

动物福利法治：焦点与难点

Animal Welfare Law: Focal & Difficult Issues

主编：常纪文

Paul Littlefair

中国社会科学院法学研究所

组织编写

英国防止虐待动物协会

Institute of Law, Chinese Academy of Social Sciences

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Royal Society for the Prevention of Cruelty to Animals of England



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前 言

本书是在中国动物保护法制建设国际研讨会(2008 Beijing)论文集的基础上编辑而成的。

加强动物的保护法制建设,既可以加强国民道德素质的建设,促进环境保护,预防发生动物公共卫生事件,还可以促进经济发展。因此,加强动物保护法制的建设,其意义是不言而喻的。

动物的法律保护在欧洲是一个已有二百多年历史的话题。目前,在中国,随着经济和社会的进一步发展,动物的法律保护也日益成为一个热门话题。中国在依法保护野生动物、农场动物和宠物动物方面做出了艰巨的努力,在动物防疫、动物卫生等方面取得了巨大的成就。但是中国作为一个发展中国家,动物保护立法的发展需要一个过程,不可能一下子制定出一系列脱离自己国情的动物保护法律。在这个过程中,我们不能闭门造车,应当借鉴和吸收国外成熟的经验。但中国有自己的文化传统,盲目地追求中国的动物保护立法与西方国家全面接轨,也是不可取的。因此,我们现在迫切的任务是:借鉴国外成熟的动物保护立法经验,发展和完善既符合中国国情与文化传统,又能促进经济和社会全面发展的动物保护法律体系。

目前,中国的动物保护法制建设还不太发达,一些问题,如动物的法律地位问题,动物保护立法体系的构建问题,动物保护监管体制、机制和制度的健全问题,动物的保护与国际贸易的协调问题,需要我们加强交流。2008年4月26~27日,国内外的动物保护法学者和实务界人士一百一十多人,齐聚一堂,共同为这一社会热点话题加强学术交流,献计献策,是中国动物保护法学界的一件盛事。2008

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年是中国社会科学院法学研究所成立 50 周年,在这特殊的年份举行这次具有特殊意义的国际会议,意义重大。

本书的出版,得到了会议主办方之一——英国防止虐待动物协会的资金支持,得到了中国全国人大法制工作委员会、全国人大环境与资源委员会、环境保护部、国家林业局的支持,得到了新西兰奥克兰大学、英国阿伯丁大学、美国动物法律保护基金会、美国国家爱护动物基金会及德国、澳大利亚等国家专家的支持,得到了中国香港大学、香港爱护动物协会的支持,得到了中国科学院、中国人民大学、中国政法大学、清华大学、武汉大学、南开大学、西南政法大学、西北政法大学、中国农业大学、中国林业大学、中国地质大学、北京理工大学、华北电力大学、山东大学、中山大学、郑州大学、苏州大学、华中师范大学、中南林业科技大学、福州大学、山东科技大学、山东师范大学、湖南师范大学、上海财经大学、上海政法学院等院校专家的支持,尤其是得到了中国社会科学院法学研究所和国际法研究中心领导的大力支持;在此一并表示感谢。

常纪文 Paul Littlefair

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Animal Protection Law Enforcement in Practice in the UK

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Cruelty to Animals (RSPCA)

UK

The RSPCA was founded in London in 1824 and is the world's oldest and largest animal welfare organisation. It was set up following the passing in 1822 of Britain's first animal protection legislation, "Martin's Act", to enforce the new law, educate the public on animal cruelty and protection, and lobby for further improvements in the way animals were treated. The Society's aims have remained the same throughout its long history. The RSPCA is concerned for the welfare of all animals and its science division researches and develops policy in four areas: companion animals, farm animals, laboratory animals and wildlife.

Although the RSPCA is a non-governmental organisation with charity status, it is unique in having a law enforcement role. For almost a century the most significant piece of legislation used to counter cruelty was the 1911 Protection of Animals Act. This was superseded in 2006 by the Animal Welfare Act which has enshrined the concept of

a “duty of care” on the part of owners or keepers towards their animals. It is no longer enough simply not to abuse animals – citizens are required to provide minimum standards of care.

The RSPCA's 330 animal protection inspectors have uniforms, vehicles and specialised animal handling equipment. They go through a six-month training course which includes lectures in law, assertiveness, health and safety and basic veterinary knowledge, and field training in practical areas such as boat and rope skills, orienteering, animal rescue and handling.

A national call centre takes over one million calls annually, of which most are concerned with advice on animal care. Over 120,000 cruelty complaints are investigated by inspectors in England and Wales. Inspectors' powers are limited—they do not have power to enter people's property for instance. In carrying out enforcement and animal rescue work they often cooperate with official agencies and other bodies such as the police, lawyers, veterinarians, local government animal wardens and fire brigades.

As the Society's name implies, the focus of the inspector's work is on prevention of animal suffering. This is done primarily by educating animal owners and supporting them in improving the care they provide. Inspectors are skilled in dealing sympathetically with all kinds of people. They advise owners by issuing notices based on the “Five Freedoms”, offering simple, practicable suggestions to improve the provision of food and water, appropriate space, shelter, and to ensure animals are vaccinated and have access to veterinary treatment when necessary. In many instances such improvements can be made without resulting in a financial burden for the owner. In cases where owners are deemed to be unable to provide appropriate care and suffering is occurring or is likely to occur, inspectors try to persuade such owners

to sign over animals to the RSPCA where they may receive veterinary treatment and be rehomed. The Society has over 50 animal centres across the country which annually rehome around 70,000 animals, mainly cats and dogs.

The RSPCA prosecutes around 1,000 defendants every year and secures around 1,600 convictions. Around 80% of prosecutions relate to animal suffering caused by neglect or failure to provide appropriate care. The remaining cases are the result of deliberate acts of cruelty. Penalties under the new law range from fines to, in around ten percent of cases, prison sentences of up to one year. Owners can also be banned from keeping all or named species of animals for periods ranging from several years to life.

RSPCA inspectors have delivered law enforcement courses in around 15 countries and regions in Europe and Asia that have animal protection law. These include the regions of Taiwan and Hong Kong. Courses are adapted to suit each territory's legal framework and the role and needs of the enforcement body concerned.

The Evolution of Animal Welfare Law in New Zealand

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As an agricultural nation that exports animal products to the world, the concept of animal welfare is of immense importance to New Zealand. For much of the 20th century, New Zealand operated under a very basic model of animal protection, only punishing wilful acts of cruelty against certain animals, allowing other types of harm to go unpunished. In 1999, the country revamped its entire framework involving the legal treatment of animals. The New Zealand Animal Welfare Act has changed matters dramatically. It applies to all animals, and has introduced a more complex regulatory structure. It prohibits wilful and negligent acts of cruelty, and also imposes obligations upon those who choose to take care of animals. While there are still many concerns about the manner in which this legislation is enforced, it represents a major step forward for animals. This presentation will examine the changes that have been made to New Zealand's legislation, and consider the strengths and weaknesses of its animal welfare laws.

Animal Welfare Law in Hong Kong

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There are several ordinances affecting the welfare of animals in Hong Kong. The primary legislation is the Prevention of Cruelty to Animals Ordinance, Cap 169, which includes subsidiary regulations detailing how captive animals should be treated, confined and transported. The Ordinance provides a general prohibition against cruelty to animals and punishes acts of cruelty with a sentence of up to 3 years imprisonment. Some further protection for domestic animals is provided in the Public Health (Animals and Birds) Regulations, Cap 139B, which regulates the trade in pets. The Dogs and Cats Regulations, Cap 167A, prohibit the slaughter of dogs and cats for food, and a recent decision of the Court of Final Appeal provides that the appropriate punishment for slaughtering dogs should be a term of imprisonment. Under the Rabies Ordinance, Cap 421, it is an offence to abandon an animal.

The general offence of cruelty to animals is provided in section 3 (1)(a) of the Prevention of Cruelty to Animals Ordinance. Generally there is no need for the prosecution to establish that the offender intended cruelty, but unnecessary pain and suffering caused to the

animal must be proved. Any suffering will be sufficient to show pain; *West v. Harries* (1991) 58 A Crim R 86. The Ordinance provides that animals kept in confinement or captivity, or in the course of transport, must be provided with sufficient food and constant fresh water. It may be necessary to remove animals from their owners where the animal is at risk of further cruelty. The Prevention of Cruelty to Animals Regulations further provide that animals kept in captivity must have adequate shelter from sun/rain, clean, well ventilated and safe places of confinement, free movement, and protection from injury and disease.

The Hong Kong government has recently proposed amendments to the legislation in Hong Kong to better protect animal welfare. The proposals include the prohibition of persons who have been convicted of cruelty offences from keeping animals. The government also intends to provide powers to government vets to require owners to act immediately to rectify welfare problems. Pet traders will be restricted in their sourcing of dogs, severely curtailing the use of unlicensed breeders. Fines for selling unweaned animals will be doubled to \$ 100,000 and trade licences will be revocable at the discretion of the Department of Agriculture, Fisheries and Conservation.

Whilst the current focus in Hong Kong on revising animal welfare laws to better protect animals is admirable the proposed amendments simply do not go far enough. Animal welfare law in Hong Kong is lagging woefully behind most civilized jurisdictions and the amendments proposed by government will not significantly address this gap. Hong Kong desperately needs to review overseas practice and reform its animal welfare model from the current reactive version to a more active framework. The law now allows for a broad interpretation of animal suffering, often to the detriment of welfare. An objective test

for unnecessary suffering must be developed. The most significant problem with the current legislation, however, is its lack of proper enforcement. The Department of Agriculture, Fisheries and Conservation, which is currently responsible for overseeing animal welfare laws in Hong Kong, is an inappropriate choice as safeguard for animal welfare. If animals are to truly be protected in Hong Kong, this most fundamental of problems must be addressed.

The Case for Anti-Cruelty Legislation

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UK

It is a characteristic common to many societies around the world that traditionally little regard has been given to the treatment of animals. It was widely believed that they possessed neither interests nor feelings, and the way in which they were treated was irrelevant; humans owed no responsibility to other species, and it was entirely within the discretion of the owner or keeper of an animal to treat it in whatever way he or she saw fit. However, as scientific research has provided greater understanding of animals' capacities and the effect that human treatment has on them, so there has evolved a growing consensus that it is appropriate and legitimate for the state to intervene to protect them. The extent and nature of this protection varies enormously, but the general starting point is to it illegal to treat animals cruelly. Not only is this considered to be of benefit to other species, it is also advantageous to society at large as there is growing evidence of a strong link between cruelty to animals and violent behaviour towards people.

A number of basic issues need to be kept in mind when developing

anti-cruelty legislation. First, consideration must be given to those animals to which it should apply. Extending such legislation to vertebrates has generally been considered practical and scientifically sound. Whether the law should extend to all such animals, including those living in a wild state, is a matter of choice, but many systems restrict the scope of the legislation to domestic animals and non-domesticated animals while they are kept in captivity or otherwise under human control. Second, it must be determined who may be guilty of cruelty; it is generally considered that the law should apply to any person, but there is a strong argument that a particular responsibility should be imposed on the owner or keeper of an animal. Third, the concept of cruelty must be defined. Most commonly this focuses on causing an animal unnecessary suffering. The legislation may outlaw such suffering caused by specific means, but the offence is generally found to be most effective when set out in the widest terms. Two further considerations are crucial. To have the maximum effect the offence should apply not only to cruelty resulting from a positive act, but should also extend to causing unnecessary suffering by an omission or failure to act; and it should include cases of deliberate cruelty and where unnecessary suffering results from negligence on the part of the person responsible for the animal. Finally, consideration should be given to enforcement. In particular; who is going to carry it out; what are the sanctions where a person is found guilty; and, crucially, what is to happen to the animals involved?

Anti-cruelty legislation has been shown to be a tool for informing society about the proper treatment of animals, and it should be regarded as having an educative as well as a punitive role. However, if animals are to have adequate protection from abuse, the legislation must be effective in both its wording and its enforcement.

In any society, the first piece of animal protection legislation to be introduced is always of crucial importance. Not only does it establish the principle that humans, especially owners and keepers, must have due regard to protecting animals from cruelty, it may also lay the foundations for further measures aimed at promoting the welfare and the quality of life of those animals over which humans have direct control.