

Animal Welfare Law and Ethics
This is an edited version of the talk given at University of
Lisbon Law School: 31 May 2004

A. Introduction

Over three thousand years ago, the Greek poet **Bion** wrote:

‘Boys stone a frog in sport, but the frog dies in earnest’.

What Bion was saying was that the question whether we think an activity is morally justifiable is likely to depend on whose viewpoint we adopt. From the *boys’* point of view, throwing stones at the frog was good fun and may even have had a practical use, sharpening skills which might one day be useful in battle. From the *frog’s* point of view, however, this was not fun at all – at best the stones would hurt, perhaps cause serious injury and could lead to its death.

I will return to Bion and the central truth he identified: the importance of empathy in moral philosophy.

I am going to talk about how both the law and prevailing morality treats animals. I will suggest that each is deficient and will explain why.

B. How do we know that animals suffer?

It is highly pertinent to ask: how do we know that animals suffer? If they don’t, moral concern about their welfare would fall away. You may know that **Descartes**, the French mathematician, described animals as

‘these mechanical robots [who] could give such a realistic illusion of agony’.

However, no serious scientist today doubts that the manifestation of agony is real, not illusory. One of science’s more positive contributions in this area is to show that animals not only suffer physically but also have a range of complex emotional and behavioural needs. That is of course consistent with evolutionary theory, under which all animals, including

humans, have a common ancestor. We share a very high percentage of our genetic makeup with certain mammals¹. **Darwin** believed that

‘other mammals experience (to greater or lesser degrees) anxiety, grief, objection, despair, joy, love, “tender feelings”, devotion, ill-temper sulkiness, determination, hatred, anger, disdain, contempt, disgust, guilt, pride, helplessness, patience, surprise, astonishment, fear, horror, shame, shyness, and modesty’

Of course, the suffering may not always be identical to what we would experience in the same circumstances. We must beware of the dangers of anthropomorphism. Sometimes, the suffering may be less; sometimes it may be greater. According to **Dr Jon Richmond**, until recently the chief inspector of animal experiments in the UK:

‘... [s]terility can cause intense distress in humans, but may not be of significance to animals. Minor facial weakness in man does not impair general health, but can have severe consequences for ruminants’²

The psychological suffering endured by animals may in some situations be worse than it would be for people. For example, animals are not – as far as we know - helped through their trauma by a sense of mission or injustice, as, for example, Nelson Mandela was on Robben Island. They do not know that their suffering will come to an end, either.

C. Humankind’s exploitative relationship with animals

(a) the scale of the problem

I have always thought that man’s inhumanity to man, terrible and multifaceted though it is, is *quantitatively* relatively small compared to man’s inhumanity to other animals. We find so many different ways of causing suffering to animals – in the laboratory, in the factory farm, on the hunting field, in fur farms, in the trade in exotic pets, in the way that many people treat their domestic pets and a thousand other ways. Usually, this is perfectly legal.

¹ about 98% with chimpanzees

² *Cost/benefit assessment: The UK experience* (3rd World Congress on Alternatives and animal use in the life sciences at Bologna, Italy 31 August 1999). Dr Richmond recognised that ‘... it is generally sound to assume that interventions or pathologies that cause suffering in man will also do so in animals ...’.

And the problem is getting worse. The RSPCA³ is the world's oldest animal welfare organisation. The RSPCA was founded in 1824, just after the first law in the UK, and one of the first anywhere in the world, was passed giving limited protection to certain animals. Before that, the general view was: a person should be able to do whatever he wants to animals he owns; they are his property⁴.

Since then, the UK has introduced several more laws protecting animals. It is, however, undoubtedly the case that there is far, far more suffering caused to animals by people in the UK today than 180 years ago. What has happened is that *individual* acts of cruelty – which of course still occur in very large numbers – have been supplanted by *institutionalised* forms of cruelty. Science and technology have 'progressed' – I use the term loosely – to the extent that society has found all sorts of new ways to cause suffering to animals, in the quest for some human benefit.

When I tell you that, in the US alone, every year billions of animals are farmed in factory farms where they suffer physically and psychologically, often immensely, and that around the world somewhere between 50 and 100 million live animals are experimented on every year, you will begin to understand the scale of the problem.

(b) the development of new techniques causing animal suffering

And we should not think that the process has stopped. Science is forever coming up with new ways of exploiting animals. Genetic manipulation is a classic example. I am involved with a case at the European Patent Office in Munich relating to the **oncomouse**, a strain of mouse which is genetically predisposed to develop cancer. The question in the case is whether Harvard University should be able to patent their 'invention' or whether the public would find the patenting objectionable. Either way, the point is this – **as a society we are now deliberately breeding animals to suffer.**

³ Royal Society for the Prevention of Cruelty to Animals

⁴ John Stuart Mill, the 19th century philosopher summed up – and criticised - the argument this way in *Political Economy* (1848):

'The reasons for legal intervention in favour of children apply no less strongly to the case of those unfortunate slaves and victims of the most brutal part of mankind – the lower animals. It is by the grossest misunderstanding of the principle of liberty that the infliction of exemplary punishment on ruffianism practised towards those defenceless creatures has been treated as a meddling by government in things beyond its province; an interference with domestic life. The domestic life of domestic tyrants is one of the things which it is the most imperative on the law to interfere with'

And, in the UK, I am involved in another case, brought by Compassion in World Farming, where the genotype of chickens has been manipulated to such an extent – for production reasons, of course - that they suffer severe organ and limb problems and the industry has to starve the breeders for long periods⁵ because otherwise their bodies would literally collapse. The question in the case is whether this is against EU and UK law. You may be astonished that there is even a question about this, but in fact CIWF has already lost before one judge⁶.

So, another example of massive suffering to animals - and on an enormous scale - caused by genetic manipulation.

(c) EU protocol on animal welfare

In fact, the European Union now accepts that animals are sentient beings and therefore qualitatively different from other traded ‘products’⁷.

The ethical debate must therefore proceed on the basis that animals do suffer. They are not simply creatures of instinct, as some have argued.

D. The approach of the law to animal protection

(a) introduction

There are two kinds of approach which countries have taken to passing laws to protect animals:

- the first is that animals are not worthy of the law’s protection at all. Many countries in the world literally have no animal protection laws at all – perhaps not altogether surprising when one considers how people are treated in some of them. Some Eastern Bloc countries until recently had no laws. I hope it will be self-evident to this audience that animals are deserving of legal protection and that the question is simply: what level of protection is appropriate?

⁵ for weeks at a time, the birds may be fed as little as 20% of what they would take *ad libitum*

⁶ the judge was not satisfied that the chickens were necessarily suffering – technically the legal test is whether the birds are in a ‘positive state of well-being’. Disturbingly, he went on to say that, in any event, it is permissible to balance one welfare problem (here, chronic hunger) against other welfare problems (here, organ and limb problems) – even though it is perfectly possible to farm chickens commercially without either set of problems.

⁷ Protocol to the Treaty of Amsterdam

- the second approach is that at least some animals should have protection, but not *unqualified* protection. No country offers unqualified protection. Let me illustrate what I mean by reference to the UK, a country with the reputation of being a haven for animals – a wholly undeserved reputation, in my view, except in comparison with the position in many other countries.

(b)balancing animal needs against some human interest: UK law

There is a large amount of animal welfare law in the UK. At first sight, that may appear to be a strength, a sign that our society cares about animals and is anxious to protect them. I want to argue that it is in fact a weakness. Let me explain.

The reason there is so much legislation is directly attributable to the philosophy which underlies it. This is that animals merit the protection of the law only if and to the extent that the protection will not interfere with some human interest which is deemed to be more important. The law tries to strike a balance between the *human* interest involved and the needs of the *animal*.

Occasionally, the balance is struck in favour of the animal. For example, a person's wish to beat a domestic pet has to give way to the pet's need to be protected from being beaten.

Very often, however, the human interest is allowed to triumph. As a result, the law allows people to cause animals suffering, often intense suffering, in a whole variety of circumstances, as we have already seen.

At best in these cases UK law intervenes to try keep the suffering to a minimum (although that can still be very great). Sometimes it does not even bother to do that, as with hunting with dogs, which is at present unregulated by the law.

What the law does not do is to rule out these activities simply on the basis that they necessarily involve suffering to the animals, who have not consented to it and will not benefit from it. That contrasts with the law's approach to protecting people from being subjected to physical pain, as we shall see. There the protection is usually unconditional.

UK law often uses the concept of ‘**unnecessary suffering**’ – it is only ‘unnecessary’ suffering which is prohibited. For example, with respect to farm animals, the law says⁸:

‘Any person who causes unnecessary pain or unnecessary distress to any livestock for the time being situated on agricultural land and under his control or permits any such livestock to suffer any such pain or distress of which he know or may reasonably be expected to know shall be guilty of an offence’

So, by definition, the infliction of *necessary* pain and *necessary* distress is legal. Which begs the obvious question – what is necessary pain or necessary distress? Necessary for whom? Not, you may be sure, for farm animals, but rather for the economic interests of the food industry. Remember the chicken case – the farming industry says it is ‘necessary’ to starve the breeders. This, of course, is caused by the industry’s manipulation of the animals’ genotype.

Necessity is, in practice, a very elastic and conveniently subjective concept: you can justify just about any form of animal cruelty on the basis of alleged necessity – medical, economic, cultural, entertainment and so forth.

(c) UK law’s approach to protecting people

The approach of UK law to protecting *people* from physical harm is very different, as indeed it is in every country. So:

- save for self-defence, causing pain to people, when it is not for their benefit, is a crime⁹. The law unconditionally prohibits torture, even of suspected terrorists, however much the state may need to extract information from them. It is true that, in the UK, parents are allowed to smack their child - wrongly in my view - but the theory, at least, is that that is for the child’s benefit, not the parents’
- the law of course quite rightly prohibits experimenting on people when it is not for their benefit and without their informed consent

⁸ section 1 of the Agriculture (Miscellaneous Provisions) Act 1968

⁹ provocation is a defence to murder as well

- the law no longer allows children to work in mines or factories, or be sent up chimneys, whatever *economic* benefits might thereby accrue. Those benefits are simply not allowed into the equation: what matters is the need to protect children from harm
- similarly, the law prohibits paedophilia, whatever pleasure the paedophile may derive from the activity. The need to protect children is the only consideration. No balance to be struck. Again, quite rightly.

So, in all these cases, the protection given to vulnerable people from physical harm - from violence, if you like - is unconditional, and does not have to be balanced against other interests. As you will see, very different to the law's approach to animals.

(d) a simple animal protection law would suffice

But for the balancing approach – balancing human interests against animals' needs – it is not too much of an exaggeration to say that you would need only a very simple law to protect animals:

‘It shall be an offence knowingly to inflict pain or distress on a sentient animal, except for its own benefit or in self-defence’.

This is why I say that the fact that the UK has several animal protection laws is a weakness, not a strength.

(e) the balancing approach: EU law

The position is the same at European level. Increasingly, EU legislation is including animal protection measures - although often after, somewhat artificially, finding some obstacle to the internal market. The EU, you will know, is essentially a free trade organisation. But, again, the approach is to balance human interests against the interests of animals, with usually the balance struck very firmly on the side of people.

For example, live food animals can be transported from one end of the continent to another, often with great distress, and the Commission in its current proposals is not proposing to change this fundamentally. This is because farmers say it is in their economic interests to transport live animals, rather than their meat, and those interests are considered more important than the animals' distress.

(f) the balancing approach: Portuguese law

I don't know much about Portuguese law, but I have read about the so-called sport of **pigeon-shooting**. I understand that some 45,000 to 60,000 pigeons are killed each year in Portugal in this way. The feathers of the pigeons are first removed so that they fly in an erratic way, to test the ability of the shooters. This, it seems, is legal, presumably on the basis that the shooters' desire for a perverse form of pleasure is more important than the pigeon's desire not to be mutilated and shot. Similar to Bion and his frog, you might think. Similar also to bull-fighting, still practised in Portugal¹⁰.

E. Ethics and animals

(a) inconsistent approach

And why is the law inconsistent in its approach to people, on the one hand, and animals, on the other? The answer is that society's prevailing morality or ethics is also inconsistent. In a perfect democracy, of course, the law should reflect prevailing moral standards, so if those standards are flawed so inevitably will the law be.

Too many people apply double standards as between their approach to other people, on the one hand, and their approach to animals, on the other – just as in other times, or in other societies even today, double standards have been applied to different groups of people: men and women, black people and white people, Jews and Aryans, slaves and freemen. You may be aware that that, under the **US Bill of Rights**, slaves were counted as just half a person. Like married women at one time and animals still, they were regarded as property, and their interests therefore had to give way to the proprietorial interests of their owners.

(b) the impossibility of proving that a particular ethical approach is correct

So what should our ethical approach be?

I should say immediately that, of course, one can never *prove* that a particular ethical approach is correct. If a person's political opinions are merely the rationalisation of his or her instinctive response to a situation,

¹⁰ the Portuguese Parliament recently legalised the killing of bulls in the ring (as in the Spanish version). This had been prohibited for 80 years.

so it is with matters of ethics. We react to a given situation at an emotional level and then find the reasons to justify our position. The assumptions we make in addressing an issue will often determine the outcome, and those assumptions will often be the product of our cultural conditioning¹¹.

This does not mean, however, that rational thought has no place when considering ethical issues. As a minimum, we should, first, ensure that we have sufficient facts to make a reasonable judgement; and, second, strive for consistency across ethically comparable issues.

(c) empathy as the key

No moral philosophy can be reduced to a single sentence but I want to suggest that **empathy** should be the key to our thinking. ‘Empathy’ is defined in the dictionary like this¹²:

‘The ability to understand and share the feelings of others’

Empathy, in other words, means putting oneself into the shoes of the other person. You may know the famous book *To kill a mocking-bird* by the American author Harper Lee about racism in the Deep South in the 1920s. The hero of the book, Atticus Finch, a lawyer with a conscience, tells his daughter:

‘You never really understand a person until you consider things from his point of view’

As a moral code I think empathy is best described in the Golden Rule in St Matthew’s Gospel, which in modern English says¹³:

‘In everything, do to others what you would have them do to you’¹⁴

¹¹ The 18th century Scottish philosopher **David Hume** put it like this (in *A Treatise on Human Nature* (Analytical Index by LA Selby-Bigge) (1992):

‘The approbation of moral qualities most certainly is not deriv’d from reason, or any comparison of ideas; but proceeds entirely from a moral taste, and from certain sentiments of pleasure or disgust, which arise upon contemplation and view of particular qualities or characters’¹¹.

¹² *New Oxford Dictionary of English*. A slightly more complicated definition appears in the *Oxford English Dictionary*:

‘The power of projecting one’s personality into (and so fully comprehending) the object of contemplation’

¹³ chapter 7, verse 12

¹⁴ similarly, Hillel, leader of one of the Pharisean schools in Old Testament times, summarised the Torah as directing:

I want to suggest that ‘others’ should include animals, because, as we have seen, they are just as capable of suffering, just as capable of being adversely affected by someone’s behaviour.

F. Freedom to act as we want to

Let me return to the question of bullfighting. One of the arguments which is no doubt advanced in support of the practice – certainly it is with hunting with dogs which excites such controversy in the UK – is that people should be free to hurt and kill animals in the pursuit of sport if that is what they choose to do. An argument based on liberty or freedom of action. I think this is misconceived, as I will explain.

- (a) it is true that, if bullfighting was prohibited, this would prevent the people concerned behaving as they wanted to. But every law restricts the freedom of some or all people, either by requiring them not to act in a way in which they may wish to act or by requiring them to act in a way they may not wish to act. So, the law prohibiting murder restricts the freedom of those who may wish to commit murder; the law requiring the wearing of seat-belts in cars restricts the freedom of those who may not wish to wear seat-belts. To say that a ban will infringe liberty takes the argument as to whether there *should* be a ban no further forward. Even the most rabid libertarian accepts that, in a civilized society, there have to be some rules, and therefore restrictions on personal freedom.
- (b) what, then, is the ‘freedom’ which supporters of bullfighting wish to preserve? It can only be the liberty to pursue an activity which most people recognise is cruel. The freedom in question is therefore the freedom to be cruel. One only needs to state the proposition to reveal how absurd it is.
- (c) we all believe in the freedom of the individual. But most people also believe in the basic principle that freedom should stop at the point at which its exercise interferes to a substantial extent with the freedom of others, in particular where it causes them physical suffering. No doubt bullfighters would say that they accept this principle where people are the victims.

‘What is hateful to you, do not do to your enemies’.

- (d) of course, bullfighting is a tradition with a long history. Banning it might conceivably have some impact on the social fabric of those communities in Portugal which practise it. The same argument is run by people defending hunting with dogs in the UK. But this cannot justify retaining a cruel and unnecessary practice. When the abolition of slavery was mooted in the US, people in the slave-owning states argued that abolition would destroy the social fabric there. It did not, of course, but even if there was any realistic prospect that it would, it would not have justified the continuation of a cruel practice. Tradition cannot justify cruelty – if it did, we would defend cannibalism.
- (e) a linked argument advanced by the hunting lobby in the UK is that it is the hallmark of a mature society that we should tolerate behaviour which the majority of people may not wish to take part in. To do otherwise is illiberal. As a general proposition, that is again unobjectionable. But, once more, this cannot be determinative of the issue. There is clearly some behaviour which a civilized society should not tolerate. That is why we have laws. Cruelty to children, to the mentally ill and to other vulnerable groups should not be tolerated. Nor should cruelty to animals. It cannot matter whether the animals are wild or domesticated. As Lord Devlin, one of the great British judges of the last century, said:

‘Not everything is to be tolerated. No society can do without intolerance, indignation, and disgust, they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of a society cannot be weighty enough to deprive the individual of freedom of choice. I suppose that there is hardly anyone nowadays who would not be disgusted by the thought of deliberate cruelty to animals. No one proposes to relegate that or any other form of sadism to the realm of private morality or to allow it to be practised in public or private’¹⁵.

Again, we should put ourselves in the position of the bull, not the bullfighters – just as with Bion and his frog. We should empathise and ask if we would want done to us what is done to the bulls. If we would not, we should not do it to them.

G. The solution

¹⁵ *Morals and the Criminal Law*, Patrick Devlin (1965)

A civilised society should, I believe, consider animal welfare not in isolation, not as a kind of add-on for those who happen to care about animals, but as part of a coherent moral framework.

Within that framework, we should insist that protection of the law is given to *all* those vulnerable to exploitation - children, the mentally ill, the elderly, oppressed minorities, and, yes, animals - unconditionally, not simply where the protection does not interfere with what someone else claims to be a more important interest

And, we must not confine ourselves to arguing simply for the highest welfare standards consistent with some system of cruel exploitation; we should argue that the law should prohibit the exploitation itself, as we would if people were the victims.

H. Conclusion

The key for me is that, as a society, we should judge suffering by its intensity, not by the identity of the victim. This was the simple truth apologists for apartheid could never grasp – they regarded the suffering of black people as being less important than the suffering of white people. Similarly, some fundamentalist Muslims think the suffering of Christians is less important than the suffering of Muslims, and vice-versa – and many people think that the suffering of a person is *intrinsically* worse than the suffering of an animal, without ever explaining why.

Compassion which is selective or conditional - which cares about a white child but not a black child, about people but not animals, about a domestic pet but not a farm animal - is intellectually and morally bankrupt, in my view. The reason we should include animals in our ‘circle of compassion’, as Albert Schweitzer put it, is because they, too, can suffer.

Crucially, as the Latin scholars amongst you will know, ‘compassion’ means, literally, ‘suffering with’. In other words, *empathy*. Empathy really is the best guide for ethics, in relation to animals as much as to people.

David Thomas
May 2004