



PERCEPTION EXPANSION: A JURISPRUDENTIAL ANALYSIS OF RIGHT TO LIFE OF WHALES

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ABSTRACT

The Sanskrit phrase “Yatha Drishti Tatha Srishti” means that ‘your perception determines the creation’. It elucidates a fundamental lacuna of Human Beings- We tend to evaluate the world through Human perception and by using Human Standards. Even after Darwin had established the continuities between ourselves and other apes, we have tried to cling to the idea that there is something quite unique to human beings, some way in which we differ, not only in degree, but also in kind, from animals. Such perception has led Human beings to assume superiority over other creatures and restrict the sphere of right-holders to Human beings and connected institutions. In order to justify such restriction, classical Human Juris have defined law in such a way that sphere of rights and justice does not extend to Non-Humans. This article argues against such restriction by opposing the barbaric practice of Whaling through criticism and redefining of classical conception of personhood and relying upon the theory of utilitarianism as well as Locke’s conception of personhood.

A. INTRODUCTION

“The universe along with its creatures belongs to the land. No creature is superior to any other. Human beings should not be above nature. Let no one species encroach

over the rights and privileges of other species.”¹

Despite the Vedic² treatment of Animals as equals, Human beings have constantly assumed superiority over Non-Humans.³ Since, the Unknown author of Genesis established Mankind as ruler of Non-Humans; the Human beings have tried to dominate the Non-Humans by drawing a sharp divide between Humans and Non-Humans. An example of such Domination could be evinced in the Practice of Whaling i.e. Whale Hunting. Such Domination has resulted in denial of the most inherent right to life of Whales.

In this article, the author advocates for recognizing the right to life of whales and consequently implementing a permanent Moratorium on Whaling. The central issue in establishing such a claim is the exclusion of whales from the sphere of Personhood and consequently from the sphere of Right-holders. I argue for inclusion of whales within the sphere of Right Holders as was first propounded by D’Amato and Sudhir K.chopra.⁴ In line with such approach, I assess the demand of whales for inclusion in sphere of right-Holders by using the

¹ Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547 Quoting Isha Upanishad.

² Vedas are the ancient religious books of Hindu dharma. There are four Vedas: Rigveda, Samved, Yajurved, Atharvaved.

³ Such Superiority is a manifestation of Speciesism Oxford English Dictionary defines Speciesism as “the assumption of human superiority over other creatures, leading to the exploitation of animals” It is attitude of Bias towards your own species and thereby perception of other species as Lower beings.

⁴ D’Amato and Chopra, *Whales: Their Emerging Right to Life*, 85 AJIL 21 (1991)(hereinafter “D’amato”).



jurisprudential tool of Jeremy Bentham's Utilitarianism.

B.SIGNIFICANCE OF ARGUMENT

The dependence on the whale meat obtained by whaling for subsistence dates back to as far as 4,000 years ago when early Norsemen used stone harpoon heads.⁵ Other early hunters were Basques, who developed the first organized whale fishery in the 12th century. They set a pattern of overfishing as evinced by virtual elimination of Biscayan right whales in the Bay of Biscay. Such pattern was followed by American, Norwegian, British and Japanese whalers in the modern era. The Modern commercial whaling began with the introduction of two inventions: the explosive harpoon and the factory ship.⁶ The continuous whaling, without any attention being paid to the preservation of whale resource, led to the total decline in whale population which was once estimated to be 100,000 to 300,000 to 9,468 by 1918-1919. After the First World War, the whaling nations -threatened by the constant plummeting in stocks and yet ever increasing yields- realized that collective profits depend on sizable number of whales and decided in their own interest to accept certain regulations on whaling activities. Such attitude of self interest culminated in conclusion of International Agreement for

the Regulation of Whaling in 1937.⁷ It focused on longevity of whaling industry rather than the sole motivation of increasing current profitability as could evinced in the significant decision of prohibition on catching gray whales and right whales⁸ as well as other regulatory directions.⁹ However, in practice whaling operations remained unabated. The continuous operations of whaling nations reflected an approach to continue indiscriminate whaling without any respect for regulations until the whaling operations ceased to be remunerative. The significant fallacy of such approach is the neglect of the fact that whaling shall not end when the practice ceases to be profitable as could be evinced today from the constant support of Japan to resumption of commercial whaling despite its tremendous costs and low remuneration due to its cultural significance and sunken capital in whaling ships. inadequacy of the scope of regulations; inadequate scientific data; non-cooperation by some major whaling nations; poor enforcement of agreements and no international supervision or control; and lack of global interest¹⁰ led to further significant reduction in the stock of whales despite the conservative agreement of 1937. It led to signing of most important protocol regarding whaling activities- the

⁵ Wendy Watanabe, *Commercial Whaling and Ocean Resource Management*, 3 Loy. L.A. Int'l & Comp. L. Rev. 67,67 (1980), <http://digitalcommons.lmu.edu/ilr/vol3/iss1/4> (last visited Dec.01,2018, 04.36PM).

⁶ David Mence, *The Cetacean Right to Life Revisited*, 11 Int'l J. L. Context 17, 17 (2015).

⁷ International Agreement for the Regulation of Whaling, June 8, 1937, 52 Stat. 1460, TS No. 933, 190 LNTS 79.

⁸ The protection of right whales was already in place before the introduction of 1937 treaty. Additionally, gray whales were protected in 1937 agreement by virtue of article 4.

⁹ DOUGLOUS JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 398 (Springer 1965).

¹⁰ P. BIRNIE, *INTERNATIONAL REGULATION OF WHALING* 129-130 (Oceana 1985)



new International Convention for the Regulation of Whaling (ICRW) of 1948.¹¹ It superseded previous agreements and established International Whaling Commission (IWC), which convenes annually to identify protected species and revise whaling quotas on the basis of three quarters of majority vote. It started as a whalers club, focusing on conservationist approach to provide longevity to whaling industry but gradually shifted to protectionist end of spectrum focusing on providing longevity to whales as a species. Such shift, though manifested in legal documents, has to be attributed to increasing attention paid to animal rights and thereby changing psychological stand of people and states towards animals. For Instance, United States of America, an erstwhile dominant pro whaling nation and an adamant supporter of conservationist approach transformed to protectionist approach on account of increasing support of Animal rights movement led to Tom Regan and due to activities of clubs like the Sierra Club.¹² The protectionist approach could also be attributed to increasing awareness about environment preservation at the international forum. Such awareness, which had a significant impact on changing the status of IWC from whalers club to whales preservation forum is reflected in The Stockholm Conference on the Human Environment which passed a call for 10 year moratorium on commercial whaling¹³ as

well as in various legal instruments such as Convention on International Trade in Endangered Species (CITES) which characterized 15 whaling species as endangered¹⁴ and the most comprehensive United Nations Convention on the Law of the Sea (UNCLOS).¹⁵ The most significant provision of UNCLOS is Article 65 which reads as:

*"States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study."*¹⁶

The protectionist approach of article 65 directly referring to cetaceans (whales, dolphins and porpoises) had a significant impact on the standing of IWC. another significant factor impacting the standing of IWC is the changing membership of IWC. From 1980 to 1981, the membership of IWC witnessed an increase of 33%.¹⁷ The new members were mostly non-whaling nations¹⁸ who voiced adamant opposition to whaling as could be evinced from the remarks of the then Indian Prime minister, Rajiv Gandhi who stated that The only purpose of india's entrance into ICRW is to "join other nations . . . in their endeavor to save this most fascinating and remarkable member of our

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CITES,org.,

<https://www.cites.org/eng/app/appendices.php> (last visited Nov. 6, 2018, 06.57 PM).

¹⁵ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁶ *Id* at art. 65.

¹⁷ For detailed account of 1982 IWC meeting See generally Birnie, *Countdown to Zero*, 7 MARINE POL'Y 64, 66 (1983); IWC, *Chairman's Report at 17-42*, IWC/34th Mtg./1982.

¹⁸ These Nations had never participated in whaling.

¹¹ International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 UNTS 72.

¹² Sierra club, <https://www.sierraclub.org/explore-issues> (last visited Oct. 6, 2018, 01.34PM).

¹³ Stockholm Declaration on the Human Environment, Principle 4, UN Doc. A/CONF.48/14/Rev.1.



planet's living fraternity.¹⁹ Such protectionist attitude led to approval of Seychelles proposal which proposed a *Temporary moratorium on commercial whaling* by 1986 by a vote of twenty-five in favor, seven against and five abstentions.²⁰ The voting pattern for such moratorium clearly evinced a strong wave against whaling. However, such moratorium cannot be considered a strong protective measure against whaling in light of its temporary nature. The moratorium itself provided for its end. Global commons recommendation of world conservation strategy, an organization commissioned by the United nations environment programme further substantiated that that moratorium is only to be extended to all commercial whaling until the consequences for the eco-systems concerned of removing large portions of the whales' populations, and such populations' capacity for recovery, can be predicted. The temporary nature of moratorium evinces that it can remain operative only on the basis of favorable political conditions.

It was hoped that such favorable political conditions will eventually culminate into an entitlement stage where the right to life of whales shall be recognized by the international community.²¹ However, recent developments suggest that such entitlement stage might remain only a moral desirability. Japan proposed partial resumption of commercial whaling with strict quotas in the 67th IWC meeting organized in Brazil in 2018 in a proposal titled "The way forward

of IWC".²² The Japanese proposal was rejected. However, the significant aspect of Florianopolis conference was the substantial increase in the pro whaling nations as could be evinced in the approval of 27 countries favoring Japan's proposal of resumption of commercial whaling.²³

Furthermore, although IWC prohibits commercial whaling, North Atlantic Marine Mammal Commission (NAMMCO) permits Commercial Whaling. NAAMCO is an international regional body comprising of Faroe islands, Greenland, Iceland and Norway. It focuses on conservation, management and study of cetaceans while recognizing the need of coastal groups of subsistence and thereby consequently allowing commercial whaling within (liberal) quotas.²⁴ It is a separate organisation which operates only in the north atlantic region. However, the existence of such separate organisation adopting a completely opposite stand than that of IWC, challenges the authority of IWC. The most troubling aspect in this regard is the amount of attention being paid to NAMMCO as evinced by high degree of attendance.²⁵ Such factors indicate that commercial whaling might resume in a few years. However, such resumption will be

²² IWC, <https://iwc.int/iwc67> (last visited Nov. 7, 2018, 08.54 PM).

²³ Seashepherd.org, <https://seashepherd.org/2018/09/15/japans-proposal-to-resume-commercial-whaling-denied/> (last visited Nov. 7, 2018, 08.54 PM).

²⁴ NAMMCO, <https://nammco.no/about-us/> (last visited Nov. 7, 2018, 09.54 PM).

²⁵ NAMMCO, https://nammco.no/wp-content/uploads/2018/02/11-nammco-fac-2018-02_overview-observer-attendance-and-status.pdf (last visited Nov. 7, 2018, 08.50 PM).

¹⁹ IWC/37th Mtg./e1985/OS.

²⁰ Out of the seven oppositions, only three filed an objection, exempting them from the purview of ban.

²¹ D'Amato, *supra* note 4, at 40.



catastrophic for whales. Currently, IUCN red list has included various species of whales in the “endangered” category²⁶ and Convention on the international trade in endangered species of wild flora and fauna (CITES) has also listed 15 species of whales²⁷ in appendix I²⁸. The precarious condition of whales clearly demonstrates that the return of commercial whaling might result in their extinction.

Therefore, Recognition of right to life of whales and consequent imposition of Permanent and complete moratorium on whaling has to be given immense importance in light of changing Legal and Political attitudes

C. BENTHAM’S UTILITARIANISM

Jeremy Bentham proposed the Theory of Utilitarianism²⁹ by analyzing Juristic concepts on the antagonism of Pleasure and pain. The Fundamental proposition is to engender the greatest possible amount of happiness. Bentham, while proposing such theory, unlike its predecessors expanded the scope of application of such doctrine to Non-Humans. Bentham proposed that “The

question is not, Can they reason? Nor can they talk? But, Can they suffer?”³⁰ The rationality of suffering for Legal Consideration is based on the empirical reality that if Any other criteria such as Capacity of Reasoning is taken as basis of Moral and consequently Legal Consideration, then Many Human beings would also be left out of the sphere of right Holders, For Instance, Infants and Mentally disabled. Such approach to right holders is also adopted by John Stuart Mill.³¹ Mill endorsed such theory by drawing an analogy to slavery and drawing parallels between arguments advanced against Benthamian analysis as stated above and arguments of slaveholders in the America. Peter singer, the notable animal Right activist has further stated that Since Animals feel pain; they possess Interest of avoiding such a pain. Singer proposed that since animals possess such interest, equal consideration must be afforded to such Animals. Such utilitarianism approach clearly evinces that sentience i.e. capacity to feel pleasure and pain is construed as basis of according personhood to a “thing.”³²

However, the utilitarian approach concerns itself not with individual rights but with the Utilitarian calculus of the society. Therefore, Individual rights may be sacrificed at the altar of Maximum social welfare, for Instance, Right to religion may be sacrificed, if it be found inconsistent with the principle of social utility. In

²⁶ IUCN Red List, *Balaenoptera musculus* (Blue whale) , Accessed 06-11-2018 at <https://www.iucnredlist.org/search?query=Blue%20Whale&searchType=species> (last visited Nov. 5, 2018, 08.54 PM); IUCN Red List, *Eubalaena glacialis* (north atlantic right whale) Accessed 06-11-2018 at <https://www.iucnredlist.org/species/41712/50380891> (last visited Nov. 7, 2018, 05.21 AM).

²⁷ CITES,org., <https://www.cites.org/eng/app/appendices.php> (last visited Oct. 7, 2018, 05.54 PM).

²⁸ Appendix I lists only those species that are the most endangered among CITES-listed animals and plants

²⁹ JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 310-11 (Prometheus 1988).

³⁰ Id.

³¹ JOHN STUART MILL, *UTILITARIANISM AND OTHER ESSAYS* 228, 252 (Penguin 1987).

³² Personhood entails endowment of rights upon the subject on whom personhood is endowed. On the other hand, “things” are not subject to endowment of rights in law.



consequence Whaling also has to be measured on the utilitarian calculus by demonstrating that the adverse impact of permanent Moratorium on whaling does not outweigh its benefits.

.1 Adverse effects of permanent Moratorium on whaling:

1) The moratorium does not take into consideration the interests of the consumers of whale products and the whaling industry. Interests of the consumers of whale products and of the whaling industry, though not conclusive but is a very strong persuasive argument while considering the validity of such Moratorium.³³ Such ban would totally destroy the Whaling industry. Although it is true that whales are highly endangered today, the present ban on commercial moratorium, which is temporary in nature allows the recovery of whales. After whales have been recovered, The moratorium on commercial whaling also has to be lifted. Such approach is in consonance with the object and purpose of ICRW. The object and purpose of any multilateral treaty or convention is primarily interpreted from the preamble of such treaty or convention.³⁴ The preamble of ICRW states “*a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.*” The phrase makes clear that to the extent that it referred to protection of the stocks, this was to be done with a view to ensuring the future of the whaling industry by the use of

³³ William T. Burke, *Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the IWC*, 27 OCEAN DEV. & INT'L L. 315 (1996).

³⁴ SCOTT, *THE POLITICAL INTERPRETATION OF MULTILATERAL TREATIES* 120 (2004).

foundational ideology³⁵ of Conservation.³⁶ Conservation is defined as the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.³⁷ The phrase maximum supply in conservation supports such economically motivated approach. It is also consistent with the growing international trend towards free and unrestricted global trade.³⁸

Such approach neglects the harmful impact of whaling and the constantly changing status of IWC. IWC might have started as a Whalers club but it has developed into the protectionist approach towards whales through increased focus on Environmental Impact.³⁹ GATT, The most significant treaty aiming at unrestricted global trade,⁴⁰ recognizes protectionist approach towards environment and any interpretation of the GATT that involves a conflict between free

³⁵ Foundational ideology of any treaty or convention could be found out by recognizing the set of principle or principles which form the core of any treaty. It is the common goal to be pursued by the states ratifying the treaty.

³⁶ William T. Burke, *A New Whaling Agreement and International Law*, in Robert L. Friedheim, ed, *TOWARD A SUSTAINABLE WHALING REGIME* 52 (5th ed. 2001).

³⁷ Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas art. 2, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285.

³⁸ Howard Scott Schiffman, *the Protection of Whales in International Law: A Perspective for the Next Century*, 22 Brook. J. Int'l L. 303,335 (1996).

³⁹ Warshall, *The Ways of Whales*, in J. McIntyre, ed, *MIND IN THE WATERS* 125, 140 (Charles Scribner sons 1975).

⁴⁰ T.L. Mcdorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT', L. & ECON. 477, 480 (1991).



trade and the environment is influenced by the United Nations Conference on Environment and Development, the "Rio Conference,"⁴¹ which discussed issues relating to trade and the environment with a discussion of GATT provisions and principles.⁴² Rio Conference adopted the concept of "sustainable development"(economic development that the environment can safely support)⁴³. The present endangered situation of whales, as stated before, however, point to clear violation of sustainable development, if Whaling is not banned.

Furthermore, Such approach violates the Sustainable development goals(SDG),⁴⁴ adopted by 193 countries across the globe.⁴⁵ Pro whaling nations like Norway have proposed that Whale meat, obtained from whaling is in consonance with SDG 2.⁴⁶ However, such contention is fallacious as Whale, being a slow breeding⁴⁷ and long living animals, whose populations are already severely depleted and which face a myriad of other threats which humans have been unable to solve, including by-catch, the

consequences of marine debris (entanglement, ingestion, etc.), chemical pollution, food depletion, habitat degradation and climate change, whales can never be considered as a sustainable food source and communities with a dependency on their meat never achieve food security as a constant threat of extinction of whale resource looms over them. Additionally, The piling scientific evidence suggests that recovery of whale populations could actually lead to increased productivity for fisheries, in light of the significant role played by whales in our ecosystem.⁴⁸ Such scientific evidence points towards providing food security to whaling nations and also could be considered to be in consonance with SDG 14.⁴⁹ Additionally, SDG 3 aims at achieving healthy life for all people which depends upon the food they eat. Whales live in an ecosystem filled with manmade contaminants which they consume. Eating whale meat, therefore, has been considered hazardous to Human health in light of its Prenatal and postnatal effects as well as effects among Adults.⁵⁰ Furthermore, Whaling interferes with the whale watching sport as whale watching operators depend on healthy populations of whales and dolphins and being able to reliably predict their

⁴¹ Report of the United Nation Conference on environment and development, U.N. Doc. A/Conf.151/26/Rev.1, U.N. Sales No. E.93.I.8 (1992) [hereinafter UNCED REPORT].

⁴² Id at 18, 20-22.

⁴³ Howard Scott Schiffman, *the Protection of Whales in International Law: A Perspective for the Next Century*, 22 Brook. J. Int'l L. 303,340 (1996).

⁴⁴ GA Res. A/RES/70/1, ¶59 (Sept. 25, 2015).

⁴⁵ UN, <https://www.un.org/sustainabledevelopment/development-agenda/> (last visited Nov. 25, 2018, 04.45PM).

⁴⁶ It could be described as "End Hunger, Achieve Food Security and improved nutrition and promote sustainable agriculture."

⁴⁷ Steiger & Calambokidis, *Reproductive rates of Humpback whales of california*, 16(1) Marine mammal science, 220, 224-225 (2000).

⁴⁸ See generally Joe Roman, *Whales as marine ecosystem engineers*, 12 Front Ecol Environ 377,379 (2014).

⁴⁹ It could be described as "Conserve and sustainably use the oceans, seas and marine resources for sustainable development."

⁵⁰ P. Weihe & H.D. Joensen, *Dietary recommendations regarding pilot whale meat and blubber in the Faroe Islands*. 71 Int J Circumpolar Health 1,2-4 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3417701/pdf/IJCH-71-18594.pdf> (last visited Nov. 25, 2018, 04.45PM).



movements.⁵¹ Whaling has ceased to be a lucrative market. On the other hand, whale watching market is witnessed a consistent growth. This form of Eco-Tourism, which expands to 119 countries and overseas territories worldwide and employs 13200 people, has generated 2.1 Billion in revenues per year on account of 13 million people taking a whale watching trip every year.⁵² Therefore, whaling constitutes a significant hindrance in achieving Inclusive and sustainable economic development and expanding the scope of decent employment to all envisioned in SDG 8.

Furthermore, it could also be stated that the interpretation of objects and purpose of IWC used by Pro whaling nations to justify Whaling is fallacious. The International community is divided on the issue of correct interpretation of objects and purpose of IWC. While Pro whaling nations advance the interpretation stated before, Anti Whaling nations propose a different interpretation. The latter propose that as protection of whales is the primary purpose of the convention and development of whaling industry assumes secondary position.⁵³ It seems that such conflict is guided by the principle of political

motivation and preferences/ preconceptions of the Countries determined in accordance with the preferences/ preconceptions of the residents of the countries rather than by pure legal analysis. Although, both the approaches present a reasonable and prima facie legal interpretation of the object and purpose of IWC, I believe that the correct approach is the protectionist approach advanced by pro whaling nations in light of various protectionist measures introduced by IWC. However, it is possible that the author is also inclined towards protectionist approach in light of his preconceptions regarding Animal rights. Therefore, in the present assessment it is wise to not take into account the issue of interpretation of preamble of IWC as a tool of deciding the right to life of whales.

Even in the exclusion of such interpretation, in light of above stated violations, it could be stated that the interests of whaling industry cannot present an obstacle for recognition of right to life of whales and the proclamation of permanent moratorium on whaling

2) It violates the cultural and nutritional significance of whaling.

Prof. Sumi, professor of international law at Yokohama City University, has proposed such argument against recognition of right to life of whales.⁵⁴ Sumi proposes that the Anti-whaling nations have been consistently operating a cultural bias against Japan and other Pro-whaling nations. He states that Whaling in Japan is a part of culture rather than industry. whaling is an

⁵¹ Oceancare, https://www.oceancare.org/wp-content/uploads/2017/05/SDG-Briefing-Whaling-web_2018_SDG.pdf (last visited Nov. 25, 2018, 04.45PM).

⁵² O'Connor, S., Campbell, R., Cortez, H., & Knowles, T., (2009), Whale Watching Worldwide: tourism numbers, expenditures and expanding economic benefits, the International Fund for Animal Welfare, IWC/61/14, 4-13 (2009), https://www.cms.int/sites/default/files/document/BacgroundPaper_Aus_WhaleWatchingWorldwide_0.pdf.

⁵³ SIMON LYSTER, *INTERNATIONAL WILDLIFE LAW* 20 (Oceana 1985).

⁵⁴ Sumi, *The "Whale War" Between Japan and the United States: Problems and Prospects*, 17 DEN. J. INT'L L. & POL'Y 317, 318 (1989).



ancient practice of Japan which could be demonstrated by the fact that many whale bones have been excavated from Japanese archaeological mounds. Furthermore, Ancient Japanese poem, "Manyoshu", which was compiled at the end of the eighth century, contains references to whaling and whale meat.⁵⁵ On the other hand, USA and other whaling states have made only commercial use of whale meat, blubber and particularly whale fuel. However, with discovery of oil, a relatively cheap fuel Anti whaling nations have taken a protective stand against whaling. Such approach clearly demonstrates that permanent Moratorium on whaling would just be a manifestation of such cultural bias and in complete contravention of Japanese cultural tradition.

However, The International law is clear that cultural practices are to be encapsulated in a new humanism in which the protection of culture is increasingly conceptualized through the prism of human rights.⁵⁶ In other words, any conflict between culture and human rights will result in nullification of former in favour of latter.⁵⁷ By extension, the same principle must apply to Animal

Rights. Any other approach would result in placing human rights on a higher pedestal than animal rights and thereby assuming superiority over them. It would be a manifestation of speciesism. Therefore, a conflict between right to life of whale and Japanese culture has to be resolved in favour of whale's right.

3) It precludes the scientific use of whales for the benefit of human society.

A complete Moratorium on whaling would prevent the scientific community from discovering any substantial use of whales or any of its products. Such approach is strengthened by the history of medical science. Medical sciences are replete with examples of cures derived from animals and plants, many of which seemed useless and were at the point of extinction at the time of the medical discovery. For Instance, A feverish Andean man suffering from malaria, accidentally drank water from a pond containing quinine, which was later used to cure malaria on a global scale.⁵⁸

Although it is correct that scientific curiosity has guided the progress of human society so far and shall continue to do so, it is also equally true that whaling is not the only option for satisfying such curiosity. Ample scientific evidence suggests that it is not required to kill a whale to learn about its biology and behaviour. All information required for the conservation and management of whale populations can be obtained from non lethal research methods.⁵⁹

⁵⁵In Manyoshi, the term "Isanotori" (whale hunter) was used as a customary epithet in sea related context.

⁵⁶ UNESCO, I Bokova, Director-General of UNESCO, *A New Humanism for the 21st Century*, UNESCO Doc.ERI-2010/WS/1 Rev (7 October 2010).

⁵⁷ UNESCO, *Universal Declaration on Cultural Diversity* art. 4, <http://www.unesco.org/new/en/culture/themes/culture-and-development/the-future-we-want-the-role-of-culture/culture-and-human-rights/>.

"No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope."

⁵⁸ Sciencealert.com, <https://www.sciencealert.com/these-eighteen-accidental-scientific-discoveries-changed-the-world> (last visited Dec. 4, 2018, 04.45 PM).

⁵⁹ Australian Government, Department of the environment, water, heritage and arts,



For instance, Until recently, no Non-lethal technique was available for accurately ageing the large free-swimming cetacean species. Such inadequacy was used by Japan to demonstrate the need for continuance of usage of lethal scientific methods. The search for a non-lethal technique to accurately describe the age of whales led to discovery of novel technique utilizing whale skin to form an epigenetic age estimation method.⁶⁰ In the case of scientific whaling, if the costs are weighed against the competitive disadvantage of possible extinction of species and availability of non-lethal technique providing same, if not more accurate, results, then nonlethal sampling is demonstrably the best practice and such studies ought to replace all lethal studies.⁶¹ Such argument finds support in the ominous practice of misreporting of game caught. The staggering accounts of misreporting revealed by Russian scientists reveal that Soviet Union has misreported scientific whaling for more than 100% for more than

<http://www.environment.gov.au/system/files/resources/25068547-3401-43da-9ee4-5fd37dbbd0d6/files/fs-techniques.pdf> (last visited Dec. 5, 2018, 04.45 PM).

The Australian government has used several non-lethal techniques such as Acoustic research methods, Molecular methods, Genetic assessment, survey programs, Satellite tagging in its \$32 million, six-year International Whaling and Marine Mammal Conservation Initiatives Program, which has produced similarly accurate scientific results as that of JAPRA II, The scientific programme of Japan (Japan has been adamant on using lethal methods in light of its commercial aspect).

⁶⁰ A.M. Polanowski et al, *Epigenetic estimation of age in humpback whales*, 14 Mol Ecol Resour 976, 984 (2014).

⁶¹ C.A.Waugh & V. Monamy, *Opposing lethal wildlife research when nonlethal methods exist: scientific whaling as a case study*, 7(1) J Wildl Manag 231, 234 (2016).

40 years.⁶² During 1946–1986, the Soviet Union reported catch of 3651 for blue and pygmy blue whale while the actual catch was 13035, it reported catch of 2,710 for Humpback whale while the actual catch was 48,721, it reported catch of 19 for Bryde's whale while the actual catch was 1,468, it reported catch of 4 for Southern Right whale while the actual catch was 3,368.⁶³ Although the tendency to misreport cannot be attributed to every state, the staggering account of misreporting by soviet union makes a strong case for taking such misreporting into consideration while deciding upon the issue of permanent moratorium on whaling and such factor combined with before stated availability of non-lethal methods of accurately studying whales point towards the futility of scientific whaling and allows for the recognition of right to life of whales.

4) It violates right of Aboriginal subsistence Hunting of whales.

Aboriginal subsistence whale hunting does not aim at maximizing profit or catches.⁶⁴ It is aimed at subsistence of indigenous groups who have accepted whaling as an essential requirement of their cultural identity.⁶⁵ Presently four countries conduct Aboriginal subsistence Hunting of whales : Denmark (Greenland), Grenadines (Bequia), Russia (Chukotka) and United states of America (

⁶² Ivashchenko & Phillip J. Clapham and Robert L. Brownell, *Soviet Illegal Whaling: The Devil and the Details*, 73(3) Marine Fisheries Review 1, 14(2011).

⁶³ Id at 15.

⁶⁴ <https://iwc.int/aboriginal>

⁶⁵ Doubleday, *Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law*, 17 DEN. J. INT'L L. & POL'Y 373, 340 (1989).



Alaska and Makah tribe of Washington state).⁶⁶ Such whaling for subsistence finds support in the Article 1(2) of the International Covenant on Economic, Social and Cultural Rights which state: *"In no case may a people be deprived of its own means of subsistence."*⁶⁷

Therefore, any Ban on whaling would violate the cultural inclusion of whaling among such Indigenous groups and thereby consequently violate the International Covenant on Economic, Social and Cultural Rights. Doubleday, while proposing the above stated argument opts for a literal interpretation of the Article 1(2) of International Covenant on Economic, Social and Cultural Rights. However, a literal interpretation must not be used to assess the meaning of before stated phrase as if such interpretation is accepted, then it would lead to the absurd result of allowance of even human cannibalism. In order to avoid such absurd conclusion, as D'amato and Chopra suggest, it must not be read in isolation.⁶⁸ It must be interpreted in light of violation of other rights. Consequently, as whaling violates right to life of whales, it cannot be justified on account of aboriginal subsistence requirement.

5) It violates sovereign right of states over its natural resources.

The United Nations general Assembly through Resolution 1803 titled "Permanent Sovereignty over Natural Resources"

⁶⁶ IWC, <https://iwc.int/aboriginal> (last visited Nov. 7, 2018, 09.54 PM).

⁶⁷ International Covenant of Economic, Social and Cultural Rights art. 1(2), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967).

⁶⁸ D'amato, *supra* note 4, at 27.

recognized the right of states to freely explore exploit and dispose of its natural resources.⁶⁹ It is considered as the basic constituent of the right to self-determination which forms the basis of international Law. It is stated in the resolution that *"Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace."*⁷⁰ Such Sovereign right of states is embodied in United Nations convention on law of the seas (UNCLOS) as Right to fish granted to citizens of every state.⁷¹ It is to be noted that UNCLOS being the regulatory mechanism for the States in seas⁷² and supported by an established State practice⁷³ makes it mandatory to be followed by every state, irrespective of its ratification of the said treaty. A complete and Permanent ban on whaling would consequently violate the Sovereign right of states over its whales as it would deprive them of the right to determine its use for the development of the nation and for the well being of its people.

⁶⁹ G.A. Res. 1803 (XVII) at ¶ 2(Dec. 14, 1962).

⁷⁰ *Id* at ¶ 7.

⁷¹ UNCLOS, <https://www.unclosdebate.org/argument/855/us-already-abides-unclos-matter-customary-international-law-and-domestic-policy> (last visited Dec. 7, 2018, 03.53PM).

⁷² William T. Burke, *The New International Law Of Fisheries: UNCLOS 1982 And Beyond* 288-289 (Oxford 1994).

⁷³ UNCLOS, <https://www.unclosdebate.org/argument/855/us-already-abides-unclos-matter-customary-international-law-and-domestic-policy> (last visited Dec. 7, 2018, 03.53PM).



A need for discussion has arisen on the legitimacy of sovereign rights concept in light of the fact that the international law must not provide a simple exit from the teeth of international norms to any state who invokes the doctrine of sovereign rights. However, such discussion goes beyond the scope of this paper.

Although the claim for sovereign rights is legitimate, it must be weighed against the equally competent claim of precautionary principle. Precautionary principle states that lack of scientific certainty must not be used as a defense to avoid measures if serious threat of significant reduction in biological diversity or extinction of species exists.⁷⁴ Such doctrine is incorporated in various international instruments⁷⁵ and it is not overridden by UNCLOS as long as it is consistent with the 'general principles and objectives' of the Convention.⁷⁶ The Precautionary Principle is applicable only when: (a) the threat is uncertain; (b) there is a threat of environmental damage and (c) the threatened harm is of an irreversible nature.⁷⁷

In the case of whales, Uncertainty exists as the IWC itself recognizes the considerable scientific uncertainty over the no. of whales of different species and in different geographical stocks.⁷⁸ However, it is reasonable to expect adverse environmental impact considering scientific studies confirming that decline of whale's populations certainly alters energy flow and trophic interactions; and such perturbations, have the potential to alter pelagic food web structure dramatically.⁷⁹ Additionally the status of various species of whales as Endangered⁸⁰ leaves no room for doubt that Commercial whaling at such a phenomenal rate would lead to their extinction, which is irreversible. Therefore, the precautionary principle is applicable in case of whales and a permanent moratorium on whaling is only an extension of such principle.

Although, there exists a conflict between precautionary principle and sovereign rights, it is reasonable to ascertain that the conflict must result in negation of latter principle in light of before stated precarious condition of whales and violation of various sustainable

⁷⁴ Preamble to the Convention on Biodiversity, 1760 UNTS 79; 31 ILM 818 (1992) [CBD].

⁷⁵ Rio Declaration on Environment and Development, Principle 15, UN Doc. A/CONF.151/26 (vol. I)(1992) (Rio Declaration); WTO Agreement on the Application of Sanitary and Phytosanitary Measures art.5 ¶ 7, 33 ILM 28 (1994); Framework Convention on Climate Change art.3.3, 31 ILM 849 (1992); Cartagena Protocol on Biosafety, 39 ILM 1027 (2000),

⁷⁶ P. BIRNIE, A. BOYLE & C. REDGWELL, *INTERNATIONAL LAW AND THE ENVIRONMENT* 744-752 (3rd ed., 2009).

⁷⁷ 7 IUCN Council, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, May 16, 2007 (last visited November 5, 2018, 03.44PM),

<http://www.monachusguardian.org/library/iucn07a.pdf>.

⁷⁸ IWC, <https://iwc.int/estimate> (last visited November 6, 01.33PM).

⁷⁹ Trites et al, *Ecosystem change and the decline of marine mammals in the Eastern Bering Sea: testing the ecosystem shift and commercial whaling hypotheses*, 7(1) Fisheries Centre Research Reports 106, 125 (1999).

⁸⁰ IUCN Red List, *Balaenoptera musculus* (Blue whale) (last visited November 5, 2018, 03.48PM), 2018

at <https://www.iucnredlist.org/search?query=Blue%20Whale&searchType=species>; IUCN Red List, *Eubalaena glacialis* (north atlantic right whale) (last visited November 5, 2018, 03.54PM), at <https://www.iucnredlist.org/species/41712/50380891>



development goals. Consequently, it could be stated that the social utilitarian calculus lies in favour of recognizing the right to life of whales.

D. CONCLUSION

Human ethics has focused on the inherent, independent value of individual life, free from external contribution i.e. The worth of a human being's life is not determined in accordance with the individuals contribution to society or in connection with usefulness of the individual. Such fundamental moral principle has reflected in legal principles by honoring the sacredness of every individual's life in the same manner. The philosophy of whale rights insists only that such logic be respected. The independent value of human beings implies that whales have such independent value. Any other approach would be an extension of speciesism. The logical conclusion is that women do not exist serve men, slaves do not exist do serve masters and whales do not exist to be hunted by human beings. The main hindrance in recognition of such logic is the Human perception. The Vedas recognized such question by stating "Yatha Drishti Tatha Srishti" i.e. the creation is the result of your perception. The human beings have a tendency to humanize the world i.e. while evaluating anything in the world, human beings focus on Human characteristics and human standards. However, such perception is based on the inherent assumption that humans possess certain characteristics that separates us from the whales i.e. a manifestation of human exceptionalism and therefore, endows us with the right to judge the whales through the narrow prism of human standards i.e. a manifestation of human exceptionalism

which must not be used while making such evaluation. Why should whales, majestic creatures that are more intelligent,⁸¹ more sentient as stated before and who have more lingual expertise⁸² than human beings, be judged by human standards?

Once such perception is set aside and the truth of inherent, independent value of life of whales is acknowledged, we can state that whales must be protected by recognition of right to life and no other lesser protection because the extension of human duties as could be evinced today by the temporary moratorium fails to achieve justice for whales. I do not agree that only the continuation of temporary moratorium on only commercial whaling is sufficient for the purpose of protection of whales because justice did not demand reformation of slavery or regularizing slavery but abolishing it and recognizing the rights of the erstwhile slaves. Similarly, Justice does not demand "more humane" hunting and trapping of whales, but the total eradication of these barbarous practices by recognition of their right to life in accordance with the Benthamian jurisprudential understanding of personhood and rights.

⁸¹ D. DAY, *THE WHALE WAR* 152 (1987).

The brain of whale is 6 times larger than human beings and its neo- cortex is more convulated than human beings. Such findings indicate greater intelligence among whales than human beings.

⁸² Morgane, *The Whale Brain: The Anatomical Basis of Intelligence*, in J. McIntyre, ed, *MIND IN THE WATERS* 91,92 (Charles Scribner sons 1975).

The whales have developed language among themselves and also have developed interspecies communication with dolphins.



BIBLIOGRAPHY
Statues:

1. The Indian Penal Code, 1861.
2. The Indian Evidence Act, 1872.
3. The Code of Criminal Procedure, 1972.

Articles:

Integration Of The Insanity Defence And Mens Rea: A Suggested Accommodation Of Medical And Legal Views In Criminal Responsibility Of The Mentally Challenged.

A.M, Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, 4th edition-text (4th ed. 2000).

Bergs, L. Vernon, '*Medico-Legal Insanity and the Hypothetical Question*' (1923), Journal of Criminal Law and Criminology, Vol. 14.

Gluek, Sheldon, "Ethics psychology and criminal responsibility of insane' Cr. L.J. 208.

Kent Greenawalt, The Perplexing Borders of Justification and Excuse, 84 COLUM. L. REV. 1897.

OLIVER WENDELL HOLMES, JR. THE COMMON LAW 3 (Dover ed., Dover Publ'ns, Inc.

Books:

1. Code of Criminal procedure 1973, ch XXV, ss 328-339.
2. H. L. A. HART, *Punishment and Responsibility* 48 (48th edn, 1968).

Vibhuti, K.I., P S A Pillai's Criminal Law, 12thEdn. (2016).
