

Should Environmental Law Learn from Animal Law? Compassion as a Guiding Principle for International Environmental Law Instead of Sustainable Development

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Article abstract

Environmental law and animal law share many common elements and goals, but also exhibit many fundamental differences. Generally, conversations about the two are primarily concerned with what animal law can learn from environmental law. However, if one accepts the argument that environmental law needs to be, at the very least, reformed in order to afford real protection to the environment, or even revolutionized, then perhaps environmental law can also learn from animal law. What would the main lesson be? I argue that a turn to compassion, rather than sustainable development, as a guiding principle for international environmental law and its related scholarly discourse could be one of the main contributions offered by animal law. To illustrate this argument, I first present ecofeminist animal theory's critique of the environmental movement. I expose the problematic nature of the concept of "sustainable development", from an ecofeminist standpoint. I then use ecofeminist animal theorist Deane Curtin's compassionate practice framework to develop the idea that another guiding principle for international environmental law must be adopted, drawing also on other contributions from ecofeminist animal theorists. Finally, I demonstrate how a compassionate guiding principle is already present in different animal law instruments, using examples of existing international legal norms on animal welfare, and insisting on the theme of the recognition of non-human animals as relational individuals.

SHOULD ENVIRONMENTAL LAW LEARN FROM ANIMAL LAW? COMPASSION AS A GUIDING PRINCIPLE FOR INTERNATIONAL ENVIRONMENTAL LAW INSTEAD OF SUSTAINABLE DEVELOPMENT

*Sabrina Tremblay-Huet**

Environmental law and animal law share many common elements and goals, but also exhibit many fundamental differences. Generally, conversations about the two are primarily concerned with what animal law can learn from environmental law. However, if one accepts the argument that environmental law needs to be, at the very least, reformed in order to afford real protection to the environment, or even revolutionized, then perhaps environmental law can also learn from animal law. What would the main lesson be? I argue that a turn to compassion, rather than sustainable development, as a guiding principle for international environmental law and its related scholarly discourse could be one of the main contributions offered by animal law. To illustrate this argument, I first present ecofeminist animal theory's critique of the environmental movement. I expose the problematic nature of the concept of "sustainable development", from an ecofeminist standpoint. I then use ecofeminist animal theorist Deane Curtin's compassionate practice framework to develop the idea that another guiding principle for international environmental law must be adopted, drawing also on other contributions from ecofeminist animal theorists. Finally, I demonstrate how a compassionate guiding principle is already present in different animal law instruments, using examples of existing international legal norms on animal welfare, and insisting on the theme of the recognition of non-human animals as relational individuals.

Le droit de l'environnement et le droit animal partagent plusieurs éléments centraux et objectifs, mais présentent également plusieurs différences fondamentales. Généralement, les discussions sur ces deux régimes juridiques concernent majoritairement ce que le droit animal peut apprendre du droit de l'environnement. Or, si l'on accepte l'argument que le droit de l'environnement doit, au strict minimum, être réformé afin d'offrir une réelle protection à l'environnement, voire même subir une révolution, il s'en trouve peut-être que le droit de l'environnement peut également apprendre du droit animal. Quelle en serait la principale leçon? J'avance l'argument qu'un changement de principe directeur, du développement durable vers la compassion, pourrait être la principale contribution offerte par le droit animal au droit international de l'environnement et sa littérature. Pour illustrer cet argument, je présente d'abord la critique du mouvement environnemental de l'approche de la théorie animale écoféministe. Je démontre la nature problématique du concept de « développement durable » d'un point de vue écoféministe. J'utilise ensuite le concept de compassion tel que formulé par Deane Curtin, associé à l'approche de la théorie animale écoféministe, pour développer l'idée selon laquelle un principe directeur alternatif doit être adopté en droit international de l'environnement, m'appuyant sur d'autres contributions d'auteurs situés dans la même approche théorique. Finalement, je démontre comment un principe directeur de compassion existe déjà au sein de différents instruments de droit animal, utilisant des exemples de normes internationales existantes portant sur le bien-être animal, et insistant sur le thème de la reconnaissance des animaux non-humains en tant qu'individus relationnels.

El derecho ambiental y el derecho animal comparten muchos elementos y objetivos comunes, pero también exhiben muchas diferencias fundamentales. Generalmente, las conversaciones sobre los dos se refieren principalmente a lo que el derecho animal puede aprender de la ley ambiental. Sin embargo, si uno acepta

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el argumento de que el derecho ambiental debe ser, como mínimo, reformado para brindar una protección real al medio ambiente, o incluso revolucionado, entonces quizás la ley ambiental también puede aprender de la ley animal. ¿Cuál sería la lección principal? Sostengo que un cambio hacia la compasión, en lugar del desarrollo sostenible, como un principio rector para el derecho ambiental internacional y su discurso académico relacionado podría ser una de las principales contribuciones ofrecidas por el derecho animal. Para ilustrar este argumento, primero presento la crítica de la teoría animal ecofeminista del movimiento ambientalista. Expongo la naturaleza problemática del concepto de "desarrollo sostenible" desde un punto de vista ecofeminista. Luego uso el marco de práctica compasiva de la terapeuta ecofeminista de animales de Deane Curtin para desarrollar la idea de que se debe adoptar otro principio rector para el derecho ambiental internacional, basándose también en otras contribuciones de los teóricos ecofeministas de los animales. Finalmente, demuestro cómo un principio guía compasivo ya está presente en diferentes instrumentos de derecho animal, usando ejemplos de normas legales internacionales existentes sobre bienestar animal, e insistiendo en el tema del reconocimiento de animales no humanos como individuos relacionales.

In 2014, the documentary “Cowspiracy” was released,¹ and soon made available on the widely popular streaming website Netflix.² In it, the filmmaker, Kip Anderson, becomes interested in the prominent role animal agriculture plays in environmental degradation. When he begins his quest to interview important actors in the environmental protection movement, he stumbles upon “an intentional refusal to discuss the issue of animal agriculture.”³

In February 2014, the news organization “Mother Jones” published an article entitled “It Takes How Much Water to Grow an Almond?!”⁴ about water use for fruits, vegetables and nuts in the context of the California drought, which had been declared a state emergency a few weeks before.⁵ The article revealed that 1.1 gallons of water is needed to produce one almond.⁶ However, meat and dairy production were conspicuously excluded from the reflection, and other crops did not fare much better, causing some to argue that “almonds became a scapegoat for California’s drought.”⁷ Scattered responses can be found pointing to the much more drastic water use necessary for animal agriculture, including for the food that is grown but destined almost exclusively to feeding farm animals, such as alfalfa.⁸

In March 2017, a headline circulated in environmental protection networks: “New Zealand river granted same legal rights as human being.”⁹ A week later, another headline announced the same situation in India: “Ganges and Yamuna rivers granted same legal rights as human beings.”¹⁰ On June 8th, 2017, the First Judicial Department of the Appellate Division of the New York Supreme Court eluded the question as to whether personhood could be granted to two chimpanzees in captivity, Kiko and Tommy, on a procedural basis.¹¹ The Nonhuman Rights Project¹² sought for the Court to issue a writ of *habeas corpus*, in order to determine the legality of their

¹ Watch the documentary “Cowspiracy” online at: <www.cowspiracy.com/>.

² “Cowspiracy: The Sustainability Secret” (2014), online: Netflix <www.netflix.com/title/80033772>.

³ “About”, online: Cowspiracy <www.cowspiracy.com/about>.

⁴ Alex Park & Julia Lurie, “It Takes How Much Water to Grow an Almond?!” *Mother Jones* (24 February 2014), online: Mother Jones <www.motherjones.com/environment/2014/02/wheres-californias-water-going/>.

⁵ Office of Governor Edmund G Brown Jr, “Governor Brown Declares Drought State of Emergency” (17 January 2014), online: Office of Governor Edmund G. Brown Jr. <www.gov.ca.gov/news.php?id=18368>.

⁶ *Ibid.*

⁷ Richard Gonzales, “How Almonds Became A Scapegoat For California's Drought” *The Salt* (16 April 2015), online: NPR <www.npr.org/sections/thesalt/2015/04/16/399958203/how-almonds-became-a-scapegoat-for-californias-drought>.

⁸ Erin Brodwin, “One Chart Sums Up the Real Problem in the California Drought — And it Isn't Almonds” *Business Insider* (13 April 2015), online: Business Insider <www.businessinsider.com/real-villain-in-the-california-drought-isnt-almonds--its-red-meat-2015-4>.

⁹ Eleanor Ainge Roy, “New Zealand River Granted Same Legal Rights as Human Being”, *The Guardian* (16 March 2017), online: The Guardian <www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>.

¹⁰ Michael Safi, “Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings”, *The Guardian* (21 March 2017), online: The Guardian <www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>.

¹¹ *Matter of Nonhuman Rights Project, Inc. v Lavery* (NY Slip Op 2017).

¹² See the “Nonhuman Rights Project”, online: NHRP <www.nonhumanrights.org/>.

detention (captivity). The decision quoted a previous decision, *People ex rel. Nonhuman Rights Project, Inc. v Lavery*, in which the Court held that unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights — such as the fundamental right to liberty protected by the writ of habeas corpus — that have been afforded to human beings.¹³

In New Zealand, while a river has been granted personhood, non-human animals are now recognized as sentient beings by an amendment to the *Animal Welfare Act*, but remain the property of humans who are in charge of their protection.¹⁴ Section 14 of the *Te Awa Tupua Bill* declares that the river “is a legal person and has all the rights, powers, duties, and liabilities of a legal person” and specifies that “[t]he rights, powers, and duties of *Te Awa Tupua* must be exercised or performed, and responsibility for its liabilities must be taken, by *Te Pou Tupua* [the river’s human representatives] on behalf of, and in the name of, *Te Awa Tupua*.”¹⁵ Even if one argues that the effects of these legal statuses are not concomitant with the discursive forces of the terms “personhood” and “property,” their symbolism still speaks volumes in social terms.

Thomas G. Kelch identifies animal law with the micro perspective and environmental law with the macro perspective. Animal law is preoccupied with “the suffering, pain, and distress of an individual animal or groups of animals.”¹⁶ Environmental law, for its part, is preoccupied with “the general deterioration of the natural in our environment.”¹⁷ Ontologically, the field of environmental law usually includes non-human animals. But for many, the “macro” perspective does not correspond to animal law’s concerns, as Kelch illustrates using the example of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*.¹⁸ *CITES* ultimately seeks to protect species as a whole, rather than the wellbeing of individual animals. From an animal law perspective, this is not a successful treaty.

Bruce Myers and Joyce Tischler offer examples of issues of interest in both fields in their contribution on the commonalities and differences between animal and environmental law,¹⁹ such as “the regulation of toxic chemicals in commerce.”²⁰

¹³ *People ex rel Nonhuman Rights Project, Inc v Lavery* (NY Slip Op 2014).

¹⁴ *Animal Welfare Amendment Bill* (NZ), 2015/107.

¹⁵ *Te Awa Tupua (Whanganui River Claims Settlement) Bill* (NZ), 2016/129.

¹⁶ Thomas G Kelch, “CITES, Globalization, and the Future of Animal Law” in Randall Abate, ed, *What Can Animal Law Learn from Environmental Law?* (Washington: Environmental Law Institute, 2015) 269 at 270.

¹⁷ *Ibid.*

¹⁸ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 UNTS 243 [*CITES*].

¹⁹ Bruce Myers & Joyce Tischler, “Animal Protection and Environmentalism: The Time Has Come to Be More Than Just Friends” in Randall Abate, ed, *What Can Animal Law Learn from Environmental Law?* (Washington: Environmental Law Institute, 2015) 387 at 398–404.

²⁰ *Ibid* at 396.

According to them, this issue would benefit by being addressed by both those concerned with animal protection and those concerned with environmental protection: “Environmental advocates want a law that works, and animal advocates want a testing regime that minimizes or eliminates the use of animals in chemical toxicity testing.”²¹ But the point remains that an issue can be important for both fields for very different reasons. This difference in motivation is also a source of debate in the case of greenhouse gas emissions; an animal protection perspective favours concentrating on the industrial farming of products of animal origin, while an environmental protection perspective favours concentrating on energy and transportation.²² For Myers and Tischler, “animal protectionists see environmentalists ignoring an anthropogenic driver of the climate crisis; environmentalists see a risk of diluting the necessary focus on the burning of fossil fuels in an already difficult political climate.”²³

In 2015, a collective volume entitled *What Can Animal Law Learn from Environmental Law*,²⁴ edited by Randall S. Abate, was published. It took into account the frequently advanced argument that while environmental law and animal law are often conflated, due to their numerous points of convergence, environmental law has generally been taken more seriously, as evidenced by legislation, case law, and the court of public opinion. The volume thus includes contributions from American, international, comparative and prospective perspectives on how animal law can further its cause by learning from environmental law’s successes and pitfalls.

But what if we turn that question on its head and ask: what can environmental law learn from animal law? I argue that a turn to compassion, instead of “sustainable development,” as a guiding principle for international environmental law and its related scholarly discourse, could be one of the main contributions offered by animal law. This is certainly not to say that environmental lawyers or legal academics are not compassionate. Rather, the argument is that environmental law, as it is developed, interpreted and reproduced in the current neoliberal context, frames the discussion in a way that excludes compassionate concerns for the condition of non-human animals. I argue that sustainable development is a highly problematic concept not only in terms of environmental protection at large, but also for contextually considering the needs and desires of individual, relational non-human animals. The condition of humans, after all, is implicitly or explicitly included in any mention of sustainability. However, sustainable development pervades international environmental law norms, discourses and practices, as one of its key principles.

The United Nations Rio Declaration on Environment and Development,²⁵ constituting a major foundational text of modern international environmental law, is considered “the canonical formulation of the legal concept of sustainable

²¹ *Ibid.*

²² *Ibid* at 410.

²³ *Ibid* at 411.

²⁴ Randall Abate, ed, *What Can Animal Law Learn from Environmental Law?* (Washington: Environmental Law Institute, 2015).

²⁵ *United Nations Rio Declaration on Environment and Development*, GA Res, UNCED, 1992, UN Doc A/CONF.151/26 (vol. I), 31 ILM 874 [*Rio Declaration*].

development as well as of the main principles of international environmental law underpinning treaties, treaty negotiations, domestic legislation, and a now substantial body of domestic and international jurisprudence.”²⁶ Its Principle 1 states: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” Jorge E. Viñuales locates the “birth” of the *Rio Declaration* in the seminal United Nations World Commission on Environmental and Development’s *Our Common Future* report,²⁷ as one of its recommendations was the drafting of a convention on sustainable development.²⁸ Since its inception, the concept of sustainable development has been integrated in countless international and national legal norms, of which examples are presented in section 1 of this article. To state the obvious, sustainable development as a guiding principle for environmental law has been non-unanimous. Anthropologist Arturo Escobar wrote in his influential volume *Encountering Development: The Making and Unmaking of the Third World*, in reference to *Our Common Future*, that “[t]he report, after all, focuses less on the negative consequences of economic growth on the environment than on the effects of environmental degradation on growth and potential for growth. It is growth (read: capitalist market expansion), and not the environment, that has to be sustained.”²⁹ Ecofeminists, thus amongst others, have strongly criticized this concept, as will be demonstrated below.

Environmental law and animal law are often considered natural allies. However, “environmental ethicists routinely claim that the practical implications of animal welfare and animal rights views would be drastically anti-environmental.”³⁰ I argue that to truly depart from environmental law’s anthropocentrism, the notion of speciesism must be seriously considered. Ecofeminist animal theory, whose principles are reflected in many animal law instruments, could contribute to the adoption of contextual compassion as a guiding principle for international environmental law as a manner to accomplish this. This is in line with the theme of this special issue, which is critical approaches to international environmental law. If one accepts that critical theory means questioning the naturalized and implicit biases of a way of thinking about a subject, then critical environmental law/legal theory should bring one to question the inherent biases it fosters towards non-human animals, either by ignoring them ontologically, by conflating them with “nature,” or by considering them only as resources to be exploited, rather than considering them as individuals whose care must be evaluated contextually.

To illustrate this argument, I draw on contributions from ecofeminism, which is a strand of feminism that focuses on the similarities in the devaluation of nature and

²⁶ Jorge E Viñuales, ed, *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015) at 2.

²⁷ World Commission On Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

²⁸ Viñuales, *supra* note 26 at 9.

²⁹ Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton: Princeton University Press, 1995) at 195.

³⁰ Gary Varner, “Environmental Ethics, Hunting, and the Place of Animals” in Tom L Beauchamp & RG Frey, eds, *The Oxford Handbook of Animal Ethics* (New York: Oxford University Press, 2014) 855 at 855.

of women.³¹ In particular, I draw specifically on the sub-category of ecofeminist animal theory. I insist on this sub-category of ecofeminism rather than ecofeminism as a whole, and rather than animal rights theory.³² Ecofeminism “helps us imagine healthier relationships; stresses the need to attend to context over universal judgements; and argues for the importance of care as well as justice, emotion as well as rationality, in working to undo the logic of domination and its material and practical implications.”³³ However, it is usually aimed at environmental law and policy in general terms, and is thus not often a good tool to theoretically conceptualize non-human animals as individuals. Ecofeminist animal theory redresses this. This theoretical sub-category is one of the only tools within critical environmental theories that truly considers the needs and desires of individual non-human animals.

In this article, I first present the ecofeminist animal theory critique of the environmental movement. I expose the problematic nature of the concept of “sustainable development,” from an ecofeminist standpoint. I then use ecofeminist Deane Curtin’s compassionate practice framework to develop the idea that another guiding principle for international environmental law must be adopted, drawing also on other contributions from ecofeminist animal theorists. Finally, I demonstrate how a compassionate guiding principle is already present in different animal law instruments, using examples of existing international legal norms on animal welfare, and insisting on the theme of the recognition of non-human animals as relational individuals. This section provides a brief overview of what norms animal law could contribute to, or modify in international environmental law, with the objective of integrating the principle of compassion. Its aim is to demonstrate how compassion can be integrated in legal norms in practice.

I. The Environment Through the Lens of Ecofeminist Animal Theory

I use the term “ecofeminist animal theory” following Karen S. Emmerman, who points out that “not all ecofeminist theory is inclusive of animals’ concerns.”³⁴ Indeed, within the ecofeminist movement itself, the accepted uses of non-human animals for human benefit have not been unanimous, constituting a “delicate matter,” to use Noël Sturgeon’s characterization of the contentious issue.³⁵ Sturgeon points to

³¹ Marti Kheel, *Nature Ethics* (Lanham, MD: Rowman & Littlefield Publishers, 2007) at 8.

³² The problematic nature of “animal rights,” as theorized by ecofeminist animal theory, is described in Part II.

³³ Carol J Adams & Lori Gruen, “Introduction” in Carol J Adams & Lori Gruen, eds, *Ecofeminism: Feminist Intersections with Other Animals & the Earth* (New York: Bloomsbury, 2014) 1 at 1.

³⁴ Karen S Emmerman, “Inter-Animal Moral Conflicts and Moral Repair: A Contextualized Ecofeminist Approach in Action” in Carol J Adams & Lori Gruen, eds, *Ecofeminism: Feminist Intersections with Other Animals & the Earth* (New York: Bloomsbury, 2014) 159 at 168; Greta Gaard’s term of “vegetarian ecofeminism” is also frequently used: Greta Gaard, “Vegetarian Ecofeminism: A Review Essay” (2002) 23:3 *Frontiers* 117.

³⁵ Noël Sturgeon, “Considering Animals: Kheel’s Nature Ethics and Animal Debates in Ecofeminism” (2009) 14:2 *Ethics & the Environment* 153 at 153.

the themes of “ecological holism, individualistic frameworks, cultural difference, social privilege and ethics of care” as frameworks around which opposing views clash within the relatively small circle of ecofeminists concerned with human/non-human animal relations.³⁶ Carol J. Adams and Josephine Donovan use the term “feminist ethic of care” in their Reader on the topic, arguing that under such a perspective, non-human animals are individuals with feelings that they can communicate, the effect being that humans have contextual moral obligations towards them.³⁷ They also specify that this approach differs from the animal welfare approach, mainly due to the fact that it is politically engaged against “the political and economic systems that are causing the suffering [of non-human animals].”³⁸ This specificity parallels critical legal theory’s commitment to political theorizing and to deconstructing structures as wholes, rather than only their components.³⁹

The 1993 edited volume *Ecofeminism: Women, Animals, Nature* was one of the first to offer “a theoretical bridge for women working in the related movements of environmentalism, animal liberation, and feminism.”⁴⁰ Greta Gaard’s introductory chapter underlines how the devaluation of “whatever is associated with women, emotion, animals, nature, and the body” combined with the dual valuation of “those things associated with men, reason, humans, culture, and the mind [have] served as justification for the domination of women, animals, and the earth.”⁴¹ The volume serves as a plea for ecofeminism to directly include non-human animals in feminist analyses about nature,⁴² a plea that has been answered by numerous theorists in the years following its publication. Lori Gruen, in the same volume, argues that should non-human animals be excluded from ecofeminism, the latter “would run the risk of engaging in the sort of exclusionary theorizing that it ostensibly rejects.”⁴³

A prominent example of ecofeminist animal theory is the work of Marti Kheel, who denounced concerns with the protection of general and large categories promoted by holist nature philosophy, such as “species” or

³⁶ *Ibid.*

³⁷ Josephine Donovan & Carol J Adams, “Introduction” in Josephine Donovan & Carol J Adams, eds, *The Feminist Care Tradition in Animal Ethics* (New York: Columbia University Press, 2007) 1 at 2-3. The editors distinguish ecofeminist authors who adopt an antispeciesist stance, such as Greta Gaard and Lori Gruen, with those who do not, only the former corresponding to a feminist ethic of care (at 13).

³⁸ *Ibid.* at 3.

³⁹ For example, the Critical Legal Studies (CLS) approach’s most known expression is “law is politics,” “meant to express a fundamental criticism of the alleged objectivity and neutrality of the law. Legal claims do not exist in a vacuum and must be analysed in their context, as most of the time the particular setting in which they arise is characterized by a complex set of ‘moral, epistemological, and empirical assumptions.’”: Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016) at 136.

⁴⁰ Greta Gaard, ed, *Ecofeminism: Women, Animals, Nature* (Philadelphia: Temple University Press, 1993).

⁴¹ Greta Gaard, “Living Interconnections with Animals and Nature” in Greta Gaard, ed, *Ecofeminism: Women, Animals, Nature* (Philadelphia: Temple University Press, 1993) 1 at 5.

⁴² *Ibid.* at 6.

⁴³ Lori Gruen, “Dismantling Oppression: An Analysis of the Connection Between Women and Animals” in Greta Gaard, ed, *Ecofeminism: Women, Animals, Nature* (Philadelphia: Temple University Press, 1993) 60 at 61.

“ecosystems” in, amongst many other texts, *Nature Ethics*.⁴⁴ An example of this philosophy would be animal experimentation with the aim of rendering the environment “safe.” Instead, she believed one should be concerned with the care of non-human animals as individual beings.⁴⁵ Kheel argues: in expanding their moral allegiance to the larger “whole,” holist nature philosophers reflect a masculinist orientation that fails to incorporate care and empathy for individual other-than-human animals. I contrast the notion of *care-taking* for the whole of the ecosystem with direct, unmediated care for the whole of the ecosystem with direct, unmediated care for and about individual beings. Rather than dismissing this absence of concern for individuals as an oversight, I explore whether it might have deeper, psychological roots based on the construct *masculine identity*.⁴⁶

Therefore, in addition to proposing a critique of anthropocentrism, she further proposes one of androcentrism.⁴⁷ Kheel calls for an ecology/ethics of care and empathy, and as such, she believes that “feelings of care for individual animals are best fostered when humans have the opportunity to perceive them as subjective beings.”⁴⁸ She argues for “*contextualized care*,” as sometimes, care would mean to simply leave non-human wild animals free from human intervention.⁴⁹

In terms of international environmental law, ecofeminist animal theory is highly relevant. For example, the preamble of *CITES*⁵⁰ states: “Conscious of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view.” Kheel pointed out that the use of “value,” when referring to that of non-human animals, “connote[s] an economic framework by which humans rate the rest of the natural world in order to determine who is ‘owed’ rights or responsibilities.”⁵¹ Maneesha Deckha has also raised the incoherence of law not recognizing non-human animals as persons, yet affording this legal privilege to corporations, in “[t]he one major area where law departs from its anthropocentric focus.”⁵²

In the national context, Deckha uses culture as an additional vector of oppression to be analyzed in legal relations. For example, she argues that a recent Canadian case before the Court of Appeal of Alberta in which the treatment of an elephant in a zoo was challenged⁵³ confronted the judges with the social reality that the elephant in question, Lucy, belongs to one of the nonhuman “wild” species that Westerners commonly romanticize rather than stigmatize. The realization that she is now captive and suffering disturbs culturally informed sensibilities in a way that the living conditions

⁴⁴ Kheel, *supra* note 31.

⁴⁵ *Ibid* at 2.

⁴⁶ *Ibid*.

⁴⁷ *Ibid* at 4.

⁴⁸ *Ibid* at 17.

⁴⁹ *Ibid* at 226.

⁵⁰ *CITES*, *supra* note 18.

⁵¹ Kheel, *supra* note 31 at 8.

⁵² Maneesha Deckha, “Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm” (2013) 50:4 *Alta L Rev* 783 at 784.

⁵³ *Reece v Edmonton (City)*, 2011 ABCA 238.

of other, less culturally popular, animals would not.⁵⁴

In *Recasting Our “Wild” Neighbours: Toward an Egalitarian Legal Approach to Urban Wildlife Conflicts*,⁵⁵ Deckha exposes, with Erin Pritchard, how urban wildlife control laws can participate in logics reproducing racism, sexism, and speciesism.⁵⁶ Use of the term “wild” can “provide an especially fertile illustration of the links between animal subordination and gender and racial/cultural subordination,” as it is not domesticated and thus under the control of humans,⁵⁷ nor is it “civilized.”⁵⁸ In urban contexts, the “accepted urban manifestations of the ‘wild’ [animals]” are those who remain under the control of humans.⁵⁹ Parallels abound in terms of the control of women, racialized bodies, and environmental “resources.” In other words, the dominant actors of a society will accept the presence of “wild” non-human animals to the extent that they still possess control over them, whereas they will try to eliminate the presence of those for which they do not succeed in gaining this control. In addition to urban, non-human, non-domesticated animals, this process of objectification and subordination can be found in numerous other contexts.

While ecofeminist animal theory is concerned with relational and contextual considerations, sustainable development guides most international efforts relating to the environment. Following the “Millennium Development Goals,” the “Sustainable Development Goals” were adopted in 2015, as part of the *2030 Agenda for Sustainable Development*.⁶⁰ The language used denotes the logic behind sustainable development, for example with terms such as “resource,” which ultimately refers to human benefit. An illustration of this can be found within the description of “Goal 14 – Life Below Water.” The introduction to this goal is the following:

The world’s oceans – their temperature, chemistry, currents and life – drive global systems that make the Earth habitable for humankind.

Our rainwater, drinking water, weather, climate, coastlines, much of our food, and even the oxygen in the air we breathe, are all ultimately provided and regulated by the sea. Throughout history, oceans and seas have been vital conduits for trade and transportation.

Careful management of this essential global resource is a key feature of a sustainable future.⁶¹

Thus, even water consumption is related to commerce, again reinforcing the importance of the “development” component of “sustainable development.”

⁵⁴ Deckha, *supra* note 52 at 805.

⁵⁵ Maneesha Deckha & Erin Pritchard, “Recasting Our “Wild” Neighbours: Toward an Egalitarian Legal Approach to Urban Wildlife Conflicts” (2016) 49:1 UBC L Rev 161.

⁵⁶ *Ibid* at 162.

⁵⁷ *Ibid* at 169.

⁵⁸ *Ibid* at 170.

⁵⁹ *Ibid* at 175.

⁶⁰ United Nations, “Sustainable Development Goals” (2015), online: United Nations <www.un.org/sustainabledevelopment/sustainable-development-goals/#>.

⁶¹ United Nations, “Goal 14: Conserve and sustainably use the oceans, seas and marine resources”, online: United Nations <www.un.org/sustainabledevelopment/oceans/>.

The United Nations also has a *Division for Sustainable Development*, whose objective is to implement the “internationally agreed development goals,” including the Sustainable Development Goals.⁶² Furthermore, in the *United Nations Framework Convention on Climate Change*,⁶³ Article 3 sets out the principles that should guide the Parties in implementing the instrument. Paragraph 1 states: “The Parties should protect the climate system for the benefit of present and future generations of humankind [...]” Paragraph 4 states: “The Parties have a right to, and should, promote sustainable development [...] taking into account that economic development is essential for adopting measures to address climate change.” Finally, paragraph 5 states:

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change.

Linking environment protection with economic growth, however, is problematic for many ecofeminists and other critical theorists and activists. Martha McMahon, more than twenty years ago, presented ecofeminism as such:

In contrast to the abstract model of the individual offered by neoclassical economics, ecofeminism offers an embodied, sensual subject intimately connected to others and nature in time and space — the concrete here and now. It works from the ground up.⁶⁴

This definition is thus at odds with a guiding principle that celebrates neoliberal economic growth above all other concerns.⁶⁵

An example of an ecofeminist case study analysis of sustainable development is Ana Isla’s article that “examines the adverse socio-economic-ecological impacts of biopiracy [bioprospecting] on local communities resulting from sustainable development, a green-sounding term that is being used to expand global

⁶² United Nations, “Division for Sustainable Development Goals”, online: United Nations <sustainabledevelopment.un.org/about>.

⁶³ *United Nations Framework Convention on Climate Change*, 5 September 1992, 771 UNTS 107 (entry into force: 21 March 1994).

⁶⁴ Martha McMahon, “From the Ground Up: Ecofeminism and Ecological Economics” (1997) 20:2 *Ecological Economics* 163 at 164. Interestingly, she argues “that the model of ‘economic man’ as a separate, autonomous, detached, competitive and primarily self-interested individual is antifeminist, anti ecological, and oppressive of those who are ‘other’ than economic man. Yet I show that while this notion of the individual is falsely universalizing, it is also locally and partially true. It is the partiality of its truth that makes neo-classical economics such a powerful intellectual and political tool.”

⁶⁵ In their 2017 article, Federico Demaria and Ashish Kothari describe sustainable development as “a concept based on false consensus” and “an oxymoron.” They explain how economic growth came to be seen as reconciled with environmental protection, when rather than concentrating on wealth in the Global North, “[t]he focus supposedly became poverty in developing countries” in the years following the publication of the United Nations World Commission on Environmental and Development’s report, *Our Common Future*. Federico Demaria & Ashish Kothari, “The Post-Development Dictionary Agenda: Paths to the Pluriverse” (2017) 38: 12 *Third World Quarterly* 2588 at 2590-92.

capitalism” in the context of Costa Rica.⁶⁶ Isla presents the “debt-for-nature” swaps, occurring under the aegis of the International Monetary Fund (IMF) and the World Bank. Under such schemes, governments of countries that are indebted to other countries can swap parts of their loans’ reimbursement obligations with, in the case of Costa Rica, “Conservation Areas.”⁶⁷ On such lands, vast parts become “nucleus areas,” which are then “reserved for research into biodiversity, singling these lands out for industrial research on behalf of multinational corporations.”⁶⁸ The author links this practice with the fact that rural women, holders of vast knowledge on medicinal uses of plants, have been counselled, under the sustainable development framework, to create micro-enterprises to market this knowledge with the help of loans.⁶⁹ She then demonstrates how “when a market system to produce medicinal plants and organic agriculture are imposed on indigenous cultures, they shift from being a source of women’s power—remembering that it was women who provided *cocimientos*—to being a source of women’s exploitation.”⁷⁰ Through these processes, Indigenous women are forced, for the sake of capital accumulation, to abandon food production for their families, working long hours for a minimal income.⁷¹

All, then, do not consider sustainable development a panacea. What could environmental law look like if, rather than sustainable development, compassion was its guiding principle? Could a turn towards compassion bridge more perspectives, rather than concentrating on an economized, market-oriented view of sustainability?

II. Compassion as a Guiding Principle for Environmental Law

Steven Best argues that the dualistic, speciesist construction of nature “produced a theoretical mystification that both overestimated the fetishized ‘rationality’ of humans and underestimated the amazing forms of intelligence found throughout virtually every animal species.”⁷² I argue that instead of the fetishization of rationality, which informs sustainability as a guiding principle,⁷³ animal law could teach environmental law how to develop a new guiding principle, informed by Deane Curtin’s compassion perspective developed in a chapter of the edited volume *Ecofeminism: Feminist Intersections with Other Animals & the Earth*.⁷⁴ Curtin

⁶⁶ Ana Isla, “Conservation as Enclosure: An Ecofeminist Perspective on Sustainable Development and Biopiracy in Costa Rica” (2005) 16:3 *Capitalism Nature Socialism* 49 at 49.

⁶⁷ *Ibid* at 51.

⁶⁸ *Ibid* at 53.

⁶⁹ *Ibid* at 58.

⁷⁰ *Ibid* at 59.

⁷¹ *Ibid* at 61.

⁷² Steven Best, “The Rise of Critical Animal Studies: Putting Theory into Action and Animal Liberation into Higher Education” (2009) 8:1 *JCAS* 9 at 15.

⁷³ Indeed, the debate is about what type of rationality should be privileged, as evidenced by a 2017 article reviewing 151 academic articles about rationality and sustainable development: Ivan Bolis, Sandra N. Morioka & Laerte I. Sznelwar, “Are we making decisions in a sustainable way? A comprehensive literature review about rationalities for sustainable development” (2017) 145 *J Cleaner Prod* 310.

⁷⁴ Deane Curtin, “Compassion and Being Human” in Carol J Adams & Lori Gruen, eds, *Ecofeminism: Feminist Intersections with Other Animals & the Earth* (New York: Bloomsbury Academic, 2014) 39.

proposes a conceptual framework of compassion that includes less violent food choices, but also takes into account environmental issues and economic fairness.⁷⁵

“Compassion” is the term selected by Curtin instead of “care” or “empathy.” The reason is that compassion is a developed moral capability, whereas care or empathy are closer to the natural capacities that make compassion possible. Humans, and many other animals, naturally have empathy for the suffering of others. Compassion, on the other hand, is a cultivated aspiration to benefit other beings.⁷⁶

For the author, compassion is not solely emotional, and as such does not constitute the polar opposite of rationality. Rather, compassion “blends reason and feeling together.”⁷⁷ As a result, its practice becomes resilient. Curtin draws on recent writings of the Dalai Lama for this perspective on compassion. The Dalai Lama writes: “Empathy is characterized by a kind of emotional resonance — feeling with the other person. Compassion, in contrast, is not just sharing experience with others, but also wishing to see them relieved of their suffering.”⁷⁸ The practice of compassion becomes more resilient than empathy, because it is not only about feeling in itself, but also acting on such feelings. Because the “level” of feeling is surpassed, it is not as “draining” as it would be otherwise.⁷⁹

Curtin names his framework one of compassionate *practice*. The use of the term “practice” emanates from the fact that compassion is “not an isolated, rational judgment about the world. It is a deep, ongoing pattern of engagement.”⁸⁰ Emotion, therefore, can lead to the feeling of compassion, inasmuch as it is cultivated in this direction. Through this, emotion, rationality and action can be aligned and create, as one, a practice of compassion.⁸¹

Curtin opposes this practice of compassion with the liberal political philosophy of rights. Whereas reciprocity is central to a perspective of rights-holders, compassionate thought and actions are antithetical to expecting reciprocity, and as such there is no “expectation of repayment.”⁸² Imagining giving rights to non-human animals (and rivers) is hard; maybe rightly so. Perhaps this is because the rights framework is conceptually limiting. Compassion, in Curtin’s view, is relational, and “[i]t has no need, therefore, to privilege rational personhood.”⁸³ Indeed, ecofeminism rejects rational individualism that is associated with a rights framework. As Helena Silverstein explains, “[t]he meaning of rights, whether based on individualism, rationality, sentience, or anything else, is hollow. For those who buy into a holistic approach, rights based on rationality or sentience do little to recognize the

⁷⁵ *Ibid* at 55.

⁷⁶ *Ibid* at 40.

⁷⁷ *Ibid* at 40-41.

⁷⁸ His Holiness the Dalai Lama, *Beyond Religion* (Wilmington, Mariner Books, 2012) at 55.

⁷⁹ *Ibid*.

⁸⁰ Curtin, *supra* note 74 at 46.

⁸¹ *Ibid*.

⁸² *Ibid* at 41.

⁸³ *Ibid* at 55.

interconnectedness of the planet.”⁸⁴ From this standpoint, attributing rights to entities such as rivers is not such a success, as the relational aspect is not entrenched in the perspective a rights’ framework leads to.

Translating this framework to international environmental law as a guiding principle would thus have to be accomplished without the use of the “rights” language. Indeed, the “animal rights” approach has largely been criticized by numerous ecofeminist animal theorists, including Curtin himself.⁸⁵ One of the reasons is that the “type of individualism” on which the animal rights discourse and practice are based does not imply an analysis of how the “structures or systems of power” themselves create and reproduce this exploitation of non-human animals.⁸⁶ Furthermore, the relational aspect of ecofeminism risks being ignored through animal rights’ “legalistic reasoning.”⁸⁷ The individual characteristics defining different non-human animal lives can also be ignored through aggregated categories such as “farmed animals.”⁸⁸ Therefore, a balance must be struck: ecofeminist animal theory rejects worldviews that adopt individualism as a basis, but insists on rejecting generalized categories. The individuality of non-human animals (and humans) must be considered in a relational, contextual manner.

Also, interdependence is a concept that should be integrated in a new international environmental framework. Recognizing how humans and non-human animals depend on nature, how non-human animals depend on humans and nature, and how nature depends on humans and non-human animals is of central importance. Sunaura Taylor advances the notion that “feminist theory has done a lot to theorize what it means *to care*, [but] there has been less said about what it means to be *cared for*.”⁸⁹ Even though non-human animals are often more vulnerable than humans, it is possible “to understand animals not as dependent beings with no agency, but rather as vital participants and contributors to the world.”⁹⁰ How can we manifest compassion (for nature, for non-human animals, and for humans) without being “infantilizing and oppressive”?⁹¹ Can we imagine how non-human animals wish us to be compassionate towards them? Can we imagine how we should be compassionate for nature in a similarly non-oppressive manner?

Such a new legal framework must also leave a space for the appreciation of context during interpretation of norms. Pluralism is needed to accomplish this; not necessarily only legal, but also moral, as there are many sources of morality to be

⁸⁴ Helena Silverstein, *Unleashing Rights: Law, Meaning, and the Animal Rights Movement* (Ann Arbor, University of Michigan Press, 1996) at 233.

⁸⁵ Deane Curtin, “Toward an Ecological Ethic of Care” (1991) 6:1 *Hypathia* 60 at 61.

⁸⁶ Lori Gruen, “Facing Death and Practicing Grief” in Carol J Adams & Lori Gruen, eds, *Ecofeminism: Feminist Intersections with Other Animals & the Earth* (New York: Bloomsbury Academic, 2014) 127 at 129.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Sunaura Taylor, “Interdependent Animals: A Feminist Disability Ethic-of-Care” in Carol J Adams & Lori Gruen, eds, *Ecofeminism: Feminist Intersections with Other Animals & the Earth* (New York: Bloomsbury Academic, 2014) 109 at 109 (emphasis in original).

⁹⁰ *Ibid.* at 110.

⁹¹ *Ibid.* at 109.

considered in a contextual approach.⁹² For Emmerman, taking context into account when facing important dilemmas means including “among other things, detailed descriptions of what is at stake for the humans and non human animals, situating those details in historical, political, and societal context, and asking hard questions about how we found ourselves in a situation of conflict to begin with.”⁹³ Here again, ecofeminist animal theory insists on conceptualizing the system as a whole, rather than only its effects in an independent fashion. Thus, a contextualized perspective paired with a holistic perspective of the “environment” should be adopted, rather than falling into the traps of either individualist rational rights, or of aggregation which ignores the different experiences, needs and desires of the components of given ecosystems.

To be sure, the adoption of a guiding principle of compassion would not be accomplished without resistance to the proponents of “objective” sustainable development, or of hierarchies between oppressions. In “The War on Compassion,” Carol J. Adams responds to the oft-repeated argument that because so many humans are suffering, this should be the priority for our compassion and compassionate actions.⁹⁴ She contends that this enforces “a conservative economy of compassion.”⁹⁵ Indeed, it appears doubtful that we have limited reserves of compassion, for which recipients must be carefully selected in order for us to exude enough according to our priorities. Even if this can appear self-evident, it must be said that compassion towards non-human animals does not preclude one from having compassion for humans, and vice versa.

In a recent 2017 article, Werner Scholtz similarly proposes a turn towards compassion for international environmental law in relation to non-human animals.⁹⁶ However, Scholtz relies on a welfare approach, and concentrates on international wildlife law specifically, in an effort to counteract the negative effects of conservation as its guiding principle. It is worth exposing the difference in both proposals here. As the author explains, “[i]n terms of the ‘welfare’ model, human beings are morally superior to animals, which are regarded as property. [...] welfarism entails a balancing process which weighs the interests of non-human animals against those of humans in order to determine whether animal pain and suffering is ‘necessary’ or ‘justified’.”⁹⁷ Scholtz argues that welfare concerns are mostly absent or incidental in current international wildlife law, because on the one hand, it concentrates on a conservation objective, and on the other hand, because wild non-human animals are rarely afforded welfare protections in contrast with other groups of non-human animals, such as domestic.⁹⁸ The author does mention the possible contribution of feminist theory towards embodying the “welfare-centric approach” he advocates,

⁹² Emmerman, *supra* note 34 at 161.

⁹³ *Ibid.*

⁹⁴ Carol J Adams, “The War on Compassion” in Josephine Donovan & Carol J Adams, eds, *The Feminist Care Tradition in Animal Ethics* (New York: Columbia University Press, 2007) 21 at 22.

⁹⁵ *Ibid.*

⁹⁶ Werner Scholtz, “Injecting Compassion into International Wildlife Law: From Conservation to Protection?” (2017) 6:3 *Trans'l Env'l Law* 463.

⁹⁷ *Ibid* at 465.

⁹⁸ *Ibid* at 465-66.

citing recent work by Thomas G. Kelch.⁹⁹ Kelch¹⁰⁰ argues that in the face of expanding globalization and the use of non-human animals in these increased international trade relations, universal principles for the treatment of non-human animals must be adopted,¹⁰¹ constituting “a unified voice and a universal linguistic and conceptual palate that spans the gulfs of cultural barriers.”¹⁰² These principles are “based substantially on a proffered variant of Feminist Care Theory, which posits that moral principles are based on feelings of compassion, sympathy and empathy.”¹⁰³ He further defines caring as “the suite of feelings and cognitions that an emotionally sound human experiences *in response to focusing attention on the suffering of others*”¹⁰⁴ and applies this definition to situations where concrete relationships occur.¹⁰⁵

While the approach proposed by Scholtz might be acceptable for some forms of feminism, a welfare-centric approach certainly differs importantly from ecofeminist animal theory’s perception of non-human animals within our ecosystems. As mentioned above, Adams and Donovan distinguish what they termed a “feminist ethic-of-care” from a welfare approach: “the feminist care approach recognizes the importance of each individual animal while developing a more comprehensive analysis of her situation. Unlike ‘welfare’ approaches, therefore, the feminist care tradition in animal ethics includes a political analysis of the reasons why animals are abused in the first place.”¹⁰⁶

The compassionate guiding principle proposed in the present article differs from Kelch’s proposal in that, of course, it concentrates only on international environmental law and seeks to replace the principle of sustainable development, but also in that it is based on ecofeminist thought and on compassion in all aspects of non-human animals’ lives, including both pleasure and suffering. This article argues for a contextually specific and holist form of compassion when considering the “environment,” rather than in the limited contexts of preventing abuse of individual non-human animals, or in situations when humans enter into relationships with non-human animals and encounter their suffering. Therefore, this article seeks to put forward a challenge to the principle of sustainable development and to its effect on the underlying logic of international environmental law, discourses and practices, through the ecofeminist animal theory concept of compassion as developed by Curtin, while Kelch’s article seeks to put forward universal principles for instances in which non-human animal suffering is encountered, such as through a “workable catalogue of animal rights.”¹⁰⁷

⁹⁹ *Ibid* at 474.

¹⁰⁰ Thomas G Kelch, “Towards Universal Principles for Global Animal Advocacy” (2016) 5:1 *Trans'l Env'l Law* 81.

¹⁰¹ *Ibid* at 84.

¹⁰² *Ibid* at 111.

¹⁰³ *Ibid* at 85.

¹⁰⁴ *Ibid* at 90 (emphasis added).

¹⁰⁵ *Ibid* at 92.

¹⁰⁶ Donovan & Adams, *supra* note 37.

¹⁰⁷ *Ibid* at 110.

But is imagining a compassionate-based legal framework far-fetched? In other words, do rational frameworks such as sustainable development dominate international legal norms to an extent that a challenge to them would not stand a chance? Some existing or proposed international norms aimed at non-human animals do integrate such an approach, and are presented below as an example of a concrete articulation of what I believe to represent compassionate law. The following examples demonstrate that legal norms based on compassion can and do exist.

III. Animals and Compassion: Examples of International Legal Norms

I consider the following emerging legal norms inspiring from an ecofeminist animal theory perspective, notwithstanding their binding value from a formal standpoint, i.e. whether they have been adopted in international conventions, are considered soft nonbinding instruments or are still in the form of proposals. It is worth specifying that these norms are taken individually, and do not imply that the whole instrument from which they are extracted is an instrument that is fully coherent with the proposed framework.

One example can be drawn from the 1978 *Universal Declaration of Animal Rights*, proclaimed at the UNESCO headquarters in Paris.¹⁰⁸ Its first article affirms the following: “All animals have equal rights to exist within the context of biological equilibrium. This equality of rights does not overshadow *the diversity* of species and of *individuals* [my emphasis].”¹⁰⁹ In contrast, in *CITES*, as per the goal of the convention itself, species are the object of protection. The preamble states: “Recognizing, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade.”¹¹⁰ Thus, in order to be granted protection against “over-exploitation,” non-human animals must be part of a species threatened with extinction, “species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival,” or part of species protected under article II 2.b).¹¹¹ As Bruce A. Wagman and Matthew Liebman point out, the selection process is highly controversial: “The decision of which animals are listed, and in which Appendix, is of vital importance to ultimate species survival as well as the treatment of individual animals.”¹¹² In the 1946 *International Convention for the Regulation of Whaling*, whales in waters where the Contracting Governments

¹⁰⁸ *Universal Declaration of Animal Rights*, 17 October 1978, online: <<http://www.la.utexas.edu/users/bump/Universal%20Declaration%20of%20Animal%20Rights.htm>>.

¹⁰⁹ *Ibid* (emphasis added). Notwithstanding the use of the rights language, the emphasis was thus added on the part I consider the most interesting.

¹¹⁰ *CITES*, *supra* note 18.

¹¹¹ *Ibid*, art II.

¹¹² Bruce A Wagman & Matthew Liebman, *A Worldview of Animal Law* (Durham, NC: Carolina Academic Press, 2011) at 289.

undergo whaling are also considered only as a species, under the denomination of “whale stocks.”¹¹³

Paragraph 1 of article 1 of the 1988 proposed *International Convention for the Protection of Animals* states: “Humans and animals co-exist within an interdependent ecosystem. Humans and animals share an evolutionary heritage. Humans, as moral beings, have an obligation to act responsibly toward animals.”¹¹⁴ Interdependence is clearly enunciated here. Because non-human animals are parts of our ecosystems, rather than simply representing a resource at our disposal, humans bear a moral responsibility towards them. Paragraph 2 of article 1 of this proposed convention starts with the affirmation that “Life has intrinsic value.”¹¹⁵ As such, it recognizes non-human animals as having valuable lives without reference to their utility to humans. This is in clear contradiction with the *Whaling Convention*, for example, which conceptualizes whales as resources for the purposes of humans, as the preamble explicitly recognizes through stating: “Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks.”¹¹⁶ This is analogous to the spirit of *CITES*, enunciated in the first two paragraphs of its preamble:

Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;

Conscious of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view.¹¹⁷

As long as non-human animals and “nature” are considered to be resources for the use of humans, no matter how we qualify this use (e.g. sustainable, responsible, green, etc.), the same detrimental logic underpins related actions. Indeed, the overriding logic of the market is at play when such elements are perceived as resources, because no matter which adjective is attached to “development,” the fact remains that this all operates within a framework that does not question “developing” them. Non-human animals, ultimately, are living beings, rather than non-sentient materials. Moreover, they “are the living, breathing, sentient Others through which human identity is consolidated culturally and maintained legally.”¹¹⁸ Considering them merely as resources to be exploited amounts to refusing to recognize the non-human animal “as a sentient and vulnerable being whose subjectivity matters.”¹¹⁹

In the 2011 *Draft Universal Declaration on Animal Welfare*, article III states the following: “Sentience shall be understood to mean the capacity to have feelings,

¹¹³ *International Convention for the Regulation of Whaling*, 2 December 1946, 161 UNTS 72 (entered into force: 10 November 1948) [*Whaling Convention*].

¹¹⁴ *International Convention for the Protection of Animals*, online: Animal Legal & Historical Center <www.animallaw.info/treaty/international-convention-protection-animals>.

¹¹⁵ *Ibid.*

¹¹⁶ *Whaling Convention*, *supra* note 113.

¹¹⁷ *CITES*, *supra* note 18.

¹¹⁸ Deckha, *supra* note 52 at 784.

¹¹⁹ *Ibid.* at 785.

including pain and pleasure, and implies a level of conscious awareness.”¹²⁰ Non-human animals, then, are not only presented as potential victims of suffering, but also as beings that can experience a variety of feelings. This is also expressed in more indirect terms in the World Organization for Animal Health’s *Terrestrial Animal Health Code*, article 7.1.3 paragraph 1, which states that “[w]elfare is a broad term which includes the many elements that contribute to an animal’s quality of life.”¹²¹ This contrasts starkly with the spirit of *CITES* or the *Whaling Convention* in that these two instruments consider the threat to these species as extinction, rather than the possibility of daily suffering, or experiences of pleasure. This all or nothing perspective disregards the possibilities of enriching lives for these non-human animals as individuals, while the inclusion of the sentience concept, defined not only in terms of the ability to feel pain, is a prerequisite to a compassionate approach.

Such examples demonstrate how animal law can be geared towards a compassionate framework considering its underlying logics. They demonstrate how it is possible to conceptualize non-human components of ecosystems not only in a non-anthropocentric manner, but also in a manner that tries to extend compassion and not reproduce dynamics of exploitation under the guise of market-oriented principles such as sustainable development.

The problematic nature of sustainable development as a guiding principle for environmental law has already been largely criticized, as demonstrated above. It constrains one to think about environmental protection within a framework that values rationality over all, and further, a very specific form of rationality aimed at maximizing “resources.” This usually excludes a consideration for the wellbeing of individual non-human animals as a main area of concern. I argued in this article that a shift to a guiding principle of compassion could improve environmental law’s track record in terms of protection results. This would also imply that environmental law “learn” from animal law, in a context in which, as Carter Dillard put it, “animal law is often seen as less important, a more emotional and less rational response to the suffering of individual animals, whereas environmental law and environmentalism deal with lofty subjects like human health and safety, and the survival of whole species, including our own.”¹²²

¹²⁰ *Universal Declaration on Animal Welfare*, online: Global Animal Law <www.globalanimallaw.org/database/universal.html> (emphasis added).

¹²¹ World Organisation for Animal Health, *Terrestrial Animal Health Code* (2017), online: OIE <www.oie.int/en/standard-setting/terrestrial-code/access-online/>. It must be noted that the OIE guidelines certainly do not question the structure that creates systems of exploitation of non-human animals, and is clearly located within the “welfare approach” and does not engage nor converge with the “abolition approach.”

¹²² Carter Dillard, “Environmentalism as a Form of Animal Rights” *Animal Legal Defence Fund* (23 December 2013), online: ALDF <aldf.org/blog/environmentalism-as-a-form-of-animal-rights/>.

A change of paradigm for international (and all other normative levels) environmental law must occur in the very near future, considering the current alarming environmental realities. Some feel optimistic about animal law following in the footsteps of environmental law. For example, Chad J. McGuire argues that global values for an environmental “ethos” are “supported by consensus” and “developed by empirical evidence,” and that the same will happen with animal law as scientific evidence builds up.¹²³ However, I argued the opposite in this article. Scientific evidence demonstrating animal sentience has already been established for decades.¹²⁴ Aside from that, is “rational,” evidence-based consensus what we should really strive for as a basis for protective action? In the environmental protection context (and others, of course), “empirical” data is often contested by actors with different interests and different views of “science,” rendering consensus extremely hard to achieve. Furthermore, questioning this valuing of the rational is another battle led by the feminist movement, amongst others, in response to not only environmentalists, but also to some animal rights activists by ecofeminist animal theorists such as Cathryn Bailey.¹²⁵ Bailey points out that “we have been reminded again and again that what separates ‘us’ from the animals is reason.”¹²⁶ She argues that “[i]f reason sets the parameters of the discourse [...] only reason can be heard.”¹²⁷ This excludes and delegitimizes all other forms of discourses, from which we might all have something to gain from.

Thus, I argue that the terms valued in the discourse in efforts to render environmental law more coherent with its protection objective should be rethought to exclude “sustainable development” and its related, manifestations, its market-oriented logic, as well as its underlying assumption that such a concept can be objectively and rationally evaluated and implemented. In order for the discussion about environmental protection to turn towards a framework of compassion, thoughtful, contextual actions towards all components of our interdependent ecosystems must be taken.

This also means increasingly considering non-human animals as having intrinsic value within the environmental law realm. This would only be coherent with the fact that they are gaining this recognition in more and more spheres of contemporary social life. And after all, as Gary L. Francione and Robert Garner wrote, “[y]es, there are people who still defend the view that animals simply do not matter at all and that nothing we do to them raises a moral issue or should raise a legal issue. But there are people who defend the view that the earth is flat.”¹²⁸

¹²³ Chad J McGuire, “Environmental Law and International Trade: Public Morality as a Tool for Advancing Animal Welfare” in Randall Abate, ed, *What Can Animal Law Learn from Environmental Law?* (Washington: Environmental Law Institute, 2015) 293 at 309.

¹²⁴ Marc Bekoff, “After 2,500 Studies, It’s Time to Declare Animal Sentience Proven” *Live Science* (6 September 2013), online: Live Science <www.livescience.com/39481-time-to-declare-animal-sentience.html>.

¹²⁵ Kathryn Bailey, “On the Backs of Animals: The Valorization of Reason in Contemporary Animal Ethics” (2005) 10:1 *Ethics and the Environment* 1.

¹²⁶ *Ibid* at 4.

¹²⁷ *Ibid* at 8.

¹²⁸ Gary L Francione & Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (New York: Columbia University Press, 2010) at ix.