

# THE ELEPHANT IN THE ROOM: COMPARING THE NATURAL BEHAVIOR OF ELEPHANTS IN SWEDISH CIRCUSES AND ZOOS WITH A CRITICAL LEGAL PERSPECTIVE

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## ABSTRACT

According to the Swedish legislator, animal welfare is an important ethical issue in the country that has deep and broad anchoring in human consciousness. Nevertheless, criticism regarding urgent measures needed to raise the level of legislative protection for animals has been articulated in international comparisons. One of these measures being that Sweden ought to ban the use of all wild animals for entertainment purposes. Correspondingly, when the new Swedish Animal Welfare Act 2018:1192 was incorporated in 2019, the supplementary Animal Welfare Ordinance 2019:66 also followed which now added elephants to a list of 11 other kinds of wild animals prohibited to be displayed at circuses or similar operations. Notably, the new ban did however not prohibit the exhibition of elephants at zoos in Sweden. The reason behind the ban was according to the responsible minister that it was obvious that elephants' natural behavior could not be satisfied in a circus. The Animal Welfare Act distinctly contains the contingent of *natural behavior* as a stipulation for a good animal environment. This critical animal law article consequently focuses its analysis to the issue of elephant's prospects of natural behavior in both the circus as well as in the zoo environment. By utilizing elephants as an example and by comparing these two different institutions of entertainment, a systematic study

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illustrates an inconsistent use in the application of the legal requirement 'natural behavior'.

*Key words:* Animal Law, Animal Protection, Animal Rights, Animal Welfare, Critical Animal Studies, Ethology, Natural Behavior.

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# 1 INTRODUCTION

According to the legislator, animal welfare is an important ethical issue that has a deep and broad anchoring in human consciousness in Sweden.<sup>1</sup> However, some international comparisons have expressed criticism against shortcomings in the Swedish animal welfare regulations, e.g., regarding the permissibility and continued use of wild animals for entertainment.<sup>2</sup>

Suitably, on June 21, 2018, a press release came from the Ministry of Trade and Industry. The headline read: *Elephants and sea lions will be banned in circuses*.<sup>3</sup> The Parliament had a week prior decided on the Government's proposal for a new, updated, and modernized Animal Welfare Act (2018:1192),<sup>4</sup> which would enter into force on April 1, 2019.<sup>5</sup>

In the Government Bill to the law, the ban on elephants and sea lions was addressed. This ban, however, would take effect as soon as possible, even before the new Act entered into force and before the new Animal Welfare Ordinance (2019:66)<sup>6</sup> had been put in place. The ban was thus incorporated in the older Ordinance,<sup>7</sup> and came into force already on January 1, 2019, a few months before the introduction of the new Act and Ordinance on April 1, 2019.

In the press release, the then responsible Minister of Rural Affairs, Sven-Erik Bucht, commented on the reason for the revision. "*It is obvious that the needs of sea lions and elephants' natural behavior cannot be met in circuses and therefore the government now chooses to introduce a ban.*"<sup>8</sup>

The Government, through the Ministry of Enterprise and Innovation, had thus swiftly banned elephants and sea lions from being exhibited in circuses due to the fact that their *natural behavior* could obviously not be met, this considering that the contingency of natural behavior is a legal criterion in animal welfare legislation.<sup>9</sup> In the preparatory work certain factors that warranted the ban on elephants in circuses were mentioned, these being that they are moved around, that they are exhibited and that the

<sup>1</sup> Government Bill 2017/18:147 – Ny Djurskyddslag, p. 41, also stating that this was concluded already in Government Bill 1987/88: 93 to the previous Animal Welfare Act SFS 1988:534.

<sup>2</sup> See e.g., The Animal Protection Index (the World Animal Protection, 10 March 2020) <<https://api.worldanimalprotection.org/country/sweden>> accessed 25 November 2021.

<sup>3</sup> Author's translation. See press release in Swedish at the Swedish Government Website, 'Elefanter och sjölejon förbjuds på cirkus' (the Swedish Government Website, 21 June 2018) <<https://www.regeringen.se/pressmeddelanden/2018/06/elefanter-och-sjolejon-forbjuds-pa-cirkus/>> accessed 25 November 2021.

<sup>4</sup> Animal Welfare Act SFS 2018:1192, hereinafter interchangeably The Animal Welfare Act and the Act.

<sup>5</sup> Government Bill 2017/18:147.

<sup>6</sup> Animal Welfare Ordinance SFS 2019:66, hereinafter interchangeably The Animal Welfare Ordinance and the Ordinance.

<sup>7</sup> Animal Welfare Ordinance SFS 1988:539.

<sup>8</sup> Author's translation. See press release in Swedish at the Swedish Government Website, 'Elefanter och sjölejon förbjuds på cirkus' (the Swedish Government Website, 21 June 2018) <<https://www.regeringen.se/pressmeddelanden/2018/06/elefanter-och-sjolejon-forbjuds-pa-cirkus/>> accessed 25 November 2021.

<sup>9</sup> Animal Welfare Act (2018:1192) Chapter 2 Section 2, unofficial English translation available (the Swedish Government Website) <<https://www.government.se/information-material/2020/03/animal-welfare-act-20181192/>> accessed 25 November 2021.

areas for keeping the elephants are insufficient.<sup>10</sup> These factors do indeed apply to circuses to a greater extent than to zoos. Elephants at zoos are also exhibited in shows, although perhaps not in the same manner as in the circus, but they are not moved around such as with the circus and there are regulations on standard size enclosures.<sup>11</sup> The public interest and societal benefits that are served by circuses and zoos might also be seen as different, and it was declared that these can be satisfied at the zoo rather than at the circus. Furthermore, both the Swedish animal welfare regulation and the legislator's preparatory statements on natural behavior in relation to other societal interests need to be understood in the light of Directive 1999/22/EC on the keeping of wild animals in zoos, from which it follows that there exists a conservation interest in keeping animals at zoos.<sup>12</sup>

The quick and effective decision can and should of course be seen as a progression in animal welfare considerations. Yet, considering that there were no elephants at any circuses in Sweden, this could simultaneously be noted as an inconsequential legal change, especially so given the fact that elephants are still allowed in zoos, the institution where they are still being kept in the country. More precisely, there are currently still elephants at two zoos in Sweden: Kolmården Zoo in Östergötland which holds Asian elephants and Borås Zoo in Västergötland which holds African elephants.<sup>13</sup> Nevertheless, there was no extension of such a ban to zoos. The article will therefore analyze if the legal logic behind the ban on elephants in circuses ought also to motivate a ban on elephants in zoos. The question that the paper means to answer is consequently:

*How is the use of elephants in zoo environments justified, while the current legal understanding regarding the use of elephants in circus environments is that it conflicts with the requirement of natural behavior for the animal?*

What will be analyzed is thus particularly the legal criterion *natural behavior* used in Swedish animal welfare legislation.<sup>14</sup> Examining the natural behavior of an elephant and the possibility of its fulfillment in a zoo environment and comparing this to a circus environment which has been deemed legally unsatisfactory, enables a critical analysis regarding the concerned legislation and its application in a legally systematic and coherent manner. Inconsistencies in the application of law are important to scrutinize

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<sup>10</sup> Government Bill 2017/18:147, p. 143 & 363.

<sup>11</sup> Therefore, it is not unlikely that the Swedish legislator considers that shortcomings in natural behavior can be accepted at zoos because they are not as bad as in the circus. What this article will argue is that not as bad, does not equal good, or that it necessarily means that the zoo fulfils the legislative stipulations of good animal welfare.

<sup>12</sup> Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos (OJ L 94, 9.4.1999, pp. 24-26), due to the EU legislation it can be assumed that the legislator views the two institutions as distinctly different. Seeing them as satisfying different public interests, that in the case of the circus the interest is pure entertainment while in the case of the zoo there also exists a conservation interest. Government Bill 2017/18:147, p. 84 concludes that a balancing act between the interest in animal welfare and other interests may be necessary on occasions. This thus seems to be such an occasion. What will be further argued later in this article is that conservation interests regarding elephants cannot be efficiently executed at zoos and that they are therefore both merely institutions of entertainment in this regard.

<sup>13</sup> See Kolmården Zoo 'Elefant' (Kolmården Zoo Website) <<https://www.kolmarden.com/djurpark/djur/elefant>> accessed 25 November 2021 and Borås Zoo 'Afrikansk Stäppelefant' (Borås Zoo Website) <<https://www.borasdjurpark.se/djur/afrikansk-stappelefant/>> accessed 25 November 2021.

<sup>14</sup> Animal Welfare Act (2018:1192) Chapter 2 Section 2.

because they rattle the very foundation of the legal system, such as the concept of justice and the principle of equality. Like cases shall be treated alike.

In the article, parallel with phrases such as “the human obligation to provide natural behavior for animals” or similar, the term “right” to natural behavior will deliberately also be utilized. Having awareness that this can be a somewhat controversial or provocative term to use in regard to the subject matter the position taken will be briefly explained. The utilization of the term *right* is made with the recognition that the legislator has not used the same phraseology in the instance of natural behavior. Nevertheless, even though the term is not used in the legislation it can still be used as a description of the law.<sup>15</sup> Further, what constitutes a right is and has been the subject of an extended and enduring debate.<sup>16</sup>

The usage of the term in this article is based on the concept of *Hohfeldian claim rights*, which in short views a right as the correlative of someone else’s duty.<sup>17</sup> This perspective is accompanied with the *interest theory of rights* understanding which also concludes that rights are correlatives of duties that protect interests and benefits of others.<sup>18</sup> The usage of the rights terminology regarding animals and legislation is further anchored by extracting *simple rights* from the current animal welfare legislation.<sup>19</sup> These

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<sup>15</sup> Even if the legislator has not chosen to frame the current animal welfare legislation in terms of animal rights it does not necessarily exclude the possibility to do so. Utilizing the rights terminology simply offers another perspective to view the same legislation. See e.g., Visa AJ Kurki, ‘Why Things Can Hold Rights: Reconceptualizing the Legal Person’ (2015) University of Cambridge Faculty of Law Research Paper No. 7/2015; Saskia Stucki, ‘Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights’ (2020) Oxford Journal of Legal Studies 40(3), 533-560; Birgitta Wahlberg ‘Animal Law in General and Animal Rights in Particular’ (2021) Scandinavian Studies in Law, Vol. 67, 13.

<sup>16</sup> In civil law traditions the word right can refer to both law and justice as well as individual rights. Theories of subjective rights started developing centuries ago. The main theory was for a long time *the will theory of rights* (or choice theory). Which in short concludes that rights derive from choices, decisions and demands, and that having a right signifies having control over a duty. In the 19<sup>th</sup> century *the interest theory of rights* (or benefit theory) developed as contender. See e.g., Visa AJ Kurki, *A Theory of Legal Personhood*, Oxford University Press (2019).

<sup>17</sup> Claim rights are passive rights that concern the conduct of others, the duty bearers, and the right holder simply enjoys them rather than exercises them. Wesley Newcomb Hohfeld presented his famous analysis on rights in two articles. See Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16; Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 Yale LJ 710.

<sup>18</sup> *The interest theory of rights* does in opposition to *the will theory of rights* not entail that rights are ultimately about choices and demands, but rather about interests and/or benefits. Which opens the scope for animals to already be seen as legal rights holders considering the current animal welfare legislation, since it is the animals that benefit from the human duties to treat them well and from the prohibition of inflicting unnecessary suffering. Further, even *the soft will theory of rights* might open the door for animal rights, as human beings could represent animals and make demands on their behalf. See Saskia Stucki, ‘Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights’ (2020) Oxford Journal of Legal Studies 40(3), 533-560; Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019); Cass R Sunstein, ‘Can Animals Sue?’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2004).

<sup>19</sup> Animals can arguably already be seen as holding *simple animal rights*, extracted from the current positive animal welfare legislation. These rights are narrow and relatively weak legal rights at best, not *fundamental animal rights* which are the kind of strong and broad rights that are traditionally associated with rights and argued for *de lege ferenda*. Saskia Stucki, ‘Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights’ (2020) Oxford Journal of Legal Studies 40(3), 533-560.

simple rights are imperfect and weak rights which are also poorly enforceable, particularly because animals lack of standing. Nonetheless, they can still be referred to as rights. Briefly put, animals can with this perspective already be viewed as holding certain legal rights since humans have legal duties towards animals, such as the duty to provide natural behavior for them.<sup>20</sup> Thus, by applying this theoretical framework an interpretation is facilitated where animals can be seen as having a right to natural behavior.<sup>21</sup>

This article is preferably categorized as a study in Animal Law, which also entails that it is a multidisciplinary study.<sup>22</sup> Its analysis is interdisciplinary in such a manner that it incorporates perspectives from both Ethology and Critical Animal Studies, while at the same time being a legal study that critically looks at the concept of natural behavior. Given this interdisciplinary approach, it is not a traditional legal paper but rather an alternative and broader study of a legal problem. Analyzing the subject matter with a more nuanced and comprehensive lens that incorporates knowledge and perspectives from several different scientific fields enriches the analysis.<sup>23</sup> Although the concept of natural behavior has been discussed to a certain degree in Sweden previously, equivalently broad analyzes have not yet been conducted and can therefore prove rewarding.<sup>24</sup>

In order to conduct the analysis in a focused manner and to illustrate a legal inconsistency, the article will concentrate on the situation for elephants and their prospects of natural behavior and thus omit the question of sea lions who were also affected by the new ban, since space limitations will not allow it. Furthermore, the analysis will only consider the situation of elephants in circuses and zoos and not their situation and their possibility of natural behavior when they are being used for other entertainment purposes and in other environments.<sup>25</sup>

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<sup>20</sup> Ibid. See also Visa AJ Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019). Which supports that the idea of animals already holding *simple rights* can be argued for regardless of whether or not animals are officially defined as legal persons. Kurki's *bundle theory of legal personhood* breaks away from the *orthodox view of legal personhood* and rather explains numerous elements as incidents of legal personhood which could theoretically construct animals as *passive legal persons*.

<sup>21</sup> Even if this would be a non-absolute right since the legislator has stated that it is sometimes necessary to balance the interest in animal welfare with other important societal interests. Government Bill 2017/18:174 p. 84-85.

<sup>22</sup> See e.g., Birgitta Wahlberg 'Animal Law in General and Animal Rights in Particular' (2021) *Scandinavian Studies in Law*, Vol. 67, 13, for an in-depth explanation of the concept of Animal Law as a field of jurisprudence.

<sup>23</sup> Ibid.

<sup>24</sup> Concerning natural behavior see e.g., Cecilia Mille & Eva Frejadotter Diesen, *The best animal welfare in the world? – an investigation into the myth about Sweden* (Animal Rights Sweden 2009); regarding critical analysis of zoos see e.g., Susan Willis, *Looking at the Zoo* (1999) *The South Atlantic Quarterly* 98, 669; regarding critical analysis of circuses see e.g. Tanja Schwalm, "No Circus without Animals"?: Animal Acts and Ideology in the Virtual Circus' in Laurence Simmons and Philip Armstrong (eds) *Knowing Animals* (Brill 2007).

<sup>25</sup> The zoos are the only location where elephants are currently held permanently in Sweden. Nevertheless, they are still not yet prohibited to be exhibited and used for other forms of entertainment such as film, television, and theater. See e.g., controversies during the filming of the popular Swedish movie 'The Hundred Year-Old Man Who Climbed Out of the Window and Disappeared' were scenes were filmed with an elephant and a controversial elephant trainer, Tidningarnas Telegrambyrå (TT), 'Plågade elefanter i

## 2 ELEPHANTS IN SWEDISH CIRCUSES AND ZOOS

### 2.1 SWEDISH ANIMAL WELFARE LEGISLATION AND THE CONCEPT OF NATURAL BEHAVIOR

#### 2.1.1 THE CONCEPT OF NATURAL BEHAVIOR IN THE ANIMAL WELFARE ACT

The underlying reason for the investigator's proposal on the ban on exhibiting elephants in circuses in Sweden was particularly due to the concern that the elephant's *natural behavior* cannot be satisfied in a circus environment.<sup>26</sup> This concept of natural behavior is determinately also a central concept in Swedish animal welfare legislation.<sup>27</sup> Thus, what this term entails according to the legislator will below be described in more depth.

The term has by now been used for some time in Swedish legislation, the provision being introduced in connection with the enactment of the previous Animal Welfare Act in 1988:<sup>28</sup>

**Section 4 (1)** Animals shall be accommodated and handled in an environment that is appropriate for animals and in such a way as to promote their health and permit natural behaviour.<sup>29</sup>

However, the requirement did at that time only cover certain animals that were bred or kept for food, wool, skins or furs. The provision has since been extended. First, in 1993 and 1998 when the use of animals for competitions and experiments were included. Later, in 2003, the provision was amended to apply to all animals covered by the Act. Today, it constitutes a central provision in the Act.<sup>30</sup> The provision is placed in Chapter 2 of the Act on general provisions on the handling, keeping and care of animals:

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svensk storfilm' (Svenska Dagbladet, 11 December 2013 <<https://www.svd.se/plagade-elefanter-i-svensk-storfilm>> accessed 25 November 2021.

<sup>26</sup> Swedish Government Official Reports, SOU 2011:75, p. 633-635 & 654-655. See also Government Bill 2017/18:147, p. 143 & 363, the Government agreed with the inquiry which assessed that circuses, where animals are moved from place to place and exhibited to the public, lack the practical preconditions for keeping elephants in a way that allows them to behave naturally. Since a circus has very limited opportunities to keep the animals with the area and under the conditions that many animal species need to feel physically and mentally well and to meet the animals' needs of natural behavior. The investigator concluded that keeping and showing them at the circus means stress too the animals.

<sup>27</sup> Ibid., p. 445. Discussing the introduction of the term in the Government Bill to the Animal Welfare Act (Government Bill 1987/88:93) where it was stated that the purpose of the provision is to take into account the specific biological behavior of each animal species. It is also concluded that the provision is considered to be a foundational provision in the Swedish animal welfare legislation and that it has great symbolic value. Regarding elephants kept in zoos, it is also relevant to interpret the Swedish rules in light of Council Directive 1999/22 / EC of 29 March 1999 on the keeping of wild animals in zoos. The directive also states that animal welfare must meet the biological needs of individual species. This should be done by accommodating the animals under conditions that satisfy the biological and conservation requirements of the individual species by for example providing species-specific enrichment in the enclosures.

<sup>28</sup> Government Bill 1987/88:93.

<sup>29</sup> Animal Welfare Act (1988:534). Unofficial translation available upon request: *The Animal Welfare Act, The Animal Welfare Ordinance* (Government Offices of Sweden, the Ministry of Agriculture 2009).

<sup>30</sup> Government Bill 2017/18:147, p. 82.

### **Good animal environment and natural behaviour**

**Section 2** Animals shall be kept and cared for in a good environment for animals and in such a way that:

1. their well-being is promoted;
2. they are able to perform behaviours for which they are strongly motivated for and that are important for their well-being (natural behaviour); and
3. behavioural disorders are prevented.<sup>31</sup>

When the term was first introduced, it had been understood that animal husbandry had during the post-war period undergone major changes and that the industry had become increasingly rational and adapted to technology and the economy.<sup>32</sup> The legislator then considered that the modernization of the industry had led to environments for animals in the agricultural businesses becoming progressively more barren and that it limited the animals' ability and possibility to perform their natural behavior. The legislator found that it was particularly due to the incremental rise of industrial animal industries, which at that time started moving from small scale into large animal production factories. As a reaction to these developments there was an increase in criticism against animal exploitation. A seminal piece of criticism was presented in the classical book *Animal Machines* by Ruth Harrison in 1964.<sup>33</sup> Partly as a response to Harrison's book the famous Brambell Commission presented its report in 1965, which outlined the Five Freedoms, where number four was the Freedom to express (most) normal behavior.<sup>34</sup> The Brambell Report had influence on several countries that incorporated similar phrases in their national legislation, early adaptors were e.g., West Germany and Norway but later the European Council also followed suit. Further, natural behavior or synonyms were progressively being used in legislation in other Nordic countries, apart from Norway also Denmark and Finland assimilated equivalents.<sup>35</sup> Thus, Sweden chose in the Animal Welfare Act of 1988 to adopt the concept as an important base for the national animal welfare legislation.<sup>36</sup>

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<sup>31</sup> Animal Welfare Act (2018:1192) Chapter 2, Section 2. Unofficial translation available at Government Website (Swedish Government Website, 20 June 2018) <<https://www.government.se/494b85/contentassets/9f6a4e0fb1704a0ba72531b63811ac22/animal-welfare-act-sfs-2018-1192-12-mars-2020.pdf>> accessed 25 November 2021.

<sup>32</sup> Government Bill 1987/88:93, p. 16–17. The then head of the ministry still stated that a balance should yet be struck between on the one hand the interest in animal welfare and on the other hand economic, productivity and technical factors. Animal welfare considerations should, however, be given much greater importance than what had been the case thus far. The preparatory work clarified that this demand for natural behavior can in principle be seen as a clarification of the general obligation in the Animal Welfare Act that animals must be treated well and protected from unnecessary suffering and illness. The more precise purpose of this provision being that the specific biological behavior of each animal species must also be considered and that what is to be considered as an animal's biological behavior should be determined from experience and scientific findings. See the Government Bill 1987/88:93, p. 52–53.

<sup>33</sup> Swedish Government Official Reports, SOU 2011:75, p. 446; Ruth Harrison, *Animal Machines* (Vincent Stuart Publishers 1964).

<sup>34</sup> *Ibid.* See also F. W. Rogers Brambell, *Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems*, Cmnd. 2836 (Her Majesty's Stationery Office, London 1965).

<sup>35</sup> *Ibid.*, p. 455.

<sup>36</sup> Government Bill 1987/88:93, p. 53.

However, during the preparatory work for the new Act, it was in the deliberations and investigations discussed whether the concept of natural behavior should be retained and continued used in the new Act. Several consultative bodies had objections and the inquiry also stated that the term can be perceived as unclear.<sup>37</sup> It was thus questioned whether the term is appropriate or whether the term should be removed or replaced for the purpose of the new Act.<sup>38</sup> Ultimately, it was after elongated discussions decided that the term would remain as it was concluded to have a great symbolic value and that it could be interpreted as an indication or meaning that the animals need for natural behavior should be given less weight if the expression was removed from the legal text.<sup>39</sup>

One of the difficulties raised by the consultative bodies regarding the term natural behavior is that it can infer associations with the complete situation and behaviors of animals in their wild state. The legislator responded that this is not the intention. The intention is in accordance with the preparatory work not that all behaviors that animals perform when they live freely in nature need to be performed when they are being kept by humans. It was e.g., concluded that some behaviors are undesirable and can in themselves amount to animal welfare problems. There are behaviors for which animals are strongly motivated, but which are undesirable in animal husbandry and which, if not controlled, can in themselves lead to animal welfare issues, e.g., that animals fight. Animals kept by humans are in completely different conditions than animals that live in the wild. In nature, animals are exposed e.g., to attacks by predators or to starvations. This is of course not something that should occur in an animal husbandry. Certain behavioral needs, which are triggered by such similar external factors, therefore do not arise when the animals are kept by humans since the animals are not exposed to these triggering factors. There is thus a certain limit to the behaviors that animals should be allowed to perform in animal husbandry.<sup>40</sup>

In short, the behaviors that are prioritized are first and foremost behaviors for which the animals are *strongly motivated*, and which gives the animals *functional feedback*, i.e., reduces the animals' motivation to perform the behavior when it is performed.<sup>41</sup> It notably focuses on behaviors that relate to the animals' need for *movement, rest, comfort, activities, food foraging and social interaction*.<sup>42</sup>

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<sup>37</sup> Certain consultative bodies considered the wording unclear, and the discussion was mainly regarding the question if the wording refers to basic behaviors that are important for the animal's well-being or if it refers to behaviors that animals perform in the wild. See the Swedish Government Official Reports, SOU 2011:75, p. 445.

<sup>38</sup> Government Bill 2017/18:147, p. 82.

<sup>39</sup> Ibid., p. 83. Other alternative expressions were discussed to replace natural behavior, e.g., *behavioral needs*, but the Government concluded in line with the inquiry that these expressions also lead to ambiguities as to what is referred, and it was decided that the term natural behavior should be maintained in the legal text. Nevertheless, the Government also commented that their present conclusion is that it was most probably not the original intent that natural behavior is to be viewed as the same behavior as an animal would have in its free state in the wild.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid. The Swedish terms that are referred to in the legislative history is namely: *rörelse, vila, komfort, sysselsättning, födosök och socialt umgänge*. (Author's translation).

The legislative history expresses that the definition of natural behavior needs to be interpreted according to research and findings in the natural sciences.<sup>43</sup> Howbeit, there are a number of different definitions of the term natural behavior in scientific literature and it is therefore problematic to determine which behaviors need to be prioritized.<sup>44</sup> To elucidate the term, the inquiry mentions two key factors as important in defining which behaviors are relevant. One is, as above mentioned, behaviors that the animal is *strongly motivated* to perform and the other is that the animal experiences *frustration or stress* if it is prevented from performing the behavior. The requirement for natural behavior can, as the inquiry states, also be described as allowing animals to perform such behaviors that are required in order for the animals to feel well physically and mentally, i.e., that are important for their welfare.<sup>45</sup>

The Government has hence put emphasis and focused animal husbandry legislation so that animals shall be able to perform their natural behavior and so that behavioral disorders are prevented.<sup>46</sup> This is accordingly a corner stone of promoting good animal welfare, which is the purpose of the law. The initiating paragraph in Chapter 1 Section 1 of the Act makes this distinction:

### **Purpose of the Act**

**Section 1** The purpose of this Act is to ensure good animal welfare and promote good animal well-being and respect for animals.<sup>47</sup>

This always entails striving for the animals to feel well both physically and mentally, and the provision therefore also contains a requirement that behavioral disorders be prevented.<sup>48</sup> Since, one incessant consequence of animals not being able to engage in natural behaviors that are important to their well-being is that they develop and suffer from various forms of behavioral disorders. This often involves the development of so-called *stereotypies*, e.g., movements that are repeated in the same way for a certain period of time. This consequence is one of the most common behavioral disorders. Almost all species of mammals and birds kept in captivity in stimulus-poor environments have been shown to develop stereotypies.<sup>49</sup> The legislator also clarifies that some animals that are exposed to stress and that do not have the opportunity to control the situation can also react with passivity and so-called learned helplessness. All behavioral disorders are in general a sign of poor animal welfare since corresponding stereotypical behaviors do not occur at all in animals that live in the wild.<sup>50</sup>

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<sup>43</sup> Government Bill 1987/88:93, p. 52–53.

<sup>44</sup> In terms of law the proposal on Fundamental Rights for Animals by the Finnish Animal Rights Lawyers Society could form a legal tool to ensure the fundamental needs of animals in this respect. See in particular the content of sections 3–4 of the proposal. Available in English: ‘Proposal on Fundamental Rights for Animals’ (the Finnish Animal Right Lawyers Society, 21 May 2020) <<https://www.elaintenvuoro.fi/english/>> accessed 25 November 2021.

<sup>45</sup> Government Bill 2017/18:147, p. 83–84.

<sup>46</sup> Animal Welfare Act (2018:1192) Chapter 2, Section 2, Point 3.

<sup>47</sup> Animal Welfare Act (2018:1192) Chapter 1, Section 1.

<sup>48</sup> Government Bill 2017/18:147, p. 85.

<sup>49</sup> *Ibid.* The legislator refers especially to observations made in pigs that are not given the opportunity to root.

<sup>50</sup> *Ibid.*

The Government has emphasized that the occurrence of behavioral disorders in animal husbandry is a clear sign that there may be problems that have a negative impact on the animal welfare.<sup>51</sup> The Government has therefore stated that at general herd or population level and over time, the ambition is zero tolerance towards behavioral disorders.<sup>52</sup> If behavioral disorders have occurred, the cause must be determined and measures taken, both to rectify the situation that has arisen but also to prevent future problems. Depending on the circumstances, measures may need to be taken both for the individual or individuals who exhibit behavioral disorders and against this form of animal husbandry in general.<sup>53</sup>

In the legislative history, it is stated that the provision can in principle be seen as an extension and a clarification of the general obligation in Chapter 2 Section 1 of the Animal Welfare Act which states:

**Basic animal welfare requirements**

**Section 1** Animals shall be treated well and shall be protected from unnecessary suffering and disease.<sup>54</sup>

The distinct purpose of the provision on natural behavior is that the species-specific and special biological behavior of each animal species must be taken into account and that what is to be considered to constitute an animal's biological behavior may be decided on the basis of experience and scientific findings.<sup>55</sup>

However, the requirement for animals' right to natural behavior is not without restrictions.<sup>56</sup> In the legislative history for the previous Animal Welfare Act, it was reasoned that there in some instances need to be a balancing act between different interests. On the one hand the interest in animal welfare and on the other hand economical, productivity and technical factors.<sup>57</sup> Yet, the assessment was then that animal welfare considerations needed to be given greater importance than had hitherto been the case, even if this would mean a reduction in 'production'.<sup>58</sup> According to

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<sup>51</sup> Ibid.

<sup>52</sup> Ibid. The Swedish term is: *besättningsnivå* (authors translation). This requirement is meant to send a clear signal about the animal keeper's obligation to prevent behavioral disorders so that animals are kept in such an environment and in such a way that behavioral disorders do not arise except in isolated exceptional cases.

<sup>53</sup> Ibid. Although, the Government stated that individuals can develop behavioral disorders despite animal husbandry being generally good and that it is according to them therefore not realistic to have a view that means that zero tolerance at the individual level should always prevail in all animal husbandry.

<sup>54</sup> Animal Welfare Act (2018:1192) Chapter 2, Section 1.

<sup>55</sup> Government Bill 1987/88:93, p. 52–53.

<sup>56</sup> Regarding the framing of this as a simple and non-absolute right see explanation of terminology in the Introduction and n.16-22.

<sup>57</sup> Government Bill 1987/88:93, p. 19.

<sup>58</sup> The Government has also emphasized that since the provision was enacted, animal welfare has improved considerably and the level of animal welfare has been raised, not least through regulatory changes in ordinances. The law has also been changed to strengthen animal welfare, e.g., the species of animals covered by the requirement of natural behavior has gradually increased and it has been clarified that animals that show signs of ill health must receive the necessary care. The provisions on the care of animals, animal bans and penalties for crimes against animals have also been increased. See Government Bill 2017/18:147, p. 85.

discussions leading to the new Act the balancing of interest between animal welfare and other important public and societal interests will continue.<sup>59</sup>

The Animal Welfare Act's requirements for natural behavior and the provision on how animals are to be kept and cared for are intended to constitute a framework for the provisions in the Animal Welfare Ordinance and other regulations by the Swedish Board of Agriculture.<sup>60</sup> Through these more intricate and detailed rules for animal husbandry, the law's requirements for natural behavior are meant to be further concretized.<sup>61</sup> It has been considered important that the regulations on animal husbandry develop as the knowledge of animals develops. Therefore, it has been deemed essential that the more detailed provisions are based on current science and continuously updated. Even though some consultative bodies wished for the ban on elephants and other animals in the circus to be placed in the new Act, the Government concluded that detailed provisions concerning natural behavior are best suited to be incorporated in regulations at a lower legislative level.<sup>62</sup> The authority, in this case the Swedish Board of Agriculture, should as previously stated, in the formulation of the regulations make a balance between the interest in animal welfare and other important public and societal interests, if possible, without substantially restricting animal welfare. Although, it has been quite unclear for the Board of Agriculture how to conduct this balance.<sup>63</sup>

### 2.1.2 THE BAN ON EXHIBITING ELEPHANTS IN THE ANIMAL WELFARE ORDINANCE

With the new year 2019, a new ban was thus introduced regarding the display of elephants and sea lions in circuses in Sweden. As established, this paper will focus solely on the issue of elephants and exclude the question of pinnipeds. The reason and background for this new ban was that the Government inquiry laying the foundation for the new Animal Welfare Act in Sweden investigated the issue of elephants in circuses and concluded that their natural behavior could not be satisfied in these environments.<sup>64</sup> The investigator briefly concluded that the societal benefits of showing elephants in public is obtained at

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<sup>59</sup> It was noted, however, that in this balancing act, the interest in animal welfare must be given great importance and the high level of animal welfare must not be eroded.

<sup>60</sup> For detailed rules concerning elephants at the zoo see the Swedish Board of Agriculture's regulations 'Statens jordbruksverks föreskrifter om djurhållning I djurparker m.m' SJVFS 2019:29, Saknr L 108, Chapter 8.

<sup>61</sup> *Ibid.* Although, it will later be illustrated that these regulations on elephant husbandry in zoos are neither intricate nor detailed. See Section B of the Article.

<sup>62</sup> The Government has also commissioned a Scientific Council that SLU (Sveriges Lantbruksuniversitet) has established, and which will play a major part in the production of the scientific factual basis that the Board of Agriculture needs for their regulatory work. The Government considers that it is important that the positions taken in the regulations can be based on a solid scientific basis. Government Bill 2017/18:147, p. 86–87, further information regarding the Scientific Council in section 6.6 of the Bill.

<sup>63</sup> Government Bill 2017/18:147, p. 86. When the ban on elephants and sea lions in circuses was suggested the Swedish National Board of Trade was assigned to report the new ban to the European Commission in accordance with EU Regulations Directive 2006/123/EC of the European Parliament to the Council on services in the internal market, Article 15.7 and 39.5. See the Ministry of Enterprise and Innovation Decision N2018/03697/RS from 2018-06-15, Public Document.

<sup>64</sup> Swedish Government Official Reports, SOU 2011:75. p. 633-635 and p. 654-655.

zoos where the animals' need for natural behavior and privacy could be better met.<sup>65</sup> Nevertheless, what the societal benefits or public interests of showing elephants to the public is, are not described by the legislator in the preparatory work.<sup>66</sup> Although, due to the relevant EU legislation regarding zoos, it can be assumed that the legislator is of the idea that the zoo fills a function of conservation concerning elephants and is referring to this notion.<sup>67</sup> However, the assumption that the zoo is an efficient institution for conservation of elephants will later in this article be contested.<sup>68</sup>

In the older Ordinance there was already a ban in place on the exhibition of certain other animals in circuses predating this ban. The older provision contained a list which had been gradually extended throughout the last decades.<sup>69</sup> Now, the Government decided that the use of elephants would also be banned, and that this ban would be incorporated immediately to the then current Ordinance, i.e., prior to the new Act entering into force on April 1, 2019. The ban was hence introduced already January 1, 2019, in the old Animal Welfare Ordinance, Section 35, which then read:

**Section 35** Animals must not be taken from place to place and exhibited to the public in menageries.

Monkeys, predators, with the exception of domesticated dogs and cats, pinnipeds, elephants, rhinoceroses, hippopotamuses, deer, with the exception of reindeer, giraffes, kangaroos, birds of prey, ratite birds and crocodylians must not be taken from place to place and exhibited to the public in other circumstances either.

The animals referred to in subsection 2 must not be exhibited to the public in performances or otherwise at circuses, variety shows or similar entertainments. Ordinance (2018:1204).<sup>70</sup>

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<sup>65</sup> Ibid., p. 654. The Swedish term is: *samhällsnyttan* (author's translation). It can also be important to note here that the question was already discussed in the inquiry into the older Animal Welfare Act (1988:534) if elephants and sea lions should be allowed to be exhibited at circuses. See Government Bill 1987/88:93, p. 60-61. It was then concluded by the inquiry chair that circus is a very old form of culture that it is important to preserve.

<sup>66</sup> It is described in Government Bill 2017/18:147, p.84 that a balancing act between the interest in animal welfare and other important public interests may be necessary on occasions. This is apparently such an occasion.

<sup>67</sup> Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos (OJ L 94, 9.4.1999, pp. 24-26).

<sup>68</sup> See later sections of the article B, C and Conclusions.

<sup>69</sup> In the Animal Welfare Ordinance (1988:539), Section 35 it was prior to adding elephants and sea lions already stated that monkeys, predators other than domestic dogs and domestic cats, pinnipeds with the exception of sea lions, rhinoceroses, hippopotamuses, deer with the exception of reindeer, giraffes, kangaroos, birds of prey, ratite birds and crocodiles were not allowed to be exhibited in circuses. See unofficial translation: *The Animal Welfare Act, The Animal Welfare Ordinance*, Government Offices of Sweden, the Ministry of Agriculture (2009).

<sup>70</sup> Animal Welfare Act (1988:534), Section 35. This was thus the last formulation of the section, when elephants and pinnipeds were added, a few months prior to it being obsolete due to the enactment of the new Ordinance. (Authors translation of last revision not updated in the unofficial Government translation).

This ban would then later be transferred to the new Animal Welfare Ordinance that the Swedish Board of Agriculture had been authorized to draft in accordance with the new Animal Welfare Act.<sup>71</sup> It was thus placed in the new Animal Welfare Ordinance, Chapter 3 Section 3 which took effect on April 1, 2019, and stipulated:

**Prohibition on public exhibition of animals in certain cases**

**Section 3** Animals must not be taken from place to place and exhibited to the public in connection with this in cages, other spaces or enclosures that restrict the animals' freedom of movement in a way similar to a cage.

Nor may the following animals be taken from place to place in some other way and be exhibited to the public in connection with this at a circus or some other similar activity:

1. monkeys;
2. predators with the exception of domesticated dogs and cats;
3. pinnipeds;
4. elephants;
5. rhinoceroses;
6. hippopotamuses;
7. deer with the exception of reindeer;
8. giraffes;
9. kangaroos;
10. birds of prey;
11. ratite birds; and
12. crocodilians.<sup>72</sup>

## 2.2 THE NATURAL BEHAVIOR OF ELEPHANTS ACCORDING TO ETHOLOGY

### 2.2.1 THE NATURAL BEHAVIOR OF ELEPHANTS IN THE WILD

The concept of natural behavior from a legal perspective has above been elucidated with various aspects. As mentioned, the legal definition does not equate completely with how an animal behaves in the wild, i.e., how a wild animal is able to perform behaviors in its free and natural state. Still, what has also been established in the preparatory legislative work is that the definition and interpretation of natural behavior should be based on scientific research on animal's behavior, and that it should aim to satisfy their motivations and needs to avoid frustration and to counteract behavioral disorders. As declared, the goal is zero tolerance regarding behavioral disorders at general herd or population level, and the aim is simultaneously also to prevent this at the individual level. Consequently,

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<sup>71</sup> See press release in Swedish at the Swedish Government Website, 'Elefanter och sjölejon förbjuds på cirkus' (the Swedish Government Website, 21 June 2018) <<https://www.regeringen.se/pressmeddelanden/2018/06/elefanter-och-sjolejon-forbjuds-pa-cirkus/>> accessed 25 November 2021.

<sup>72</sup> Animal Welfare Ordinance (2019:66), Chapter 3, Section 3. Unofficial translation available at Government Website (the Swedish Government Website, 20 June 2018) <<https://www.government.se/494c6c/contentassets/934374dfdabf43e5993dc67a974ec24e/animal-welfare-ordinance-sfs-2019-66-12-mars-2020.pdf>> accessed 25 November 2021.

and as the legislator with its bodies has also stressed, it is important from an ethological perspective to define what an elephant's natural behavior is.<sup>73</sup>

In Sweden, there are currently African and Asian elephants at two zoos and there is an abundance of research in the ethological field about their natural behavior and welfare.<sup>74</sup> Due to lack of space, only a general overview of common relevant features will be presented below. The presentation will focus on the behaviors that according to the legislative history are crucial in relevance to the legal term *natural behavior*, i.e., behaviors that they are *strongly motivated to perform*, and which gives the animals *functional feedback*. These factors and behaviors include important aspects for the elephants such as the need for *activity, social interaction, movement, food foraging*.<sup>75</sup> These factors will be expanded on briefly below:

Elephants live in complex societies with *active days*.<sup>76</sup> They are intelligent and have a great need for social and intellectual stimulation. Elephants are highly social animals, and the coevolution of elephant intelligence is intertwined with the necessary brain functions to manage a complex social life.<sup>77</sup> Social animals are naturally intelligent,<sup>78</sup> since to function effectively in a society one requires a high level of understanding of conspecifics, i.e., empathy, which in turn requires a high level of intelligence and self-awareness.<sup>79</sup>

Research has shown that *social interaction* is important to elephants. They are generally intelligent and social herd animals that live in large, complex groups with a matriarch and clear structures. The group is made up by related cows and their children, with an experienced and mature cow as the leader. The size of the herd can vary ranging from between six to 40 elephants. These family groups may also come together in extended related units or clans of up to 100 or in gatherings of sometimes up to 1000

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<sup>73</sup> The Government has put much focus to the scientific findings in Ethology. Compare with Government Bill 2017/18:147, p. 52 were two consultative institutions, *Kungliga Skogs- och Lantbruksakademien* and *Kött och Charkföretagen* accuse the inquiry of putting an extreme predominance to ethological questions of natural behavior. To clarify: Ethology is the study of animal behavior. See e.g., the Department of Zoology at Stockholm University 'What is Ethology' (Department of Zoology, 17 October 2017) <<https://www.su.se/zoologi/english/research/2.50141/2.50017/courses/what-is-ethology-1.328947>> accessed 25 November 2021.

<sup>74</sup> See e.g., Jake Veasey, 'Concepts in the care and welfare of captive elephants' (2006) *International Zoo Yearbook* 40, 63–79; Ros Clubb & Georgia Mason, *A review of the welfare of zoo elephants in Europe* (A report commissioned by the RSPCA 2002); Paul A. Rees, 'Low environmental temperature causes an increase in stereotypic behaviour in captive Asian elephants (*Elephas maximus*)' (2004) *Journal of Thermal Biology* 20: 37–43.

<sup>75</sup> Government Bill 2017/18:147, p. 83. The Swedish terms that are referred to in the legislative history is namely: *rörelse, vila, komfort, sysselsättning, födosök och socialt umgänge* (authors translation). See also n. 43. The Elephants need for rest and comfort (*vila* and *komfort*) will not be addressed in this paper since it is not deemed necessary for the analysis.

<sup>76</sup> In Swedish the term used by the legislator is *sysselsättning* which has been chosen by the author to be translated as *activity*.

<sup>77</sup> Intelligence can here be understood as the capacity to acquire and apply knowledge towards a specific goal. See e.g., Jake Veasey, 'Concepts in the care and welfare of captive elephants' (2006) *International Zoo Yearbook* 40, 63–79, 70.

<sup>78</sup> *Ibid.* Concluding that species with larger social networks tend to have a relatively larger neocortex.

<sup>79</sup> See also for interest; elephants engaging in forms of communication such as human speech. Angela Stoeger, 'An Asian Elephant imitates Human Speech' (2012) *Current Biology* 22 (22), 2144–2148.

individuals.<sup>80</sup> The research also shows individual distinctive personalities whose characteristic traits jointly benefit the group. Some elephants are proactive and curious, others more passive and reactive while some are more empathetic and caring. These different qualities complement each other and together contribute to the herd.<sup>81</sup> They are engaged in their family and herd where they have advanced relationships, communication, and rituals and which results in a strong motivation for social and cognitive stimulation.<sup>82</sup>

Elephants also have a strong motivation for *movement* and exercise. In the wild, the elephant has a nomadic lifestyle and mobile behavior with a large home territory. They move across a massive range of habitats from deserts, grassland, swampland, seasonal forests, tropical forest through to montane forests and upland moorland.<sup>83</sup> The elephant herds move over vast areas on a daily basis, As the elephants are large and active animals, they have a great need to get physical outlet.<sup>84</sup>

There is also a strong motivation for *food foraging*.<sup>85</sup> In their free state, elephants spend a large part of their day searching for food and engaging in the act of eating. About 60–80 percent of their time is spent foraging.<sup>86</sup> Also, unlike e.g., cows, antelope, deer, and giraffes, etc., elephants do not ruminate, i.e., they do not regurgitate and re-masticate partially digested food.<sup>87</sup>

Conclusively and in brief, some of the most crucial factors for animal welfare in any animal husbandry is *activity, social interaction, movement, food foraging*. These are according to the legislator behaviors that animals are *strongly motivated to perform*, and which gives animals *functional feedback*. For a large, social, and intelligent herd animal like an elephant these factors are problematic, to say the least, to satisfy. Elephants are active animals with a strong motivation and need for social and intellectual stimulation, since they in their natural state live in large family groups and interact continuously with each other. They are nomadic, their natural home area is vast, and they move over large areas daily, spending a large part of their days foraging for food. Knowing these facts from ethological studies about elephants' natural behavior and applying them to the legal criterions of natural behavior makes it difficult to argue in a legally sound manner that a man-made environment such as a zoo could be a satisfactory environment

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<sup>80</sup> Nine to 11 is the norm in African elephants and around eight for Asian elephants. Jake Veasey, 'Concepts in the care and welfare of captive elephants' (2006) *International Zoo Yearbook* 40, 63–79, 70.

<sup>81</sup> See e.g., Carl Safina, *Beyond Words: What Animals Think and Feel* (Picador Publishing 2016).

<sup>82</sup> See e.g., 'The Elephant Listening Project' (The Elephant Listening Project Website) <<https://elephantlisteningproject.org/>> accessed 25 November 2021.

<sup>83</sup> Jake Veasey, 'Concepts in the care and welfare of captive elephants' (2006) *International Zoo Yearbook* 40, 63–79, 72.

<sup>84</sup> In the wild, elephants have a home area of between 1630 - 5060 km<sup>2</sup>. See Valeria Galanti, Damiano Preatoni, Adriano Martinoli, Lucas Wauters, G. Tosi, 'Space and habitat use of the African elephant in the Tarangire–Manyara ecosystem, Tanzania: Implications for conservation' (2006) *Mammalian Biology - Zeitschrift für Säugetierkunde*, 71, 99 – 114.

<sup>85</sup> In Swedish the term used by the legislator is *födösök* which has been chosen by the author to be translated as *food foraging*.

<sup>86</sup> Jake Veasey, 'Concepts in the care and welfare of captive elephants' (2006) *International Zoo Yearbook* 40, 63–79, 72.

<sup>87</sup> *Ibid.*

for this animal. Contrarily, it quite quickly becomes evident that the factors of *activity, social interaction, movement, food foraging* will in all likelihood be left unsatisfied.

### 2.2.2 THE POSSIBILITY OF NATURAL BEHAVIOR FOR ELEPHANTS IN CAPTIVITY

Below text will explain how elephants generally fare in captivity related to above mentioned factors, i.e., *activity, social interaction, movement, food foraging*, and compared with their natural behavior according to an ethological perspective. The specific focus will be directed towards the situation for elephants in zoos since that is where they are still being kept in Sweden. Differences in conditions in the circus and the zoo will follow in the subsequent part of the article.

The detailed rules regarding keeping elephants at zoos in Sweden is regulated in the Swedish Board of Agriculture's regulations '*Statens jordbruksverks föreskrifter om djurhållning i djurparker m.m.*' SJVFS 2019:29, Saknr L 108, Chapter 8. This chapter contains three paragraphs and has below been translated:<sup>88</sup>

#### **Chapter 8. ELEPHANTS**

##### **General**

1 § The Animals shall have access to a shower or a pool that is minimum 1 m deep.

2 § Rear enclosure shall exist.

##### **African elephant and Asian elephant**

3 § Space requirements as follows:

Indoor area with display:	50 m <sup>2</sup> /animal, however at least 200 m <sup>2</sup> , height 6 m. The floor shall be equipped with underfloor heating.
<i>Design of the area:</i>	Separation possibilities where the minimum space shall be 50 m <sup>2</sup> /animal. Scrubbing site.
Outdoor area with display:	4,000 m <sup>2</sup> .
<i>Design of the area:</i>	Soft ground cover, sand or soil, access to scrubbing site.

As explained above, elephants have a high need for *activity*, such as social and intellectual stimulation, a fact which likely also makes them pressingly vulnerable and susceptible to impoverished welfare in captivity. It is problematic to activate elephants in a satisfactory manner in captivity. Interaction is important to them, and it is precarious for humans to satisfy their need for communication and emotional and intellectual stimulation.<sup>89</sup> Elephants also have a need for physical interaction. Given their physical size and strength, it is problematic and dangerous for human caregivers to be physically close to them. Often in captive training caregivers and trainers use so-called protected contact and training, which uses shielding walls and other tools in order to create distance and barriers between

<sup>88</sup> SJVFS 2019:29, Saknr L 108, Chapter 8. (Only available in Swedish, translation made by author).

<sup>89</sup> Anna M. Claxton, 'The potential of the human-animal relationship as an environmental enrichment for the welfare of zoo-housed animals' (2011) *Applied Animal Behaviour Science* 133, 1-10.

the elephant and the human so to make it safer for the human.<sup>90</sup> This method is especially utilized when it comes to contact and interaction with the elephant bulls. Elephants in captivity have been found to develop aggressions and stereotypical behavior due to potential causes such as lack of stimuli and dominating behaviors from the human handlers.<sup>91</sup> The studies available suggests that it can be as much as 40 percent of zoo elephants that perform stereotypies, i.e., far from the goal of zero tolerance toward behavioral problems.<sup>92</sup>

There are considerable logistical problems providing appropriate *social interaction* for elephants in a zoo environment. Since it is difficult to maintain captive elephants in biologically proper and natural social groups.<sup>93</sup> As mentioned, elephants are herd animals that live in matriarchies. The family and the herd are highly important to an elephant. In their natural habitat, they live in large family groups and as above also noted, these can often be quite large, and they have the possibility to choose their company. This organizational structure presents zoos with several problems, conditions as such are difficult to satisfy in captivity. Large facilities are needed to house the number of animals required to attempt to replicate even the smaller family units. Even in the bigger zoos, there is not enough space to house more than a few individuals.<sup>94</sup> In captivity, family groups and friends are separated, and elephants are moved and placed in new constellations. If their natural behavior was in actuality considered in this regard the elephants ought themselves to be allowed to choose their own company. Further, the small groups of elephants kept at zoos are not large enough and they importantly lack the natural matriarchal order. In the wild, much of the elephant's time is spent engaging in social interaction, and this is true also for the bulls.<sup>95</sup> The elephant units should ideally be formed of related animals, since it is not certain that individuals of the same species will function together without kinship. They can just as well be maladapted and ill-suited for each other. This is problematic for the individuals, for the caretaker and for the welfare in this form of animal husbandry in general. An illustrative sign of the problems concerning social interaction for elephants in captivity have been their difficulty to reproduce.<sup>96</sup>

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<sup>90</sup> E.g. at Kolmården Zoo in Sweden they frequently use shielding walls in what they refer to as “protected contact and training”. This is especially used for the training with the elephant bulls. See Kolmården Zoo Play, ‘Video – Elefantjurarna’ explaining how they do this, (Kolmården Play, 24 August 2016) <<https://www.youtube.com/watch?v=v7Hn1mkLf8>> accessed 25 November 2021.

<sup>91</sup> See Ros Clubb & Georgia Mason, *A review of the welfare of zoo elephants in Europe* (A report commissioned by the RSPCA 2002), 245, where they conclude that aggressions from elephants towards humans make elephant keeping the most dangerous profession in the United States of America.

<sup>92</sup> *Ibid.*

<sup>93</sup> Jake Veasey, ‘Concepts in the care and welfare of captive elephants’ (2006) *International Zoo Yearbook* 40, 63–79, 72.

<sup>94</sup> *Ibid.*, p. 70-71.

<sup>95</sup> It is important to note that also the bulls have a need for a rich social life. Susan Hambrecht, Sandra Reichler, ‘Group Dynamics of Young Asian Elephant Bulls (*Elephas maximus* Linnaeus, 1758) in Heidelberg Zoo – Integration of a Newcomer in an Established Herd’ (2014) *Der zoologische garten*. 82, 267 - 292.

<sup>96</sup> An indication of the problems is the difficulty for elephants to reproduce in captivity. See Ros Clubb & Georgia Mason, *A review of the welfare of zoo elephants in Europe* (A report commissioned by the RSPCA 2002), 244. In Sweden, it was not until the last two decades that the zoos have been able to successfully breed the elephants. See e.g., Sveriges Television (SVT), ‘Elefantunge föds i Borås’ (SVT, 30 Mars 2021) <<https://www.svt.se/nyheter/lokalt/vast/elefantunge-fodd-i-boras>> accessed 25 November 2021 and

Elephants have, as has been explained, a strong need for *movement*. Their home territories are vast, varied, and extensive. Their natural habitats have warm climates with varying flora and fauna. It is problematic to reproduce similar environments in captivity. The elephants are nomadic animals and walk wide-ranging distances on a daily basis. The lack of this daily exercise can result in health problems, stereotypies and also in aggressivity.<sup>97</sup> In captivity they often contract problems with obesity, their feet and joints. Cold climate also seems to aggravate the joint problems further.<sup>98</sup> This is a considerable problem in Sweden during extended parts of the year. The cold climate and temperatures in Sweden consequently mean that the elephants need to spend much of their time indoors in cramped and artificial environments during long intervals in the year.

Regarding the *food foraging* aspects, it is important to note that the digestive strategy of the elephant may also further create and exacerbate welfare problems in captivity. The elephant is as mentioned not a ruminant. In the wild elephants spend large parts of their days searching for food and eating.<sup>99</sup> In captivity they are served nutritionally concentrated food and this food is served and consumed over a short time. This is closer to the feeding behavior of a ruminant, even though elephants do not perform rumination.<sup>100</sup> There is thus a great vacuum of time for the elephant which would have been filled with the activity of food foraging and this may have consequential effects on their welfare.<sup>101</sup>

To briefly summarize, the situations for elephants in the wild and in captivity is obviously poles apart. Still, there are criterions of natural behavior that need to be met for the animal husbandry to be legally sanctioned. The factors of *activity, social interaction, movement, food foraging* have been analyzed and relevant shortcomings and flaws in the zoo husbandry and environment has been identified. Even if the zoo complies with the regulations made by the legislator, in the form of the Swedish Board of Agriculture's chapter on elephants in zoos, these regulations with its mere three paragraphs are not detailed enough to guarantee natural behavior as according to the legal definition described by the legislator in the higher legal hierarchy in the Animal Welfare Act.<sup>102</sup> To start, the regulation only concerns the right to a shower and bath, some

Sveriges Television (SVT), 'Här föder kungens elefant en prins' (SVT, 22 mars 2020) <<https://www.svt.se/nyheter/lokalt/ost/har-foder-kungens-elfant-en-prins>> accessed 25 November 2021.

<sup>97</sup> Ros Clubb & Georgia Mason, *A review of the welfare of zoo elephants in Europe* (A report commissioned by the RSPCA 2002); Anna M. Claxton, 'The potential of the human-animal relationship as an environmental enrichment for the welfare of zoo-housed animals' (2011) *Applied Animal Behaviour Science* 133,1-10.

<sup>98</sup> Paul A. Rees, 'Low environmental temperature causes an increase in stereotypic behaviour in captive Asian elephants (*Elephas maximus*)' (2004) *Journal of Thermal Biology* 20: 37-43.

<sup>99</sup> As above mentioned, elephants spend about 60-80 percent of their time food foraging. See above n. 87.

<sup>100</sup> Jake Veasey, 'Concepts in the care and welfare of captive elephants' (2006) *International Zoo Yearbook* 40, 63-79, 72. Concluding that, because rumination can be considered as a vital component of ruminant feeding behavior, it is not unreasonable to assume that it is likely to be rewarding to perform, but even if this is not the case, it is effective in occupying the time of captive ruminants.

<sup>101</sup> *Ibid.*

<sup>102</sup> The criticism here is directed at the legislator as a sole exerciser of power consisting of all its bodies with norm-setting power. Hence, it is also important to analyze the Swedish Board of Agriculture's interpretation of what is needed to satisfy the natural behavior of elephants. The human duty to give animals the

space regulations, and a few design features, none of the other necessary factors for natural behavior has been addressed. Further, a pressing question regarding the regulations should also be if a space regulation of 50 m<sup>2</sup>/individual for a large animal that in the wild roams over thousands of square kilometers can be deemed as satisfactory in relation to natural behavior.<sup>103</sup> They do also have the right to an outside area but due to the cold weather that is frequently present during a big part of the year in Sweden, the elephants spend a large quantity of time indoors.<sup>104</sup> Thus, regarding the welfare of elephants in captivity, i.e., their physical and mental state, it is common that they develop physical problems in feet and joints due to lack of exercise, excess weight, and cold climate. It is precarious to fill their days with suitable activities and it is dangerous for elephant trainers to be near the animals.<sup>105</sup> The lack of proper environment, exercise, social interaction, and stimuli commonly leads to elephants developing behavioral disturbances and stereotypies, as mentioned a large and considerable percentage of elephants in zoos show these tendencies.<sup>106</sup> This should, as the legislator has pressed, be described as a strong indicator of poor animal welfare.<sup>107</sup>

In connection with the ban on elephants in circuses, the legislator made statements that indicated that it is impossible to keep elephants in circuses because they are moved around and exhibited.<sup>108</sup> The elephants in zoos are also exhibited in shows, although perhaps not in the same manner as in a circus. However, they are not moved around, and they have enclosures.<sup>109</sup> The question that remains is thus whether it is also impossible for elephants at the zoo to have their natural behavior satisfied and to enjoy good welfare. The fact that so many elephants in zoos *de facto* show behavioral disorders is a strong indication that so is the case, but it is still not a decisive factor for whether it is possible or not.

This article will not be able to entirely affirm that it is impossible to keep elephants at zoos according to legislated welfare standards, even if it is the hypothesis. Yet, what can be stated is that research in the matter is pessimistic and indicates the impossibility. Since, if as indicated in the research, that warm climates, very large enclosures, and large social groups prove to be essential for elephant welfare, most zoos

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opportunity to engage in natural behavior is regulated by law. In relation to the Parliament, the legislative power in Sweden, the Government is regarded as the executive power, and it can be argued that the same applies to the Swedish Board of Agriculture as an extension of the Government.

<sup>103</sup> SJVFS 2019:29, Saknr L 108, Chapter 8.

<sup>104</sup> Concerning the usage of the rights terminology see Introduction and n. 16-22.

<sup>105</sup> See more on the use of protected contact, Stefan Lindberg, 'Mindre fysisk kontakt mellan människa och djurparksdjur' (Sveriges Radio, 12 July 2017) <<https://sverigesradio.se/artikel/6736982>> accessed 25 November 2021.

<sup>106</sup> Ros Clubb & Georgia Mason, *A review of the welfare of zoo elephants in Europe* (A report commissioned by the RSPCA 2002).

<sup>107</sup> Government Bill 2017/18:147, p. 85.

<sup>108</sup> See Government Bill 2017/18:147, p. 143 & 363. See also then responsible minister stating that it was obvious that elephant's behavior cannot be met at a circus in press release above n. 9.

<sup>109</sup> Howbeit, it also needs to be mentioned that the Circus Academy lists some factors that they consider preferable in circus environments, with one of them being changing environments. Since elephants are nomadic animals, they claim that the moving around should perhaps not necessarily be seen as a negative factor regarding natural behavior. See the Swedish Circus Academy (*Akademien för Cirkuskonstens bevarande i Sverige*), Public Document N2015\_00090-267 cirkusförfrågan:180514 4221164\_2\_1.

will find it difficult, if not impossible, to improve enough to be able to meet these needs.<sup>110</sup> It is hard to see a solution for the lack of opportunities to perform various natural behaviors considering restricted space and opportunities for exercise, cold and wet climates, extended periods of confinement, hard and wet flooring, inappropriate diets, small social groups, and sometimes even housing in isolation, the lack of relatedness or stability within social groups, early weaning, breaking when young, and the exposure to aversive stimuli during training.<sup>111</sup> Thus, the welfare problems that arise at a zoo regarding elephants indeed seem very difficult, if not impossible, to overcome.

## 2.3 ELEPHANTS IN THE ZOO AND IN THE CIRCUS

Both the zoos and circuses as we know them today are legacies and remnants of colonial entertainment projects. They have their historical beginnings in the 19th century when imperial expansion made possible such showcases. In these institution's animals as well as humans were shown to attract support for colonial interests.<sup>112</sup> In both circuses and zoos not only animals were exhibited but also native people. Both were displayed to support colonial imagery that demonstrated dominance and control, and with the aim of gaining interest in different colonial ventures.<sup>113</sup> The zoos were also often menageries for royal families, i.e., royal collections of animals. In the zoo the royals could collect animals as they collected other fine artifacts from exotic places in their palaces.<sup>114</sup>

### 2.3.1 THE ZOO

Zoos, regardless of their colonial roots and history, have during the last decades attempted to go through an institutional transformation.<sup>115</sup> From being a location of entertainment into an educational institution. Many zoos have had focus on marketing themselves as educational, preservation and conservation institutes that save animals both on an individual and species level.<sup>116</sup> The justification for their existence, their *raison*

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<sup>110</sup> Ros Clubb & Georgia Mason, *A review of the welfare of zoo elephants in Europe* (A report commissioned by the RSPCA 2002), p. 251.

<sup>111</sup> *Ibid.*, p. 247.

<sup>112</sup> Tanja Schwalm, "No Circus without Animals"?: Animal Acts and Ideology in the Virtual Circus' in Laurence Simmons and Philip Armstrong (eds) *Knowing Animals* (Brill 2007), 80.

<sup>113</sup> *Ibid.*, p. 80-82. E.g., in zoos indigenous people were exhibited with "the animals with which they were associated" and in the famous Barnum & Bailey circus, documents show a request from Barnum to several hundred American consulates for "any specimens of . . . uncivilized peoples", which later led to the removal of two groups of Aborigines from Australia by an agent for Barnum, and them later being exhibited in Europe.

<sup>114</sup> See e.g., Robert J. Hoage, Anne Roskell, and Jane Mansour, 'Menageries and Zoos to 1900' in Robert J. Hoage, and William A. Deiss, (eds), *New World, New Animals: From Menagerie to Zoological Park in the Nineteenth Century* (Johns Hopkins University Press 1996), 8-18 and Richard W. Flint, 'American Showmen and European Dealers: Commerce in Wild Animals in Nineteenth Century' in Robert J. Hoage, and William A. Deiss, (eds), *New World, New Animals: From Menagerie to Zoological Park in the Nineteenth Century* (Johns Hopkins University Press 1996), 98.

<sup>115</sup> Susan Willis, *Looking at the Zoo* (1999) *The South Atlantic Quarterly* 98, 669-687.

<sup>116</sup> It is also now necessary for the zoos to do so, as EU Member States are now required, both in the licensing of zoos and in supervision of them, to verify that zoos comply with EU law requirements of participation in research activities, promotion of public education, spreading awareness of biodiversity and so on. See

*d'être*, being for the sake of animals, not for humans.<sup>117</sup> Arguing that the most effective manner to influence humans to care for animals is by physically showing them the animals, combining education with entertainment. A combined hybrid form of so-called *edutainment*.<sup>118</sup> The claim being that this creates a commitment that cannot be created by showing these animals through e.g., pictures, books, or movies.<sup>119</sup> Perhaps it is by the influence of this marketing campaign that the legislator has conceived the idea that there exists a justifiable public interest or societal benefit of showing real, live, elephants in artificial environments in Sweden.<sup>120</sup>

Contrarily, as research on the zoo experience suggests, the intended education and advocacy impacts of a zoo visit are negligible, and zoos actually function primarily as a form of animal watching entertainment.<sup>121</sup> Further, the fact remains that zoos are commercial institutes.<sup>122</sup> Apart from selling entertainment to the visitor, there are also frequently gift shops scattered around the parks to entice the paying customers, and animals are made to perform in shows for customers, that are often connected to an additional cost. This fact cannot be ignored when discussing the existence of the zoo. Even if some of the income will be forwarded to projects that promote animal issues, the zoo is there to make money. Still, the commercial and entertainment aspects of the zoo business is covered by emphasizing conservation, training, and scientific research.

Elephants are sometimes claimed to fulfil a conservation role in modern zoos. Yet, conservation organizations such as the World Wide Fund for Nature (WWF), the International Union for Conservation of Nature (IUCN) and the African Elephant Specialist Group (AfESG) does not consider that captive breeding makes a significant contribution to elephant conservation, due to the low breeding rates and the high levels of mortality.<sup>123</sup> It has for example been shown that a calf born in a zoo has a 10-30 percent chance of dying in its first year. The calf will most likely be separated from its mother prematurely and if not, there is also a ten percent chance that it will be killed or rejected by her. Even if the calf survives its infancy, its life expectancy is only about 15 to 16 years. Further, captive breeding brings with it increased welfare costs and more practical problems. Half of the offspring are male, who are even more costly and difficult to house safely and well than the females.<sup>124</sup> There are hence high financial costs involved in

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Council Directive 1999/22/EC of 29 March 1999 relating to the keeping of wild animals in zoos (OJ L 94, 9.4.1999, pp. 24-26).

<sup>117</sup> Susan Willis, *Looking at the Zoo* (1999) *The South Atlantic Quarterly* 98, 669-687. See also e.g., the Discussion Series by Kolmården Zoo, discussing their purpose and the history of the zoo keeping elephants, 'Kolmården diskuterar – Elefant' (Kolmårdens Djurpark, 18 August 2016) <<https://www.youtube.com/watch?v=CM7k2rw2hos&t=1370s>> accessed 25 November 2021.

<sup>118</sup> Sabrina Brando, 'Wild Animals in Entertainment' in Bernice Bovenkerk and Josef Keulartz (eds) *Animal Ethics in the Age of Humans Blurring Boundaries in Human-animal Relationships* (Springer International Publishing 2016) (295ff), 296.

<sup>119</sup> *Ibid.*

<sup>120</sup> Swedish Government Official Reports, SOU 2011:75. p. 654. See further above n. 66. This notion now also needs to be understood in light of Directive 1999/22/EC on the keeping of wild animals in zoos.

<sup>121</sup> Sue Donaldsson, & Will, Kymlicka, 'Farmed Animal Sanctuaries: The Heart of the Movement? A Socio-Political Perspective' (2015) *Politics & Animals*, 50-74, 54.

<sup>122</sup> With the exception of some public zoos.

<sup>123</sup> Ros Clubb & Georgia Mason, *A review of the welfare of zoo elephants in Europe* (A report commissioned by the RSPCA 2002).

<sup>124</sup> *Ibid.*, p. 249

keeping elephants,<sup>125</sup> as well as great costs in terms of keeper safety.<sup>126</sup> Regarding importation, this is in most cases only allowed for the purpose of conservation.<sup>127</sup>

Consequently, adding more elephants to the zoo population, either through captive breeding or importation, seems difficult to justify. Other important public interest factors such as conservation or economic factors will with difficulty be persuasively argued against the poor animal welfare.<sup>128</sup> Elephants generate significant welfare costs, and these are not outweighed by any real benefits.<sup>129</sup> Because it has been concluded in studies that they have no direct conservation role in the zoo, and their indirect conservation role is unquantified. They have enabled some research to be conducted, but zoo elephants are not kept for research, and it is not obvious that this research could only have been done in zoos. The claims that the zoo generates conservation and research benefits regarding elephants can therefore be contested.<sup>130</sup> This leaves the elephants role at the zoo as that of providing entertainment and diversion for zoo costumers, not a societal benefit or public interest most would regard as justifying poor welfare.<sup>131</sup>

In Sweden, the royal connection to the zoo also remains and lingers all through to the current day. At Kolmården Zoo, one of the elephant cows was a gift from the king of Thailand to the Swedish king.<sup>132</sup> The zoo has also received a bull from Denmark, which was previously Princess Margrethe's elephant. Together these two have reproduced and given birth to an elephant calf. A happening that was celebrated royally, with newspapers and media referring to it as the birth of a royal baby.<sup>133</sup> The postcolonial

<sup>125</sup> Ibid., p. 248, see also Chapter 3 of the Report.

<sup>126</sup> Ibid., see also Chapter 10 of the Report.

<sup>127</sup> The import of live elephants for “primarily commercial purposes” is not allowed so as not to “endanger further their survival”. See CITES, ‘International Trade in Live Elephants’ (CITES, 9 April 2019) <[https://cites.org/eng/news/statement/international\\_trade\\_in\\_live\\_elephants](https://cites.org/eng/news/statement/international_trade_in_live_elephants)> accessed 25 November 2021.

<sup>128</sup> Ros Clubb & Georgia Mason, A review of the welfare of zoo elephants in Europe (A report commissioned by the RSPCA 2002), p. 249, there are few perceived benefits of keeping elephants at zoos therefore it seems very hard to justify the high welfare costs.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid., p. 248, see also Chapter 2 of the Report.

<sup>131</sup> Ibid., p. 248, see also Chapter 3 of the Report. Perhaps seen as an important interest for humans, and also a common role for animals, but such trivial interest ought not to be an outweighing factor in a balancing act concerning poor welfare.

<sup>132</sup> All Asian elephants and African elephants from other States than Botswana, Namibia, South Africa and Zimbabwe (who are listed in Appendix II) are considered to be “threatened with extinction” and are therefore listed in Appendix I of the CITES Convention. This means that import of live animals for “primarily commercial purposes” is not allowed so as not to “endanger further their survival”. The international trade in live elephants, especially when it takes the animals out of their natural range, is submitted to strict rules in CITES to regulate such trade, but the trade is not completely prohibited, and some aspects of the trade are not covered by CITES rules. See CITES, ‘International Trade in Live Elephants’ (CITES, 9 April 2019) < [https://cites.org/eng/news/statement/international\\_trade\\_in\\_live\\_elephants](https://cites.org/eng/news/statement/international_trade_in_live_elephants) > accessed 25 November 2021. For a royal member to give an Asian elephant as a gift, rather than through a commercial transaction, to another royal representant thus makes the exchange subjected to less rules. See also Djurens Rätt, ‘Framgång när skärpta regeln för handeln med vilda elefanter röstades igenom’ (Djurens Rätt, 27 August 2019) <<https://www.djurensratt.se/blogg/framgang-nar-skarpta-regler-handeln-med-vilda-elefanter-rostades-igenom>> accessed 25 November 2021.

<sup>133</sup> See e.g., news on the Royal Thai Embassy in Stockholms Website, ‘New Baby Royal Elephant’ (Royal Thai Embassy, 23 March 2020) <<http://thaiembassy.se/en/new-baby-royal-elephant/>> accessed 25 November 2021 and Swedish media reporting on the birth, ‘Kunglig elefantfödsel på Kolmården’ (Dagens

heritage seems to be somewhat forgotten and not spoken about, yet the institute of the zoo remains in a clear connection with the royal family.<sup>134</sup>

Still, the zoos have in general grown into legitimate and authoritative institutes that exist for the sake of animals, often presented as spokespersons and representants of animals. The Swedish zoos has seemingly become more self-conscious and aware of the image they desire to portray and thus also the language that needs to be used to create this imagery. In 2019, the Swedish Zoo Organization (SDF) created an internal document, a blacklist of words that was not to be used by its members with suggested rephrasing alternatives. This document was created to be used in communication with media and the public. The blacklist contained words such as “captivity”, “surplus animals”, “animal collection”, “collection plan” and “collection planning”.<sup>135</sup>

Many of the unethical practices of zoos are quieted, such as e.g., capturing animals in the wild, breaking up families and friendships for captive breeding purposes, euthanizing unwanted offspring and so on.<sup>136</sup> Nevertheless, it has been shown on a yearly basis that a large quantity of animals dies and are being killed at Swedish zoos, this includes fully healthy animals and animals threatened with extinction. During 2020, 1118 animals died at Swedish zoos. Some of them being so-called “surplus animals” for which there was no longer room. At Kolmården Zoo, 141 animals died during 2020. Several of these animals were killed despite being healthy and among the list of dead animals were severely endangered animals such as two reticulated giraffes, an imperial zebra, and six of one of the world’s most endangered animals, the addax or white antelope.<sup>137</sup> At Borås Zoo, 75 animals died during 2020, some of them also highly endangered or vulnerable animals including six African wild dogs, two cotton-top tamarins, one chimpanzee, three cheetahs, one giraffe, one wolverine, one lion, one endangered bongo and one red panda. Borås Zoo have themselves previously admitted that they kill healthy lion cubs and African wild dogs when they do not have room for them. According to an investigation made by the Swedish national public television broadcaster (SVT) more than half of the animals killed at Borås Zoo were healthy animals.<sup>138</sup>

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Nyheter, 22 March 2020) <<https://www.dn.se/kultur-noje/kunglig-elfantfodsel-pa-kolmarden/>> accessed 25 November 2021.

<sup>134</sup> See e.g., the Royal Family’s Website, ‘Kungaparet besökte Kolmårdens Djurpark’ (Sveriges Kungahus) <<https://www.kungahuset.se/kungafamiljen/aktuellahandelser/2013/aktuellt2013oktoberdecember/kungaparetbesoktekolmardensdjurpark.5.4ea495e313c19c119aac494.html>> accessed 25 November 2021.

<sup>135</sup> See ‘Här är orden svenska djurparksföreningen svartlistat’ (Djurrättsalliansen, 27 April 2020) <<https://djurrattsalliansen.se/2020/04/27/har-ar-orden-svenska-djurparksforeningen-svartlistat/>> accessed 25 November 2021.

<sup>136</sup> Sue Donaldsson, & Will, Kymlicka, ‘Farmed Animal Sanctuaries: The Heart of the Movement? A Socio-Political Perspective’ (2015) *Politics & Animals*, 50-74, 54.

<sup>137</sup> See ‘1118 döda djur på svenska djurparker’ (Djurrättsalliansen, 25 May 2021) <<https://djurrattsalliansen.se/2021/05/25/1-118-djur-doda-pa-svenska-djurparker-2020/>> accessed 25 November 2021 & Sofia Roström Andersson, ‘Utrotningshotade antiloper avlivades på Kolmården’ (Aftonbladet, 15 November 2012) <<https://www.aftonbladet.se/nyheter/a/7LRPa4/utrotningshotade-antiloper-avlivades-pa-kolmarden>> accessed 25 November 2021.

<sup>138</sup> Ibid. See also Valeria Henander, ‘Friska djur avlivas rutinmässigt på djurparken’ (SVT, 11 January 2018) <<https://www.svt.se/nyheter/lokalt/vast/friska-djur-avlivas-rutinmassigt-pa-djurparken>> accessed 25 November 2021.

It should still be mentioned that there has also been some positive evolutions in the history of zoos in recent decades. For example, in the case of the elephant, a development has taken place where one could previously see lone elephants at zoos in small barren enclosures (or rather cages), who had not met another member of their own species ever or in decades,<sup>139</sup> to the current situation where more focus now seems to be placed on the elephants' welfare and wellbeing. More efforts are put in place to make the elephants fare as well as possible in these environments. E.g., in Sweden, elephants do not have to be alone, and the zoos have tried to create small family units. Zoos have improved the size, design, and enrichment in animal environments.<sup>140</sup> Although, it needs to be kept in mind that they are also legally demanded to do so according to the regulations emplaced concerning the space and design of the enclosures.<sup>141</sup> In some of these respects, the elephants are therefore better off than in the circus.

Nevertheless, even if elephants have received enriched environments that surpass the circus, a critical debate about keeping elephants in Sweden ought yet to include keeping elephants in zoos. Because even if, as according to the zoo themselves, the zoo exists for the elephant's sake, the elephants are still there to be watched by humans, and they must still perform for the customers on a frequent basis in elephant shows.<sup>142</sup> It needs to be considered that there are alternative ways to promote education, research and conservation measures regarding elephants.<sup>143</sup> There are alternatives for promoting elephant issues both on a species and individual level where elephants can be helped in their natural environment. Suggestibly and preferably, *in situ* conservation should be promoted. There are national parks, protected environments and elephant sanctuaries that could more effectively be supported instead.<sup>144</sup>

### 2.3.2 THE CIRCUS

The circus, on the other hand, has not been as successful in transforming itself as an institution and has received sharp criticism, often publicly, regarding their use of animals in shows.<sup>145</sup> In comparison to discovered scandals in other animal husbandry such as e.g., the zoo, there has been a high level of attention and debates regarding general animal

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<sup>139</sup> E.g., the history of the elephant Saba who came to Kolmården Zoo in 2007 after spending 20 years in isolation in the French Zoo Le Pal. See e.g., Sara Olby, 'Fodertillgång och stereotypa beteenden under natten hos Asiatisk elefant (*Elephas maximus*)' (Linköpings Universitet, Institutionen för fysik, kemi och biologi) <<http://www.diva-portal.org/smash/get/diva2:429090/FULLTEXT02>> accessed 25 November 2021.

<sup>140</sup> E.g., Kolmården Zoo has sonar-activated water enrichment for dolphins. Sabrina Brando, 'Wild Animals in Entertainment' in Bernice Bovenkerk and Josef Keulartz (eds) *Animal Ethics in the Age of Humans Blurring Boundaries in Human-animal Relationships* (Springer International Publishing 2016), 295, 309.

<sup>141</sup> SJVFS 2019:29, Saknr L 108, Chapter 8.

<sup>142</sup> See e.g., Kolmården Zoo Website on schedules for elephant shows, 'Träffa världens största landlevande däggdjur' (Kolmården Zoo, 29 August 2021) <<https://www.kolmarden.com/parken/visningar/elefant>> accessed 25 November 2021.

<sup>143</sup> The same applies to many other animals at the zoo for that matter.

<sup>144</sup> See e.g., Ros Clubb & Georgia Mason, *A review of the welfare of zoo elephants in Europe* (A report commissioned by the RSPCA 2002); Sue Donaldsson, & Will, Kymlicka, 'Farmed Animal Sanctuaries: The Heart of the Movement? A Socio-Political Perspective' (2015) *Politics & Animals*, 50-74.

<sup>145</sup> See e.g., Eurogroup for Animals, *Wild Animals in EU Circuses – Problems, Risks and Solutions* (Eurogroup for Animals 2021).

welfare in circus environments.<sup>146</sup> Some animal rights organizations have also chosen to focus extra on this form of animal husbandry.<sup>147</sup> The opportunity to create opinion to ban wild animals such as elephants in circuses did thus come to reality. Another important factor is presumably that the legislative discussion to ban animals in circuses has also been an extended debate that dates back many decades by now. It began already with an animal welfare inquiry in 1957 regarding public demonstration of animals.<sup>148</sup> This early discussion culminated in a proclamation two years later regarding a prohibition of public display of monkeys, predators other than domestic dogs and domestic cats, pinnipeds other than sea lions, rhinos, hippos, deer, giraffes, kangaroos, birds of prey, ostriches and crocodiles.<sup>149</sup> The list of prohibited animals in circuses has since then been progressively extended throughout the years to encompass more and more animals.

Further, more and more detailed regulations regarding animal husbandry in circuses were starting to be issued in the beginning of the 21<sup>st</sup> century. In 2001 the Swedish Board of Agriculture's regulations issued more detailed rules on animal husbandry in circuses.<sup>150</sup> Between 2004 and 2007 Sweden had a separate Animal Welfare Authority that revised these regulations in both 2004 and 2007, which led to the circus regulations that was emplaced before the new Act and Ordinance.<sup>151</sup> A reason that was stated for these revisions was that it needed to become clear which lowest level of animal husbandry was acceptable in circuses. The ambition was also that the control mechanism of circuses would be more uniform throughout the country with these new regulations acting as an aid. The Animal Welfare Authority further pointed out in the regulatory motives that in their view it was more likely that circuses could conduct satisfactory animal husbandry with domesticated animals and considerably more difficult with non-domesticated as it is difficult to meet their needs and natural behaviors in a circus.<sup>152</sup>

Prohibiting animal husbandry where animals suffer for the sake of human entertainment is of course a positive progress for animals and an action that should be highly encouraged. In an optimistic view it is a step in the direction towards more bans on different forms of exploitative animal husbandry. Yet, a question that should perhaps still be asked is why the ban in circuses was discussed to such an extent, while similar animal husbandry, e.g., in the zoos, was not questioned to any comparable degree. This fact ought to raise some questions. E.g., if there is actual ethological scientific support for this distinction, i.e., evidence based in the natural sciences justifying the vastly different legal treatment of the two institutions? If there is evidence that supports that elephants

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<sup>146</sup> See e.g., scandals at Ölands Zoo and Parken Zoo in Sweden during 2012 that gained much media attention but were later deemed adjusted by the County Administrative Board. 'Hur djupt går förändringarna?' (Djurskyddet, 24 May 2013) <<https://tidningen.djurskyddet.se/ledare/djurskyddskandalen-hur-djupt-gar-forandringarna/>> accessed 25 November 2021.

<sup>147</sup> See e.g., Eurogroup for Animals, *Wild Animals in EU Circuses – Problems, Risks and Solutions* (Eurogroup for Animals 2021).

<sup>148</sup> Swedish Government Official Reports 1957:38 *Offentlig förevisning av djur, betänkande med förslag av djurskyddsutredningen*.

<sup>149</sup> Kungl. Maj:ts kungörelse (1959:486) om offentlig förevisning av djur.

<sup>150</sup> Swedish Board of Agriculture's Regulations, *Statens jordbruksverks föreskrifter om djurhållningen vid cirkusar*; SJVFS 2001: 64, Saknr L 116.

<sup>151</sup> Swedish Government Official Reports, SOU 2011:75, p. 635.

<sup>152</sup> Ibid.

have the possibility for natural behavior in zoos? In relation to such questions, there are critical voices within the welfare sciences who claim that animal welfare at circuses is not worse than in any other animal entertainment industry, and naturally then also compared to zoos.<sup>153</sup>

There ought also to be questions raised why this quick and forceful impose of a ban on one institution while completely leaving another to continue its use of these animals. Especially since the ban targeted an institution that is on the decline,<sup>154</sup> that did not actually hold any elephants, and that had not held any elephants for quite some time.<sup>155</sup> Further, throughout Europe the use of elephants in circuses is being phased out and in the continuation perhaps also on a global level in a not-too-distant future.<sup>156</sup> So, why introduce a ban on circuses while not even raising the issue of banning them in zoos, the institution where they are actually still kept in Sweden? Had it not been more important to indeed ban the institution that still in effect holds these animals' captive rather than to target a ban on an institution that has already stopped the practice? At the least, ought not the discussion of elephant's possibility of natural behavior at zoos in any case also have been raised since the arguments put forward to legitimate the ban in circuses could similarly be applicable on zoos?

### 2.3.3 COMPARATIVE REMARKS

What has been reviewed in this section, the questioning of the inconsistent application of the legal criterion natural behavior in the circus and in the zoo, unwraps questions for further discussion that this article cannot possibly answer due to length considerations.<sup>157</sup>

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<sup>153</sup> See e.g., Marthe Kiley-Worthington, *Animals in Circuses and Zoos*, (Little Eco-Farms Publishing 1990), 220, stating that: "This study shows that the welfare of the animals in British circuses, as judged by physical and psychological criteria, is not as a rule inferior to that of other animal husbandry systems such as in zoos, private stables and kennels.... It is therefore irrational to take a stand against circuses on the grounds that the animals in circuses necessarily suffer, unless they are to take the same stand against zoos, stables, racehorses, kennels, pets, and all other animal-keeping systems."

<sup>154</sup> The current circus industry is small nationally and the circus companies are relatively few. There are eleven Swedish and foreign circuses that have toured in Sweden for at least one season since 2013. At present, there are three active circuses that tour in Sweden with animals. See Public Document by the Ministry of Enterprise and Innovation, *Konsekvensutredning till förslag om ändring i djurskyddsförordningen om förbud mot elefant och sjölejon på cirkus*, 2018-06-20.

<sup>155</sup> According to the Swedish Circus Academy (*Akademien för Cirkuskonstens bevarande i Sverige*), Swedish circuses have not shown elephants and sea lions since 2013. See Public Document N2015\_00090-267 cirkusförfrågan:180514 4221164\_2\_1.

<sup>156</sup> An alternative of not regulating at all was emphasized by the Circus Academy and Cirkus Maximum with reference to the fact that elephants are being phased out as circus animals throughout Europe, due to the fact that no new recruitment has taken place since the mid-1980s. See Public Document by the Ministry of Enterprise and Innovation, *Konsekvensutredning till förslag om ändring i djurskyddsförordningen om förbud mot elefant och sjölejon på cirkus*, 2018-06-20. Here it is also be important to note that CITES now strictly regulates the buying and selling of elephants which makes it challenging to buy new elephants for the circuses. See above n. 133. The less regulated way to acquire new elephants is by exchanging them as gifts. Which explains the gifting of elephants from example Thailand to royal families. An exchange which primarily facilitates, such as in the case of Sweden, the zoos acquiring new elephants. Zoos can also exchange elephants in between them.

<sup>157</sup> Even though there are many interesting queries that compels further investigation related to this topic, these questions will unfortunately fall outside the scope of this paper due to a lack of space.

Yet, as illustrated it can be settled that the legislative discussion on elephant welfare was a remarkably selective critical debate since poor animal welfare is a widespread problem in animal husbandry.<sup>158</sup>

The fact that the elephant receives different considerations regarding where in the human sphere they are situated points towards an important legal theoretical problem in the construction of the legislation aiming to protect animals. The foundation of all current animal legislation is built on a paradigm that in animal law is referred to as *welfarism*, as opposed to an *animal rights* perspective.<sup>159</sup> This paradigm has its grounds in anthropocentric perspectives where animals are still legally objects, even if that can be as objects of protection.<sup>160</sup> Importantly, the assertion in this paradigm is that humans do not have duties towards animals, that humans are justified in utilizing animals, but that humans have duties regarding animals when they use them.<sup>161</sup> The protection that the animal will receive will therefore also depend on how strong the human interest is in the question of exploiting the animal, and how much suffering that certain form of animal utilization require. Compare e.g., a dog who lives as a pet in a family with a dog who is used for medical experiments. In these two different situations different sets of animal protection rules will apply to these two dogs.<sup>162</sup> Even though, it could be the same breed of dog, thus a dog with the same need for natural behavior. The same problem is visible in this article with the elephants.<sup>163</sup> The elephants have the same need for natural behavior whether they exist in a circus or in a zoo. Simply, it just seems as though the human interests in this situation, i.e., going to the zoo to be entertained by watching elephants, or what the legislator has referred to as the ‘societal benefit’, trumps the

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<sup>158</sup> Compare e.g., with animals exploited in the food production industry, the fur and skin industry and regarding animals that are being used in different forms of scientific research and medical as well as non-medical testing.

<sup>159</sup> For example, the legislator’s statement that the balancing act of animal welfare issues with various human interests will continue illustrates that the legislation on the protection of animals in Sweden is based on a welfare paradigm, which places humans and human interest’s superior to all other sentient beings. See Government Bill 2017/18:147, p. 84. See also Birgitta Wahlberg ‘Animal Law in General and Animal Rights in Particular’ (2021) *Scandinavian Studies in Law*, Vol. 67, 13, 13-14 for a more detailed analysis of what the welfare paradigm entails. See further regarding the differences in the animal welfare paradigm and the animal rights perspective e.g., Gary L. Francione & Robert Garner, *The Animal Rights Debate* (Columbia University Press 2010).

<sup>160</sup> Birgitta Wahlberg ‘Animal Law in General and Animal Rights in Particular’ (2021) *Scandinavian Studies in Law*, Vol. 67, 13, Note that animals are neither natural persons nor legal persons. In terms of law, animals are traditionally classified as objects of protection (mainly in terms of public law) and property (mainly in terms of private law).

<sup>161</sup> Compare this with a notion of having duties towards animals for their sake as individuals and sentient beings. See Birgitta Wahlberg ‘Animal Law in General and Animal Rights in Particular’ (2021) *Scandinavian Studies in Law*, Vol. 67, 13.

<sup>162</sup> Animal Welfare Act (2018:1192), Chapter 2, Section 1, stating that: “Animals used in animal experiments shall not be considered to be subjected to unnecessary suffering or disease when used if the use has been approved by an ethical committee on animal experiments.” Unofficial translation available at Government Website (Swedish Government Website, 20 June 2018) <<https://www.government.se/494b85/contentassets/9f6a4e0fb1704a0ba72531b63811ac22/animal-welfare-act-sfs-2018-1192-12-mars-2020.pdf>> accessed 25 November 2021.

<sup>163</sup> See Birgitta Wahlberg ‘Animal Law in General and Animal Rights in Particular’ (2021) *Scandinavian Studies in Law*, Vol. 67, 13, 13-14 for further analysis of these discrepancies.

natural needs of the elephant.<sup>164</sup> It might be argued that in the case of the circus the interest is purely human entertainment and diversion, while in the case of the zoo there also exists a conservation interest. The argument being that this public interest factor could justify the continued holding of elephants at the zoo given the limited access to natural behavior that exists there when compared to the circus environment. In opposition, it has been argued in this article that conservation regarding elephants cannot be efficiently carried out at zoos which leaves the elephants role there as that of merely providing entertainment and diversion.<sup>165</sup> Consequently, the circus and the zoo could both be seen as solely supplying entertainment in this regard and ought hence to receive the same legal scrutiny to avoid inconsistency in the application of the law.

Decidedly, a ban has been imposed in Sweden, considered so urgent that it should not wait to be incorporated with the new legislation coming into force a few months later, on a use of animals that did not actually occur in the country.<sup>166</sup> Admittedly, it can be argued that the ban was aimed at possible future use of elephants in Swedish circuses, or aimed at foreign actors who could possibly enter the market.<sup>167</sup> However, elephants did exist and still do exist in zoos, but the natural behavior of elephants in the zoo environment was ignored, even though it was obvious to the politicians that the natural behavior could not be met in a circus environment. This obvious observation ought to at least also have warranted an inquiry into the natural behavior of elephants in zoos.

For the question, as has been raised in this article, is if elephants have the opportunity for natural behavior in zoos with the same legal logic that justified the ban on them in circuses. What this article wants to highlight is that according to some of the most important factors that elephants have a *strong motivation* for and that they receive *functional feedback* from, as laid out in the legislative history; the elephants need for *activity, social interaction, movement, and food foraging*, the argument can similarly be made that their natural behavior cannot be satisfied in zoo environments either.<sup>168</sup> Taking into account that elephants in zoos have been recorded to suffer from obesity, develop foot problems and joint pain, that they have difficulty breeding, that they die prematurely, etc. Further, and highly importantly it has been shown that they frequently develop behavioral disorders and stereotypies. There are thus clear indicators that elephant welfare also suffers in zoo environments too.

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<sup>164</sup> Swedish Government Official Reports, SOU 2011:75. p. 654. See also above n. 66.

<sup>165</sup> See Section B of the Article.

<sup>166</sup> Considering that there were not any elephants at any circuses in Sweden this is difficult to justify. See Public Document by the Ministry of Enterprise and Innovation, *Konsekvensutredning till förslag om ändring i djurskyddsförordningen om förbud mot elefant och sjölejon på cirkus*, 2018-06-20; and the Swedish Circus Academy (*Akademien för Cirkuskonstens bevarande i Sverige*), Public Document N2015\_00090-267 cirkusförfrågan:180514 4221164\_2\_1.

<sup>167</sup> This is also the case according to the Public Document by the Ministry of Enterprise and Innovation Report - *Konsekvensutredning till förslag om ändring i djurskyddsförordningen om förbud mot elefant och sjölejon på cirkus*, where they conclude "The assessment is that those affected by the proposal are mainly foreign circuses that have elephants or sea lions and that possibly plan to tour in Sweden in the future. Swedish circuses and the foreign circuses that have actually toured in Sweden in recent years have phased out these animals and the assessment is that they are not affected." (Authors translation).

<sup>168</sup> Government Bill 2017/18:147, p. 82.

Some enriching factors do obviously exist in zoos that circus environments lack, but it also needs to be pointed out in the discussion that some critical voices also mention certain benefits that exists in circuses that zoos typically lack.<sup>169</sup> Perchance it can indeed also be difficult for humans to determine which human made factors and environments is in point of fact the most stimulating for an elephant. Ultimately, the elephant does not really belong in any of these environments and if one is to criticize one institution for not being able to satisfy the elephant's natural behavior, then the argument needs to be applied and scrutinized regarding the other institution as well.

### 3 CONCLUSIONS

To avoid any misunderstandings, it might need to be repeated and yet again pointed out that it of course is a positive legal development that elephants have been banned from circuses. From both an animal welfare perspective and an animal rights perspective the aspiration should be that all animals should be banned from circuses. However, it is still important to address, that the logic and the reasons stated in the preparatory work regarding this ban is also applicable to other institutions as pointed out in this study.

The Swedish animal welfare legislation means to protect animals' natural behavior. The legislative history clarifies that this is not to be fully equated with the natural behavior that the animal would have in its natural state in the wild. Still, the Government stresses that behaviors that should be taken into account are those that they have a *strong motivation* for and that gives the animal *functional feedback*. These behaviors include the need for *activity, social interaction, movement and food foraging*. These needs need to be met to counteract behavioral disorders and stereotypies, the goal importantly being a zero tolerance towards these on a general herd level or population level.

The Government concluded that the natural behavior cannot be satisfied for elephants in circuses. According to the analysis in this paper, the arguments that justified the ban in circuses ought also to be applicable to exhibiting elephants in zoos. If applied it would according to this analysis also warrant considerations of a prohibition on exhibiting elephants in zoos, considering that this environment can seemingly neither satisfy the elephants natural behavior according to the relevant crucial welfare aspects. The elephant's natural behavior needs to be satisfied to prevent and counteract behavioral disorders and stereotypies, yet that elephants develop stereotypies in zoos is by now well documented. Both physical and mental suffering has been documented both in individual elephants and on more general levels, seeing that the available studies indicate that around 40 percent of zoo elephants show signs of stereotypies. These behavioral disorders indicates that the natural behavior of these animals is not satisfied in this institution either.

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<sup>169</sup> The Circus Academy lists some factors that they consider preferable in circus environments, e.g., changing environments, physical closeness to trainers and active days. See the Swedish Circus Academy (*Akademien för Cirkuskonstens bevarande i Sverige*), Public Document N2015\_00090-267 cirkusförfrågan:180514 4221164\_2\_1.

This deviating treatment of animals depending on where they happen to be kept in human society demonstrates one of the results of the welfare paradigm currently present in all animal protection legislation. Which means that the protection that the animal gets in the given situation will depend on what benefit they are deemed to give humans in their role in that environment. In this case it has been declared by the legislator that the ‘societal benefits’ of showing elephants to humans can be fulfilled in the zoo rather than in the circus. Thus, this paradigm results in diverging legal treatment depending on where the animal is being kept, in this case if the elephants is kept in a circus or a zoo. Nevertheless, what the societal benefits of keeping elephants in zoos actually are remains an unanswered question.

Importantly, since as has been argued in this article the conservation efforts regarding elephants cannot be accomplished efficiently at a zoo, considering the low breeding rates, the high levels of mortality and the various problems with welfare that arises. This leaves the remaining interest to be entertainment and diversion, i.e., the same public interest that the circus provides. It is not unlikely to believe that the Swedish legislator has considered that shortcomings in natural behavior can be accepted at zoos due to the notion that the zoo fulfils a conservation role regarding elephants. The argument likely then being that the conservation interests outweigh the deficiencies since the environment at the zoo is not as bad as the situation is for the elephants in the circus. What this article has assessed is that there is no justifiable conservation factor and that not as bad does not equal good, or that it necessarily means that the zoo fulfils the legislative stipulations and duty of providing good animal welfare.

Justice and the principle of equality demands treating like cases alike. Since there are no societal benefit of conservation regarding elephants at the zoo it leaves them there to solely supply entertainment to the zoo customers. Even if the elephants are not moved around and even if the enclosures are better at zoos, the environment is still far from meeting the standard that would be needed in order to fulfil the stipulation of natural behavior. It demands to be considered that it would be highly costly and, as research has indicated, in reality probably impossible for a zoo to fulfil what would actually be required for good elephant welfare. The risk of this impossibility needs to be acknowledged having in mind that the duty to provide for the natural behavior of animals is legislated in the Swedish Animal Welfare Act, or if you will, consider that the legislation stipulates a “right” to it for the animals. Since with the application of the theories and perspectives that this article has utilized it can also be referred to as a right for the elephants. This claim-right correlated to the legislator’s duty exists if there are no other important public interests. This article has exhibited that there might not be any such interest.

Even if there might not be many elephants in Swedish zoos currently, this is still an important issue to analyze because it demonstrates the legal concept of natural behavior and also the weakness of legislation based on the welfare paradigm, its history and purpose and how it is now applied in inconsistent ways. The analysis conducted in this article may not be transferable in its entirety or identically to all other forms of animal husbandry, nevertheless, it can prove enlightening to some other forms of animal husbandry. Specifically, to other wild animals in man-made environments, and perhaps especially to other animals in zoo environments. It is also worth to note that the analysis conducted here could possibly by analogy enlighten analyses of various other animals in captivity since problems with having natural behavior satisfied, and the problem of

behavioral disturbances in human made environment is seemingly a commonplace complication for animals in many forms of animal husbandry and since the concept of natural behavior is not used in a coherent and consistent manner.

A discussion of the natural behavior of animals in the zoo can be a natural starting point into a potentially bigger debate. Since the zoo question concerns wild animals that in most cases cannot yet be deemed 'domesticated' there exists wild natural habitats to compare and contrast their man-made environment with. This is unfortunately more difficult when the analysis concerns animals that are assumed to be domesticated. Nonetheless, a discussion of the natural behavior concerning the animals used for food, dairy and clothes is most definitely needed. As mentioned in the historical review, it was expressly due to the rise of industrial animal husbandry that natural behavior became a legal concept in the first place and when the provision was first incorporated it only applied to animals that were bred or kept for food, wool, skins, or furs. Although, it is rather towards the wild animals that this legal concept has been discussed and applied in a prohibitive manner in recent time.

In here analyzed scenario, it was deemed obvious that the natural behavior of the elephants was not satisfied, which led to the positive legal development of a ban on this form of animal husbandry. Even if the ban did in fact not change the situation for any elephant, it still sends a signal to society that the natural behavior of elephants is something that should be considered and taken seriously. Meanwhile, it is important to not only send signals with legislative revisions. A legal revision ought to create *de facto* change as well. The consideration and scrutiny of the natural behavior regarding elephants in zoos, could in turn result in a prohibition that indeed in reality made an impact. The legal and practical change of prohibiting animals in the zoo that cannot have their natural behavior satisfied is not unrealistic. Contrarily, banning elephants or other animals at the zoo could be practically implemented without any great difficulty. This form of animal husbandry could relatively quickly be scaled down and phased out by discontinuing the intake of new animals into zoos and retiring animals that are already there. There are animal shelters, national parks, and protected environments around the globe in more naturally suitable geographical locations that the animals could be relocated to.

At last and in conclusion, according to the analysis in this paper, banning elephants in circuses but continuing to allow zoos to keep them in captivity seems to be an inconsistent use of the requirement of natural behavior. The highly selective legal discussion and the urgent ban was particularly perplexing since there were not any elephants in circuses in Sweden while there are in fact elephants in zoos. A consistent use of the term natural behavior with the same legal logic that motivated the ban on elephants in circuses ought to also justify a ban on exhibiting them in zoos. An elephant is an elephant.

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