# Supplanting anthropocentric legalities: Can the rule of law tolerate intensive animal agriculture?

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# SUPPLANTING ANTHROPOCENTRIC LEGALITIES

## Can the Rule of Law Tolerate Intensive Animal Agriculture?

*Maneesha Deckha*

The rule of law is a concept in motion. Whether adopted as foundational to the constitutional backdrop of nation-states or circulating as a higher-order international law general principle of law, the now-transnational concept defies a fixed meaning and has been subject to multiple interpretations. Its open-endedness permits it to attend to pressing social problems and matters of justice heretofore unseen or undertheorized and which exceed its normal liberal legal parameters and colonial formation. In this contribution, I suggest that the rule of law is deployable against the planetary scourge of animal-based food systems (ABFS) and the more-than-human violence ABFS occasion.[1] Drawing on posthuman feminist theory, the chapter contributes to the growing field of global animal law that explores animal law issues through international law and transnational law frameworks (Blattner 2019; Cao *et al* 2016; Peters 2020, 2017, 2016: 3–4; Stucki 2017), by highlighting the potential of the rule of law to challenge the legitimacy of at least some forms or portion of ABFS.

The magnitude of present-day ABFS' environmental imprint, their role in producing zoonotic pandemics, and their violence and exploitation of nonhuman animals has produced an emergent public discourse – despite industry influence and resistance from the general public who still favor animal-based consumption – calling for a food systems re-orientation toward veganism and plant-based foods (Sanford *et al* 2021: 3–4). This is a call emanating from some nongovernmental and academic sectors for a global transformation

1 I adopt the term ABFS from Krithika Srinivasan's recent work in this area (Srinivasan 2021: 2). My use incorporates land and aquatic animals.

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(Almiron and Fernández 2021: 141–3). The high-profile 2019 Intergovernmental Panel on Climate Change's *Special Report on Climate Change and Land* reviewed and affirmed the existing evidence for a wide-ranging planetary systems rethink, including of the food and agricultural sector. It did not make any dietary recommendations, but some notable authors of the Special Report commented on the benefits for emissions reductions if a plant-based shift occurred in at least countries with high levels of animal consumption (Sanford *et al* 2021: 10, 14, discussing Shukla *et al* 2020). Other United Nations (United Nations Food and Agricultural Organization, United Nations Environmental Program) bodies have released global overview reports documenting the environmental evidence against consuming meat and other animal products (UN Environment Programme 2021: 54, 2019: 42; UN Food and Agricultural Organization 2018: 8, 16–19, 52, 2006: 270–5). And the European Regional Office of the World Health Organization (2021: 7), while not authoring or endorsing any bold policy position recommending a largely plant-based diet for the world, has produced a regional fact sheet in its European Office discussing the benefits of a plant-based diet.

Thus far, however, no national governments have adopted a policy or legislative platform to shift their food systems away from ABFS toward plant-forward systems. We can observe multiple reasons for governmental silence. Perhaps most obviously is the political unwillingness to contest the human cultural normalization of eating animals or their by-products, most pronounced in Western countries, but also present among the global elite influenced by Western diets and status symbols. The staggering scale of violence against animals in present-day ABFSs simply doesn't register against this entrenched normalization,[2] or, if it does, animal suffering is denied, dismissed, minimized or defended (Buttlar and Walther 2022: 2; Milfont *et al* 2021: 2–3).

Another source of political recalcitrance to name such violence, or even highlight the harm to humans the planet that killing animals at present unprecedented levels causes, is the mythical and romantic narratives that have long attached to ABFS and immunize farmers from government oversight. As a result, farmers are legally given free rein in many countries as to how they raise 'their' animals and also enjoy strong lobbying influence directed at minimizing government regulation and maximizing government protection of otherwise non-viable industries. It is a situation of 'regulatory capture' that legally yields a race to the bottom in terms of animal agricultural, aquacultural and fishing practices with sobering outcomes for animals, people and the planet (Goodfellow 2016: 196–9; Sankoff 2019: 302–3).

2 Even critical social science disciplines otherwise concerned with foregrounding 'nature' can invisibilize 'food' or farmed animals (Arcari *et al* 2021: 942–3).

Due to structural limitations as well as systemic anthropocentrism, it would be optimistic to expect that voluntary industry transformation in the agricultural, aquacultural, or commercial fishing sectors will occur. While there may be some appetite for reform, it will very likely not be at a pace or scale required to avoid further environmental disaster or reduce harms to animals or marginalized humans working in or affected by the negative externalities of animal agriculture. To the contrary, these industries are expected to grow globally (Milfont *et al* 2021: 1).

Despite the seemingly colossal and intractable nature of the global problems presented by ABFS, a handful of domestic legislators have come forward in recent years to propose laws aimed at stemming the growth of large factory farms and altering the dietary preferences of national populations through imposing taxes on animal products. At the international law level, no such legal effort has yet materialized even in the form of support in principle for domestic market regulation. What has emerged at this level are soft law instruments, notably the IPCC's *Special Report on Climate Change and Land*, suggesting that nations consider regulatory instruments such as reversing current subsidies for high-intensive emissions food, subjecting their agricultural sector to carbon pricing and exchange trading regimes as they do the fossil fuel industries, and other policy instruments that may produce behavioral change 'to consume less meat' (Hurlbert *et al* 2019: 697, 702, 722). In this chapter, I suggest that elected representatives or other legally minded decision-makers at the national or international level should not view such initiatives or measures as simply a matter of politics, and thus properly made irrelevant if they do not win majority support and get legally enacted through classic democratic channels. Instead, such legally minded decision-makers should view such proposals as implicating a higher order national constitutional and international law principle: the rule of law. Specifically, I argue that the rule of law *connects to and is promoted by* emergent legislative proposals in a handful of jurisdictions around the world to curtail intensive ABFS.[3] Indeed, as I discuss later, a recent proposal spurred by the COVID-19 global pandemic from the American Bar Association, calling for an International Convention for the Protection of Animals, establishes such a connection.

Why does making this connection, and theorizing the rule of law in this substantive way, matter? For all its multiple connotations and the divergent

3 I focus on intensive agriculture because the little legislative action that has come forward has focused on this form of food production. The focus is not meant to minimize the devastation caused by commercial fishing or intensive aquaculture to animals, people and the planet or the harm caused to animals and ecosystems by noncommercial iterations of these industries. I leave the analysis, however, connecting the rule of law to commercial fishing and aquaculture as well as noncommercial iterations of these industries for future research.

meanings ascribed to it, the rule of law – in its domestic and international iterations – champions the principle of legality and the promotion of justice (Humphreys 2010: 1–2, 6). Liberal legal scholars laud the concept as the grounding of any viable national legal system (Bingham 2010; Raz 1990; Humphreys 2010: 1–2). The concept is less authoritative than treaties in the international legal sphere and less prominent at the international legal level generally, yet the concept is nonetheless salient within international law (Humphreys 2010: 7–9), with emergent scholarship on an 'international rule of law' seeing it as general principle of law that can be used to supplement regulatory gaps or to interpret treaties for the benefit of individuals vis-à-vis their state governments (ibid: 6–7). Despite its uneven and perhaps dwindling purchase in some parts of the world, and its inefficacy in alleviating the global problems many believed its adoption in nation-states would such as poverty and violence (ibid: 1), the concept that rose to global prominence through British imperialism remains an influential legal rhetorical device. Notwithstanding its open-endedness, the concept enjoys widespread regard in global decision-making circles and amongst a considerable sector of the general public in the Global South (Lino 2018; Humphreys 2010: 1). Global scales exist to measure the presence of the rule of law in countries, shaping donor fund allocations and development project investments (LexisNexis 2022). Additionally, media and social influencers also deploy the concept to criticize government excess (Arvay and Wu 2020; Zouev 2020).

The rule of law, then, as it is typically conceived across domestic and international jurisdictions (of which I say more later), has enormous potential to apply broadly and, as this chapter argues, is relevant to and promoted by intensive ABFS-curbing legislative measures. The hoped-for effect of the present argument is to help generate a legal and political culture, and supporting policy and legislation, that mandates as a matter of *legality* and *justice*, and not simply political will tolerant of government abdication and industry self-regulation, government action at national and international levels to dismantle ABFS. Government action is needed to support nascent but growing plant-forward cultural change emanating in order to stimulate the radical change in food systems that multiple nongovernmental transnational actors have identified as necessary for planetary health and the well-being of all beings (Kristiansen *et al* 2021: 154, 163; Ndlela and Murcott 2021: 28; Willett *et al* 2019: 447, 478–80, 484).

The analysis begins in the first section by situating the thesis – namely, how the globally resonant and the international law-relevant concept of the rule of law as a baseline for a society that is characterized by legality and justice is boosted by national legislative action to rein in intensive agriculture – in relevant theoretical frameworks. This part considers the benefits of applying feminist posthumanist theory to counter romanticized representations of ABFS but also the limits of posthumanist scholarship in calling for an end

to animal agricultural practices. The second section provides an overview of the emergence of recent legislative proposals in some countries of the Global North that have called for reducing the scope of intensive ABFS. The third section then discusses the pliability of the rule of law to serve as an agent of social change in the realm of intensive ABFS. This section first explains how the rule of law can be a persuasive discursive legal tool in supporting legal regulation to address social problems and support progressive social values. It then explains why the intensive ABFS-curbing initiatives discussed in the second section regarding the present-day food system should be seen as initiatives that promote the rule of law, emphasizing the iterative connection between the rule of law and social justice.

Nothing in this chapter is meant to suggest that the rule of law, rightly seen by many as a foundational 'handmaiden' to imperialism (May 2021: 2354), is a universally benign, non-imperial or effective guarantor of justice today (ibid: 2356, 2359). As Christopher May has commented, 'the rule of law and imperialism remain intertwined' (ibid). Nor does the analysis dispute that continued investments in the rule of law and a liberal legal order in its typical Western legal and thus anthropocentric framing also prop up capitalism and the exploitation it entails (ibid: 2354; Goodale 2005: 554–5, 562). But even as its critics have noted, the idea of the rule of law can denote a more plural vision, once that is thicker and more substantive than how the concept is typically imagined, and which contests the traditional bounds of Western liberal legality from which it is derived (May 2021: 2353, 2355). This is arguably what would occur if the rule of law was invoked in favor of animals. Animals are legal non-subjects and intensely vulnerable in the liberal legal tradition (Deckha 2021: 85, 2015: 55, 64, 2013: 800–4; Eisen 2017: 941, 943–4), due to the very property rights that the empire-building version of the rule of law exalted and current economically oriented accounts view as critical for a nation to thrive (May 2021: 2353, 2355–6). If the rule of law were to be rhetorically marshalled in legal strategies to help foment a plant-forward food system, as I argue it has the potential to do so here, such strategies would be a deployment of the rule of law that *counters* the norms of private property and thus imperialism and liberalism by *de-propertizing* billions of animals. It is thus a legal strategy worth considering further, especially given the regulatory capture the animal agricultural industry enjoys despite the colossal suffering it requires, a legal phenomenon partly explained by the romanticized narratives that still surround ABFS.

## Countering Bucolic Visions: The Promise and Limits of Posthuman Theory

### *Mythologizing Farming and Agriculture as Inherently Virtuous*

In a criminal trial defending a woman charged with public mischief for giving water to thirsty pigs on a transport truck en route to slaughter, her defense

lawyers deliberately avoided referring to the place where the pigs had been raised as a 'farm' (Animal Liberation Currents 2017: para 33). The defense lawyers knew that changing the narrative around farming was important to their case (and something which their submissions deliberately strove for at every turn).[4] The term 'farming' and even 'agriculture' gives rise to naturalized and romanticized agrarian connotations and corresponding narratives and cultural scripts (such as 'the successful farmer is hard-working, self-reliant and religious, living and working in harmony with nature to preserve the land for future generations of farmers, that is, for the family and community' (Walter 1997: 49)) that justify intensive animal agriculture (Vanclay and Enticott 2011: 257, 259; Pilgrim 2019: 75–7). These connotations, narratives and cultural scripts about 'farming' support farm subsidies and otherwise shape public policy (Sutherland 2020: 1156), as well as conceal the brutalities that intensive animal agriculture inflicts on animals (Stucki 2017: 278–9; Khazaal and Almiron 2016: 374–5). They also facilitate deceptive imaging such as happy cows or chickens on packaging and in marketing (Stucki 2017: 278–9; Khazaal and Almiron 2016: 385; Silver 2019; Gillespie 2018). They also bolster the arguments for industry self-governance.

### *Reappraising Animal Farming and Agriculture From an Animal-Centered Frame*

The favorable social construction of farming and agriculture as still 'natural' and 'traditional' and of farmers as the 'original conservationists' (Vanclay and Enticott 2011: 264) also obscures the extreme technologically mediated nature of the breeding and raising of animals for human consumption. Most readers will be aware of the breathtaking re-drawing of American animal agriculture from more local, small-scale operations in the mid-twentieth century to the current intensive farming regime (Wadiwel 2014: 538–9), a model that has been exported and adopted around the globe (Mazac and Tuomisto 2020: 2; Walter 1997: 49). Many further realize the overwhelmingly industrialization of ABFS, that is, how animals are housed and how they are 'processed' during their lives once born (e.g. automated breeding, feeding, watering, milking, artificial daylight, assembly line castration and debeaking (Cassuto and Dibenedetto 2020: 5156)), in slaughter (e.g. mechanized slaughter chutes, stun bolts, blades, gassing, shredding, etc. (Cassuto 2012: 226)) and after death (e.g. defeathering, deskinning, boiling, rendering and further 'product' processing (Gillespie 2018)). What may be less transparent is how technologically mediated animals' *bodies* are from conception

4 The trial judge (who, not incidentally, grew up on a farm and said so) rejected the defense's terminology asserting the term 'farm' would be used in the trial going forward (James Silver, Guest Lecture in my Animals, Culture and the Law class, Faculty of Law, University of Victoria, 9 October 2017). The defense was ultimately successful in the case, but not for animal rights reasons. For further analysis, see Deckha 2018: 74–5, 77–8.

onward. Farmed animals have been subject to an unprecedented level of genetic breeding for specific traits and are also exposed to subsequent bodily interventions once born (Weisberg 2015: 40; Holloway *et al* 2009: 394–5).

Posthumanist scholarship, particularly feminist new materialist scholarship that binds the present collection together, helps reveal farmed animals as corporate biotechnological inventions and illuminate the routine spillover across and porosity between bodies and species in general (Banerjee 2016: 400–2; Braidotti 2013; Braidotti 2009: 526–8). Such intellectual work can help to dispel the romanticized visions of farming and agriculture that persist despite overwhelming industrialization and conglomeration. As such, feminist new materialism and the larger version of posthumanism in which it is housed can help make space for plant-based interventions into cultural foodscapes heavily dominated by animal-based eating (Muhlhauser *et al* 2021: 2–3).

However, a limit of feminist new materialism and posthumanist scholarship in general, is their typical disinclination to oppose the human instrumentalization of animals (Giraud 2019: 20; Leth-Espensen and Svensson 2020: 554). Although rigorously critical of anthropocentrism and human exceptionalism, posthumanists do not necessarily accept, and thereby resist, claims about non-human species integrity and corresponding moral or legal rights to life and bodily integrity for animals (Weisberg 2015: 49–50; Lindgren and Öhman 2019: 1205–6). The relational partnerships of 'co-mingling' and 'entanglements' of humans with animals and non-animals that feminist new materialists and posthumanists emphasize and exalt at a molecular and intimate bodily level is an important counter-narrative to human exceptionalism. Yet, such hallmark feminist new materialist concepts are also paradoxically invoked to implicitly endorse or even explicitly celebrate animal uses in industries where human workers are seen to be intimately involved in caring for 'agential' animals (Twine 2013: 143, 157–8; Hollin *et al* 2017: 934–5; Weisberg 2009: 35–7). Those who adopt these positions defend these endorsements through Donna Haraway's influential ideas of mutual co-constitution, kinship, 'nature-cultures' or 'becoming-with' (Heath and Meneley 2010: 433–42),[5] and her larger instruction that our ethical obligation is not to stop killing animals, which she sees as an impossible but also unnecessary goal, but to ensure that animals live and die well (Twine 2013: 139–40; Giraud 2013: 104).

In short, the 'care' that many influential posthumanist feminists proffer as a better model than industrial alternatives embeds ethical exclusions that are still a type of violence (Hollin *et al* 2017: 935–7; Timeto 2021: 325–6; Bruckner *et al* 2019: 45–6; Gillespie 2011: 103, 121; Stanescu 2019: 1123). Thus, while feminist new materialist and posthumanist accounts alert us to the

5 For how Haraway's positions have shifted over the years away from posthumanist dismissal of animal rights, see Timeto 2021: 315–16.

highly naturalized and thus deceptive narratives that underpin ABFS today, and some scholars immersed in this theoretical model do highlight animal abuse and the suffering animals experience in animal-use industries (Sands 2019), feminist new materialist and posthumanist scholarship is largely not aimed at dismantling ABFS and can even help romanticize so-called humane or ethical versions of farming or agriculture due to the human-animal relations in them. A more animal-centered theoretical framework, one that is attuned to the violence of power asymmetries even in 'better' farms, zoos, or research labs such as that available in feminist animal care ethics, ecofeminism and critical animal studies (Deckha 2021: 16–20; Adams and Gruen 2021), is required to press posthumanist theory toward an anti-exploitation orientation (Timeto 2021: 323–4; Bruckner *et al* 2019: 39n2). The remainder of the chapter adopts these latter theories' anti-exploitation ethics as theoretical frames for the legal analysis.

## Emerging Legislative Animal Farming Reduction Models

### *Restricting Concentrated Animal Feeding Operations*

But, there is some resistance emerging in legislative corridors. Perhaps most prominent is US Senator Cory Booker's proposed federal legislation, the *Farm System Reform Act*.[6] If passed, the bill would prohibit new concentrated animal feeding operations (CAFOs) as well as prevent existing ones from increasing in size, and phase out existing CAFOs that have in excess of 1000 cows/calves, 82,000 laying hens and 125,000 non-laying hens by 2040 (Baise 2020; Case 2020).[7] The bill's effect, if passed, would be dramatic. As one industry trade publication put it, '(w)hat Sen. Booker wants to do is end CAFO operations which raise over 99% of our poultry, 99% of turkeys, 98% of hogs, and 70% of dairy cows' (Baise 2020). In addition to the *Farm System Reform Act* bill, there have been a few initiatives at the state level to target the scope of intensive farming; these bills, if passed, would stop new construction or expansion of 'confinement feeding operations'[8] and prevent new mega-dairies.[9] One-year moratoria against large CAFOs have succeeded at the municipal level in South Dakota and Wisconsin.[10]

6 Farm System Reform Act US Bill S 3221 (2019–116th Cong) s 102.

7 Note that Senator Booker has co-sponsored bills that would support intensive agriculture on smaller scales. See, for example, Justice for Black Farmers Act US Bill S 300 (2021–117th Cong) and Climate Stewardship Act US Bill S 1072 (2021–117th Cong).

8 US, HF 440, 89th Gen Assem, Reg Sess, IA, 2021.

9 US, SB 583, 81st Gen Assem, Reg Sess, OR, 2021.

10 For more on one county in South Dakota that has taken up this work see Faulk County Record 2019: 10. Three counties in Wisconsin passed such moratoria (Polk County Resolutions 2019; Kaeding 2019; Now Media Group 2016).

Outside of the United States, there has been some action to restrict CAFOs in countries with animal-centered diets but no current proposed legislation. In Switzerland, a then-newly elected Green party member brought forth a petition that launched a nationwide vote in 2019 on factory farming that failed to win majority approval (Totally Vegan Buzz 2019). In the United Kingdom, the newly announced Action Plan for Animal Welfare ('Plan') is, as its name suggests, aimed at improving animal welfare; it does not seek to circumscribe intensive or other animal agriculture (Harvey 2021). In terms of secondary industries that support intensive agriculture, however, it is notable that the Plan includes proposed legislation to ban live animal transport (ibid). Animals will also be legally recognized as sentient beings in one of the three legislative pillars of the Plan – the Animal Sentience Bill – which is arguably a symbolic move that may lead to future change (Sebo and Shann 2021). Though this symbolism and corresponding welfare measures in the Animal Sentience Bill are significant, there is nothing in the Plan that presently aims to restrict the scope of domestic intensive agriculture (ibid).[11]

### *Circumscribing Animal Consumption – Taxation and Divestment*

Legislation has also been introduced to scale down consumption of animal products at an individual level. Proposals to tax animal consumption have come forward in Denmark, Germany, and Sweden, though none of these bills passed (Withnall 2016; BBC News 2012; Schulz 2020; Relman 2019; Charlton 2019; Sverige Radio 2013). More localized initiatives to restructure choice, and without stigmatizing animal-eating preferences as socially undesirable and thus deserving of special taxation, appear to have been more successful. Most recently at the municipal level the city of Berkeley, California, has asked the state's public pension fund to divest from intensive agriculture and redirect investment to plant-based opportunities (Gor 2021b). And Berkeley and larger municipalities are leading action on adjusting the animal to plant-based ratio of foods the cities purchase in their delivery of services (Gor 2021a).

### *Common Theme Across Initiatives: Reducing Scope of Intensive ABFS*

The preceding proposals that restrict CAFOs and tax animal consumption or seek to divest from it are not identical. Notably, in addition to different details and legislative routes, the former are production-side oriented while

11 Currently, in the United Kingdom, the not-for-profit Humane Being is planning to mount a legal challenge against the British government to have it stop intensive animal farming (Hamlett 2021).

the latter target consumption. However, legislative proposals to eliminate further intensification in ABFS in terms of operational size and proposals to amplify consumer taxes on animal flesh, or have pension funds and purchasing menus divest from intensive farming however, are not categorically different. None are classic welfarist ones aimed at improving animal welfare through, for example, eliminating the most egregious practices of animal confinement, but are directed at abating the growth of intensive ABFS. The former is a direct effort to reduce the scope of the industry, while the latter constitute indirect efforts to achieve the same goal. They thus share the common theme of targeting behaviors that exploit animals. We may classify all of them as 'intensive ABFS-curbing' measures.

Despite the multiple merits of phasing out intensive ABFS, it is clear that the legislative initiatives above the municipal level have not been met with majority support from state or national lawmakers to pass into law or attracted the attention of the international law community. Would a concerted strategy linking such initiatives to the rule of law make a difference for those unswayed by the multitude of reasons to support intensive ABFS-curbing proposals? It is not clear. But creating such a narrative is worth considering as it underscores not simply the social undesirability of the practices at issue but also the principled *legal* basis for governments to respond and the international law community to take notice.

## A Plant-Forward Legality: Thickening the Rule of Law Beyond the Human

Where can such responsibility come from in countries with no constitutional provision to possibly be mined for its animal-protective principles? As I argue in this section, one answer is the unwritten constitutional principle of the rule of law that formally permeates legal cultures in Western societies, has emerged as an international law concept (Wohlwend 2021: 2–3), and also circulates through a global rule of law vision through a legal and professional elite (Rijpkema 2013: 196). More specifically, the acknowledgment that the rule of law requires that justice-oriented social mores translate into legal requirements can be tapped to develop an argument in favor of farmed animal protection.

### *Typical, Narrow Iteration*

A wide array of scholars, despite their ultimate divergent delineations of the scope of the rule of law, identify the following governance features inherited from the British originary version as a baseline for the concept: the formulation of clear and transparent laws accessible to the public (accessibility), government fairness and accountability in public law decision-making (order

not arbitrariness), the operation of administrative regimes pursuant to legal authority (legality versus illegality) where government actors are not themselves above the law (formal equality), and judicial independence and the availability of judicial review of executive and administrative action (judicial supremacy) (Liston 2005: 147–52; May 2021: 2351–2). This baseline for the rule of law envisions the rule of law as safeguard against government excess through the existence of a set of rules communicated in advance to the (human) public subject to the laws that are predictable and universally applied (Liston 2011: 40–1; Gordon 2010). It also envisions it as unrelated to morality (Craig 2017: 95–6). In both veins, the baseline is a narrow or 'thin' vision of the rule of law, and the more classic iteration adopted by Western governments (Peerenboom 2004: 2–5), as well as the international law community (Wohlwend 2021: 13).

### *Proactive Rule of Law*

However, there are more substantive visions of the rule of law and as May has noted, 'many states (and many other global actors), for much of the time, do seem to accept some version of the (thicker) rule of law' (May 2021: 2353). Thicker visions of the rule of law allow for morality to shape what the rule of law means (ibid; Tremblay 1997). They acknowledge that normative values are legitimate and even necessary in the legal arena and allow the law to shift to better reflect changing social values. Historically, this account of the rule of law assumes individual citizens have moral rights and duties with respect to one another and political rights against the state, broadly speaking (Dworkin 1986: 11–12). It also insists that those rights be recognized in positive law so they may be enforced (ibid). A binary distinction is not drawn between the rule of law and substantive justice. Rather, this view requires the rule of law to encapsulate and enforce moral rights (ibid). This view often rejects a strict dichotomy between form and substance (Craig 2017: 107; May 2021: 2351).

In some versions, the rule of law plays a catalyzing force, prompting governments to act rather than simply refrain from acting and enforcing certain rights protections, and can even mediate private relationships (Gordon 2010). This more 'proactive' rule of law version believes that the rule of law can be a tool that *compels* government action, and not just arrests it, typically in the service of realizing a more just society. Professing such a vision is to believe in larger social norms and a state duty to actively bring them into reality (Dworkin 1986). International law visions of the rule of law frequently endorse this generative role for nation-states to bring into effect new protections to guard against vulnerabilities in their populations, rather than simply maintain existing allocation of protections, helping to model typically a robust sense of an inclusive liberal democracy (Zimmermann 2017: 9;

Krygier 2014: 53). To the extent that '(i)nternational law can be understood as a value-based system', the meaning of the 'rule of law' in international law is similarly infused with social justice orientations despite the contestation over meaning amongst international law lawyers, and differences from the domestic national understandings (Krieger *et al* 2019: 12).

Some point out that a substantive rule of law, such as this, is really just an endorsement of a particular ideology of law (ibid: 109). Yet, thin, legal positivist conceptions of the rule of law are not immune from this critique – they are based on substantive liberal legal foundations, principally moral autonomy and respect for the individual (ibid). In that sense, a thin conception of the rule of law can also be seen as endorsing a particular theory of law and, itself, rests on particular understandings of human liberty, equality and dignity (Allan 2014: 155–8). In the context of the common law, these substantive foundations and values are critical tools for articulating formal legal rules and principles (ibid: 111). Ultimately, the debate surrounding whether minimalist of maximalist version of the rule of are to be preferred is not this chapter's focus. Rather, the present purpose is to point to the availability of a proactive vision to activate government response to animal vulnerability.

### *Connecting the Rule of Law to the Harms of ABFS*

A substantive, proactive vision of the rule of law has brought about considerable recent social change in terms of civil liberties and human rights in many countries around the world where judges, legislatures and populations have embraced this vision. What is its potential to apply to 'animal rights' issues such as intensive ABFS through serving as a legal basis for the measures discussed earlier in the second section? On the one hand, the potential seems minimal as the common law legal system in which the concept is rooted is an anthropocentric one (Deckha 2013: 784, 801, 810), and judicial cases and scholars promoting a thick version of the rule of law have done so in the context of considering *human* rights claims (Coen 2018). It is not simple to integrate animal interests into constitutional cultures premised on the dignity of the human above all others (Eisen 2017). Even a thin version of the rule of law is rarely connected to animal interests.[12]

On the other hand, the rule of law is a capacious, open-ended, and oft-contested concept amenable to a variety of legal and political meanings and there is no precedent in common law jurisdictions that *explicitly* restricts the norm-generating potential of the concept to human interests. It is a

12 An exception to this occurred in the dissenting judgment of the Chief Justice of the Alberta Court of Appeal in *Reece v Edmonton (City)* 2011 ABCA 238. For discussion of the groundbreaking nature of this dissent, please see Deckha 2013.

foundational concept that does not bring to mind an image of a 'human'; inspected from this angle, the rule of law is less tethered to humans and human claims than the concept of personhood arguably is (Deckha 2021: 87–96). The rule of law can thus conceivably promote other-than-human interests alongside and independently of human interests. Ideas of core constitutional national values and new international law norms can transcend the human subject even though such readings of constitutionalism or international law are not traditional or mainstream, particularly where the nonhuman subjects dwell in an intensely vulnerable legal state (Eisen 2017: 910).

This outlook about the rule of law's potential to ameliorate animals' socio-legal predicament is reflected in a recent resolution from the American Bar Association,

> urg(ing) all nations to negotiate an international convention for the protection of animals that establishes standards for the proper care and treatment of all animals to protect public health, the environment, and animal wellbeing.
>
> *(American Bar Association 2021)*

The resolution calls for an International Convention for the Protection of Animals (ICPA) and also 'encourage(s) the U.S. State Department to initiate and take a leadership role in such negotiations' (ibid). The resolution came about in the midst of the COVID-19 pandemic and cites the pandemic and its devastating fallout as an urgent 'wake-up call' for governments to act to restrict and regulate certain human–animal practices to avoid future potential of zoonotic disease (ibid: 11).[13] Most notably for present purposes, part of the rationale the ABA gives for the resolution invokes the rule of law. Specifically, it is stated in an appended report that the resolution promotes one of the goals of the ABA, namely 'to "advance the rule of law" by "work[ing] for just laws" ' (ibid: 2 citing ABA Mission and Goals). The report supporting the resolution identifies the lack of minimal international standardized protection for animals as relevant to the urgent global social problems presented by zoonoses, environmental devastation and animals' status as sentient beings (American Bar Association 2021: 2, 6–9). The report also cites the 'ethical imperative to treat animals with proper care and respect' as a further reason that the international convention it envisions for animals would be 'just' (ibid: 2fn14).

The ABA's ICPA is not directed at restricting ABFS but only 'the capturing or hunting of high-risk wildlife' and some 'sale and use of wild animals

13 The Resolution also notes the earlier work by Professor David Favre and the Global Animal Law Association in calling for similar measures (ibid: 3, citing Favre 2012).

for commercial, culinary, or medical purposes'; it is also directed at *regulating* 'high-risk wildlife management', and the trade, use and transporting of wild animals (ibid: 4). It is consequently topically different and also primarily a welfarist measure and thus differently oriented than the intensive animal agricultural measures discussed earlier. However, these qualities do not preclude the rule of law rationale the resolution's supporting report highlights from applying to other instances of human-animal relations.

The reasons the ABA's supporting report gives for the rule of law basis for the ICPA resolution – promotion of public health, environmental reasons, animal well-being and ethical obligations – also relate to the problem of ABFS, as we have seen. The absence of legal protection is also part of the rule of law argument the ABA crafts in its report, an absence that is equally pertinent in many national jurisdictions regarding lack of protection for intensively farmed animals (Blattner 2019: 347–54; Sankoff 2019: 7–10; Cassuto 2012: 226, 236). But the rule of law rationale for regulation or restriction can even be invoked in those regions where there is considerably more regulation in favor of farmed animals (such as at the European Union level) than elsewhere globally. Improving regulation in favor of animals as the ICPA resolution envisions, but also restricting certain practices or industries altogether, aids animal well-being and makes inroads into other social goals such as public health and environmental issues as already referenced. It is thus reasonable to transpose the rule of law rationale that the ABA assembles as a partial basis for the legal need for an ICPA to provide a legal basis for the measures discussed earlier. In other words, we can view the rule of law as connected to and in favor of the ABFS-curbing measures discussed earlier.

## Conclusion

Bucolic myths about ABFS help shield intensive animal agriculture from government regulation, public scrutiny and much-needed social redirection toward plant-based societies. Feminist new materialism and posthumanist feminist scholarship aids in exposing these myths about what is 'natural' and thus normative, but it is necessary to turn to more animal-centered theories that impugn the industries that exploit animals to theorize legal strategies that can curb these industries. It is possible to then apply this anti-animal exploitation outlook to work within anthropocentric legal systems that treat animals as property and deploy existing legal principles in unconventional ways to help abolish intensive agricultural farming and its multiple adverse effects.

One such foundational principle is the rule of law. The idea of the rule of law as a higher-order legality concept translates across almost every nation-state and at the international level. Existing widespread respect for this concept amongst jurists as well as jurisprudential precedent in favor of a thicker

vision of the rule of law can be tapped in favor of animal-friendly legislation. A proactive rule of law recognizes the inseparability of ethical values, rights and legal theory from the form and content of the rule of law, and demands our lawmaking institutions recognize these substantive elements in positive law need not be anthropocentric in design our outlook. This social-justice oriented version of the rule of law can provide a legal tool to help persuade recalcitrant lawmakers to support legislative initiatives targeting intensive animal farming. Whether such invocation makes pragmatic and ethical sense is a question for further research that this chapter has shown is worth exploring. The present analysis illuminates that such legislative initiatives implicate the rule of law as understood by legal jurists at a national level, and at an international understanding of the global rule of law. It is a legal strategy that can assist in not only highlighting ABFS as a grave social problem in need of a remedy, but also in connecting this problem to the foundational and exalted principles of legality and social justice and thus spotlighting the legal urgency by which governments and the international law community must act to provide a remedy.

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