the Amended Act, is “to repeal certain sections; to insert certain definitions; to provide for the designation of a National Licensing Officer; to provide for a procedure for the application for a licence...; to provide for the functions of a National Licencing Officer; to provide for the issuance of licences; to provide for an appeals process; and to provide for matters connected therewith”.¹⁴⁴ From this objective, it is evident that the amendments are primarily administrative in nature and so this Act can be seen as a ‘licensing act’¹⁴⁵ rather than an animal welfare act seeking to improve the lives of animals. Indeed, the Amendment makes only two brief mentions of animal welfare, which will be discussed below.

While the title of the Act seems to allude to the activities governed in this Act, there remains some ambiguity. The PAPA covers ‘Performing Animals’, specifically, the exhibition and training of performing animals, and the use of animals for safeguarding. Even though the Act has the word ‘performing’ in its title, the word ‘performing’ is not explicitly defined anywhere in the Act, the Amendment, or the Regulations. However,

¹³⁹ EUROGROUP FOR ANIMALS *supra* note 18.

¹⁴⁰ Wilson *supra* note 129 at 354.

¹⁴¹ EUROGROUP FOR ANIMALS *supra* note 18.; KNUTZE, A. Work-related illness: Hernia perinealis, Bursitis praepatellaris and Tyloma olecrani in female circus elephants (*Elephas maximus*), in *Erkrankungen der Zootiere*, 31 (1989) 185-189.

¹⁴² Performing Animals Protection Act, 1935 *supra* note 135.

¹⁴³ South Africa, Performing Animals Protection Amendment Act, 2016, at https://www.gov.za/sites/default/files/gcis_document/201701/a4of2016performinganimalsprotectionamendact.pdf [Last consulted: 17 August 2022].

¹⁴⁴ Performing Animals Protection Amendment Act, 2016 *supra* note 143.

¹⁴⁵ O'REGAN *supra* note 136.

the definition of ‘exhibition’ seems to include ‘performing’. The definition is provided in the principal Act, Section 11 and states “to expose for show at any entertainment to which the public are admitted whether for payment of money or otherwise”.¹⁴⁶ Although circuses are not explicitly mentioned, the definition of ‘exhibition’, as well as the title ‘performing’, relates clearly to circus activities.

When activities are mentioned in the primary Act and the Amendment, these are, at best, vague, with only some mention of specific activities. For example, the primary Act mentions the exhibition, and training for exhibition, of any animal.¹⁴⁷ Similarly, the Amendment mentions exhibition, training or transporting for exhibition, as well as animals used for safeguarding.¹⁴⁸ Interestingly, the exclusions provided for in the Act are much more specific. Section 9 is one of the few sections of the principal Act that was not amended. This section explicitly excludes the following activities from the ambit of the Act: “confinement or training of animals for military, police, or sporting purpose, or the purposes of an agricultural show, horse show, dog show, cage bird show or any public zoological garden”.¹⁴⁹ These are all notable exclusions, as many of these activities can be considered ‘performative’ — but since no justification is given, it remains unclear why these activities fall outside of the scope of the Act. There is another activity mentioned in the Regulations of PAPA — animals used in the filming industry.¹⁵⁰ Animals in films and adverts are commonplace — in fact, many films will have a caveat at the end: “no animals were harmed in the making of this film”. Animal welfare is (at least in the United States of America’s film context) well monitored, relying on certification from the American Humane Association’s Film and Television Unit.¹⁵¹ According to the film-industry development arm of the eThekweni Municipality in Durban, South Africa, there must be an animal trainer present on film sets, however, there is no further legal requirement for welfare involvement when making a film or commercial.¹⁵² A final activity mentioned in PAPA is animals used for safeguarding. ‘Use for safeguarding’ is defined in Section 8(f) as meaning “the training, use or placing at disposal for gain, or the letting, of [**a dog**] an animal, with a view to or for the protection of persons and property” [not my emphasis].¹⁵³

¹⁴⁶ Animals Protection Act No. 71 of 1962, *supra* note 134.

¹⁴⁷ Performing Animals Protection Act, 1935 *supra* note 135.

¹⁴⁸ Performing Animals Protection Amendment Act, 2016 *supra* note 143.

¹⁴⁹ Performing Animals Protection Act, 1935 *supra* note 135.

¹⁵⁰ South Africa. Department of Agriculture, Forestry and Fisheries, Performing Animals Protection Regulations, (2016), at https://www.polity.org.za/attachment.php?aa_id=70377 [Last consulted: 17 August 2022].

¹⁵¹ MALAMUD, R. Animals on Film: The Ethics of the Human Gaze, in Spring, 83 (2010) 1-26. 2.

¹⁵² DURBAN FILM OFFICE. Regulations and Legislation (2022), at <http://www.durbanfilmoffice.co.za/Filming-In-Durban/Regulations-and-Legislation/Animals-on-set> [Last consulted: 1 June 2023].

¹⁵³ Performing Animals Protection Amendment Act, 2016 *supra* note 140.

Neither the primary Act nor the Amendment makes substantial mention of animal welfare. In both, ‘cruelty or suffering’ is mentioned in Section 7(a). This section allows the relevant Minister to make regulations pertaining to the Act. In the primary Act, Section 7(d) states these regulations can pertain to “any reasonable requirement which may be necessary to prevent cruelty or suffering”. In the Amendment, this section remains essentially the same, however, one further mention is made of welfare. Section 8 (2), which refer to the penalty, now includes a provision that allows a magistrate to suspend the license of any person convicted two or more times of cruelty to animals under this Act or any other law. In 2016, then-minister Senzeni Zokwana of the Department of Agriculture, Forestry and Fisheries (DAFF) (now called the Department of Agriculture, Rural Development and Land Reform or DALRRD) released the ‘Performing Animals Protection Regulations, 2016’. The Regulations make explicit mention of animals used in the filming industry, an activity not mentioned in either the primary Act or the Amendment. Section 5 of the Regulations reads “The use of animals in the filming industry must be under direct or indirect supervision of an officer as defined in the Act.” One can thus see that the activities that are governed by the Act, the Amendment, and the Regulations are mostly vague — at no point is the word ‘circus’ even mentioned. It is therefore not always clear what activities the legislation particularly relates to. This presents a significant weakness in the legislation.

In Sections 3G(b) and Section 7(d) of the Amendment and in the Regulations, one finds the most explicit consideration of animal welfare. Section 7(d) states that the Regulations may relate to matters regarding reasonable requirements “which may be necessary to prevent cruelty or suffering in the exhibition, training, maintenance, use or travelling of animals”. Section 3G(b) of the Amendment states that the Officer must be satisfied that “the premises, accommodation, equipment and facilities that are utilised for the training, exhibition or performance of the animal are safe and will not cause harm to the animal”. These are the only two direct mentions of animal welfare in the Amendment and the only instances where words like ‘cruelty’, ‘suffering’, ‘harm’ and ‘safe’ are used.

The Regulations provide the process of applying for a licence, the licensing requirements, the appeals process, the form to be used, and a few other details.¹⁵⁴ Even though it primarily concerns licensing, as part of the licensing requirements, there are directives that relate to animal welfare. In Section 4(3) of the Regulations, directions are given about the animals’ welfare (loosely defined) and the facility they are to be kept. This is the only place in the principal Act, the Amendment, and the Regulations where more explicit instructions relating to animal welfare are given. In this paper, I focus specifically on Section 4(3), which reads:

¹⁵⁴ Performing Animals Protection Regulations, (2016) *supra* note 150.

“4 Licensing requirements shall apply for each species and include

- 3) All animals should,
 - a) be individually identified
 - b) kept in well maintained, hygienic and appropriate accommodation with
 - i) an approved site plan for the primary and second facilities
 - ii) fencing and access control
 - c) have adequate space with suitable surface
 - d) have a suitable stimulating environment to enhance animal wellbeing (environmental enrichments)
 - e) have access to adequate feed and water at all times
 - f) have access to suitable shelter
 - g) should be trained and handled using appropriate humane methods.”

As with other legislation governing animals in South Africa, the above is extremely vague. It is unclear what ‘appropriate accommodation’ is, or what constitutes ‘adequate space’ or a ‘suitable surface’. Similarly, no specific information on ‘suitable stimulation’ or ‘humane methods’ of training is given. It would appear as if these aspects were left to the interpretation of the person applying for the license and/or the National Licensing Officer. The application form (given as part of the Regulations) asks for information about the trainers’ experience — this might entail that the Licensing Officer considers the trainers’ experience when granting the license. Section 3B of the Amendment clarifies that the National Licensing Officer must be an Animal Scientist, or a Veterinarian, and Section 3D allows for the appointment of experts to implement the Act.¹⁵⁵ However, there is no indication of the qualification of trainers and handlers, merely the statements that they have “applicable experience” or be “competent”.¹⁵⁶

South African animal law scholar, David Bilchitz, argues that the Act is problematic, since, although it proclaims to be about protecting animals, “very little detail as to what is required in order to be involved in exhibiting or training performing animals as well as the harms that animals are to be protected against in these industries”.¹⁵⁷ Similarly, the Regulations include only vague instructions about the welfare requirements of animals. The lack of explicit regulations leaves room for the maltreatment of animals. These vagaries are even more worrying when one considers that wild animals — like elephants and big carnivores like tigers and lions — who have complex welfare needs, are supposed to be catered for in a travelling circus. These are serious shortcomings of these provisions and fundamentally affect the welfare of animals in travelling circuses.

¹⁵⁵ Performing Animals Protection Amendment Act, 2016 *supra* note 143.

¹⁵⁶ Performing Animals Protection Regulations, (2016) *supra* note 150.

¹⁵⁷ BILCHITZ, D. What was left unsaid: the unconstitutionality of the Performing Animals Protection Act in *Nspca V Minister of Agriculture, Forestry and Fisheries*, in South African Journal of Human Rights, 30 (1) (2017) 183-195. <https://doi.org/10.1080/19962126.2014.11865103>. 190.

7. LAW REFORM IN SOUTH AFRICA

Thus far, I have engaged with the scientific data about the welfare (or lack thereof) of animals in circuses and outlined some moral problems with circus animals. I considered possible alternatives to ameliorate these welfare and ethical concerns. I concluded that there is sufficient scientific evidence about the harms suffered by circus animals, as well as compelling moral reasons, to abolish the practice of performing animals in circuses. I then provided an overview of circuses in South Africa and briefly unpacked the relevant legislation governing circus animals.

Returning to the South African reality, as has been mentioned, there is currently only one circus using performing animals, namely, the McLaren Circus. As recently as March 2022, this circus has been issued with a warning by the Cape of Good Hope SPCA as it was found to be in contravention of the Performing Animals Protection Act on at least seven counts.¹⁵⁸ All these contraventions are related to the welfare prescriptions discussed earlier in this paper, namely those in Section 4(3) of the Regulations. Even though the owner proclaims that his circus meets all standards,¹⁵⁹ he has been found wanting in terms of the PAPA. Even though there is, currently, only this one travelling circus, it is nevertheless important to consider how law reform can 1) address the suffering of those animals currently used in this travelling circus, 2) prevent further travelling circuses from being established and 3) consider how PAPA could be strengthened to protect animals used in other activities also covered by this legislation (such as those animals used for exhibition and safeguarding, as well as other performing animals).

Given the above conclusion and the South African reality, it is pertinent to consider how the current legislation might be reformed to better protect animals. To this effect, I consider two ways in which law reform can be achieved — firstly, by amendments to the primary Act, and secondly, through additional legislation.

7.1. Changing the primary act

There might be good reasons to ban all activities mentioned in the PAPA (as amended) and its Regulations, i.e., safeguarding, exhibition, and animals used for filming. However, this article focuses only on performing animals, and more specifically circus animals, so any proposed changes can only be said to extend to those activities, and not all other activities covered by PAPA. Since it falls outside of the scope of this paper to interrogate all the activities covered by PAPA, it does not follow from this paper that

¹⁵⁸ SPCA CAPE OF GOOD HOPE. McLaren Circus issued with a warning (2022, March 28), at <https://capespca.co.za/inspectorate-news/mclaren-circus-issued-with-a-warning/> [Last consulted: 1 June 2023].

¹⁵⁹ CARTE BLANCHE *supra* note 26; MCCLAREN CIRCUS *supra* note 25

these activities should be banned. Returning to performing animals, the first, and most comprehensive legal reform would be a total ban on (at least) circus animals.

Such an amendment aligns with a statement by World Animal Protection, an animal welfare organisation. They released a report in which they reflected on each country's animal law. This report concluded that South Africa does not score particularly well regarding legislation protecting animals, including animals used for entertainment. In order to improve, they claim that "the Government of South Africa [should] forbid the organisation of and attendance to entertainment events causing animal suffering".¹⁶⁰ Following this recommendation, the Act could be amended to only exclude performing animals, thereby still allowing animals for exhibition and safeguarding. This amendment could be affected in at least two other ways. Firstly, the definition of 'exhibition' in Section 11, which currently includes the clause 'to expose for show at any entertainment' should be changed. Exhibition could be more narrowly defined, and perhaps only allow the exhibition of animals in spaces that allow them to exhibit their species-specific behaviour. I suggest a definition such as "exhibit means to expose animals in permanent facilities where they have access to as natural an environment as possible, with enough space to exhibit their species-specific behavioural traits". A definition such as this would do two things: firstly, by including the word 'permanent', it would make travelling circuses an impossibility. Secondly, by referring to 'as natural environment as possible' and 'space to exhibit species specific behavioural traits', the act would disallow 'entertainment' acts such as a circus, in which animals are not in a natural space, and they are also not allowed to exhibit their species-specific behaviour.

A second way in which the PAPA could be amended is by adding a provision explicitly banning performing animals in circuses, i.e., the addition of a clause like 'No animal is allowed to be trained or used for entertainment — including for performances such as circuses'. A ban on circus animals inevitably raises the question of other performing animals — like those marine animals performing at aquariums. World Animal Protection states that a prohibition on entertainment that causes animal suffering should cover, in addition to circuses, rodeos, animal fights and races, and rides on wild animals. While it falls outside the scope of this paper to discuss these activities directly and since I have not explicitly focused on other activities, such as animals in films in this paper, I cannot conclude that those activities should also be banned. In addition, there might be other activities, such as horse racing that are also covered by this Act that I have not considered. I do strongly suggest that those activities, and others like them, be closely scrutinised to see whether the arguments forwarded in this paper (and the subsequent proposed legal bans), would similarly apply to those activities. It might be that, by

¹⁶⁰ WORLD ANIMAL PROTECTION, Animal Protection Index (API) 2020 (2020), at https://api.worldanimalprotection.org/sites/default/files/api_2020_-_south_africa_0.pdf [Last consulted: 1 June 2023].

amending some aspects of the PAPA for specific activities (such as circuses), other activities would also be effectively banned.

Naturally, any ban would be subject to a transitional phase. World Animal Protection suggests a total ban could begin by phasing out wild animals.¹⁶¹ As part of the legal ban, there needs to be provision made for all wild animals to be retired with immediate effect — they must be rehomed to appropriate facilities (such as those provided by ADI to other some foreign rescued circus animals). However, this still leaves the problem of other, mostly domestic animals, and whether they should be allowed to remain as circus animals. Earlier, in Section 5, I mentioned that some of the reports found that there might be some animals suited for circuses — specifically, those with low cognitive functions, simple social structures, who can be easily transported and do not have complicated ecological requirements.¹⁶² As I pointed out, this might entail that some small mammals, birds, reptiles and other lower invertebrates could be more suited to a travelling circus environment. However, although these animals might be better suited from a welfare perspective, the philosophical worries (like dignity and exploitative labour) still remain. Given these remaining worries, it seems that all animals should be banned in at least circus environments. This is in line with the earlier discussion of the Constitutional Court's acknowledgement that animals deserve moral consideration.

7.2. Additional legislation

The above law reforms are the ideals — either outrightly banning the use of animals for circuses or changing the wording of certain definitions so as to, in effect, abolish the practice in the primary Act. However, such amendments are often difficult to enact and might be subject to drawn out legislative processes. A more immediate and perhaps effective way to improve animal welfare is often through subordinate legislation which, include, for example, regulations made by ministers, regulations of local authorities, or provincial proclamations.

To this affect, we can consider the Regulations of PAPA. Regulations are made by ministers, and so the process to change these are less burdensome. The Regulations of PAPA, as already mentioned, deal mostly with the processes around the licence, but it also contains some mention of licencing requirements, which include prescriptions for the treatment of animals. These Regulations could be amended to do one of two things 1) increase the requirements for licences to make it either so administratively burdensome, or so expensive to apply for a licence, that circuses are discouraged from applying for these licences or 2) add species specific directives so that it will be, in effect, difficult (if not impossible) for a travelling circus to attain a licence.

¹⁶¹ WORLD ANIMAL PROTECTION *supra* note 160.

¹⁶² EUROGROUP FOR ANIMALS *supra* note 18.; IOSSA ET AL. *supra* note 47 at 137.

Regarding the first suggestion — since Section 1 of the primary Act includes the clause ‘unless such a person is the holder of a license’, it follows that the licence could be the linchpin for law reform. If the licence is either unaffordable or the process to apply for one is extremely administratively burdensome, the licencing process itself could be used as a deterrent. The application fee for the license is currently ZAR390 (US\$23) per animal. If a zoo has, for example, 20 animals, that would be an annual amount of ZAR7800 (US\$460). By substantially increasing this amount, the cost alone would serve as a possible deterrent. A further strategy is to decrease the duration of the validity of the licence — currently, it is 12 calendar months (Section 3K of Amendments). By amending this provision to be three or six calendar months, the application for a licence could be too costly and onerous for circus owners to regularly complete.

One way the application process could be made more administratively burdensome is by improving the licensing requirements as listed in Section 4 of the Regulations. As mentioned, the requirements around animal housing and welfare listed in Section 4(3) is vague — by substantially increasing the burden on the applicant when it comes to these requirements, the license would be substantially more challenging to get, again serving as a deterrent for applications in the first place. Adding species-specific directives would not only serve as an administrative burden but could also realistically improve the welfare of circus animals if a total ban is not feasible and if circuses still apply despite the increased cost and administrative load. Such species-specific legislation could provide comprehensive requirements for animals often used in circus performances such as lions, tigers, elephants, dogs, ponies, horses etc. In addition to respecting the Five Freedoms¹⁶³ of all animals, species-specific provisions must “include requirements regarding housing, feeding, handling and husbandry”.¹⁶⁴ Depending on how (and by who) these requirements are written, the rewriting thereof alone could be enough to ban the use of at least certain animals in travelling circuses — by providing appropriate standards about the housing of, for example, large carnivores and elephants. For example, the frequent movement of animals could be banned (since it causes distress and animals are unable to express natural behaviours) or more specific rules about what constitutes ‘adequate’ space that allow animals to express their natural behaviours (which, by default, would likely be unattainable by a transient facility such as a travelling circus) could be added. More specific regulations would address a shortcoming of Section 4(3) of the Regulations, which, as it stands, is too vague.

One challenge to the above suggestions is that the Regulations are written by a specific minister — and so the relevant minister (currently Ms Thoko Didiza) would need to express the political willpower to change the Regulations to this effect. It is

¹⁶³ The Five Freedoms are: Freedom from hunger and thirst, freedom from discomfort, freedom from pain, injury or disease, freedom to express normal behaviour and freedom from fear and distress.

¹⁶⁴ WORLD ANIMAL PROTECTION *supra* note 160.

here where activists could play a key role through getting the public to protest circuses as well as civil action such as petitions, or litigation to enforce the NSPCA judgment discussed above.

There are other ways in which subordinate legislation could effectively be used to stop circuses. Since provinces and municipalities are able to make proclamations and by-laws, they could also use legislation to effectively ban circuses in their jurisdictions. For example, specific municipalities might change their by-laws to not allow circuses temporary use of their land, as has been done in other parts of the world. The council of East Ayrshire, Scotland unanimously decided “to ban all travelling circuses with performing animals from its land”.¹⁶⁵ In the United States of America, similar approaches were taken by several local governments and two states.¹⁶⁶

This section presented some law reform suggestions, though there are surely more ways in which circuses that use animals could be abolished. In addition to legal reforms, consumers can bring circuses that use animals to a grinding halt — simply by not attending their shows. Such a change in public opinion could be achieved through education efforts, thereby removing the ‘social license’ of facilities that negatively affect animal welfare. However, judging by the continued existence and public support of McLaren Circus, there is still work to be done in this respect.

8. CONCLUSION

Animal law reform still has a very long way to go to adequately protect the interest of animals in South Africa and, indeed, the world. Indeed, critical engagement with “the underlying metaphysical support of animal rights at a conceptual level, rather than simply utilising the law pragmatically as an instrument of immediate resolution”¹⁶⁷ is needed for more comprehensive reform. Compared to the world, however, South Africa is particularly lacking in its legislative response to animals in circuses, and so this article offered a more pragmatic approach. A complete ban on all animal-based activities might, for some, be ideal, but in reality, it is rather through minor reforms that the lives of animals will slowly be improved.

¹⁶⁵ ANIMAL DEFENDERS INTERNATIONAL. East Ayrshire Council Bans Animal Circuses on its Land (2015), at https://www.ad-international.org/animals_in_entertainment/go.php?id=2536&ssi=10 [Last consulted: 1 June 2023].

¹⁶⁶ ANIMAL WELFARE INSTITUTE. States and Cities Opting Out of Circus Animal Acts (2018), at <https://awionline.org/awi-quarterly/spring-2018/states-and-cities-opting-out-circus-animal-acts> [Last consulted: 1 June 2023].

¹⁶⁷ DE VILLIERS, J.-H. Metaphysical Anthropocentrism, Limitrophy, and Responsibility: An Explanation of the Subject of Animal Rights, in *Potchefstroom Electronic Law Journal*, 21 (2018) 1-29. doi:10.17159/1727-3781/2018/v21i0a5320. 3.

According to the philosophical perspective and scientific evidence, it is suggested that animals in circuses have lives that are not “worth living”. Several moral, philosophical, and ethical reasons sustain the ban on using all animals, due to the unnecessary suffering that performing animals can be exposed to. One approach to remedy the suffering of these animals could be by either amending the primary legislation or through subordinate legislation.

It is the case that there are very few animals affected by circuses in South Africa — no more than a few dozen animals are used in the McLaren Circus. Even in the United Kingdom, a small number of animals are used for circuses — between 2013 and 2017, only 37 wild animals were registered for circus use.¹⁶⁸ Compared to the billions of animals who suffer in the meat industry, these few animals might seem insignificant. However, suffering ought not be measured only in quantity but also in quality. Even though only a few animals are affected, these animals face entire lifetimes of suffering — and that should be enough to justify legal reform for circus animals.

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