

# Animals, Colonialism, and the Rule of Law

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*Interest from animal law scholars is growing in grounding legal claims for animals in the globally-resonant concept that is the rule of law in order to dramatically improve the lives of animals. It might be objected that trying to marshal the rule of law's global legal prominence in favour of animals undermines anti-colonial and decolonization goals given that this exalted status for the rule of law is a legacy of British imperialism, involving the colonial subordination of colonized peoples and pre-existing Indigenous legal orders worldwide. From this vantage point, the rule of law appears too tainted by its colonial past and ongoing present and seems best abandoned rather than deployed as a conceptual ground on which to make anti-anthropocentric gains for animals in present legal systems. It is possible, however, for rule of law-based arguments seeking to advance the legal status of animals to avoid reinforcing this legacy. In this analysis, I demonstrate why arguments seeking to dramatically improve the legal positions of animals based on the rule of law can be part of an anti-colonial/decolonizing animal law reform platform and should not be ruled out for further consideration because of the concept's imperial and colonial impact.*

*Les spécialistes du droit animal s'intéressent de plus en plus à l'idée de fonder les revendications légales pour les animaux sur le concept à résonance mondiale qu'est la primauté du droit, afin d'améliorer considérablement la vie des animaux. On pourrait objecter qu'essayer de mobiliser la notoriété juridique mondiale de la primauté du droit en faveur des animaux sape les objectifs anticoloniaux et de la décolonisation, étant donné que le statut exalté de la primauté du droit est un héritage de l'impérialisme britannique, impliquant la subordination coloniale des peuples colonisés et des ordres juridiques autochtones préexistants dans le monde entier. De ce point de vue, la primauté du droit semble trop entachée par son passé colonial et son présent actuel et semble mieux abandonné plutôt que déployé comme un fondement conceptuel sur lequel nous pouvons réaliser des gains anti anthropocentriques pour les animaux dans les systèmes juridiques actuels. Mais il est toutefois possible que les arguments fondés sur la primauté du droit qui cherchent à faire progresser le statut juridique des animaux évitent de renforcer cet héritage. Dans cette analyse, je démontre pourquoi les arguments cherchant à améliorer considérablement les positions juridiques des animaux fondé sur la primauté du droit peuvent faire partie d'une plateforme de réforme du droit animal anticolonialiste et ne devraient pas être exclus d'un examen plus approfondi en raison de l'impact impérial et colonial du concept.*

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“[O]ur justice system and the rule of law are not fixed. They exist in the context of peoples’ lives and experiences. The health of our democracy partially rests on the ability of our institutions to adapt and be responsive to the changing realities in Canada.”

Jody Wilson-Raybould<sup>1</sup>

“If people behave brutally towards Animals, no form of democracy is ever going to help them, in fact nothing will at all.”

Olga Tokarczuk<sup>2</sup>

## I. Introduction

Seldom is the rule of law (or the democracy liberal legal systems presume it bolsters) a topic discussed in relation to animals. Yet, there is now emerging interest within animal law scholarship in connecting the problem of animal welfare underenforcement and the self-governing scope for animal-use industries to the rule of law.<sup>3</sup> This is a significant development as the rule of law is a foundational governing legal principle that is virtually universally applauded.<sup>4</sup> The possibility of a legal system applying the concept to protect animals even in a single jurisdiction could consequently have subsequent global impact. For this reason alone, those interested in dramatically improving the lives of animals may regard it as well worth pursuing theorization of a conceptual and doctrinal basis for the extension of the rule of law. Exploring the legal traction the rule of law may have for protecting animals also seems a productive pursuit given that other legal pathways to effect transformative change for animals (e.g. disruption of their property status and moving them into a justice-forward legal subject status) are slim.<sup>5</sup>

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1 Jody Wilson-Raybould, *Indian in the Cabinet: Speaking Truth to Power* (Toronto: HarperCollins Publishers Ltd, 2021) at 139.

2 Olga Tokarczuk, *Drive your Plow over the Bones of the Dead* (London: Penguin Random House, 2018) at 101.

3 John Adenitire, “The Rule of Law for All Sentient Animals” (2022) 35:1 Can JL & Jur 1 at 1; MB Rodriguez Ferrere, “Animal Welfare Underenforcement as a Rule of Law Problem” (2022) 12:11 Animals 1411 at 1; Katie Sykes & Sam Skinner, “Fake Laws: How Ag-Gag Undermines the Rule of Law in Canada” (2022) 28:2 Animal L 229 at 230.

4 Brian Z. Tamanaha, “The Rule of Law for Everyone?” (2002) 55:1 Current Legal Problems 97 at 98 [Tamanaha, “The Rule of Law for Everyone”].

5 Legal strategies seeking an end to animal captivity, exploitation, and injustice (as opposed to simply anti-cruelty enforcement) through common law and civilian pathways have variously used *habeas corpus* petitions, personhood claims, labour rights submissions, dignity and sentience pronouncements, and right to nature arguments. For a discussion of the limited success of law reform and litigation invoking such concepts thus far, see Charlotte E. Blattner, “The Recognition of Animal Sentience

We might worry, however, that trying to marshal the rule of law's global legal prominence in favour of animals undermines anti-colonial and decolonization goals given that this exalted status for the rule of law is a legacy of British imperialism, involving the colonial subordination of colonized peoples and pre-existing Indigenous legal orders worldwide. From this vantage point, the rule of law appears too tainted by its colonial past and ongoing present, and may accordingly seem best abandoned rather than deployed as a conceptual ground on which to make anti-anthropocentric gains for animals in present legal systems. That said, my sense is that it is possible for rule of law-based arguments seeking to advance the legal status of animals to avoid reinforcing this legacy. Indeed, this article's aim is to argue that arguments seeking to dramatically improve the legal position of animals through reference to the rule of law *can* be part of an anti-colonial/decolonizing animal law reform platform and should not be ruled out for further consideration because of the concept's imperial and colonial imprint.<sup>6</sup>

The argument presented in this article rests on two main premises: 1) that the current legal protection for the vast majority of animals in Canada and elsewhere (oceans and other bodies of water included) against human or corporate exploitation is negligible; and 2) that animals suffer enormously as a result.<sup>7</sup> Any assessment of what arguments or concepts should or should not form part of animal law advocacy due to their colonizing or decolonizing effects must keep this grim reality in mind. I also wish to clarify that the present analysis attaches a narrower definition to the terms "anti-colonial" and "decolonizing," i.e. one that only considers effects on anti-colonial and decolonization struggles that seek to benefit *human* racialized and Indigenous groups burdened by colonial logics and material practices. This is a narrower definition than a perspective that includes the legal uplifting

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by the Law" (2019) 9:2 J Animal Ethics 121; Karen Bradshaw, *Wildlife as Property Owners: A New Conception of Animal Rights* (Chicago: The University of Chicago Press, 2020); Maneesha Deckha, "Fifty Years of Taking Exception to Human Exceptionalism: The Feminist-Inspired Theoretical Diversification of Animal Law Amidst Enduring Themes" (2023) 46:1 Dal LJ 339 [Deckha, "Fifty Years"]; Jessica Eisen, "Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act" (2018) 51:3 U Mich JL Ref 469; Eva Bernet Kempers, "Transition rather than Revolution: The Gradual Road towards Animal Legal Personhood through the Legislature" (2022) 11:3 Transnational Environmental L 581; and Kristen A Stilt, "Rights of Nature, Rights of Animals" (2021) 134 Harv L Rev Forum 276.

6 The terms "progressive," "intersectional," and "anti-colonial" do not have a singular meaning. I use them as shorthand to connote animal law reform strategies that share the decolonization goals of human-focused decolonization social movements.

7 In fact, it can be observed that humans are waging a war against animals. See Dinesh Wadiwel, *The War Against Animals* (Leiden: Brill, 2015).

of animals as a major anti-colonial and decolonizing goal in and of itself.<sup>8</sup> Thus, the argument below does not require one to subscribe to this animal-inclusive understanding of anti-colonialism or decolonization. Rather, the analysis will show how including animals within the scope of the rule of law can align with anti-colonial and decolonizing agendas focussed on human injustices.

The first part of this article briefly outlines what is meant by the rule of law and why it could be beneficial to animals in the pursuit of animal law reform. The second part then reviews the connection between the rule of law and the rise of British imperialism and colonialism and their contemporary effects. I consider here the complexity and multidirectional nature of this connection to ultimately hold that recourse to the rule of law as part of legal advocacy for animal law reform can align with anti-colonial and decolonization advocacy in general.

## II. The Rule of Law and Why It Stands to Benefit Animals

### A. A Very Basic Primer on the Rule of Law

To understand how the rule of law relates to animals and can be a potentially strong source of protections for them, it is necessary to understand what the rule of law denotes. This is a daunting task as there is no single definition or accepted account of what the rule of law is or what it stands for.<sup>9</sup> Despite this indeterminacy, it is possible to identify three leading contemporary legal theories about the rule of law. These are typically referred to as formal, procedural, and substantive accounts of what the rule of law denotes (each of which has its leading proponents).<sup>10</sup> It is also possible to arrange these accounts along a spectrum of legal protections where the formal account provides the barest protections against harm and the substantive account the most, with the procedural account lying somewhere in between, supplementing the formal account with adequate procedural safeguards. The summary of these accounts below is heavily informed by Mary Liston's excellent overview.<sup>11</sup>

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8 Animals' current legal subordination in Canada and other former British and French colonies may be attributed to the imposition of colonial laws that designated animals as property. Mathilde Cohen, "Animal Colonialism: The Case of Milk" (2017) 111 *AJIL* Unbound 267 at 268.

9 Peter W Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55:3 *UTLJ* 715 at 717.

10 Adenitire, *supra* note 3 at 2.

11 Mary Liston, "Administering the Canadian Rule of Law" in Colleen Flood & Paul Daly, *Administrative Law in Context*, 4th ed (Toronto: Emond Montgomery Publications Limited, 2022) 72.

The formal account of the rule of law emphasizes that government decision-making must comply with public law norms. Foremost among these is the norm that decisions must be made according to the standards codified in written laws — not on the basis of personal whim or interests — with minimal discretion permitted by such laws. In addition, such laws should be publicly available, clear, non-retrospective, and capable of being complied with by the average (human) person. To further respect these norms, government decision-making should be unbiased and amenable to judicial review by an independent judiciary within a legal system that enjoys a robust self-governing legal profession.<sup>12</sup> If a legal system abides by these norms, it is seen to inspire trust and confidence in those that are governed. When we live in a jurisdiction characterized by a formal rule of law, we are inclined to perceive that a certain type of equality exists between government officials and ordinary citizens such that no one is “above the law.”<sup>13</sup>

To this cluster of public law standards, procedural accounts of the rule of law add in specific procedural protections, typically those connoted by the administrative law concepts of “due process” or “procedural fairness.” These procedures usually include an array of notice, hearing, evidentiary, and post-hearing requirements buttressed by, again, an independent judicial apparatus that can review procedural defects where a person is aggrieved. A system is said to be governed by the rule of law under procedural accounts when public law decision-making is married with procedural safeguards.<sup>14</sup>

Neither the formal or the procedural accounts mandate the subject matter or substantive content of laws and are thus commonly viewed as “thin” versions of the rule of law rather than “thick” ones.<sup>15</sup> Famously, there is no requirement that laws correlate with systemic equality or anti-discrimination norms or other human rights protections.<sup>16</sup> For such accounts, we turn to substantive or “thick” visions of the rule of law, which not only accord importance to public law norms and procedural safeguards, but to the content of laws too. The key aspect of such “thick” visions, in short, is that they depict law as having a tighter connection with morality and social justice, meaning that a legal sys-

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12 *Ibid.*

13 *Ibid.*

14 *Ibid.*

15 Even within these compartmentalizations, it is possible to identify internally “thinner” and “thicker” versions. See Jørgen Møller & Svend-Erik Skaaning (2012) 2:33 *The Justice System Journal* 136 at 138, discussing Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (New York: Cambridge University Press, 2004).

16 Brian Z Tamanaha, “The Rule of Law and Legal Pluralism in Development” (2011) 3 *Hague Journal on the Rule of Law* 1 at 5–6 [Tamanaha, “Legal Pluralism”].

tem cannot be grounded in the rule of law unless some sort of minimal ethical standards are upheld.<sup>17</sup>

## B. Why It Seems Plausible to Extend Rule of Law Theories to Protect Animals

Scholarly commentary addressing the rule of law and its application to animals is nascent, but the arguments about why the protections associated with the rule of law for individuals should extend to animals are quite straightforward. Most recently, John Adenitire has set out the connection between the formal, procedural, and substantive accounts of the rule of law and animals.<sup>18</sup> He has explained how each account in its archetypical cotemporary iteration entrenches unnecessary anthropocentrism (and also excludes human children and adults with cognitive atypicalities). This is because the accounts only make full sense when one imagines that it is a fully rational person that is interfacing with the legal system.

Adenitire, however, questions the need for such a level of rational capability. He explains how each account, despite their differences, is concerned with combatting arbitrary power against individuals due to the suffering such arbitrary power causes. He argues, convincingly, that the rule of law vision each account promotes is not compromised if it were to explicitly encompass animals.<sup>19</sup> Put otherwise, when we see that a common driver for any rule of law theory is a concern to curb the use of arbitrary power, it is illogical for these theories to exclude animals. As leading animal law scholar Martha Nussbaum has recently observed, animals are dominated by humans overwhelmingly in an arbitrary way, specifically because of a human exceptionalist or human-first mindset that defies justification.<sup>20</sup>

The extension of the formal, procedural, and substantive accounts of the rule of law also seems especially apt given the rampant rule of law problems that arise in relation to animals. In terms of a “thin” version of the rule of law, where existing animal welfare laws are not enforced, this problem received its highest profile in terms of judicial attention in the 2011 *Reece* decision by then Chief

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17 *Ibid.*

18 Adenitire, *supra* note 3 at 2. It may be further observed that the rule of law should not depend on recognition that legal subjects require certain capacities to qualify as legal subjects. I am grateful to Dinesh Wadiwel for this insight.

19 *Ibid* at 4.

20 Martha C Nussbaum, *Justice for Animals: Our Collective Responsibility* (New York: Simon & Schuster, 2022) at xi, 186.

Justice Catherine Fraser of the Alberta Court of Appeal.<sup>21</sup> In this case, animal advocates sought to compel the Alberta government to enforce the Alberta *Animal Protection Act*, which prohibited any animal from being in “distress,” in favour of Lucy, a lone female Asian elephant who suffered from multiple chronic health complications at the Edmonton Valley Zoo (these complications were acknowledged by the zoo). The plaintiffs argued that the failure of the government to remedy the “distress” by sending Lucy to an elephant sanctuary at least merited a declaration by the court.<sup>22</sup> By a two-to-one majority, the case was dismissed as an abuse of process. But in a dramatically divergent dissent, Chief Justice Fraser connected the plaintiffs’ claim to the rule of law, citing enforcement of existing laws and the ability of citizens to hold government accountable to the laws it passes as basic tenets of democracy.<sup>23</sup>

### **C. Why It Seems *Productive* to Extend Rule of Law Theories to Protect Animals**

As ground-breaking as this dissent was in Canada and across the world for the importance it ascribed to animal law issues and its acknowledgement that animals are made vulnerable by legal systems that categorize them as property, if we *thicken* this understanding for the rule of law, we see that animals stand to benefit much further.<sup>24</sup> Even a procedural theory of the rule of law would benefit animals who are currently portrayed as legal non-subjects in the industries that confine them. It would require governments to pass laws that guard against the procedural arbitrariness that currently pervades animal-use

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21 *Reece v City of Edmonton*, 2011 ABCA 238 [*Reece*], leave to appeal to SCC refused, 34453 (26 April 2012). Notably, Chief Justice Fraser’s opening paragraph observed (*ibid* at paras 39–41): “This appeal involves Lucy, a 36 year old Asian elephant. She arrived at the Edmonton Valley Zoo, owned by the City of Edmonton, when she was only about two years of age. It is alleged that since then, Lucy has been housed at the Valley Zoo by herself at various times, most recently for almost four years. It is also alleged that the size and structure of the shelter in which the City has confined Lucy for years fail to comply with the City’s obligations at law. And that these deprivations have caused or aggravated a number of Lucy’s long-standing health problems. Some may consider this appeal and the claims on behalf of Lucy inconsequential, perhaps even frivolous. They would be wrong. Lucy’s case raises serious issues not only about how society treats sentient animals — those capable of feeling pain and thereby suffering at human hands — but also about the right of the people in a democracy to ensure that the government itself is not above the law ... The rule of law, which forms part of the bedrock of our democracy, requires that all government action comply with the law. No one in Canada is above the law. And that includes government itself.” The dissenting opinion was an outlier for its time as it portrayed animals as beings who were vulnerable and were entitled to at least a thin version for the rule of law. For further discussion, see 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 797–813.

22 *Reece*, *supra* note 21 at para 44.

23 *Ibid* at paras 40–41. Sadly, Lucy still lives at the Edmonton Valley Zoo.

24 Adenitire, *supra* note 3 at 26–29.

industries due to the absence of regulation these industries enjoy vis-a-vis their responsibilities toward animal well-being. For the purposes of animal protection (as opposed to, say, human health) these industries are left to self-regulate.

Let us consider two important examples in Canada. First, the animal agricultural industry, by far the largest exploiter of land animals, is unregulated vis-à-vis animal well-being and the conditions animals live in beyond transport and slaughter guidelines. Even in those last two areas, the existing regulation is minimal and widely criticized as lagging behind international standards.<sup>25</sup> Industry codes created by a body called the National Farm Animal Care Council (“NFACC”) exist to set expectations for agricultural enterprises, but these are not regulatory in nature as they are industry-generated and optional.<sup>26</sup> Some industry codes were recently updated, but still protections for animals are very poor.<sup>27</sup> Anti-cruelty laws do not help to fill the gaps for farmed animals as these laws typically exempt animal husbandry and other normative animal industries or are interpreted as doing so.<sup>28</sup>

When we move to animals in research we see a similar structure. There is no public or private regulation of what can be done to most animals in Canadian research labs.<sup>29</sup> At the most, institutions funded by the federal government through the Natural Sciences and Engineering Research Council or the Canadian Institutes of Health Research must host an animal care committee that approves of all animal-using research on campus according to the decades-old 3Rs approach (refine, reduce, replace). This system is overseen by the Canadian Council on Animal Care (“CCAC”), which is populated by animal researchers and institutions and is not a government body.<sup>30</sup> It has no enforcement powers at all and although it must do yearly audits of facilities, its efficacy

25 Peter Sankoff, “Canada’s Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation?” (2019) 5:1 Canadian Journal of Comparative and Contemporary Law 299 at 2, 9–10, 14; Maneesha Deckha, “The ‘Pig Trial’ Decision: The Save Movement, Legal Mischief, and the Legal Invisibilization of Farmed Animal Suffering” (2018) 50:1 Ottawa L Rev 65 at 81 [Deckha, “The ‘Pig Trial’ Decision”].

26 For a critical overview questioning the enforceability of the industry codes and hence their status as “regulation,” see Sankoff, *supra* note 25.

27 See, for example, Agriculture and Agri-Food Canada, Government of Canada, *National Dairy Code — 1997, revised November 2021* (June 23, 2021), online: <<https://agriculture.canada.ca/en/sector/animal-industry/canadian-dairy-information-centre/acts-regulations-codes-and-standards/national-dairy-code-part-i>> [<https://perma.cc/J5SS-42MP>]; and Animal Justice’s critique of the National Dairy Code, Camille Labchuk, *7 Ways Canada’s New Dairy Code Condones Cruelty* (May 1, 2023), online: Animal Justice <<https://animaljustice.ca/blog/dairy-code-condones-cruelty>> [<https://perma.cc/2NXJ-3N62>].

28 Sankoff, *supra* note 25 at 6–8; Deckha, “The ‘Pig Trial’ Decision”, *supra* note 25 at 83, fn 5.

29 Vaughan Black, Andrew Fenton & Elisabeth H Ormandy, “Protecting Canada’s Lab Animals: The Need for Legislation” (2022) 12:6 Animals 770 at 1–2.

30 *Ibid* at 3.

is reduced by the fact that it gives universities advance notice of its inspections. Independence is also compromised by the fact that university representatives who sit on the CCAC's governance bodies also fund the CCAC.<sup>31</sup> The only repercussion that may flow for a violating institution is a loss of funding; no other penalty is a part of this system. But even this is only a remote possibility: since its 1968 inception, there has been only one recorded instance of a university under the CCAC system losing its funding.<sup>32</sup>

As with the NFACC system, the bulk of the decision-making under the CCAC system is private and not made public. There is no judicial review of any activity since the activity occurring is not considered to be government action in the first place and is thereby not justiciable. It is clear that a formal and procedural rule of law system that included animals would mean that government would provide oversight of farming and animal research, decision-making would be made according to public law norms rather than private industry cultural codes, and decisions would be transparent and judicially reviewable. In addition, to account more fully for animals' interests, representatives of relevant animal protection groups would need to be present during the processes of creating the regulations and laws that govern the industries.

As Adenitire has observed, it is unlikely that a procedural vision of the rule of law would benefit animals on the scale that a substantive vision — one that imagines them as equal beings deserving of justice — would.<sup>33</sup> An antipathy toward excesses of arbitrary government power does not translate into antipathy toward non-arbitrary yet still oppressive government power, at least on the formal and even procedural accounts. Without substantive safeguards in relation to human or other rights protections that the government is bound to respect, laws that reflect oppressive attitudes toward groups can pass an anti-arbitrariness standard.<sup>34</sup>

In contrast, on a substantive account, it would be indefensible for such industries to continue because their instrumentalization of animals would not meet the expectations of how legal subjects of justice (in this vision, animals, whether as "persons" or classified under another subjectifying category) should

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31 *Ibid.*

32 *Ibid.* Black et al offer a general critique of the inefficacy of the system in protecting animals and call for proper regulation. For another illuminating critical overview emphasizing similar concerns, but also analyzing the claims the CCAC makes through a critical discourse analysis, see Laura Janara, "Human-Animal Governance and University Practice in Canada: A Problematic Redescription" (2015) 48:3 Canadian Journal of Political Science 647.

33 Adenitire, *supra* note 3 at 3, 23, 26, 29.

34 Tamanaha, "The Rule of Law for Everyone", *supra* note 4.

be treated. It is this vision of the rule of law that is required to move animals away from their property status, and to disrupt their status as mere objects or resources for human use. If we are of the view that the non-arbitrariness aspect of the rule of law demands recognizing animals as deserving of justice then it becomes a source for generating fundamental rights to life, liberty, and security of the person, among others, for animals that should prohibit the extent of their present-day exploitation similar to how we understand the protections fundamental rights provide for humans.<sup>35</sup>

None of this is to say that the rule of law in theory is a type of panacea.<sup>36</sup> Nor is the foregoing meant to promote the view that legal systems are superior ways of instilling order and cultivating non-violence than non-legal modes of influence or governance.<sup>37</sup> Indeed, the situation of animals confirms the observation that extreme violence can easily co-exist with societies with a comparatively strong rule of law culture. But at least in a situation where the non-legal norms vis-à-vis animals are similarly dismal (and responsible for the anthropocentric legal system in the first place that classifies animals as property or non-subjects), and where the legal system has robust precedent for a substantive vision of the rule of law, bringing animals under the remit of the rule of law would likely be productive. Here, the concept is available to catalyze a shift in anthropocentric cultural norms.<sup>38</sup>

Doubtless, rule-of-law promotion efforts have had a dismal success rate in countries where there is no pre-existing normative base or culture of adhering to top-down state imperatives, institutional authority, or the “mix of cultural commitments we call the rule of law.”<sup>39</sup> However, my purpose here is to consider whether animal advocates should pursue rule of law-based arguments for animals in countries where the rule of law already strongly registers at least in its formal and procedural accounts at a normative and institutional level (this includes Canada) and where there is precedent for a substantive vision to imbue the rule of law (this also includes Canada). Assuming this threshold level of

35 This could occur through animals interests being recognized through the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. For how this analysis might unfold see Adam Clasky, “Animals as Rights-Holders: Could the Charter Abolish Farmed Animal Use?” (2025) 13:1 Global J Animal L.

36 *Ibid* at 101–103.

37 Rose Ehrenreich Brooks, “The New Imperialism: Violence, Norms, and the ‘Rule of Law’” (2003) 101 Mich L Rev 2275 at 2313.

38 For further discussion of the non-correlation, see *ibid* at 2311–2323.

39 *Ibid* at 2280–2285, 2322. As Brooks observes: “[C]hanges in formal law matter where prevailing cultural norms say that formal law matters. But when formal law has little resonance for people, changes in formal law cannot by themselves create new normative commitments to the rule of law.” *Ibid* at 2322. See also Tamanaha, “Legal Pluralism”, *supra* note 16.

adherence to the rule of law, and acknowledging the benefits it holds for animals should they eventually be included, the next section considers our central question: can the rule of law contribute to an anti-colonial and decolonizing agenda?

### **III. Can the Rule of Law Contribute to Anti-Colonialism and Decolonization?**

In this part of the article, then, the imperial and colonial role the rule of law has played in British Empire-building is recalled as a departure point for considering whether this history and legacy can be resisted and contested by contemporary deployments of the rule of law.

#### **A. Answering at a General Level**

##### ***1. Reckoning with an Imperial History and Present***

Human rights advocates typically regard thin versions of the rule of law as inadequate to the task of ensuring substantive human right goals.<sup>40</sup> A substantive vision of the rule of law is advanced instead to achieve new rights recognitions.<sup>41</sup> But even a substantive version of the rule of law can be problematic from an anti-colonial perspective. In considerable part, this is due to the entrenched association of the rule of law with the imperial era jurist Albert Venn Dicey. Dicey is credited with popularizing the concept of the rule of law in Britain as a foundational legal value encapsulating British cultural ideals of good governance.<sup>42</sup> At Dicey's time, "good governance" encapsulated colonial ambitions vis-à-vis other nations.<sup>43</sup> The British common law, in particular, was perceived to be a boon for the colonized to help inculcate proper virtues in and thus "civilize" colonial subjects.<sup>44</sup> This, of course, was the case in Canada, where we can read the *Indian Act*, first enacted by the federal government in 1876 to authorize and sustain a segregationist Indian Reserve system, as a for-

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40 Randall P Peerenboom, "Human Rights and Rule of Law: What's the Relationship?" (2005) 36:3 Georgetown J Intl L 809 at 18, 20–21.

41 *Ibid* at 25.

42 Emilio Santoro "The Rule of Law and the 'Liberties of the English': The Interpretation of Albert Venn Dicey" in Petro Costa & Danilo Zolo, eds, *The Rule of Law: History, Theory, and Criticism* (Dordrecht: Springer, 2007) at 161; LB Louwerse, *The EU's Conceptualisation of the Rule of Law in its External Relations: Case Studies on Development Cooperation and Enlargement*, Dissertation (Leiden: Leiden University Repository, 2019) at 48, 68–69.

43 Dylan Lino, "The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context" (2018) 81:5 Modern L Rev 739 at 742; Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford: Stanford University Press, 2012) at 208–209.

44 Lino, *supra* note 43 at 746–749.

mal legal expression of racial designations of colonized peoples as barbaric.<sup>45</sup> And while European empire-building adopted a legally pluralist framework that allowed for the expression of Indigenous legal orders in tandem with colonial laws, the pride in the exportation of the “rule of law” influenced colonial officials across the British Empire.<sup>46</sup> If there is a core constellation of ideas that epitomizes British colonialism and imperialism, and justified the violence that attended it, it is likely that the British Empire version of the “rule of law” that is now entrenched in postcolonial legal systems would be a part of this constellation.<sup>47</sup> A substantive vision of the rule of law that aims for progressive ends does not avoid this history.

A further concern arises from the reality that the rule of law’s dispensations of violence and colonizing impact continue today. The global discourse surrounding the rule of law promotes neoliberal economic policies and expectations for development spending that are largely set by the executive arm of the American government and the Western legal profession.<sup>48</sup> A prominent strand of postcolonial critique maintains that the rule of law contains a built-in Othering dynamic that is linked to the idea of “states of exception.”<sup>49</sup> These states problematically structure legal systems the world over, permitting formal suspension of the law during periods of emergency, but also sometimes on a more mundane basis.<sup>50</sup> In the latter instance, there is always an Other to the law’s normative legal subject such that the suspension of basic human rights is

45 *Indian Act*, RSC 1985, c I-5. Coel Kirkby, “Reconstituting Canada: The Enfranchisement and Disenfranchisement of ‘Indians,’ Circa 1837-1900” (2019) 69:4 UTLJ 497 at 511.

46 Lino, *supra* note 43 at 749. For more on how legal pluralism in multiple instances of British, French and Spanish empire-building was cultivated “as an effective mode of colonial rule,” see Laura Benton, “Empires and Jurisdictional Politics: Legal Pluralism and the Search for Global Order” in Paul Schiff Berman, ed, *The Oxford Handbook of Global Legal Pluralism* (Oxford: Oxford Academic, 2020) 188 at 188–190; Laura Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2001).

47 Neil ten Kortenaar, “The Rule, the Law, and the Rule of Law in Achebe’s Novels of Colonization” (2015) 2:1 Cambridge Journal of Postcolonial Literary Inquiry 33 at 34.

48 Paul Gowder, *The Rule of Law in the United States: An Unfinished Project of Black Liberation* (London: Bloomsbury Academic, 2021) at 171.

49 Elizabeth Kolsky, “The Colonial Rule of Law and the Legal Regime of Exception: Frontier ‘Fanaticism’ and State Violence in British India” (2015) 120:4 American Historical Rev 1218 at 1245–1246; Shampa Biswas & Sheila Nair, “Introduction: International Relations and ‘States of Exception’” in Shampa Biswas & Sheila Nair, eds, *International Relations and States of Exception: Margins, Peripheries, and Excluded Bodies* (London: Routledge, 2009) at 10–11, 19.

50 Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003) at 16–17; Sherene Razack, *Casting Out: Evicting Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2009) at 11. For a contrasting view that while states of exception should adhere to the rule of law, they are not actually endemic to liberal legal systems, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

not episodic or infrequent, but systemic. Under this view, the rule of law, even as it operates in postcolonial states that liberated themselves from British rule, also normalizes violence and lawlessness. This is not a paradoxical trait of the rule of law, but an unsaid element of how power operates in the liberal legal system, revealing to those who observe closely or are placed in this state of violence or lawlessness or exception the hypocrisy of the system and the mythic quality of the rule of law.<sup>51</sup>

## **B. Deploying the Rule of Law to Counter Colonizing Impacts**

From such critique, the question thus arises whether the rule of law can be rehabilitated as a concept, can avoid colonizing impacts, and can possibly even contribute to an *anti*-colonial agenda. An initial observation might be that the fact that the colonial historical imprint has contemporary implications is not a sufficient reason to abandon the rule of law when the value that racialized peoples burdened by colonial logics today assign to the concept is considered.

### ***1. In the Global South and Non-Liberal States***

For some authors writing from the Global South the rule of law is a critical foundation to ensure fundamental rights protections against government excess and arbitrariness,<sup>52</sup> even in the face of menacing public health threats.<sup>53</sup> Other analyses pertaining to how to think about the rule of law in relation to the contemporary postcolonial era are more ambivalent in their endorsement of the rule of law, but endorse it nonetheless as useful in global South societies negotiating the impacts of colonization. Neil ten Kortenaar offers this more nuanced treatment of the rule of law through an unpacking of the renowned Nigerian novelist Chinua Achebe's relationship to law, and the *rule of law* in particular, in Achebe's "two novels of colonization," *Things Fall Apart* and *Arrow of God*.<sup>54</sup> Ten Kortenaar flags the appreciative comments Achebe penned in a

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51 Jinee Lokaneeta, "Rule of Law, Violence and Exception: Deciphering the Indian State in the Thangjam Manorama Inquiry Report" (2021) 17:1 Law, Culture and the Humanities 71 at 71–72; Martha McCluskey, "Gender, Violence, and the Rule of Law: Remembering Isabel Marcus" (2023) 71:5 Buff L Rev 15; Patrick Wolfe, "Settler Colonialism and the Elimination of the Native" (2006) 8:4 Journal of Genocide Research 387 at 402; Lorenzo Veracini, *Empire by Settlers — The Third Wave in Colonialism: A Global History* (New York: Routledge, 2023) at 73.

52 Khurhsid Iqbal, "The Rule of Law Reform and Judicial Education in Pakistan: Search for a Model" (2015) 17:1 European Journal of Law Reform 47.

53 Kiran Kumar Gowd, Donthagani Veerababu & Veeraiahgari Revanth Reddy, "COVID-19 and the Legislative Response in India: The Need for a Comprehensive Health Care Law" (2021) 21:4 Journal of Public Affairs 1 at 6.

54 Chinua Achebe, *Things Fall Apart* (Nigeria: William Heinemann Ltd, 1958); Chinua Achebe, *Arrow of God* (London: William Heinemann Ltd, 1964).

memoir, written long after these two novels, for how the British governed other countries.<sup>55</sup> Kortenaar presents the protection and security Achebe felt moving around Nigeria under the British not as colonial nostalgia, but as a critique regarding “what is lacking in postcolonial Nigeria,” namely a well-functioning state “including a hierarchical administration whose directives were effectively carried out, and security for citizens, made possible by an effective monopoly of violence by the state *and* subordination to the rule of law.”<sup>56</sup> Ten Kortenaar takes care to emphasize how the British used the rule of law to maintain order and justify violence as part of colonial rule. He nevertheless acknowledges the value in the protection the rule of law brings to property rights and personal safety and is sympathetic to why contemporary postcolonial nationals in Nigeria and other African states might view the rule of law positively.<sup>57</sup>

It can be readily understood why the rule of law administered through British-established courts may be preferred over the rule of armed private groups and desired as a shield against state violence as well.<sup>58</sup> As Mark Brown has observed, it is possible to respect this preference by those living in postcolonial states for some residual legal colonial structures such as an independent judiciary and judicial review as a legitimate *anti*-colonial view “without at all affecting our broader view of colonialism as a political, economic, or moral form of oppression.”<sup>59</sup> Such respect also does not romanticize liberal democratic rule of law-based societies as predominantly less violent than those that are not.<sup>60</sup> Indeed, this ability of postcolonial states to be able to enforce law to prevent violence closely tags onto why Brian Tamanaha has argued that the well-established understanding of the rule of law as “protection against government tyranny” is “good” for all countries, societies, and peoples.<sup>61</sup> This

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55 Ten Kortenaar, *supra* note 46 at 33–34.

56 *Ibid* at 34 (emphasis in original).

57 *Ibid*.

58 *Ibid*.

59 Mark Brown, “An Unqualified Human Good? On Rule of Law, Globalization, and Imperialism” (2018) 43:4 Law and Social Inquiry 1391 at 1397.

60 Brooks, *supra* note 37 at 2322 (warning against such romanticism) and 2333 fn 154 (noting the promise of liberal democracies in creating less violence societies despite her hard-hitting critique again the rule of law), citing John Norton Moore, “Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance” (1997) 37:4 VA J Intl L 811 at 860.

61 Tamanaha, “The Rule of Law for Everyone”, *supra* note 4 at 105. Here Tamanaha echoes EP Thompson’s controversial claim that the rule of law was a “universal human good” (*ibid* at 100). See also the discussion of the controversy surrounding Thomson’s claim in relation to Tamanaha’s work specifically in Martin Krygier, Book Review: *On the Rule of Law: History, Politics, Theory* by Brian Z Tamanaha (2005) 32:4 JL & Soc’y 657 at 664, and in general in Mark Brown, “An Unqualified Human Good? On Rule of Law, Globalization, and Imperialism” (2018) 43:4 Law & Soc Inquiry 1391. Both discussions agree with Tamanaha regarding the desirability for all societies of the stance against government tyranny that the rule of law offers.

anti-tyranny understanding is still the “core idea of the rule of law” and, given its long lineage traceable to Classical Greek thought, “existed long before liberalism was ever imagined.”<sup>62</sup> From Tamanaha we learn that the iteration of the imperial rule of law associated with Dicey and the British Empire contains this core idea that governments must not act tyrannically, but instead must respect the law and qualify their law-making power with “internal and external limits.”<sup>63</sup> But because of the additional liberal values embedded into this vision and subsequent visions of the rule of law since then, current dominant understandings of the rule of law that link it to liberal and democratic commitments are not necessarily “for everyone.”<sup>64</sup> The later and now-dominant liberal iteration of the rule of law may be a more problematic fit for societies that do not abide by liberal norms — societies, that is, where customary law norms dominate.<sup>65</sup>

Tamanaha’s historical tracing of the concept of the rule of law shows us that what we think of as the rule of law today and attempt to globalize (with spectacularly poor results) is a liberal iteration, but that the basic idea of the rule of law is much older and not associated with liberalism (or the British Empire).<sup>66</sup> Tamanaha’s conclusion is that this vision of the rule of law is good for all states to follow, including postcolonial states where liberal values are largely absent or subordinate to other values. We may connect these observations to the acceptance or at least tolerance of liberal concepts that are otherwise targeted in postcolonial critique when they are deployed for purposes that subvert initial exclusionary liberal premises.<sup>67</sup>

## ***2. In the Global North and Contemporary Liberal States***

The ability of the rule of law to not only counter egregious state violence, but also hold administrative officials to account for oppressive decisions, includ-

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid* at 108, 111–112, 118. Krygier, *supra* note 61 at 660.

<sup>64</sup> The liberal vision of the rule of law is meant to safeguard individual liberty and should therefore be public, available in advance, non-arbitrary, clear, provide certainty, etc. so that people may know what actions they can take without running afoul of the law. *Ibid* at 112.

<sup>65</sup> *Ibid* at 112, 119.

<sup>66</sup> Krygier, *supra* note 60 at 662.

<sup>67</sup> Gayatri Chakravorty Spivak, “Righting Wrongs” in *Wronging Rights? Philosophical Challenges for Human Rights* (London: Routledge, 2011) 79 at 98–99; Ratna Kapur, “In the Aftermath of Critique We Are Not in an Epistemic Free Fall” (2014) 25:1 *Law and Critique* 25 at 37. For a discussion of the subversive deployment of other liberal concepts in favour of animals, namely rights and personhood, see Maneesha Deckha “(Feminist) Animal Rights without Animal Personhood?” in Erika Cudworth, Ruth E McKie & Di Turgoose, eds, *Feminist Animal Studies: Theories, Practices, Politics* (Routledge, 2023) 19.

ing those stemming from inherited colonial and racial mindsets, is also seen in Western liberal democratic countries vis-à-vis their own racialized nationals. In the Canadian context, we can think of Guantánamo “detainee” Omar Khadr’s claims against the federal government. The Conservative-led federal government at that time had claimed that its decision to not repatriate Khadr (who was just 15 when captured by the Americans and charged with killing an American soldier) was not judicially reviewable as the conduct of foreign affairs was a prerogative that is purely political.<sup>68</sup> Khadr, located in the notorious camp zone where only American military norms apply, was literally in a “state of exception.” Postcolonial scholars have noted the colonial and racist rationales that have allowed such camps detaining Muslim men and boys to operate as spaces where conventional civil rights guarantees of formal and procedural rule of law protections do not exist.<sup>69</sup> Among other arguments that he used in an effort to be repatriated to Canada, Khadr relied on the need for the government to abide by the Canadian Constitution to challenge the government’s claim regarding the non-reviewability of the foreign affairs prerogative power. The Canadian Supreme Court agreed with him, citing the need for governments to follow the law and the role of the courts in making sure that they do so.<sup>70</sup> Here, then, the “core” meaning of the rule of law against government holding all the power in governing is contributing to clear anti-colonial ends in the Canadian context vis-à-vis Canadian nationals. It is challenging the state of exception in which Khadr and those like him were placed due to racial and colonial Othering ideologies about Muslim men.

It is also possible to see how the rule of law, despite the violence it has historically substantiated, can be of service to contemporary anti-racist efforts in the United States vis-à-vis American citizens and racialized immigration regimes. Leading rule of law and critical race theorist Paul Gowder discusses the benefits of the rule of law to advance justice for racially marginalized peoples in the United States in *The Rule of Law in the United States: An Unfinished Project of Black Liberation*.<sup>71</sup> The book offers a robust accounting of all the ways the common law, legislators, and courts have not lived up to the ideals of the rule of law vis-à-vis Black Americans even on a thin understanding of what the rule of law requires. Gowder also discusses deficiencies in implementing a just vision of the rule of law — which sometimes rose to the level of flouting of the rule of

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68 *Canada (Prime Minister) v Khadr*, 2010 SCC 3 (CanLII) at para 33.

69 Razack, *supra* note 50.

70 *Ibid* at 37–40.

71 Gowder, *supra* note 48.

law altogether — vis-à-vis Indigenous Americans and asylum-seeking refugees at the US-Mexican border.<sup>72</sup> He is scathing in his interrogation of this history and contemporary reality where the rule of law has often been a colonial and racist ruse where it has been invoked.<sup>73</sup>

At the same time, Gowder does not call for an abandonment of the rule of law, even as the phrase seems to have lost most of its meaning in the United States since the ascent of Donald Trump.<sup>74</sup> In assessing American foreign policy in more recent times, he notes that “(n)ot all of America’s rule of law development efforts are shamelessly colonial. Some might genuinely facilitate the self-governance of those who might otherwise be subjected to violence or oppression.”<sup>75</sup> He also recognizes and applauds the progress made in the United States toward an egalitarian vision of the rule of law.<sup>76</sup> In the end, he ultimately calls for the rule of law’s amplification as a substantive vision to better realize the justice claims that Black Americans have and create a less bureaucratic and more respectful relationship between the governing and those who are governed.<sup>77</sup>

This focus on reforming what the rule of law means in the American legal system, or advancing legal submissions that invoke the rule of law’s core concern against government acting without meaningful legal accountability, as in the *Khadr* case, or seeking its protection in present-day postcolonial contexts in the global South, highlights the positive anti-colonial potential of the rule of law. Affirming adherence to such basic rule of law protections can also be said to align with the approach to reconciliation and decolonization that some prominent Indigenous leaders have advocated in the Canadian context.<sup>78</sup> Notably, in her memoir describing her rise to hold the Offices of Minister of Justice and Attorney General — the first Indigenous person to do so — and her eventual resignation due to her sense of what the rule of law required (i.e. prosecutorial independence free of political interference),<sup>79</sup> the Honourable Jody Wilson-Raybould affirms the need to respect the rule of law a myriad of times.<sup>80</sup> As she describes it, she strove to uphold the rule of law during her time

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72 *Ibid* at 108–133.

73 *Ibid* at 171–172.

74 *Ibid* at 170.

75 *Ibid* at 172.

76 *Ibid* at 177–178. Gowder’s commendatory approach to the rule of law is also evident in his earlier work, Paul Gowder, *The Rule of Law in the Real World* (Cambridge: Cambridge University Press, 2016).

77 *Ibid* at 179–181.

78 The analysis will discuss the Canadian context.

79 Wilson-Raybould, *supra* note 1.

80 *Ibid* at 139, 141, 198, 200, 232, 240, 251, 252, 290–94, 299, as examples.

in Cabinet and was eventually shuffled out of the Attorney General position because of it. She felt compelled to resign from her Cabinet position because of her belief in the rule of law and what she saw as pressure from the Prime Minister's Office and senior members of the executive to ignore it in relation to a particular prosecution decision she had made.<sup>81</sup>

Her affirmations regarding the rule of law, even a formal account that is so tightly correlated with the Diceyan version against political arbitrariness, were, for Wilson-Raybould, closely tied to her understanding of the Indigenous cultural and legal teachings she received in her matriarchal upbringing.<sup>82</sup> In one passage, Wilson-Raybould connected her upbringing "as an Indigenous woman, raised with a worldview that all things are interconnected and interdependent," to the rule of law and other "principles that undergird our democracy, and are critical to how our government functions."<sup>83</sup> Her vision of the rule of law is a substantive one that is decisively reformist in adapting to social realities and inequities. She writes:

We need to understand and apply the rule of law in ways that recognize that in our nation's history, the law, in fact, has been used to exclude, marginalize, and oppress certain peoples. We need to recognize that in various ways we must strive to make our society more substantively equal, and that people have diverse realities and experiences that we need to account for. We need to recognize that in upholding the rule of law we must do so in ways that promote greater justice and equality in how the law operates, and in society as a whole...This understanding of the rule of law is about continually bending towards justice.<sup>84</sup>

Other leading Indigenous voices addressing the Canadian legal and political landscape have also argued that reconciliation approaches (those approaches

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81 At one point in her political memoir Wilson-Raybould writes: "Then, of course, there is the rule of law. On SNC-Lavalin this was the heart of the matter. The attempts to pressure were a violation of the principle of the rule of law and the related principle of prosecutorial independence." *Ibid* at 239. She further writes that one of the reasons she resigned was "trying to ensure the rule of law was upheld by the government" in relation to the SNC-Lavalin affair. *Ibid* at 240. And also that the "entire (SNC-Lavalin) episode was an attack on the rule of law for no good reason." *Ibid* at 290. The "SNC-Lavalin affair" was a situation where Wilson-Raybould wanted to pursue a public prosecution of the company SNC-Lavalin but experienced pressure from the Prime Minister and his Office not to prosecute.

82 The closing lines of the public testimony Wilson-Raybould gave were: "I will conclude by saying this: I was taught to always be careful what you say because you cannot take it back. It was taught to always hold true to your core values and principles, and to act with integrity. These are the teachings of my parents, my grandparents and my community. I come from a long line of matriarchs, and I am a truth-teller in accordance with the laws and traditions of our Big House. This is who I am, and this is who I will always be." Quoted in Wilson-Raybould, *ibid* at 241.

83 *Ibid* at 299.

84 *Ibid* at 291, 292.

where the current Canadian legal framework is engaged with and not rejected altogether) can also be “transformative” and decolonizing in relation to inter-species relationships.<sup>85</sup> In terms of addressing the rule of law more specifically, leading Indigenous legal scholar John Borrows has suggested that the rule of law be broadened to encompass setting certain parameters as to how the environment should be treated, and that this broadening would orient Canadian law with “earth teachings” and better reconcile Canadian law with Indigenous legal orders.<sup>86</sup>

This and the previous examples showcase deployments of the rule of law to counter manifestations of state violence, racism, and colonialism (brutal state regimes or rampant gang and rebel violence in postcolonial states, ongoing detention in camps, Anti-Black racism, and white supremacy). They reveal the possibility of being deeply critical of British imperialism and colonialism and conscious of the rule of law’s formative role in each, and of its ongoing role in sanctioning the violence legal regimes authorize, while simultaneously preserving a role for the rule of law to prevent violence and secure justice. In short, the examples discussed herein reveal a legitimate basis for adopting at the very least an equivocal orientation to the rule of law, an orientation that seeks to preserve its protective potential in the pursuit of justice.<sup>87</sup>

### **C. Vis-à-vis Animals?**

As discussed earlier, these visions claiming a future for the rule of law in a post-colonial legal landscape can theoretically apply to animals. Indeed, Borrows’ account of the rule of law mentioned above specifically connects it to an inter-species vision. More recently, he has argued for a conception of the rule of law that recognizes the more-than-human world, including viewing and treating animals as teachers, elders, and kin to whom humans must be accountable and whose teachings and well-being must be commitments that infuse Indigenous and Canadian legal orders.<sup>88</sup> Although it is a more general concern about extending animals rights, and therefore not specific to invocations of the rule of law to do so, it may be productive at this point to address the oft-raised concern that rights for animals will impair Indigenous rights and thus are in-

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85 See, in general, the contributions in Michael Asch, John Borrows & James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018).

86 John Borrows, “Earth-Bound: Indigenous Resurgence and Environmental Reconciliation” in *ibid* at 50, 65.

87 Brown, *supra* note 61 at 396.

88 John Borrows, “Anishinaabe Treaties and the Rule of Law” (forthcoming in the Canadian Journal of Law and Jurisprudence).

compatible with revitalizing Indigenous legal orders and respecting Indigenous sovereignty.<sup>89</sup>

### ***1. Animal Rights as Part of an Anti-Colonial Vision***

Indigenous legal scholar Virginia Marshall, for example, advances a recent version of this argument in the Australian context stating that the “rights of nature” movement for nonhumans is “a new tool of colonisation which would decouple Indigenous ontological relationships and laws and inherent obligations to manage and care for the environment.”<sup>90</sup> Importantly, Marshall states that “the removal of Indigenous peoples from holding property rights (in nonhumans) is antithetical to the *Indigenous rule of law*.”<sup>91</sup>

From one perspective, Marshall’s invocation of an “Indigenous rule of law” affirms what I have been arguing heretofore: that the rule of law can contribute to a decolonizing agenda especially if appropriately reformed at a substantive level. But my point in this article specifically is that the rule of law should be framed thickly enough to take account of injustice against animals, a prospect that likely requires granting animals fundamental rights.<sup>92</sup> In this sense, the equivalent to Marshall’s framing might be an “animal rule of law.” As I have discussed elsewhere, this type of legal recognition for animals too often leads to a conflictual framing with Indigenous rights, animated as it is by the issue of Indigenous rights to hunt and fish and trap. In turn, this conflictual framing then overwhelms the “animal question” in relation to Indigenous rights in general, leaving this question unaddressed.

Such a framing is misleading, however, as it obscures the synergy and convergences between animal rights and Indigenous rights advocacy and theo-

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89 This conflictual framing also arises vis-à-vis racialized communities and animals. For a general canvassing of the issues and explanation of how intersectional, including anti-racist goals, are overwhelmingly aligned with animal rights ones, see Maneesha Deckha, “Intersectionality and Posthumanist Visions of Equality” (2008) 23:2 *Wisconsin J L Gender & Society* 249; Claire Jean Kim, *Dangerous Crossings: Race, Species, and Nature in a Multicultural Age* (Cambridge: Cambridge University Press, 2015).

90 Virginia Marshall, “Removing the Veil from the ‘Rights of Nature’: The Dichotomy Between First Nations Customary Rights and Environmental Legal Personhood” (2019) 45:2 *Australian Feminist LJ* 233 at 234. For a similar view in the Canadian context regarding animal rights specifically, see Paul Nadasdy, “First Nations, Citizenship and Animals, or Why Northern Indigenous People Might Not Want to Live in Zoopolis” (2016) 49:1 *Canadian J Political Science* 1. For discussion of this conflictual framing online in Canada, see Irena Knezevic, Julie Pasho & Kathy Dobson, “Seal Hunts in Canada and on Twitter: Exploring the Tensions between Indigenous Rights and Animal Rights with #Sealfic” (2018) 43:3 *Canadian Journal of Communication* 741.

91 Marshall, *supra* note 90 (emphasis added).

92 Nussbaum, *supra* note 20 at 112–115.

retical justifications.<sup>93</sup> It also fails to recognize the more specific relation that the property rights colonial legal systems recognize in animals are themselves colonial phenomena and also neglects the larger entwined nature of anthropocentrism and colonialism.<sup>94</sup> In short, presupposing that animal rights is oppositional to the flourishing of Indigenous legal orders is wrong because it obscures their considerable area of overlap. We see this overlap in rationales for animal and Indigenous rights grounded in a shared critique of colonial epistemologies (such as the view that animals are inferior to humans) and on-the-ground realities (such as industrial animal agriculture).<sup>95</sup>

## ***2. Some Tension but Still Mostly Aligned***

This overlap is not complete, of course, and instances of incompatibility and incomprehensibility across worldviews and legal orders will arise. Here, a balance has to be struck. But it would be erroneous to consider any such balancing as a presumptive colonial constraint. Even if fundamental rights for animals arose from an expanded view of the rule of law such that Indigenous or Aboriginal rights had to be balanced against the interests of animals, it is not at all clear that this would re-enact a colonial relationship due to a need to advert to animals' interests in presumably avoiding capture, pain, and premature death. To be sure, if Canadian governments or courts have the final say in establishing this balance, Indigenous self-government and sovereignty would be thwarted. However, recognizing fundamental rights for animals need not disrespect nation-to-nation relationships; the question of rights for animals can be decided by individual Indigenous nations themselves. The main (and colossal) impact of rights for animals through a substantive view of the rule of law would be vis-à-vis Canadian institutions and industries. And this disruption — to halt animal-use industries that injure animals, their families, and communities at staggering scales — would be the primary goal of an expanded vision of the rule of law for animals, rather than the goal or effect of encroaching on existing Indigenous rights in animals.

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93 Maneesha Deckha, "Veganism, Dairy, and Decolonization" (2020) 11:2 J Human Rights & Environment 44 [Deckha, "Veganism, Dairy, and Decolonization"].

94 *Ibid* at 265. See the extended discussion therein and also in Fiona Probyn-Rapsey & Lynette Russell, "Indigenous, Settler, Animal; a Triadic Approach" (2022) 11:2 Animal Studies J 38 of why combatting anthropocentrism and seeking to ameliorate animals' legal status in settler colonial laws is closely aligned with Indigenous justice claims.

95 See discussion in Deckha, "Veganism, Dairy, and Decolonization", *supra* note 93, and the authors cited therein. See also discussion in Sue Donaldson & Will Kymlicka, "Animal Rights and Aboriginal Rights" in Vaughan Black, Peter Sankoff & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 159 and Robyn-Rapsey & Russell, *ibid* at 41–44.

But in making internal decisions and certainly in disputes between Canada and Indigenous nations over which human group has jurisdiction over which animal group, it must be recalled that animals were also colonial victims and colonized subjects vis-à-vis British and French settlers in what is now known as Canada.<sup>96</sup> Animals remain colonized subjects vis-à-vis all humans who can exercise the “right to individualised violence over animals” that anthropocentric legal orders make available through animals’ legal classification as property and an array of regulatory exceptions for animal-users, a situation buttressed by a multitude of economic, social, and cultural norms that normalize human domination and animal commodification.<sup>97</sup> The continued treatment of animals as resources, even when understood through more respectful Indigenous legal understandings of who animals are, is a treatment that animals would very likely refuse.<sup>98</sup> Ascribing them instead with fundamental rights (or comparable entitlement) in their own bodies and lives vis-à-vis all humans arguably carries anti-colonial meaning and effect when weighed against a larger Western colonial backdrop that exploits them in staggering and uncountable numbers as resources and promotes such exploitation worldwide.<sup>99</sup> This more nuanced parsing of anti-colonial positionality and decolonization — a parsing that can see animals as colonized subjects, too — seems especially apt given that animals also have cultures and self-governing desires that are frustrated or extinguished by those who use them (humans). It is also a reasonable position to take when we recall that viewpoints within a singular Indigenous nation as

96 An obvious example is the fur trade and the buffalo genocide. See Denisa Krásná, “Animal Colonialism in North America: Milk Colonialism, Environmental Racism, and Indigenous Veganism” (2022) 22:1 *Acta Universitatis Carolinae. Studia Territoria* 91 at 68–69. But the farmed animals of today are also a colonial by-product. See Kelly Struthers Montford, “Milk and Law in the Anthropocene: Colonialism’s Dietary Interventions” (2020) 16:1 *J Food L & Policy* 48 at 49–50; Virginia DeJohn Anderson, *Creatures of Empire: How Domestic Animals Transformed Early America* (Oxford: Oxford University Press, 2006) at 1–12; Simon L Lewis & Mark A Maslin, “Defining the Anthropocene” (2015) 519:12 *Nature* 171 at 174. For a general discussion of the relationship between current agricultural food systems and colonialism, see John Ryan Fischer, *Cattle Colonialism: An Environmental History of the Conquest of California and Hawaii* (Chapel Hill: The University of North Carolina Press, 2015).

97 Dinesh Wadiwel, “Whipping to Win: Measured Violence, Delegated Sovereignty, and the Privatised Domination of Nonhuman Life” in Yoriko Otomo & Ed Mussawir, eds, *Law and the Question of the Animal: A Critical Jurisprudence* (London: Routledge, 2013) 116 at 122, 122–123. See also Billy-Ray Belcourt, “Animal Bodies, Colonial Subjects: (Re)Locating Animality in Decolonial Thought” (2015) 5:1 *Societies* 1. This is not to say that all humans bear equal responsibility for this dominant status vis-à-vis animals or that the level of dominance across human groups is equivalent.

98 Craig S Womack, “There Is No Respectful Way to Kill an Animal” (2013) 25:4 *Studies in American Indian Literatures* 11 at 23–26; Dinesh Wadiwel, “Animal Utopia: Liberal, Communitarian, Libertarian Or ...? Review Essay: Wayne Gabardi, *The Next Social Contract: Animals, The Anthropocene, and Biopolitics*” (2018) 7:1 *Animal Studies J* 305 at 312.

99 Deckha, “Veganism, Dairy, and Decolonization”, *supra* note 93; Donaldson & Kymlicka, *supra* note 95 at 165; Dinesh Wadiwel, *The War against Animals*, *supra* note 7 at 286.

to what “culture” is and what self-determination, sovereignty, and decolonization mean are rarely uniform,<sup>100</sup> but are instead reflective of internal pluralistic visions.<sup>101</sup>

### ***3. Lessons from Indigenous Feminisms***

Indeed, in taking up this question of balancing multiple vulnerabilities and claims to justice in the animal and Indigenous sovereignty contexts, we find ourselves in the space well-occupied by non-Western feminists who have long considered how to reconcile cultural and self-determination claims vis-à-vis a larger human majority with gender equality and the rights of children. Many feminists in this category are frustrated with dominant male voices who claim to speak for entire cultures and nations, yet also wish to combat cultural and political imperialism by Western liberal cultures and laws.<sup>102</sup> Indigenous feminists are part of this conversation and some have adopted a view of decolonization and sovereignty that does not make Indigenous legal orders or government the only arbiters of certain questions of Indigenous justice.<sup>103</sup> Such scholars take the position that marrying external expectations about gender and child equality that may emanate from non-Indigenous legal provisions cannot be dismissed as a colonizing act when it helps Indigenous women and girls achieve equity in their communities.<sup>104</sup> Others prefer a hard stop against any colonial law as final authority, calling instead for certain gender and child consultation protocols to be followed by Indigenous leaders in interpreting and implementing Indigenous laws to ensure marginalized internal voices are heard by masculinist-oriented leadership.<sup>105</sup> Both approaches are meant to reverse the presumption that gender equality and Indigenous rights — including the right to self-government through Indigenous legal orders — are irreconcilable or that gender is not important.<sup>106</sup>

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100 Nussbaum, *supra* note 20 at 95–96, 186. At least one Indigenous scholar argues that the terms “self-determination” and “sovereignty” themselves are “settler colonizer” terms, yet this is not a reason to abandon these goals. See Aaron Mills, “Rooted Constitutionalism: Growing Political Community” in Michael Asch, John Borrows & James Tully, eds, *supra* note 85 at 160.

101 Margaret Robinson, “Veganism and Mi’kmaq Legends” (2013) 33:1 Canadian J Native Studies 189 at 189, 193–194; Greta Gaard, “Tools for a Cross-Cultural Feminist Ethics: Exploring Ethical Contexts and Contents in the Makah Whale Hunt” (2001) 16:1 Hypatia 1 at 1–2.

102 For a detailed overview of this debate and how it relates to the “animal question” see Maneesha Deckha “Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals” (2007) 2 J Animal L & Ethics 189.

103 For illuminating overviews of the debate and scholars who have contributed to it, see Kiera L Ladner, “Gendering Decolonisation, Decolonising Gender” (2009) 13:1 Australian Indigenous L Rev 62; Emily Snyder, “Indigenous Feminist Legal Pedagogies” (2021) 58:2 Osgoode Hall LJ 385.

104 Snyder, *ibid* at 412–415.

105 Ladner, *supra* note 103 at 68–71.

106 *Ibid* at 71–73.

In a similar vein, when we think of what colonization accomplished in terms of subordinating animals through the common and civil law to now ask what shape and form an anti-colonial legal system and decolonization should embrace today, the experiences and legacies of nonhumans should also be integrated. This integrated vision, in which animals are no longer cast as resources or objects of property rights or distribution in the resolution of human-to-human injustices, is one that animal scholars have long called for,<sup>107</sup> and also finds support in the writings of some Indigenous scholars.<sup>108</sup> All of this is to emphasize that it is too reductive to dismiss animal rights as “colonial” simply because Indigenous rights might in some instances be diminished by their recognition and protection. The discussion in this section is also to underscore that it obscures synergies amongst animal justice and the revitalization of Indigenous legal orders to assume that these two ends are always already in conflict. A widening of the concept of the rule of law that embraces animals should therefore not be rejected on the ground that animal rights are opposed to Indigenous rights.

#### IV. Conclusion

The rule of law in all of its standard dominant legal versions — formal, procedural, and certainly substantive — is conceptually amenable to including animals’ interests within its anti-arbitrariness ambit. Each version carries potential to positively impact animals’ lives. Asserting that animal advocates committed to anti-colonialism and decolonization should avoid the concept due to its colonial heritage or its current neoliberal reach is an overly restrictive view of the relationship of the rule of law to anti-colonialism and decolonization. This article has discussed several examples of how human beings burdened by ongoing racial and colonial logics have called forth the concept to avail of their protection. The article has also highlighted postcolonial, Black anti-racist, and Indigenous viewpoints and scholarship that has affirmed an important and continuing role for the rule of law in creating decolonized and racially just legal orders and societies. Recourse to rule of law rhetoric by animal advocates committed to anti-colonialism and decolonization therefore makes sense as a legal strategy to explore.<sup>109</sup>

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107 See my recent discussions of such scholarship in Deckha, “Fifty Years”, *supra* note 5 and Maneesha Deckha, “Postcolonial” in Lori Gruen, ed, *Critical Terms for Animal Studies* (Chicago: University of Chicago Press, 2018) 160

108 Belcourt, *supra* note 97 at 9–10. See, again, discussion in Deckha, “Postcolonial”, *supra* note 107. With such integration, the conversation within internal decision-making could be marked by some of the considerations identified in Donaldson & Kymlicka, *supra* note 96 at 176–185.

109 And while the main argumentation in the first two sections of this article has not relied on it, it bears recalling that animals are also colonial victims.

This conclusion seems especially reasonable when other legal pathways to elevate animals from their current subaltern legal position and grant them fundamental protections against captivity, exploitation, and injustice have not yet had mainstream purchase. The number of animals killed on land and in water on a daily basis confounds comprehension, as do the brutalities these animals endure while living. The numbers worldwide are projected to grow further still.<sup>110</sup> We need more, not fewer, legal arguments that can work within existing legal systems to engender transformative effects for the animals in our midst. Even if there are other reasons to be cautious with broadening the substantive meaning of the rule of law,<sup>111</sup> the view that the term should be abandoned due to its colonial heritage is too swift a dismissal. As we reshape Canadian law to advance anti-colonial and decolonization goals, the anthropocentric parameters of the rule of law (and the democracy it scaffolds in Canada) merit reconsideration.

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110 Katie Tiseo et al, “Global Trends in Antimicrobial Use in Food Animals from 2017 to 2030” (2020) 9:12 *Antibiotics* (Basel) 918 at 918; Maeve Henchion et al, “Meat Consumption: Trends and Quality Matters” (2014) 98 *Meat Science* 561 at 561. For figures relating strictly to the consumption of chickens and chicken eggs, see Damer P Blake et al, “Re-Calculating the Cost of Coccidiosis in Chickens” (2020) 51:115 *Veterinary Research* 1 at 1.

111 Tamanaha argues that instrumentalizing the concept to advance social agendas “corrodes” the core value. Brian Z Tamanaha, “How an Instrumental View of Law the Rule of Law” (2007) 56 *DePaul L Rev* 469. I hope to address this argument in a separate analysis.