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Animal sentience in UK law: does the new clause need claws?

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Abstract

This article examines the introduction into UK law of a general requirement to take into account the sentience of animals in developing legislation. The difficulties encountered by the UK government during the Brexit debates of 2017 is examined. It is suggested that the concept of sentience is acknowledged to be multi-layered and complicated making it difficult to confine in a simple legislative formula to be considered by disparate individuals and departments. This leaves doubts over the success of the suggested legislation unless it is supported by central co-ordination, expertise and accountability. The history of UK law in relation to sentience is examined and compared with the EU. It is concluded that more is needed to enable a consistent approach to emerge in light of the on-going development of knowledge regarding sentience. It is proposed that a central animal protection commission is vital to ensure accountability and expertise. This is more likely to provide a scientifically and philosophically coherent set of principles.

Keywords: Animal sentience, animal welfare, Brexit,

Introduction

The period between late 2017 and early 2018 marked an uncomfortable period for the UK Government's animal welfare policy. The defeat of a proposal to provide a replacement for the EU's 'protection of animal sentience' was met with howls of derision. For many, this was confirmation of their worst fears relating to the protection of animals in a post-Brexit United Kingdom. No longer would we protect animals as well as we had when we were members of the EU. For example, agricultural animals would be less protected and experimental animals would be subject to further and worse abuse as regulation disappeared in new free trade agreements. The government was taken off-guard by a vocal and angry backlash and the news headlines were uniformly critical. This caused the government to move very hastily to introduce legislation to replace the protection of sentience under Article 13 of the Treaty on the Functioning of the European Union (TFEU).¹ By January 2018, a bill to bring the concept of sentience into UK law had moved to scrutiny by the House of Commons.

¹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01), Article 13.

This article aims to unpick the issue of animal sentience in United Kingdom Law in the post Brexit United Kingdom. Is Britain likely to have less protection of sentient creatures in law once we leave the EU? What will we gain and what will we lose? What is the way forward to provide the best possible protection for animals in the United Kingdom in science, agriculture, domestic situations and the wild? In particular, why is an animal protection commission required?

What happened in 2017-18 regarding sentience in UK law?

As part of the debate on bringing EU law directly into UK law, Parliament was asked to vote on New Clause 30 (NC30) which, if passed, would give direct effect to Article 13 of the Lisbon Treaty that states:

"In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage."²

The government whipped conservative Members of Parliament into voting against the clause which, as a result, was defeated by 313 votes to 295 on 15th November 2017. They argued that the EU withdrawal bill was not the place to enshrine the issue in law and that the Animal Welfare Act 2006 was already in place to provide sufficient protection to animals. By the 22nd of November the Government was on the defensive following a backlash on social media. The government seemed to be panicked by this public relations disaster with MPs and the government being accused of denying that animals are sentient, with many animal welfare organisations joining in the criticism. On the 23rd November, Michael Gove, the Environment secretary, moved to stem the tide of criticism by announcing that the government legislate to enshrine the need to pay regard to animal sentience in law.

On 12th December, Michael Gove asked the House of Commons Environment, Food and Rural Affairs Committee (EFRAC) to give comments on a draft Bill by the end of January 2018. It contained the following proposal (clause 1) regarding sentience:³

² Lisbon Treaty, (2007). Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. *Official Journal of the European Union, December, 17*.

³ The proposed bill also contained a second set of proposals regarding harsher sentences for animal welfare abuse that are not the subject of this article.

1. Welfare needs of animals as sentient beings

(1) Ministers of the Crown must have regard to the welfare needs of animals as sentient beings in formulating and implementing government policy.

(2) In discharging that duty Ministers of the Crown must also have regard to matters affecting the public interest.

By 1st February, the Committee had conducted a public consultation exercise, heard evidence from expert witnesses and produced a report on the Bill which agreed with the importance of the concept of animal sentience and the need for harsher penalties.⁴ However, the committee also found that the trigger issue, animal sentience, was so vaguely and hastily constructed by the government that it should be separated from other issues in the bill to allow for it to be clarified. The Committee considered that accountability issues and the status of species such as cephalopods and octopus was in need of further scrutiny. The oral evidence of two of the witnesses bears testament to the problems created in the proposed new act. Mike Radford, Reader in Law at the University of Aberdeen commented that:

‘[T]here has never been any question that Parliament recognises sentience in other species. Right from 1822, when this place passed the first animal protection legislation, it was passed on the assumption that those animals had the capacity to feel pain and pleasure.’ (EFRAC, 2018b, response to Q5)

He went on to express the view that the issue of sentience is largely symbolic and doubted whether legislation was the place for symbolism and that Parliament, as a sovereign body could, in theory, legislate to bypass such legislation in future if it wished to do so. It is also common practice for the government of the day to conduct consultations, at which point those with an interest are able to have an input. He suggested that the new Act would add nothing here and the legislation on sentience would, therefore be, potentially redundant even as it was passed. The second witness, Sir Stephen Laws commented that the language and scope of the bill was unclear: the needs of ‘sentient creatures’ go beyond providing only for their welfare, and that this could create problems in interpreting the legislation as the wording of clause 1(1) mentions both. (EFRAC, 2018, response to Q2)

⁴ EFRAC, (2018a). House of Commons, Environment, Food and Rural Affairs Committee. Oral evidence: Draft Animal Welfare (Sentencing and Recognition of Sentience) Bill 2017, HC 709. Wednesday 17 January, 2018. See <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environment-food-and-rural-affairs-committee/draft-animal-welfare-sentencing-and-recognition-of-sentience-bill-2017/oral/77281.html>

However, the opinion of these expert witnesses and the final recommendation of EFRAC that the sentence clause be sent back to the minister for amendment, remains at odds with some areas of the animal welfare community. David Bowles, Assistant Director, Public Affairs of the RSPCA stated that the draft bill means that... 'the government will have to consider animal sentience in future when they draw up laws... this is another amazing win for animals'.⁵

The Report produced by the committee in February 2018 was less than complementary about the way in which the government had dealt with the sentience issue arising from Brexit:

(EFRAC) notes that: "[Animals] deserve better than to be treated in a cavalier fashion yet the impression given to us is one of haste. It appears that this draft Bill has been presented to the public - and Parliament - in a far from finished state."⁶

In the period after the EFRA select committee issued its report in February another potentially essential component emerged. This was in the form of a letter sent by A-law and the Wildlife and Countryside Link in April 2018 to Lord Gardiner, Parliamentary Under Secretary of State for Rural Affairs and Biosecurity raising a crucial issue that was not dealt with by the proposed sentience bill:

'[We] would wish to be assured that public officials are supported and properly advised, when exercising this duty, by the necessary scientific and technical expertise of a Commission, whether this is a free standing Animal Protection Commission or an animal welfare division of the Environment Commission.

[W]e welcome a duty to report annually to Parliament as a means of ensuring accountability and urge that this be included in the legislation. However, we consider that a duty to report on its own will not be sufficient, in the absence of other mechanisms which ensure that effect is given to the policy objectives. We believe that political accountability is essential but also that, to give proper effect to the duty, there should be legislative obligations providing a method that ensures compliance.'

⁵ Nunan, E. (2018). 'Tougher Sentences for Animal Cruelty'. *Animal Life, RSPCA*. Spring, 17.

⁶ EFRAC, (2018b). House of Commons, Environment, Food and Rural Affairs Committee. Pre-Legislative Scrutiny of the draft Animal Welfare (Sentencing and Recognition of Sentience) Bill: Second Report of Session 2107-19. HC 709. Published 1 February 2018.

The idea of a central scrutinizing body that could provide expertise and accountability was suggested by Jenkins in 1992, Brooman in 1997, the Centre for Social Justice in 2018.⁷ The desirability of such a body is discussed later in this article.

Following its defeat both in the chamber of the House of Commons, and in front of the EFRA Committee, the future direction of travel for the UK's new sentience legislation is unclear despite the position set by Michael Gove, Secretary of State for the Environment in 2017:

Before we entered the European Union, we recognised in our own legislation that animals were sentient beings. I am an animal; we are all animals, and therefore I care— [Interruption.] I am predominantly herbivorous, I should add. It is an absolutely vital commitment that we have to ensure that all creation is maintained, enhanced and protected.⁸

The EFRA select committee was scathing about the legislation in its suggested form and animal welfare bodies continue to exert pressure on the government to act. Anecdotal evidence is that the government still wishes to follow the basic principle of taking sentience into account but specific proposals are yet to emerge.

This article now moves to address some of the issues raised by the controversy regarding bringing Article 13 of TFEU into UK law, the debate over clause 30, the public relations backlash and subsequent Government attempts to solve the issue through the doomed Sentience and Sentencing Bill. What, precisely are we trying to protect in relation to animal welfare and sentience? What is the EU's record on animal welfare since the introduction of Article 13 as compared to the UK?

What do we mean by sentience?

'Sentience' in animals has been recognized for hundreds of years.⁹ Bentham's famous quote: The question is not, Can they reason? Nor, Can they talk? But Can they suffer?' is an acclaimed call to

⁷ Jenkins, S. (1992). *Animal Rights and Human Wrongs*, Lennard Publishing: Hertfordshire, pp 93-94. Brooman and Legge, above n. 8, pp 436-442; Centre for Animals and Social Justice. (2018). Animal Protection Commission. See <http://www.casi.org.uk/animal-protection-commission>

⁸ House of Commons, (2018). *Animal Sentience and Brexit*. Briefing Paper Number 8155, 2nd February 2018. See <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8155#fullreport>

⁹ Brooman, S., and D. Legge. (1997). *Law Relating to Animals*, London: Cavendish Publishing, chapter one; Duncan, I. (2006). The changing concept of animal sentience. *Applied Animal Behaviour Science*, 126, 11-19, at 11.

recognize the sentience of animals and their capacity to feel pain.¹⁰ There is a myriad of examples of both UK and EU legislation introduced to protect animals on the basis of a recognition of sentience i.e. suffering. More recently, legislation requires more humane husbandry of animals in terms of providing environments to alleviate stress.

In many ways, contemporary discussions about sentience mirror discussions regarding ‘animal rights’ in the animal welfare movement. The term gave its name to a movement, the Animal Rights Movement. However, at its heart was a different discussion that was cloaked by the use of this term to define a number of philosophical positions. Conversations about animal rights have centered on what we need to protect with some, such as Tom Regan, taking a hard rights stance that accords animals rights akin, but not the same, as human rights.¹¹ Others have taken a different approach such as the utilitarian stance suggested by Peter Singer.¹² Space does not allow us to completely unpick these arguments here but at their heart lies a discussion based around sentience. Those discussions have centered on what needs protection based upon the sentient qualities of animals concerned. Should apes be accorded rights close to those of humans? Are mammals deserving of greater protection than cephalopods?

In this context, the debate about bringing a version of Article 13 into UK law reignites this discussion within a more accurate framework that was never provided by discussions centered on giving animals rights. Now we find ourselves at the heart of real issue. What is it about animals that we need to protect? How should this be done and what should the legal framework look like?

In order to answer these questions, we need first to define what we actually mean by ‘sentience’. Almost all writers in this area acknowledge the part played by the Brambell Committee from which grew contemporary discussions about the relationship between animal sentience and human’s exploitation of animals as a resource. It recognized that sentience was not just a measure of intelligence but required that farm animals’ more basic needs such as the freedom to move and have adequate provision for comfort should be catered for.

The Brambell Report, subsequently affirmed by the Farm Animal Welfare Council in 1993 provided the starting point for definitions of sentience that need protecting in farm animals:¹³

¹⁰ Bentham, J. (1789). A utilitarian view. *Animal rights and human obligations*, 25-26.

¹¹ Regan, T. (1987). The case for animal rights. In *Advances in Animal Welfare Science 1986/87* (pp. 179-189). Springer, Dordrecht.

¹² Singer, P. (1995). *Animal liberation*. Random House.

¹³ Brambell, F. W.R. (1965). *Report of the technical committee to enquire into the welfare of animals kept under intensive livestock husbandry systems*. (Command Rep. 2836). London: HMSO.

- Freedom from thirst, hunger and malnutrition;
- Freedom from discomfort;
- Freedom from pain, injury and disease;
- Freedom to express normal behavior and;
- Freedom from fear and distress.

However, these ‘freedoms’ were created in the context of accepting that animals could be used unquestionably in agriculture as long as these freedoms were provided for. What they did not take account of was a growth in opposition to the use of animals, certain species, or certain types of raising animals for food because the basic needs of the animals is compromised and cannot be justified simply by human desire for animal products. In addition, the freedoms were obviously context specific and did nothing to address other areas of animal use such as experimentation, domestic animals, circus animals and animals taken from the wild, to name but a few.

The concept of animal sentience now embraces notions of biological response needs, stress and mental well-being centered around a natural state of living for an animal. These new definitions have a relationship with Brambell’s five freedoms but give us a more complete picture of what needs protection. Carenzi and Verga suggest that the original concept of protection related to animal husbandry has moved to considerations of emotion and protection of needs related to how animals perceive the world.¹⁴

One of the foremost contributors in the area of animal sentience and welfare is Donald Broom. He suggests that scientists have been slow to recognize complex abilities and feelings in animals even to the point of skepticism and hostility from anthropocentric elements of the scientific community.¹⁵ Broom suggests that all the needs of the animal need to be taken into account when deciding what is needed by an animal to secure its welfare. The importance of Broom’s work is that he recognizes the intrinsic philosophical challenges posed by scientific discovery about animal sentience. For example, if we discover that a species of animals recognize each other and have societal structures, this would have implications for the raising of such animals for food, especially if conditions did not allow this to occur. That would amount to a compromise of the animal’s welfare that might lead to stress and raise ethical questions about the true costs of the commodity produced. Broom also suggests that the full picture of animal sentience is complicated and requires expertise to interpret and apply . One such finding is that some animals

¹⁴ Carenzi, C., and M. Varga. (2009). Animal Welfare: review of the scientific concept. *Italian Journal of Animal Science*, 8(1), 21-30, 23.

¹⁵ Broom, D.M. (2010). Cognitive ability and awareness in domestic animals and decisions about obligations to animals. *Applied Animal Behaviour Science*, 126, 1-11, 1.

showing higher sentient qualities are at times *better* at coping with adverse stressors than those with lower cognitive ability.¹⁶

This finding has implications to a legal system that aims to improve animal welfare according to sentience. Would decision makers under the proposed new system have the necessary knowledge and would there be consistency? It is difficult to see how this could be achieved without central coordination of the issues. Otherwise, the judgment and application of sentience might become a free-for-all with radically differing application of subjectively influenced and arbitrary decisions. Any lawyer will tell you that laws should seek to remove inconsistency and bias, not to entrench it in UK law.

Marian Stamp Dawkins (2006) is also a well-known writer in the area of animal sentience and what it means for our approach to regulating the use of animals in the UK. She suggests that the overall reluctance of the scientific community to accept something suggested by Charles Darwin's observations made in the late C19th may be due to something much more fundamental in human nature:

*Why does not everyone accept that animals are sentient when for Darwin it was so obvious that animals do experience not only touch and pain but emotions as well?...it remains a profound mystery how a grayish lump of nervous tissue can give rise to the rich world of our subjective experiences.*¹⁷

This observation is, possibly, the most pertinent of all when it comes to recognizing sentience in animal and enshrining this in law. Consciousness is a miracle of evolution that is difficult to conceive in our own lives, let alone that of animals who do not appear to have the same form of awareness that we possess. The implication of this for law-making in relation to sentience is profound. What is it that we mean by the word and how can we ensure that those who interpret the law have the awareness themselves of what this means for individual species, in a variety of human-made environments and circumstances? If we were asking for consistency, there can be nothing more difficult than legislating for something that goes to the very root of our own existence and our subjective set of experiences which make up our own particular view of existence. It becomes even more difficult to fathom how a government could conceive that a single clause would solve the problem, and that ministers 'having regard to the welfare needs of animals as sentient beings in formulating and implementing government policy' would adequately provide for a consistent and just law.

¹⁶ Ibid, 8

¹⁷ Stamp Dawkins, M. (2006). Through animal eyes: What behaviour tells us. *Applied Animal Behaviour Science*, 100(1), 4-10, 5

Defining sentience is a task that has not been addressed by any proposal so far. It requires expertise in several disciplines including, animal husbandry, animal behavior, philosophy and law. Can we be sure that a minister, or ministerial department would have the skill-set to adequately fulfil this function? The complexities of defining sentience, and the inconsistencies that are likely to develop, add authority to calls for an independent body of oversight such as an animal protection commission.

Does EU law protect animal sentience as well as the UK?

What would we lose if we fail to bring the EU concept of sentience into UK law? There is no doubt that, in areas such animal experimentation, the EU has acted as a driver for change in animal welfare.¹⁸ The European Commission lists a number of milestones in improving animal welfare that have been achieved by the EU including the ban on conventional cages for hens, more respect for the behavioral needs of pigs, the ban on cosmetic testing and its influence on non-EU countries.¹⁹ However, a recent report commissioned for the EU indicates, that despite citizen's concerns about the welfare of animals, the EU has failed to create a set of laws that adequately protect animal welfare.²⁰ There have been a significant number of directives and regulations passed ranging from those targeted at specific practices such as protecting animals during slaughter,²¹ to the prohibition of leghold traps²² and the protection of farm animals generally.²³ However, the 2017 report suggests that there are striking omissions in legislative coverage for several species including rabbits, cats and dogs.²⁴

In relation to fur-farming, it has been suggested that the EU is actually a major protagonist in an industry that attracts significant concern because of the welfare of wild animals kept in conditions of close confinement. Several countries including the largest fur producer, Denmark, regard animal fur as a legitimate source of revenue despite other countries in the EU such as the UK and Croatia banning the keeping of animals for their fur.²⁵ This illustrates how a wide range of cultural

¹⁸ Sparks, P., and S. Brooman. (2018). Brexit: A New Dawn for Animals Used in Research, or a Threat to the 'Most Stringent Regulatory System in the World? *UK Journal of Animal Law* 1 (2), 1-10.

¹⁹ European Commission. (2012). Milestones in improving animal welfare. See https://ec.europa.eu/food/sites/food/files/animals/docs/aw_infograph_milestones_en.pdf

²⁰ Broom, D. M. (2017). Animal welfare in the European Union. *Brussels: European Parliament Policy Department, Citizen's Rights and Constitutional Affairs, Study for the PETI Committee, 24-27*. See [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU\(2017\)583114_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf)

²¹ Directive 74/577/EEC

²² Regulation (EEC) 3254/91

²³ Directive 98/58/EC

²⁴ Broom, D., above n. 15, 47.

²⁵ Brooman, S. (2018) Politics, Law and Grasping the Evidence in Fur Farming: A Tale of Three Continents. *Journal of Animal Ethics*, in print.

attitudes to animals in the EU has sometimes created inertia to change. Religious slaughter has proved difficult to tackle because of the clash with human rights which is a primary principle for the EU and includes the right to religious freedom.²⁶

It can be concluded that the EU has acted as a force for positive change in countries that had very weak legislation. However, there are now calls for the EU to address areas of serious deficiency such as those mentioned above and others such as the production of foie gras, circus animals, dog breeding and the trade in endangered species. It appears that the inclusion of Article 13 of the Lisbon Treaty has not changed inherent cultural attitudes or created a pan-European set of morally consistent laws on animal welfare.

In contrast, the UK has a long history of animal welfare reform going back to the C19th. It began with control of the use of cattle in local baiting rituals,²⁷ animal experiments²⁸ and the abuse of animals used as dray animals and elsewhere.²⁹ The birth of the Society for the Protection of Animals in 1825 (prior to its receiving Royal approval and the addition of the 'R' in RSPCA) is evidence of the changing awareness that occurred in Victorian Britain. The list of first-time legislative protection of animals is impressive when compared to other countries and supra-national bodies such as the EU.

At the heart of these legislative changes is one issue – sentience. All these protective laws recognize that animals are able to suffer because of their ability to feel pain and many other physiological and psychological needs. The UK has, historically, been the most active country in recognizing animal sentience. This begs the question – in its current form, and without any form of central co-ordination and accountability, what would added by an act that merely asked sentience to be taken into account?

Conclusions: what is the best way to protect the sentience of animals in law?

What are we concerned about?

Initial reaction to the failure of the sentience bill was understandable because of the symbolic status the bill had acquired. However, standing alone without the oversight of an animal

²⁶ Brooman, S. (2016). In Search of the Missing Ingredient: Religious Slaughter, Incremental Failure and the Quest for the Right to Know. *Journal of Animal Ethics*, 6: 2, 153-63.

²⁷ An Act to prevent the cruel and improper Treatment of Cattle D 1822, 3 Geo, C 70

²⁸ Cruelty to Animals Act 1876

²⁹ Cruelty to Animals Act 1849.

protection commission, it may not be the answer many thought it to be. At the time of the infamous NC30 vote, the government had to fight hard to ward off the impression that they considered animal welfare to be adequately dealt with elsewhere under the Animal Welfare Act (2006). The fears this raised is illustrated by the initial reaction of the United Kingdom Centre for Animal Law (A-law):

‘It is reasonable for animal protection groups to be concerned that Parliament has not set the framework within which policy choices affecting animal welfare are to be made by whoever is given the power to make those choices after Brexit.’³⁰

In a collateral development, A-Law worked with the Wildlife and Countryside Link (2017) and a number of academics and professionals with expertise in Animal Law to produce a report on the implications of Brexit in several areas of our relationship with animals including, for example, agriculture, scientific experimentation.³¹ The requirement in Article 13 is considered (A-Law and CL, 2017, p. 5) to be an underpinning principle to the specific suggestions made in the report regarding animal welfare in those specific areas. The report is specific in terms of recommendations for the various areas of interaction between humans and animals including ending live exports, ending the trade in cat and dog fur and improving the scrutiny of animal experimentation. However, would a stand-alone provision on sentience achieve its aims and enable these issues to be resolved?

Would a clause on sentience work?

It is not suggested here that the UK has always been successful in providing for animal welfare. It is easy to sympathise with many of the reservations of those in the animal welfare community who suggest that regulation of the interaction between animals and humans is far from satisfactory in the UK. The recent public debate around the issue of sentience has been very welcome as it has invigorated and revitalised the imperative of reducing animal suffering. However, providing a workable system to take full account of animal sentience in UK law provides possibly one the greatest challenges ever faced by UK law relating to the welfare of animals. Sentience is difficult to define and our knowledge of it is ever-changing. The proposal is also a

³⁰ A-law. (2017). Briefing note on Brexit, Article 13, and “animal sentience”. UK Centre for Animal Law. <https://www.alaw.org.uk/2017/11/a-law-releases-expert-legal-briefing-note-on-brexit-article-13-and-the-debate-on-recognising-animal-sentience-in-law/>

³¹ A-Law and Wildlife and Countryside Link, (2017). Brexit: Getting the best deal for animals. Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law). See <http://www.alaw.org.uk/wp-content/uploads/Brexit-Getting-the-Best-Deal-for-Animals-Full-Report.pdf>

departure from the traditional route for introducing legislation onto the statute book that has usually had very specific aims for particular practices and species.

The furore that followed the original parliamentary debate over Article 13, ignited by NC30 in November 2017 was based on the word 'sentience' – the word has attained almost mythical status – it is a defining word to signpost a different appreciation of the non-human animal. It symbolises those who appreciate the suffering practices conducted by humans for their own benefit. For lawyers, it comes laden with the baggage of uncertainty. What does it mean and can it maintain its value over time? This where there are doubts. No-one working for the betterment of the situation regarding animals would ever doubt that animals are sentient and this deserves recognition in law. The point at issue is whether this can be best achieved in this particular form by incorporating a requirement to recognise sentience without also setting out how the duty will be made more meaningful. The experience in the EU is that, despite the existence of Article 13 in the Treaty of Lisbon, it has an inferior record of providing for animal welfare than the UK. The decision-making structure and variety of cultural views of animals in many countries is not conducive to the development of a philosophically coherent set of animal welfare laws. Perhaps the UK might do better?

The need for process, structures, possibilities for reform and accountability

The word 'sentience' has created a problem. Like the title of a movement, *animal rights*, it provides an attractive banner. It might not achieve what we intended because implementation is in the hands of those who may be more, or less, disposed to recognising the inherent value of animals. The decision of an individual, group or body on the need to take account of sentience comes loaded with a set of personal values that cannot be adequately controlled through legislation that simply requires that sentience be taken into account. What amounts to being 'adequately taken into account' to one minister, may be unjustifiable interference with long-standing practices to another.

It could be argued that this is ever the case and any system is bound to suffer from subjective interpretation. This is true, but a more robust system of accountability and safe-guards would provide a better chance of achieving the right decisions over time. Other questions can also be asked ahead of entrenching the current proposals into law: Who would provide the expertise in those institutions? How would such decisions be challenged? How would such institutions ensure they were working with the best available knowledge? There are so many such questions that cannot be answered by the simple requirement to take sentience into account that is provided in Michael Gove's sentience bill. A referral body with expertise in science, animal welfare, law and philosophy is more likely to provide a *better* answer on the requirements of animals than decisions made by numerous ministers and their departments.

The need for a new Animal Protection Commission

The idea of central oversight of animal protection is not new – a minister for animals was suggested by Jenkins in 1992,³² and the emergence of sentience as a key issue in animal welfare arguably makes the suggestion even more pertinent. The need for consistency across legislative provisions is clearly highly desirable and it is difficult to see how a legal requirement to take account of sentience in law and policy making would have ‘teeth’ if it was not given the support of external accountability and expertise. In the current political landscape, it is more fashionable for such activities to be delegated to agencies outside the direct reach of government, such as the Farm Animal Welfare Council, rather than to place them in central government as a ministry/department. This model would be a viable alternative worthy of consideration in the case of a new body tasked with overseeing animal welfare and sentience in UK law. Where the body would sit, independently or as part of EFRA, is open to debate. There are concerns that a conflict of interest might arise between anthropocentric proposals for the environment that are odds with the sentient interests of animals, including their habitats. An essential element of the sentience debate is that animals should not be treated as things as is the case with the environment.

The key benefit of creating a body outside government is that it would avoid the potential for political interference from other ministers, the cabinet or members of a political party seeking to please their constituents. Such a body could be made up of appointed experts in the field of animal sentience. This would include scientists, philosophers and academics as well as those with expertise of implementing policy. It could be overseen by EFRAC to ensure its accountability for public funding.

Such a body could recommend changes in policy for government departments based upon emerging evidence. This would put in place a system and structure that could deal with the ever-changing face of sentience. Such a body could invite contributions or expertise from outside to gather the best knowledge available. It could act as a driver to change in the recognition at policy level of what is already understood in science and philosophy. It could make recommendations dispassionately based on the evidence, free from political interference in previously politically sensitive areas. We could review the law relating to animals in some of the four main areas of the Brexit report.³³ This could act as the template for areas of review regarding animal welfare – domestic, experimentation, farming, wild and companion animals. The issues that need reform are already in the public domain.

If the proposed law is left unchanged it will leave many feeling better that sentience is written into UK law. However, problems might follow as the new policy is implemented and interpreted. What of the minister who unveils and unpopular law which reduces animal welfare because of competition in post-Brexit Britain? He argues that he has considered the sentience of animals,

³² Jenkins, Above n. 7

³³ Brexit: Getting the best deal for animals, above n. 25.

but concludes that the overwhelming need to protect British producers is paramount. It could lead to reform denied on the grounds that sentence was given due consideration and the matter is closed.

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