

# TOWARDS A HOLISTIC APPROACH IN ANIMAL LAW: THE FOIE GRAS CASE, TRENDS AND TRANSFORMATIONS

## Introduction

The *Israeli Foie Gras Case*<sup>1</sup> (hereafter the '*Foie Gras Case*') is a rare instance of a court holding that an established agricultural practice is in its *entirety* in breach of anti-cruelty legislation, as opposed to finding that a *method* of undertaking that practice is in breach. The case is instructive since most jurisdictions, including Australia, have anti-cruelty legislation that is relevantly similar to the Israeli statute. The case raises a number of important issues in Animal law. Specifically, it raises the issue of whether welfarist reforms can lead to meaningful positive changes, given that many animal rights critics deem them to be structurally and inherently defective. Some have suggested that such legislation is even a betrayal to the movement's philosophy. Another aspect that is highlighted in the case is the question of how to balance interests and attach varying weights to those interests in a fair manner that does not automatically favour human interests. But how exactly should we balance these interests and is it even desirable to do so? In addressing these issues, the *Israeli Foie Gras Case* will be drawn on as an example and the value of a 'cluster' or multi-factorial approach which incorporates various disciplines will be discussed.

## Purpose And Proportionality: Comparing Different Values of Varying Weights

The *Israeli Foie Gras Case* concerned an appeal to the Supreme Court of Israel, where the plaintiff, 'Noah' (The Israeli Federation of Animal Protection Organisations) argued that the practice of foie gras, whereby geese are force-fed for the production of 'fatty liver' for human food, breached Israeli anti-cruelty legislation, the *Animal Welfare (Animal Protection) Law, 1994* (hereafter '*Animal Protection Law*'). The relevant section of the legislation stated that "no one shall torture an animal, treat it cruelly or abuse it in any manner".<sup>2</sup> Specifically, the plaintiff asked the *Animal Welfare (Animal Protection) (Geese-Force Feeding) Regulations of 2001*<sup>3</sup> be declared annulled due to its breach of the *Animal Protection Law* and that the Minister of Agriculture be ordered to issue new regulations that would ban geese force-feeding.

Strasberg-Cohen J, with whom Rivlin J concurred, took a holistic approach to the balancing exercise. Indeed, Her Honour stated that a multi-factorial system of balances is needed "taking into account the essence and importance of the conflicting principles...and their relative superiority".<sup>4</sup> Importantly, in reviewing the theological bases that underpin the main influential theories on the topic of animal welfare and rights, Strasberg-Cohen J acknowledged that there are differing opinions concerning the moral status of animals.<sup>5</sup> Her Honour preferred what she called "the intermediate position" where the attempt is to find an acceptable balance between conflicting interests.<sup>6</sup> In this regard, both the majority and minority accepted that animals may be used by humans as 'means to an end', but that this use is not limitless or gratuitous.<sup>7</sup> However even within this paradigm, there was no agreement as to where the balance point shall lie. For Strasberg-Cohen J, Singer's utilitarian theory was seemingly preferred, in a modified form, to the extent that it allows for the human use of animals but to the extent that it is balanced against the need for humane treatment.<sup>8</sup> This preference was, in part, due to the legislation's purpose which clearly favoured a balancing approach, and

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<sup>1</sup> 'Noah' (The Israeli Federation of Animal Protection Organisations) v The Attorney General; The Minister for Agriculture; The Egg and Poultry Board; Moshe Benishty and 31 Colleagues, Supreme Court of Israel, August 2003

<sup>2</sup> Clause 2(a), *Animal Welfare (Animal Protection) Law, 1994*

<sup>3</sup> These regulations were issued while an earlier appeal was pending.

<sup>4</sup> *Israeli Foie Gras Case* at [1], p22

<sup>5</sup> *Israeli Foie Gras Case* at [3], p23

<sup>6</sup> *Israeli Foie Gras Case* at [3], p23

<sup>7</sup> Justice Strasberg-Cohen at [1] and Justice Grunis at [8]

<sup>8</sup> *Israeli Foie Gras Case* at [4], p24

according to Strasberg-Cohen J, the balancing test that is to be applied is similar to those utilised for human rights, where conflicting rights are “always relative”.<sup>9</sup>

The proportionality test, as set out by Strasberg-Cohen J, requires a balance between the type of suffering of the geese and the purpose and means of inflicting that suffering.<sup>10</sup> Unlike Grunis J, the majority found that there is indeed a distinction between basic foods and delicacies according to its necessity.<sup>11</sup> The majority held that there was no proportionality between the harm inflicted and the purpose of that harm, and thus the practice of foie gras was held to be illegal. However, the court recognised that this had far-reaching implications for those in the industry, and in order to alleviate some of the hardship, a suspended annulment of the law was declared until March 2005.

In contrast, where this balancing point lay was different for Grunis J due to his conceptualisation of ‘purpose’ and ‘means’ as well as the increased weighting placed on other factors. In terms of the latter point, His Honour questioned whether the suffering of veal calves or the forced molting of laying hens was less than that of the geese.<sup>12</sup> What Grunis J was therefore suggesting was that it is difficult to attach specific weight to and quantify various types of ‘suffering’ - if the practice of force-feeding geese is deemed cruel under the anti-cruelty legislation, then by the same logic, other industries may be targeted. Grunis J conceptualised the purpose of geese-force feeding broadly to be “the production of food for humans”.<sup>13</sup> Grunis J’s view shows that any analysis of purpose of a farming practice or industry can ultimately be construed widely enough to be for human food, and be justified on this ground. Another factor that Grunis J balances against the suffering of the geese is that the industry at hand is *wholly based* upon force-feeding in order to render a fatty liver, and indeed there are no alternatives to this method.<sup>14</sup> Grunis J was clearly uncomfortable with the elimination of an entire agricultural industry. In the final analysis, Grunis J’s view was that the purpose of force-feeding was human consumption, which justified the means employed. What this shows is that interpretation and ‘balancing’ are not as objective or neutral as we might expect, and it is to this we now turn.

### **The Proportionality Test: The Rhetoric of Necessity**

The *Foie Gras Case* raises some pertinent questions about the interpretation and the weighting given to the values and interests that are required to be balanced by the courts when analysing anti-cruelty legislation. The language of necessity permeates *Prevention of Cruelty to Animals Act 1979* (NSW) (hereafter ‘*POCTA*’),<sup>15</sup> as it ostensibly does in other jurisdictions, and the term is considerably wide and vague. As such, it raises questions of what reference point is to apply when determining what is necessary. Determining what is necessary by reference to economic considerations is starkly different in outcome than determining the same question by reference to scientific facts, or moral considerations. The problem is that the concept of necessity is heavily influenced or determined by norms that exist in society. For an *entrenched* exploitative norm, determining what is necessary in the given situation is possibly a forgone conclusion. It is also evident from the case that judicial determination in applying anti-cruelty legislation is inextricably linked to the ideological basis that is endorsed. In other words, in determining what constitutes “unnecessary suffering”, the moral question (that informs the legal answer) is determined by the parameters or the frame of reference that the ideology adopted when balancing various interests. The moral status also plays a significant role in the weight that is attached to any given value or interest. Competing ideologies bring different conceptual frameworks to bear, and each brings with it a set of preferred values.<sup>16</sup> Of course animals should not, at minimum, be subjected to “unnecessary” suffering but the objection

<sup>9</sup> *Israeli Foie Gras Case* at [6], p25

<sup>10</sup> *Israeli Foie Gras Case* at [10], p28

<sup>11</sup> *Israeli Foie Gras Case* at [10], p28

<sup>12</sup> *Israeli Foie Gras Case* at [17], p12

<sup>13</sup> *Israeli Foie Gras Case* at [18], p12-13

<sup>14</sup> *Israeli Foie Gras Case* at [18], p12-13

<sup>15</sup> See for example s24 which emphasises “unnecessary pain”

<sup>16</sup> Barlett, S. “Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks” (2002) 8 *Animal L.* at 152

here is that the requirement of no “unnecessary suffering” or the “humane treatment” requirement may be largely illusory because of the politics that are brought to bear in any contest between animals and humans.

Yet, in light of the *Foie Gras Case*, in which, by use of this balancing process, a complete abolition of the foie gras industry in Israel was achieved. Israel was the world’s fourth largest producer of foie gras at that time, with half of the production exported.<sup>17</sup> An economic disincentive was certainly present. Whilst the interests of the animals prevailed, one may say that this case is an anomaly or that the reason for the win was something other than a recognition of the inherent value of animals. Undoubtedly there are serious problems with the interpretation and weight given to animal interests in the balancing process, however the result in the *Foie Gras Case* portrays that welfare legislation and the process of balancing may indeed have the *potential* for positive change. Of course without normative guidance, the balancing process might be frustrated by attempting to compare the incomparable.

### Anti-cruelty Legislation As Trojan Horse?

This analysis of the *Foie Gras Case* raises the issue of the desirability and effectiveness of standard anti-cruelty legislation in the pursuit of meaningful change for animals. Similar to the Israeli legislation, in the Australian context, *POCTA* prohibits cruelty and aggravated cruelty generally.<sup>18</sup> Stock animals are generally afforded less protection due to wide exemptions in the Act.<sup>19</sup> Additionally, the Act requires that the alleged cruelty be unreasonable, unnecessary or unjustifiable,<sup>20</sup> as will be discussed below. Francione is particularly unreceptive to such legislation for several reasons. He argues that regulation in the form of welfare laws are not only counter-productive to achieving animal rights or abolition of institutionalised exploitation – but that these reforms themselves work to legitimise the very system of animal exploitation. According to Francione, welfarist reform, in the form of *regulation* of animal exploitation, ignores a moral point as it seeks to regulate an inherently immoral institution. In this sense, legislation that seeks to *reduce* suffering, for example, by requiring certain standards, fails to recognise that animals have an interest in not being treated as a mere instrumentality.<sup>21</sup> Accordingly, the fundamental flaw is that those who support such regulations in the hope that it will lead to the abolition of animal exploitation are mistaken given that the suffering that they seek to reduce is part and parcel of the institution itself.<sup>22</sup> In other words, such anti-cruelty legislation does not target the institutionalised exploitation that exists. In a similar vein, these laws make the practices that they regulate more socially acceptable, and thereby add legitimacy to the institution in which that practice is located. Francione points to the fact that there is no overwhelming historical evidence to show that any welfarist reforms can lead to the abolition of animal exploitation, but moreover such evidence shows that anti-cruelty legislation has led to more animal exploitation.<sup>23</sup> This false conceptualisation leads to undue compromises on part of the animal movement where the movement should rather be seeking incremental change in a manner consistent with animal rights theory.<sup>24</sup> We can say that the *Foie Gras Case* fits well into this by banning an *entire* industry. It is plausible that the success in the case was attributable to a variety of causal factors and not necessarily the fact that there was a cruelty provision in the legislation, although its existence allowed the court to review the practice of force-feeding. Indeed, the type of grassroots activism that Francione endorses was employed by

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<sup>17</sup> World Society for the Protection of Animals, *Israel Supreme Court Ban on Foie Gras*, (2003) WSPA <<http://www.wspa.org.au/news.asp?newsID=99&type=1>> at 1 May 2006

<sup>18</sup> Pt 2, s5 and s6. Note that *POCTA* also prohibits a number of specific activities such as poisoning, mutilation, torture, fighting, baiting, transport related activities etc.

<sup>19</sup> See s24 for various husbandry practices on certain stock animals

<sup>20</sup> s4(2)

<sup>21</sup> Francione, G. *Rain Without Thunder: The Ideology of the Animal Rights Movement*, Temple University Press, Philadelphia, 1996 at 1, 110-130

<sup>22</sup> Francione, G. “Animal Rights and Animal Welfare” (1996) 48 *Rutgers L. Rev.* at 426

<sup>23</sup> Francione, G. “Animal Rights and Animal Welfare” (1996) 48 *Rutgers L. Rev.* at 427. He states that “intensive farming of animals...developed after animal welfare has become deeply entrenched” at 427.

<sup>24</sup> Francione, G. “Animal Rights and Animal Welfare” (1996) 48 *Rutgers L. Rev.* at 448

'Anonymous for Animals'.<sup>25</sup> The evidence tendered resulted from years of investigation and campaigning, where activists documented the acts of cruelty that were inflicted on the geese.<sup>26</sup> Importantly, a survey in Israel at that time showed that 69% of Israelis perceived force-feeding of birds for foie gras to be animal cruelty.<sup>27</sup> Francione is doubtful about making abolitionist incremental change through litigation or legislation.<sup>28</sup> Rather he advocates *social change* as a necessary prerequisite for *legal change*. In most cases, the law changes according to social reality. What Francione overlooks is that sometimes change in law precedes societal change and is even intended to stimulate it. Anti-cruelty legislation may serve as a springboard for change. Despite the problems that exist with anti-cruelty legislation, it must be noted that a 'legal black whole' would be problematic and indeed there is merit in the assumption that the presence of basic protections for *some* animals or general protection is better than no protection at all.

### **Change, Trends and Transformation: A Holistic Approach**

One important question is whether the case is limited as a matter of precedential value. The majority considered foie gras to be a delicacy and thus the human interest in maintaining it as a food was not compelling. The court alluded that a staple food would be given different treatment. The implication here is that a basic food would be 'necessary' for human survival. This is despite the fact that humans can physically exist without the consumption of meat,<sup>29</sup> and in this respect the parameters of what is necessary are constructed not by necessity as to survival, but in relation to societal norms, convenience and preference.<sup>30</sup> In addition, Justice Grunis, recognising that many agricultural practices are arguably as cruel, believed that such a distinction was nebulous. One may wonder whether a practice such as the rearing of calves for veal could similarly be banned, using the same logic that was employed in the case.<sup>31</sup> In 1984 the founder of Compassion in World Farming Trust, Peter Roberts, took a veal farm in Sussex to court and argued for a ban on the veal crate, but lost. The courts certainly did not want to even consider regulating the veal industry, even though such a regulation would not have extinguished the industry as a whole. Yet, public attention relating to the cruelty of veal crates led up to the UK government banning the system in 1990.<sup>32</sup> The court case there functioned as a mechanism for exposing the industry. Whereas the logic of the *Foie Gras Case* applies to the veal industry as well as other industries (such as battery hens), the application of this seems unlikely. Foie gras is a marginal industry compared with chicken or cow 'production'. A ban on veal would also affect the cow industry to the extent that calves would have to be maintained until fully grown for meat. Common law reasoning would support banning industries that are unable to regulate themselves because the cruelty involved is essential to the 'final product'. In the case of veal, the emphasis has been on the veal crate itself. As long as the perception is that certain *methods* of production of veal (such as crates and deficient diets) are only problematic, the emphasis on the veal industry itself will be subverted. In this sense, Francione's comments above are of particular

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<sup>25</sup> Part of the umbrella organisation, Noah.

<sup>26</sup> Anonymous for Animals, *Recent Activities*, (2003) Anonymous Homepage <<http://www.anonymous.org.il/e-11.8htm>> at 15 April 2006

<sup>27</sup> Anonymous for Animals, *Recent Activities*, (2003) Anonymous Homepage <<http://www.anonymous.org.il/e-11.8htm>> at 15 April 2006

<sup>28</sup> Francione, G. *Rain Without Thunder: The Ideology of the Animal Rights Movement*, Temple University Press, Philadelphia, 1996 at 190-220

<sup>29</sup> Francione, G. "Animal Rights and Animal Welfare" (1996) 48 *Rutgers L. Rev.* at 427-434

<sup>30</sup> Francione, G. "Animal Rights and Animal Welfare" (1996) 48 *Rutgers L. Rev.* at 427-434

<sup>31</sup> In this industry, calves are usually taken from their mothers at just one day-old (although some countries have regulated that separation only occur after a few days) which causes great mental distress to mother and calf. Calves are fed a predominantly milk-based diet, with deliberate levels of low iron to ensure that their meat is pale. As a result, most calves are anaemic. These veal calves live for only a few months but suffer immensely during this time: Compassion in World Farming Trust, *Exotic Foods, 'Posh Nosh'* (2006), CIWF <[http://www.ciwf.org.uk/campaigns/other\\_exotic\\_foods.html](http://www.ciwf.org.uk/campaigns/other_exotic_foods.html)> at 1 April 2006

<sup>32</sup> Compassion in World Farming Trust, *Exotic Foods, 'Posh Nosh'* (2006), CIWF <[http://www.ciwf.org.uk/campaigns/other\\_exotic\\_foods.html](http://www.ciwf.org.uk/campaigns/other_exotic_foods.html)> at 1 April 2006

relevance if not instructive. The point is that the question “where do we draw the line” is misguided as line drawing in these contexts are necessarily arbitrary.<sup>33</sup>

In this light, political strategy for change needs to employ and engage in a multiplicity of fields that influence human thinking – including legal discourse. Steve Wise has said that progress for change is hampered by economic, political, religious, historical, legal and psychological obstacles.<sup>34</sup> As such, recourse is required to each of these disciplines in order to be cognisant of the obstacles against transformation that arise therein. From a slightly different perspective, each discipline can also be seen to be informed by a multitude of other disciplines and in this respect law is not necessarily self-referential. It is unavoidable in a sense that legislation and the common law are products of human activity, and they bear the inevitable imprint of human mentality and psychology.<sup>35</sup> Psychological blocks to recognising animals as ends in themselves bear the marks of religious doctrines. Science and philosophy, for instance, can be extremely useful in changing social perceptions about animals and educating the public. Science for example has proven that many of our human traits are shared with members of other species.<sup>36</sup> It is a scientific fact that human DNA is more than 98.3% identical to that of chimpanzees.<sup>37</sup> Although this tends to work as a double-edged sword in the vivisection industry, such science has certainly made us re-evaluate our relationship with chimpanzees and bonobos and has led to a reconfiguration of society’s perception of these creatures.<sup>38</sup> Law should be informed by these trends, but should not necessarily be seen as the only avenue. The problem is that we do not always know what will change first – the law, social attitudes or scientific theories.

## Conclusion

The *Foie Gras Case* raises important issues for animal law as a discourse, but also poses questions in terms of practical strategy. Whilst anti-cruelty legislation is riddled with faults and usually attempts to regulate inherently cruel industries in an unsatisfactory manner, thereby legitimating them to some extent, their existence is still a useful springboard for change. The *Foie Gras Case* demonstrates that a proportionality test that is applied in a way that fairly gives weight to various interests according to their moral merit, and ignoring to a certain extent the entrenched property status of animals, may lead to favourable outcomes. It also highlights any outcome between a contest of interests is dependant on the specific weight given to various interests. The analysis above bears out the point that we should not limit ourselves to specific recourses only, but draw on a wide range of disciplines that will change current thinking and reconfigure our relationship with nonhuman animals. In this sense, it is unwise to insist on monolithic strategies. Just exactly how these will intersect and interact is still to be explored. But it is within a multi-factorial paradigm, with some normative recognition of animal interests, that the power dynamics within the system may begin to be abolished.

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<sup>33</sup> Rachels, J ‘Drawing Lines’ in Cass R. Sunstein and Martha C. Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) at 173

<sup>34</sup> Wise, S ‘Animal Rights, One Step at a Time’ in Cass R. Sunstein and Martha C. Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) at 19

<sup>35</sup> Barlett, S. “Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks” (2002) 8 *Animal L.* at 144

<sup>36</sup> Lorenz, K *Concerning Homo Sapiens*, in *The Foundations of Ethology* (1989)

<sup>37</sup> Wise, S. *Rattling the Cage: Towards Legal Rights for Animals*, Cambridge Massachusetts, Perseus Books, (2000) at 132

<sup>38</sup> Taylor, R. “A Step At A Time: New Zealand’s Progress Toward Hominid Rights” at <[www.animallaw.info/journals/jo\\_pdf/lralvol\\_7p35.pdf](http://www.animallaw.info/journals/jo_pdf/lralvol_7p35.pdf)> at 15 April 2006