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PUPPY FARMING AND THE CONSTITUTIONALITY OF BREEDER REGULATION IN HONG KONG

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1. Introduction

1.1. *Cruelty in Puppy Farming*

Hongkongers love dogs. And yet, the local kennels were reported to be ‘living hells’. In December 2014, 36 adult breeding dogs were found in a 3-storey village house in countryside Yuen Long.¹ They were entrapped in narrow cages. The smell was sickening. Faeces accumulated to as thick as 3 inches and clogged up their hairs.

In an even more horrific incident in November 2013 which was later recorded in the judgment of *HKSAR v Cheng Kwai Ming*,² 101 dogs and 34 cats were found in 76 cages in an 800 sq. ft. apartment in the urban residential area of Tai Kok Tsui. Two to three layers of cages were stacked up like a ‘concentration camp’.³ Both cases concern one-man kennels operated by the owners themselves.⁴ The animals were in ill-health and were infected with skin and eye diseases. The harsh reality is that apart from food and water the animals were not cared for.

Currently dog breeders rely on an exemption or loophole in the Public Health (Animals and Birds) (Animal Traders) Regulations (‘Cap 139B’):⁵ a person who sells or offers to sell any of her pets or any offspring thereof is not required to apply for a license.⁶ This exemption, if not for its abuse, would have been a sensible one, as a person who sells offspring of her own pets would not be considered an animal dealer and would not be regulated.⁷ In reality, commercial breeders readily claim to be private pet owners.

Cruelty to animals indeed constitutes offences,⁸ but criminal liability tends to be relevant only when things go seriously wrong. Even where the commercial breeders are indeed

¹ ‘村屋疑狗繁殖場糞積數吋厚 36名種犬乏打理租客涉虐畜被捕 (Village house suspected to be breeding kennels with inches thick of faeces, 36 well-bred dogs left without care, tenant arrested for suspected cruelty)’, *明報 Ming Pao*, 4th December 2014, A14.

The matter was also reported by TVB Jade in night time variety programme ‘東張西望 (Scoop)’ on 9th May 2014 with the episode titled ‘人間狗地獄充斥全港 (Dog hells all over Hong Kong)’.

More recently, see the reports in ‘Hong Kong’s cruel ‘puppy mills’: breeding dogs like factory must end, calls activists’, *South China Morning Post*, 19th July 2015.

² 香港特別行政區訴鄭貴明 (*HKSAR v Cheng Kwai Ming*), unrep., HCMA 559/2014 (Magistracy Appeal to the Court of First Instance, 8th May 2015, Chinese judgment only). See also fn 10 below.

³ ‘大角咀驚現貓狗集中營拘一翁 (Old man arrested for dog and cats concentration camp in Tai Kwok Tsui)’, 香港商報 *Hong Kong Commercial Daily*, 6th November 2013, A18; ‘800呎民居養135貓狗 租客虐畜被捕或涉非法繁殖(800 sq. ft. residence housed 135 dogs and cats; tenant arrested for animal abuse involving illegal breeding)’, *明報 Ming Pao*, 6th November 2013, A10.

See also the fact-finding in the judgment of *Cheng Kwai Ming*.

⁴ In the Dec 2014 case, the owner-operator was reportedly a 41 year old male nurse, whereas in the Nov 2013 case it was a 60 year-old man.

⁵ Cap 139B is a piece of regulation made under the Public Health (Animals and Birds) Ordinance (Cap 139). Due to the length of their titles, the Ordinance and the Regulation would be referred to as ‘Cap 139’, and ‘Cap 139B’ respectively, in line with the approach of local animal welfarists.

⁶ Rules 2 and 4, Cap 139B. The Consultation Paper, para 3.3.

⁷ The current UK position also included a so-called ‘hobby breeder’ exemption. The criteria for being a ‘hobby breeder’ are however clearly stated. By s.4A(3), Breeding of Dogs Act 1973, a breeder does not require a licence so long as her dogs produced a total of less than 5 litters in any period of 12 months.

⁸ s.3, Prevention of Cruelty to Animals Ordinance, Cap 169.

convicted, the sentences are ‘glaringly inadequate’ and provide insufficient deterrence.⁹ *Cheng Kwai Ming* was eventually sentenced to imprisonment of 3 months only.¹⁰ We need more pro-active measures.

In a 2011 investigation by the Agriculture, Fisheries and Conservation Department (‘AFCD’), it was found that dog traders sourced over 74% of their dogs from self-proclaimed private pet owners.¹¹ The dog breeding industry in Hong Kong is effectively unregulated.

1.2. *The Proposed Licensing Regime*

In October 2012, the Food and Health Bureau (‘FHB’) and the Agriculture, Fisheries and Conservation Department (‘AFCD’) issued a Consultation Paper entitled *Better Regulating Pet Trading to Enhance Animal Health and Welfare* (‘the Consultation Paper’).¹² The Government proposed¹³ to amend Cap 139B and set up a regulatory regime for the breeding of dogs for sale. Any person who sells dogs, regardless of the number of dogs involved, would have to apply for a license or a permit. Holders would have to comply with the licensing conditions and a Code of Practice. Four types of Licenses and Permit would be issued to individuals:

- (a) Animal Trader License, primarily for pet shops;
- (b) Animal Breeder License Category A (‘ABLA’) for anyone who keep up to four female dogs¹⁴ for breeding purposes and sells her breeding dams or offspring of these animals;
- (c) Animal Breeder License Category B (‘ABLB’) for anyone who keeps five or more female dogs for breeding purposes and sells her breeding dams, offspring of the dams or other animals; and
- (d) One-off Permit for genuine pet owners who wish to sell an individual dog that they own.

⁹ See Whitford and Woodhouse (2010) for discussion of sentencing regarding cruelty offences. Amanda S Whitford and Fiona M Woodhouse, *Review of Animal Welfare Legislation in Hong Kong*, HKU 7010-PPR-5 (Hong Kong, June 2010), pp 5, 10, 25-26.

¹⁰ The charges relates to the failure to provide veterinary services, and the keeping of animals in a manner that that may cause unnecessary harm. It will be discussed in Part 4 that the maximum penalty for animal cruelty was increased to 3 years by the Legislature in 2006. The light sentence despite the amendment is apparently due to the judicial concern that more serious penalty should be preserved for sadistic torturing of animals: see *Secretary for Justice v Iu Chi Yung*, unrep., CAAR 4/2008 (Court of Appeal, 10 Oct 2008), para 20.

¹¹ The Consultation Paper, para 3.2.

¹² Food and Health Bureau and Agriculture, Fisheries and Conservation Department, Consultation Paper Document on *Better Regulating Pet Trading to Enhance Animal Health and Welfare* (Hong Kong, October 2012) (“the Consultation Paper”).

¹³ The Consultation Paper, para 4.1-3.

¹⁴ The term ‘female dogs’ refers to unneutered female dogs of breeding age. See AFCD’s webpage on the ‘Proposed Amendments to Public Health (Animals and Birds) (Animal Traders) Regulations (Cap 139B)’ Available at http://www.pets.gov.hk/en_business_3_1_5.php (visited 28 Aug 2015).

1.3. *A Cap on the Number of Dogs to Be Kept – The Scope of Enquiry*

A cap on the number of dogs permitted to be kept by commercial breeders is one of the four key areas the Hong Kong Society for the Prevention of Cruelty to Animals (HKSPCA)¹⁵ urges to improve upon.¹⁶ In a newspaper interview, Fiona Woodhouse, the HKSPCA Deputy Director of Welfare, expressed her concern: ‘Generally, around the world, people are against large-scale puppy farming. Living in a cage is not the best thing for the welfare of that dog. ... There should be a limit on the number of dogs they can keep’.¹⁷

Although the Consultation Paper recognized that a premise that keeps a large number of dogs is very likely to compromise animal welfare¹⁸, it did not touch on whether a number cap is to be imposed, except for the distinction to be drawn between the two types of licenses (ABLA and ABLB). Nonetheless, a number cap in the form of condition to a license is likely to be imposed by the Government. In a public presentation, Dr Jeffrey Jai, an AFCD Senior Veterinary Officer, explained it is part of the proposal to impose conditions on license holders such that the number of dogs allowed is determined by the area of the licensed premises, so as to ensure sufficient space for each dog.¹⁹

In June 2015, in answering a question in the Legislative Council (“LegCo”), the Government stated that it was in the drafting process, and the amendment regulations is expected to be tabled before the Legislative Council by the end of 2015.²⁰

This essay seeks to discuss, in light of the Hong Kong constitutional and legislative framework, whether it would be legally valid to impose a cap on the number of breeding dogs a commercial breeder is licensed to keep.²¹ Though framed apparently as a narrow question, the topic highlighted the tension between animal welfare and constitutional rights, touched on the property status of animals, and enabled a discussion on better drafting of animal welfare legislations.

Here the number limit is singled out as the focus of this essay for two reasons. *Firstly*, large scale puppy farming is *the* issue in Hong Kong. The measure of a number limit, though

¹⁵ HKSPCA is a significant local entity for the promotion of animal welfare.

¹⁶ The other three key areas are (i) Buyers’ rights to visit the breeder, (ii) Mother dogs should be rested between litters, (iii) All breeding dogs and puppies should be provided with appropriate living conditions ensuring their five welfare needs (Diet, Health, Environment, Companionship & Behaviour) are met. See HKSPCA webpage ‘SPCA urges for No More Delay to Cap 139B Amendment’. Available at <http://www.sPCA.org.hk/en/outreach/campaigns/spca-hk-urges-for-cap-139b-amendment> (visited 28 Aug 2015).

¹⁷ ‘Dog Breeding Licenses ‘Won’t Protect Animals’, *South China Morning Post*, 18th Feb 2013.

¹⁸ The Consultation Paper, *supra* note 12, para 4.11.

¹⁹ Dr Jeffrey Jai, Presentation Slides on *Public Consultation Paper on Legislation amendment to Cap.139B Public Health (Animals and Birds) (Animal Traders) Regulations* (Hong Kong, October 2012), p 23. Available at http://www.pets.gov.hk/en_business_3_1_5.php#btop (visited 28 Aug 2015). The presentation received official endorsement as it is linked from the AFCD Cap 139B amendment webpage.

²⁰ Government Press Release, LCQ19: Safeguarding and Promoting Animal Welfare (10 Jun 2015). Available at <http://www.info.gov.hk/gja/general/201506/10/P201506100754.htm> (visited at 28 Aug 2015).

²¹ This is to be distinguished from the issue of whether there should be a cap on the total number of breeder licenses to be issued in Hong Kong. There are no persuasive reasons to impose a quota system.

desirable, has not received sufficient official attention. *Secondly*, the law does not exist in a vacuum. The discussion would be more illustrative where broad-brushed constitutional principles are applied to a specific measure. It must however be noted that the number is by no means the only aspect of breeding that ought to be regulated. Treatment, food, water, veterinary care etc are all important aspects of the breeder regulations. The framework of analysis on constitutional validity offered here should, with appropriate adaptation, apply to the breeder regulations as a whole and other welfare regulations in general.

Under Article 84 of the Basic Law, Hong Kong courts in adjudicating cases may refer to precedents of other common law jurisdictions. In construing the Basic Law, Hong Kong courts are receptive to, and have readily sought assistance from, international and comparative materials.²² The English position is particularly persuasive, due to Hong Kong's former connection with the United Kingdom.

With a view to analyze the issue in the framework of domestic law, this essay will draw on the international experience to shed light on the interaction between animal welfare and the constitutional protection for property rights. In view of the scarcity of relevant Hong Kong materials, we need a receptive approach to build up a local discourse for the law relating to animal welfare.

This work is intended to facilitate a knowledge exchange with breeders, office holders, animal activists and other interested readers. It is hoped that three themes would soon be apparent to the readers. *Firstly*, in defending animal welfare legislation, **careful drafting** is as important as proper defending.²³ Given that the licensing regime for commercial breeders is still in its drafting stage, there is large room to gainsay on how it should be drafted so as to survive scrutiny from breeders with heavy vested interests. The question is recasted as how to draft it to ensure constitutionality.

Secondly, **proper advocacy** depends on making realistic arguments based our constitutional law, with full awareness of the limitation of the case for animal welfare. It also depends on adding up a number of factors together to tip the balance in the mind of judges, and this may require looking beyond the moral arguments of animal welfare.

Thirdly, a **statutory basis** is essential to the protection of animal welfare. As expressed in its title, the Consultation Paper has the pursuit of *animal welfare*. It nonetheless suggests setting up a breeder regulatory regime by way of amending a piece of *public health* regulations only. This will be an inherent defect of the proposed regime.

²² Johannes Chan and C.L. Lim, *Law of the Hong Kong Constitution* (Hong Kong: Sweet & Maxwell, 2011), para 16.016.

²³ Henry Mark Holzer, *The Policy, Law and Morality of Mandatory Spay/Neuter* (Clarks Summit, Pennsylvania: Int'l Society for Animal Rights, 2008), pp 34 and 50.

If this essay is successful, it would persuade readers that, subject to the issue of statutory basis, a number cap imposed through a properly drafted regulation would be constitutional, and indeed, necessary in our real world.

1.4. *Imposing Number Cap – The Question of How*

The question of ‘how’ is just as important as ‘whether’ to impose a number cap. To begin with, the number cap could be imposed on *a person* (the breeder), or on *a premises*.²⁴ In terms of the legal status of the number cap, there are three options. It could be made a *statutory provision* that animal breeders are not allowed to keep, say, 50 breeding dogs per premises. A rule to the same effect can be contained in a *regulation* (i.e. a subsidiary legislation like the existing Cap 139B). It could also be made a *condition* to the License. In all three scenarios, it could be stipulated that the breach of the number cap could lead to the revocation of license, confiscation of the dogs, and criminal liability.

The manner in which the number is arrived at has implications on whether the constitutional property right is engaged, as well as the rational connection and proportionality hurdles. A cap with a number that is applicable to all holders of the same type of license would be referred to as a ‘simple cap’, whereas a number limit that is imposed as a licensing condition, with the number to be determined on a case-by-case basis, on an inspection or assessment of the applying person or premises would be termed a ‘discretionary cap’.

If the number cap is to be imposed as a licensing condition, there can be greater flexibility in imposing different number limits for different licensed persons or licensed premises. The AFCD can be empowered to determine the number cap by way of discretion, possibly with a site visit. The criteria for determining the number cap can be contained in an ordinance, or a regulation.

A discretionary cap also means a greater flexibility in varying the maximum number. There can be an internal mechanism for varying the number limit (and indeed any other licensing conditions). The breeder may give reasons in writing as to why she (or her licensed premises) should be allowed a larger number cap. If dissatisfied with the AFCD’s decision, the regulations should provide for right to appeal to the Administrative Appeal Tribunal.

2. **Animals and the Hong Kong Basic Law**

2.1. *No Constitutional Protection for Animals*

The notion of animal welfare is entirely absent from the Hong Kong Basic Law.²⁵ Nor has it been litigated here in the constitutional context before.²⁶ Those defending animal welfare legislation would naturally find themselves facing an uncharted sea, if not an uphill battle. In

²⁴ To be discussed in Part 6.4 below.

²⁵ The words ‘Basic Law’ and the ‘Constitution’ would be used interchangeably in this essay.

²⁶ We do however have a number of criminal cases relating to animal welfare, some of which will be heavily cited throughout this essay.

fact, national constitutions rarely provide for animal welfares, with the notable exceptions of Germany and Switzerland.²⁷

On the contrary, welfare legislation would potentially be restricting constitutional rights and be liable to constitutional challenges. It would not be too surprising if individual breeders or their associations take the matter to Courts.

2.2. *Restricting Use of Private Possession*

Breeding dogs are personal properties of the breeders.²⁸ Article 6 of the Hong Kong Basic Law guaranteed the right to private ownership of property.²⁹ Article 105 gives substance to it and more specifically protects the right to the acquisition, use, disposal and inheritance of property and provides for a right to compensation for lawful deprivation. In line with constitutional supremacy, Hong Kong courts assumed on themselves the power to invalidate legislations and governmental acts to the extent of inconsistency with the Basic Law.³⁰ The breeders' property rights are firmly protected by the Constitution.

The number cap does not amount to a deprivation of property, as the breeding dogs can still be used for other purposes.³¹ Rather it seems to be 'a regulatory law imposed in the public interest which restricts the way in which certain property may be used',³² thus engaging the right to the *use* of property.

A simple cap would have easily engaged property rights. It could be the right to use the dog for breeding. If a breeder is banned from keeping more than 50 breeding dogs, this mean that she could not own or keep the 51st dog for breeding purpose. It can also be the right to sell dogs that has been restricted. The proposed licensing regime bites in at the point of selling, as a permit or license number must be quoted on promotion or selling.³³ In theory, a breeder does not fall into the proposed regime so long as she gives away the dogs but does not sell.

A discretionary cap can be argued to have a *facilitative* or *permissive* nature: ultimately she is not prevented to use a larger number of dogs for breeding purpose, so long as she fulfills

²⁷ Evans (2010) provided an interesting discussion of how animal activists achieved constitutional inclusion of animal welfare in Germany and Switzerland.

Erin Evans, 'Constitutional Inclusion of Animal Rights in Germany and Switzerland: How Did Animal Protection Become an Issue of National Importance?' (2010) 18 *Society and Animals* 231-250.

²⁸ For example, killing or beating animals belonging to others constitute trespass to chattels: Srivastava etc (ed), *Tort Law & Practice in Hong Kong* (Hong Kong: Sweet & Maxwell, 3rd edn, 2014), para 7.006.

See also s 2(1) Intestates' Estates Ordinance, Cap 73: personal chattels were defined to cover domestic animals.

²⁹ Article 6 of the Basic Law: 'The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.'

Article 105 of the Basic Law: 'The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.'

³⁰ *Ng Ka Ling & Others v Director of Immigration* [1999] 1 HKLRD 315, at para 61.

³¹ Chan and Lim (2011), *supra* note 22, para 30.036.

³² *HKSAR v Asaduzzaman*, unrep., HCMA 314/2009 (Court of Appeal, 7 May 2010) at para 24.

³³ The Consultation Paper, para 4.5(a) and (b).

certain criteria. In this sense, an argument could be made that a discretionary cap does not even restrict the right to use property.

A proper analysis is that the licensing regime *does* engage private property rights. Constitutional rights call for a ‘generous interpretation’.³⁴ It would be inappropriate to resolve a dispute by deciding the issue on the scope of the right, without going into the justifications of the restriction.³⁵

Assuming that the number limit does engage Article 105 rights, the Courts would then assess whether such restriction of constitutional rights could be justified. The burden is generally on the Government to justify any restrictions.³⁶ Such a restriction can only be imposed in accordance with law, that is, it must have legal basis and be sufficient clear (**Part 3**). It must also be proved³⁷ that the restriction pursued one or more legitimate aims (**Part 4**). As the proposed regulations are a piece of subsidiary legislation, it is open for breeders to argue that the objectives go beyond the scope of the empowering ordinance (**Part 5**). The Government must then establish that the regulations are rationally connected to the legitimate aim (**Part 6**); and is proportionate in the sense that it is no more than is necessary to accomplish the aim (**Part 7**). These tests would be assessed in the relevant parts below.

2.3. Equality – Regulating Dog Breeders Only?

Pausing here, one issue could be briefly addressed. It is indeed a legitimate question as to why the proposed regime only seeks to regulate the breeding of dogs but not cats or other animals. Would the licensing regime be susceptible to attack on such ground?

An argument on non-discrimination under Bill of Rights Article 22 is out of the question.³⁸ Equal protection under the law is not engaged. This is for the simple reason that dog breeders,

³⁴ *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, per Chief Justice Li, para 16: ‘It is well established in our jurisprudence that the courts must give such a fundamental right [to freedom of peaceful assembly] a generous interpretation so as to give individuals its full measure. ...’

³⁵ See Chan and Lim (2011), supra note 22, paras 16.040. See also the difference in approaches between the Court of Appeal and the Court of Final Appeal in *W v Registrar of Marriages*: [2012] 1 HKC 88 (CA), at para 162; [2013] 3 HKLRD 90 (CFA), at paras 117-119.

³⁶ *Leung Kwok Hung v HKSAR*, para 16. Chan and Lim (2011), paras 16.037-38. The issue of ultra vires is to be singled out, for it is an administrative law doctrine. The applicant has the burden of proving that the Government is acting beyond powers, as administrative powers are presumed to be duly exercised.

³⁷ See *Leung Kwok Hung v HKSAR*, para 17 regarding Article 17 right to assembly. For an application of the framework to Article 105 right to use of private property, see: *Asaduzzaman*, note 61 below, at paras 25-27; PY Lo, *The Hong Kong Basic Law* (Hong Kong: LexisNexis, 2011), p562; Chan and Lim (2011), paras 30.051-054.

³⁸ The Hong Kong Bill of Rights Ordinance is the domesticated ICCPR (International Covenant on Civil and Political Rights).

Article 22 of the Hong Kong Bill of Rights Ordinance provides: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status* (emphasis added)’.

as opposed to non-dog breeders, do not have any personal characteristics³⁹ that could be meaningfully described as ‘status’ in Article 22.

The Government intended to start with dogs and would, depending on the circumstances, consider gradually extending the regulations to cover other animals.⁴⁰ In view of the pressing concern of poor conditions at dog breeding establishments, considering dog breeding as a top priority seems to be a reasonable response. Reforms must begin somewhere. The Court in the US case of *Haviland v Butz*⁴¹ made this remark:

‘Reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. ... [T]he constitutional call for equality of treatment does not require a choice between attacking every aspect of a problem or not attacking the problem at all.’

3. Legal Certainty

3.1. *Restricting Ownership in Accordance with Law*

Due to the constitutional protection by Article 105, any restrictions on the right to use property can only be imposed ‘in accordance with law’. The phrase of ‘in accordance with law’ in Article 105 incorporated the requirement of ‘legal certainty’.⁴² This requirement has two dimensions: (i) the existence of law; and (ii) the quality of law.⁴³ Chan and Lim (2011) concisely summarized:

‘... [the] restriction of fundamental rights must have *some basis in domestic law* and must be *sufficiently clear and specific* (to the extent that the context reasonably permits) so as to enable the citizen, if appropriate with the benefit of advice, to foresee with reasonable certainty the consequences of a given action, to know what the rules are and how he might lawfully conduct himself in the light of those rules...’⁴⁴

It will be explained below that the breeder regulations, particularly the number limit, could be imposed with legal basis, due to the Government’s regulation-making powers. The regulatory regime could be made ‘sufficiently clear and specific’, as public guidelines could be issued to enable the citizens to understand how the discretion on number limit is to be exercised and to

³⁹ See *R (Countryside Alliance and others) v Attorney General* [2007] UKHL 52, para 24: on the constitutionality of hunting ban in the UK, those who hunt was held not to have a personal characteristics that could be considered a ‘status’. Cf *Leung TC William Roy v Secretary for Justice* [2005] 3 HKLRD 65, paras 43-44: homosexuality could define a class of persons.

⁴⁰ The Consultation Paper, para 4.1.

⁴¹ *Haviland v Butz*, 543 F.2d 169 (1976) (US Court of Appeals, District of Columbia Circuit). ‘Haviland’s thesis is that Congress recognized a problem of inhumanity to animals but attacked only a part of it. He insists that the requirements imposed by the Act upon producers of animal acts and other performances, but not upon operators of rodeos and other enterprises, is unjustly discriminatory.’

⁴² See *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793 (CFA), paras 61-63. The words ‘prescribed by law’ in Article 39 of the Basic Law also carries the same effect.

⁴³ Chan and Lim (2011), *supra* note 22, para 16.043; also paras 16.042-44, particularly fn 109 therein.

⁴⁴ Chan and Lim (2011), *supra* note 22, para 16.042. (emphasis added)

act accordingly. In this sense, the breeder regulations would have the ‘legal certainty’ required and would be a restriction of property rights imposed ‘in accordance with law’.

3.2. *Regulation-Making and the Basis in Domestic Law*

As things now stand, the Government is already empowered, by way of regulation-making,⁴⁵ to impose the number cap directly, or to create the discretion for imposing number cap as a licensing condition. Consider section 3(1)(g) of the Public Health (Animals and Birds) Ordinance, Cap 139:

‘The Chief Executive in Council may by regulation provide for the following matters- ...

(g) the prohibition or regulation of any business, trade or activity which involves or relates to-

(i) sale, possession or offer for sale of any animal or bird; ...’

By section 3(3) of Cap 139, the regulations may require or provide for the registration or licensing of (i) such business trade or activity, (ii) persons, (iii) premises or place, and (iv) the issue of licenses or permits, in relation to the business trade or activity. This power to make regulations brings with it the power to amend existing regulations⁴⁶. Further, the power to grant a license or a permit naturally comes with the power to impose reasonable conditions to the license.⁴⁷

The amendment of Cap 139B to introduce the breeder’s regulatory regime would have to be effected by a two-step process under sections 28 and 34 of the Interpretation and General Clauses Ordinance (Cap 1). Such a process of regulation-making can be broadly referred to as ‘negative vetting’:⁴⁸

(i) Publication in the Gazette

The piece of the proposed regulations would be published in the official Gazette.⁴⁹ The Government may stipulate that the regulations take effect on publication or on a future date.⁵⁰

(ii) Potential Scrutiny by the Legislature

⁴⁵ ‘Regulation’ is a form of subsidiary legislation made by the Government to provide for technical or procedural details necessary to implement an Ordinance, i.e. a primary legislation.

⁴⁶ s.28(1)(c), Interpretation and General Clauses Ordinance, Cap 1.

⁴⁷ s.40(2)(b), IGCO. See also Reg 5(3) of Cap 139B: ‘The Director may attach to a licence such conditions as he may think fit.’

⁴⁸ It is not clear whether the words ‘negative vetting’ refers only to step two or the entire process. Ultimately the issue is just a matter of labeling. This essay adopts the latter and broader meaning for negative vetting, for the simple reason that to hold otherwise there would be a lack of words to refer to the entire process of regulation-making under s.34 IGCO. For an example of such confusion, see *PCCW-HKT Telephone Ltd v Secretary for Commerce and Economic Development* [2015] HKCFI 1395, at para 38.

⁴⁹ s.28(2), Interpretation and General Clauses Ordinance, Cap 1.

⁵⁰ s.28(3), IGCO.

After being published, the piece of regulations would be “laid on the table” of the Legislative Council at its next sitting⁵¹. The LegCo may, within 28 days thereafter, by resolution amend such regulations.⁵²

Under the process aptly described as negative vetting, the regulations can come into effect *immediately* upon publication, and lawmakers can only scrutinize it afterwards. LegCo’s positive approval is not required.⁵³ Negative vetting is thus commonly perceived as a way to ‘circumvent’ the Legislature.⁵⁴ In contrast, the requirements of passing an Ordinance (i.e. a primary legislation) are much more onerous, considering that the LegCo would have to spend time discussing every clause of the bill and properly vote on it.⁵⁵

Only negative vetting is required to bring about the breeder regulations. Its beauty lies in the expediency. Instead of requiring sufficient votes in the Legislative Council, the amended Cap 139B as a piece of subsidiary legislation could be validly enacted by the Government by simply publishing it in the Gazette. This provided an expedient route to effect the change without going through the full-blown process of passing an Ordinance.

The hurdle of legal certainty could be a potential ground of attack if the restriction on number is contained in a mere code of practice without legal backing. Subject to the concern of *ultra vires* to be discussed below, the existence of law seems to be readily satisfied by a statutory provision or a regulation specifically enacted to impose the number cap. Even where the number cap is imposed as a licensing condition, the cap would also be given statutory backing by the existing empowering Ordinance.

3.3. *Clarity and Accessibility of Law*

When a statutory provision, regulation or licensing condition requires the breeder to keep not more than *a certain* number of breeding dogs, the rule would not be hard to follow. The nature of a number cap should in itself be clear enough for the breeders to conduct themselves.

If the number cap is to be imposed on a case-by-case basis, this would inevitably involve an exercise of discretion on the part of the relevant government authority. The criteria for determining the number cap must be made known to the public.

⁵¹ s.34(1), IGCO.

⁵² s.34(2), IGCO. Where such power is exercised, the LegCo’s amendment would take effect on the day that the resolution is published in the Gazette.

⁵³ In contrast with negative vetting under s.34 IGCO, there is also a procedure of positive vetting under s.35. The idea is that LegCo’s approval is needed to pass a subsidiary legislation if the empowering ordinance said so. Such wordings are however absent from Cap 139 and thus negative vetting is applicable.

⁵⁴ See for example “Negative Vetting’ Called Best Option’, *The Standard*, 18th February 2014, in which the Government reiterated that it has no intention of bypassing the LegCo by suggesting a ‘negative vetting’ mechanism in the adjustment of stamp duties on residential property transactions.

⁵⁵ Part K, Rules of Procedure of the Legislative Council. This RoP derives its authority directly from the Basic Law under Article 75.

For the practical process of how does a Bill becomes an Ordinance, refer to the leaflet prepared by the Legislative Council. Available at http://www.legco.gov.hk/general/english/intro/know_lc/know_process.pdf (visited on 23 Sep 2015).

Keeping the exercise of discretion in the dark would lead to attack on ground of legal certainty. In the US case of *Foster v State*,⁵⁶ a county dog-keeper licensing regime (and the number cap imposed therein) was considered to be unconstitutional, as Due Process requires such licensing regime to provide sufficient objective criteria to control the discretion of the governing authority. Further, adequate notice must be given to the applicants regarding the criteria for issuing a license.

Citizens are entitled to ‘know what the rules are’.⁵⁷ In creating the licensing regime, draftsmen should expressly list out in the regulations the factors to be considered by the authority in imposing a number cap as a licensing condition. The list can be non-exhaustive, but should be as inclusive as reasonably practicable. The authority should also issue guidance notes as to how the discretion is to be exercised, giving sufficient illustrations and explanations.

4. The Search for Legitimate Aims

4.1. *Restriction of Rights*

Legitimate aims are essentially good reasons to restrict constitutional rights. The Court of Final Appeal made the remark⁵⁸ that ‘a purpose relied on to justify a restriction on a constitutional right must be a legitimate societal aim. In other words, it has to be an aim which furthers the legitimate interests of society.’ This view necessitate a liberal approach in identifying legitimate aims, as numerous objectives can be considered as furthering the legitimate interests of the society.

Article 105 in guaranteeing the right to use private possession has not expressly provided grounds on which the right could be restricted.⁵⁹ However, the argument that private possession is unlimited does not go very far. The lack of express grounds should even mean that there is a great flexibility in identifying legitimate aims. Indeed, it would be further argued below that the search for legitimate aims is an open-ended enquiry.⁶⁰ For example, the protection of public health is recognized as a legitimate aim for restricting property rights. In *HKSAR v Asaduzzaman*,⁶¹ in view of the need to combat avian flu, the Court readily held that a restriction against keeping live chickens in premises overnight satisfied the proportionality test.

⁵⁶ 544 S.E.2d 153 (2001); 273 Ga. 555 (the Supreme Court of Georgia, United States).

The US of course has a very different constitutional framework from Hong Kong. The case is relied on here insofar as it provides an illustration to a likely issue.

⁵⁷ See *Shum Kwok Sher and Chan and Lim* (2011), supra notes 42 and 43.

⁵⁸ *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, per Ribeiro PJ, para 49 (emphasis added).

⁵⁹ This can be contrasted with the Article 17 right to assembly, where the limiting grounds were expressly provided therein. The Bill of Rights does not assist on this matter, as it simply does not contain protection for private property.

⁶⁰ See Part 4.5.2 below.

⁶¹ *HKSAR v Asaduzzaman*, unrep., HCMA 314/2009 (Court of Appeal, 7 May 2010), paras 25-27.

We now turn to a case concerning dog-eating to begin our search for relevant legitimate aims. In *HKSAR v Lau Lap Kei*,⁶² the Defendants (Ds) were construction workers who years ago came from China.⁶³ D₁ invited three friends D₂ to D₄ to his village home to slaughter and feast on the two dogs that D₁ owned. After Ds drowned the dogs, Ds were found chopping up the bodies and cleaning the blood on the ground with water. Ds were convicted of ‘slaughtering of dogs for use as food’ under r. 22(1) of the Dogs and Cats Regulations (Cap 167A),⁶⁴ enacted pursuant to the Dogs and Cats Ordinance (Cap 167).⁶⁵ The Magistrate ordered immediate imprisonment. Ds appealed against the sentence, and obtained a reduction in the imprisonment term from 30 days to 14 days on an exceptional basis.⁶⁶ The case was important for two reasons.

(i) Social, Legislative and Judicial Recognition of Animal Welfare⁶⁷

The Court was faced with an argument that it would be *too subjective* to consider the public sentiment towards animals in sentencing. Acknowledging that the Legislature drastically increased the penalty for animal cruelty in 2006, the Court noted the social and legislative concern for animal welfare. The Court granted imprisonment for dog-eating for the first time in Hong Kong,⁶⁸ and considered that 6 to 8 weeks of imprisonment would be the appropriate starting point in the future.

‘... [T]he amendment of section 3 was passed by the Legislature after consultation. The relevant increase in penalty reflected the consensus on the importance of animal life and welfare in the contemporary society and the Legislature. Although the penalty in the Dogs and Cats Regulations (i.e. r. 23) was not amended, the Court should be able to consider the mentality of the contemporary society and, within the framework permissible by the existing legislations, adopt different sentencing rationales to reflect the discontent and the hatred by the general public towards such offences.’⁶⁹

⁶² 香港特別行政區訴劉立基 (*HKSAR v Lau Lap Kei*) [2007] 3 HKLRD 273 (Magistracy Appeal at the High Court), Chinese Judgment with English Headnote.

⁶³ The selling of dog meat for consumption is legal and indeed popular in China. See ‘Yulin dog meat festival: Chinese city retains its appetite despite months of protests’, *Independent*, 22nd June 2015. See also HKSPCA’s coverage on the issue, available at <http://www.sPCA.org.hk/en/outreach/china/stopping-the-yulin-dog-meat-festival> (visited on 13 Oct 2015).

⁶⁴ By r. 22(1) of the Dogs and Cats Regulations (Cap 167A), ‘[n]o person shall slaughter any dog or cat for use as food whether for mankind or otherwise.’ Under r. 23, the maximum penalty is a fine of HK\$5,000.00 and imprisonment for 6 months. The relevant regulations were enacted in the 1950s.

⁶⁵ Note that the long title of the Dogs and Cats Ordinance is ‘[t]o provide for the keeping, regulation and control of dogs and cats, for the prohibition of the slaughter of dogs and cats, and for related matters.’ Section 3(1)(b) expressly provides that the Chief Executive in Council may, with LegCo’s approval, by regulation provide for the prohibition of the slaughter of dogs and cats and of the sale and use of their flesh.

⁶⁶ On appeal, the Court adopted the starting point of 6 weeks. The Court granted the usual one-third discount for guilty plea, and a further 50% discount as it was the first ever occasion on which the Court granted an imprisonment term for dog-eating. This resulted in an imprisonment terms of 2 weeks only.

⁶⁷ The point on animal rights and welfare would be further elaborated at Parts 4.4 and 4.5 below.

⁶⁸ From the cases in the 1970s and 80s, convictions on animal cruelty would only attract a fine: *Lau Lap Kei*, para 10.

⁶⁹ *Lau Lap Kei*, para 15(c)(ii) (translated by the author).

(ii) Justifications on Welfare Regulations

The Court made a useful observation on the justifications for increasing the sentence for animal cruelty and dog-eating. These rationales should *prima facie* apply across the board from sentencing to a constitutional review. Whatever justifies a heavier sentence should also justify the constitutional validity of an offence. Indeed, a constitutional challenge could have been made by D₁ on the basis that the eating ban infringed his property rights in the dogs. Tong J cited three justifications for granting a heavier sentence:

‘I consider that, as a modern and civilized community, most Hong Kong citizens nowadays, no matter they are dog-keepers or not, would not accept the slaughtering of dogs for use as food, and would not take it as an insignificant offence. The lenient sentences imposed in the past could no longer reflect the public hatred for the offence, the impact of the offence on public hygiene, and the pain and suffering of the dogs being slaughtered. ...’⁷⁰

These three heads could be developed into a framework for justifying welfare regulations. We first look in the human public for their sentiment towards non-human animals. Then we look directly at the pains and sufferings of the animals and their right to life. Lastly we look for non-animal justifications which also support better treatments for animals, say, public health and hygiene, environmental concerns or the rights of others.

In the Consultation Paper, the Government first cited the unsatisfactory welfare conditions of dogs kept on the premises of some of the self-claim private pet owners, and then went on to expressly state its rationales for the proposed regulations: ‘We therefore propose to plug the loophole by subjecting these ‘de-facto’ commercial breeders to necessary licensing conditions for protecting *public health* and *animal welfare*. ...’⁷¹

From the concerns expressed in *Lau Lap Kei* and the Consultation Paper, we can distill five rationales for justifying the breeder regulations. Relevant legitimate aims identified here include the protection of (i) public health and hygiene, (ii) rights of others, (iii) public morality, (iv) animal health and welfare; and lastly (v) the prevention of animal cruelty.

4.2. *Public Health and Hygiene*

Fetissenko (2011) suggested that moral standpoints, though attractive to animal activists, may not be too persuasive on the society.⁷² Coupling them with rational arguments could be much more effective in advocating for animal welfare. Public health is a powerful ground, as it is rational and objective. As seen in *Asaduzzaman*, public health is established as a legitimate aim to restrict the use of private possession.⁷³ In *Lau Lap Kei*,⁷⁴ the public health objections

⁷⁰ *Lau Lap Kei*, para 16 (emphasis added, translated by the author).

⁷¹ The Consultation Paper, para 3.5 (emphasis added).

⁷² Maxim Fetissenko, ‘Beyond Morality: Developing a New Rhetorical Strategy for the Animal Rights Movement’ (2011) 1(2) *Journal of Animal Ethics* 150-175.

⁷³ *Asaduzzaman*, supra note 61, paras 25-27.

⁷⁴ *Lau Lap Kei*, supra note 62, para 15(e).

on dog-eating were (i) the health risk to dog-eaters,⁷⁵ and (ii) the environmental contamination resulting from the improper slaughtering and disposal of dog blood and organs.⁷⁶

Public health was cited as a major justification in the proposed reform.⁷⁷ The fact that both Cap 139 and Cap 139B are entitled ‘public health’ also supported this ground.⁷⁸ It would be a grave mistake to dismiss public health as a disguised argument made by animal welfarists. Here we have at least two aspects of serious public health and hygiene concerns:

(i) Hygienic Risk to the Neighborhood

The potentially poor conditions, notably the accumulation of excrements, at the breeding facilities can present a direct threat against hygienic conditions in the neighborhood.

(ii) Kennels as the Hotbed of Diseases

The selling of dogs is known to carry the risk of zoonotic diseases, notably the lethal disease of rabies.⁷⁹ The breeding dogs, before and after giving birth, are particularly vulnerable to diseases and require special care. The diseases would easily be passed onto the puppies, which are then sold to the public. As purebred dogs give higher prices, commercial owners tend to produce a large population from an initially small numbers through inbreeding. This results in a large degree of genetic defects⁸⁰ and may further weaken the immunity in pets. Breeding facilities, by way of sales, are hotbeds for spreading diseases into the general populations of pet dogs in Hong Kong. Given the close relationship between humans and pet dogs, this would have adverse impact on human health.

4.3. *Protecting Rights of Others*

The ‘rights’ of others that are worthy of protection need not be fundamental. As explained by the Siracusa Principles,⁸¹ ‘[t]he scope of the rights and freedoms of others that may act as a

⁷⁵ *Lau Lap Kei*, para 15(e). The Judge however recognizes that Rabies is no longer a prevalent disease in Hong Kong.

⁷⁶ *Lau Lap Kei*, para 15(e). The agreed facts contained in para 7 expressly stated that D₃ was cleaning the bloodstain on the ground with water, and suggests that Ds were slaughtering the dog in open space in a village, and

⁷⁷ See para 3.5 of the Consultation Paper; see also paras 2.1, 2.4, 2.6 and 3.4 therein.

⁷⁸ Public Health (Animals and Birds) Ordinance (Cap 139), and Public Health (Animals and Birds) (Animal Traders) Regulations (Cap 139B).

⁷⁹ The Consultation Paper, para 2.4.

⁸⁰ Mark Mak, ‘私人繁殖製造怪胎 (Private breeding produces defects)’ *信報財經新聞 Hong Kong Economic Journal* (local newspaper), 28 December 2013, C03.

Mark Mak, as a local vet and animal welfarist, was highly critical on the inbreeding practice of local breeders which results in genetically defective dogs and cats.

See also relevant LegCo questioning on 10th June 2009.

Available at <http://www.info.gov.hk/gia/general/200906/10/P200906100147.htm> (visited on 29 Aug 2015).

See also HKSPCA website on genetic illnesses. Available at

<http://www.sPCA.org.hk/en/animal-welfare/hk-puppy-trade-cruelty/genetic-illnesses> (visited on 29 Aug 2015).

⁸¹ United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex

limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the [ICCPR].’

The smell and the noise at kennels may constitute nuisance in the neighborhood and infringe on the rights of others. This head may also overlap with the public hygiene concerns, in that it is in the interests of others to have a clean and hygienic neighborhood. In the US case of *Zagaris v City of Whitehall*,⁸² in upholding a provision limiting the number of dogs to be kept on a single family residence, the Court made the remark that ‘too many dogs in too small a space may produce noise, odor and other conditions adverse to the best interests of the community as a whole.’

The protection of rights of others is an explicit limiting ground to many constitutional rights (such as the freedom of expression and the right to assembly), as provided in our Hong Kong Bill of Rights. This head is therefore well grounded in our constitutional law.

4.4. *Public Morality*

4.4.1. Abolition or Regulation?

There are two major moral positions in animal ethics. Animal rightists have a more radical pursuit and insist on the *complete abolition* of the property status of animals, as it is seen as legitimizing their exploitation by humans. Welfare reform is perceived as counter-productive as people would feel more comfortable about using ‘happier animals’. In particular, rightists regard pet-keeping as immoral, in view of the power asymmetry between the pet and the owner.⁸³ Indeed, if we are to strike at the root and abolish commercial breeding, or pet trade, or even pet-keeping, there would not be any need to regulate the welfare conditions at the breeders.

In contrast, advocates of animal welfarism tend to accept the lesser moral status of animals and that we may use animals for human purposes. Welfarists believe that humans have a moral duty to treat animals humanely and not to inflict unnecessary harm. The focus is *welfare reform*, i.e. treating animals in a better way. Whilst rightists must be admired for their moral courage, the welfarists take an astute position and pursue what is perceived by them to be politically and strategically achievable.

(1985).

As the ICCPR is the basis of the HK Bill of Rights, the interpretation on ICCPR by the United Nations is persuasive on Hong Kong courts. The Siracusa Principles has been relied on by the Court of Final Appeal on a number of occasions: see Chan and Lim (2011) para 16.051.

⁸² 594 N.E.2d 129 Ohio App. 10 Dist.,1991 (the Court of Appeal of Ohio, United States).

⁸³ Francione believes that no more animals should be bred to serve as pet.

Gary L Francione, ‘Pets’: The Inherent Problems of Domestication’, *Animal Rights: the Abolitionist Approach* (31 July 2012). Available on <http://www.abolitionistapproach.com/pets-the-inherent-problems-of-domestication/> (visited on 13 Oct 2015).

It is frankly acknowledged here that this work does not attempt to resolve the differences between the rightist and the welfarist position.⁸⁴ Animal welfare is here a shorthand used to refer to “the rights and interests of animals”. The aim here is to assess the Government’s proposal of welfare reform and it will be argued that animal welfare, on its own or through public morality, can validly justify restriction on property rights.

Whilst the approach here is the pursuit of better treatment in the use of animals, it must be made *very clear* that our constitutional law is receptive to measures that suggest animals to have a right not to be treated as commodities at all. The law does not really distinguish the rightist and the welfarist position, because after all they both aim at the promotion of the rights and interests of the animals. The UK hunting ban to be discussed below is a prime example that the concerns for animal cruelty is in itself sufficient to justify the complete abolition of the hunting practice in the UK. Turning back to Hong Kong, the notion of public morality is wide enough to embrace any moral positions on animal ethics, so long as it is a view held by the majority. It would also be argued below that the search for legitimate aims is an open-ended enquiry.

Putting things in context, regulating and abolishing commercial breeding⁸⁵ can both be constitutional, save that the latter position may require more cogent arguments to persuade the Courts that abolition would be a proportionate measure. By way of illustration, in an US case *Puppies 'N Love v City of Phoenix*,⁸⁶ the Judge upheld a State legislation that pet stores may sell only animals obtained from shelters or rescue organizations but not commercial breeders. Cities such as Austin, Chicago, Los Angeles, Miami, and San Diego were found to have similar statutes to reduce animal homelessness and to prevent puppy mill cruelty.⁸⁷

In light of the American experience, abolishing commercial breeding is no less a practical and proportionate solution than regulation. Breeders will obviously prefer regulation over abolition and strenuously object to the latter.⁸⁸ Nonetheless, complete abolition is still something worth fighting for.

⁸⁴ Interested readers may turn to the seminal work ‘*The Animal Rights Debate: Abolition or Regulation?*’ which provided an intellectual discussion between the two experts Gary L. Francione (rightist) and Robert Garner (welfarist). See also a concise summary and critics of the book by Ben Mepham in [2011] 1 *Animals* 200-204.

⁸⁵ It must however be acknowledged that the stance of abolishing commercial breeding whilst preserving pet trade and pet keeping is already watered-down and strictly speaking no longer an abolitionist position, as animals would continue to be treated as properties, capable of being traded and possessed.

⁸⁶ --- F.Supp.3d ----2015 WL 4532586 (D. Ariz., 2015) Much of the judgment however turns on the Interstate Commerce Clause which is a peculiar feature of the US Constitution, and may be less than relevant for the purpose of this essay.

⁸⁷ Krysten Kenny, ‘A Local Approach to A National Problem: Local Ordinances As A Means of Curbing Puppy Mill Production and Pet Overpopulation’, 75 *Alb. L.Rev.* 379, 379 (2012), as cited by the Judge David G. Campbell.

⁸⁸ The LegCo Submission by the Hong Kong Pet Breeders Association Limited, LC Paper No. CB(2)1598/07-08, clearly demonstrated the view of some breeders that they wish to be regulated instead of being abolished. The Association alleged that a forced closedown will bring serious hardship on the dogs, the breeders and their staff. The lack of local supply will also drive the increase in retail price, leading to an influx of illegally traded dogs. These arguments are, however, speculative. The dogs may be better off with shelters and

4.4.2. Welfare as Morality

Gandhi made the oft-cited remark that ‘the greatness of a nation and its moral progress can be judged by the way its animals are treated’. We have moral duties towards animals because they are sentient beings. Our duties towards animals can also be seen as indirect duties towards the mankind.⁸⁹ Kindness and love towards animals are virtues, the cultivation of which is conducive to the moral advancement of humanity.⁹⁰ The protection of public morals can be a human-centered way of putting forward an animal welfare argument.

The approach of incorporating animal welfare in public morality may seem convoluted, but it is not something new. The wordings of treaties and constitutional instruments are often human-centered, in the sense that they do not address the issue of animal welfare. These instruments, however, usually contain a general exemption for the protection of public morals. By arguing welfare as morality, the limitations in these treaties and constitutions can be circumvented.

In the United States, as there is a clear delineation of legislative powers between the Congress and the State legislatures, animal welfare has to be placed within the suitable boxes. As the power to legislate on public health safety morals and welfare is within the so-called Police Powers preserved to State legislatures,⁹¹ local animal welfare legislations have to refashion themselves as having the aim of public health and morals, even at the enacting stage.⁹²

The European Court of Human Rights (ECtHR) in *Friend v UK*⁹³ considered that the hunting ban in the UK served the legitimate aim of ‘protection of morals’. This is particularly important because our Court of Final Appeal has previously considered⁹⁴ it ‘often appropriate’ to take ‘due account’ of decisions concerning the European Convention on Human Rights (ECHR) despite differences in wording.

adopters than with breeders. A more realistic stance is that dog keepers tend to care for animals and would respect the moral rationales behind the ban.

⁸⁹ Immanuel Kant, ‘Lectures on Ethics – Duties Towards Animals and other Spirits’ (1780-81); translated by Infield (New York: Harper and Row, 1963), pp 240-41; as cited in Simon Brooman, *Law Relating to Animals* (London: Cavendish Publishing, 1997), p 12.

⁹⁰ *Commissioners of Inland Revenue v National Anti-Vivisection Society* [1946] 1 KB 185 (Eng CA) at 202, *per* Lord Greene MR (dissenting).

⁹¹ Under the Tenth Amendment to the US Constitution, powers not delegated to the US by the Constitution are reserved to the respective States or to the people. States could thus legislate or further delegate such powers. By *Mahony v Township of Hampton*, 539 Pa. 193 (1994); 651 A.2d 525, legislating beyond police powers (ie. protection of health, safety, morals, or general welfare) would be an invalid exercise and constitute unconstitutional deprivation of life, liberty or property.

⁹² Holzer (2008), *supra* note 23, pp 45-46.

Another side of the coin is that the federal Animal Welfare Act is effective only insofar as interstate operations are engaged, as a result of limit on the legislative power of the Congress: *Haviland v Butz*, 543 F.2d 169 (1976) (US Court of Appeals, District of Columbia Circuit).

⁹³ Application no. 16072/06; 27809/08 (24 November 2009), paras 50, 55.

⁹⁴ Chan and Lim (2011), *supra* note 22, para 30.004-6.

Chow Shun Yung v Wei Pih (2003) 6 HKCFAR 299, para 36; *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 at para 59.

The General Agreement on Tariffs and Trade (GATT) is a multilateral treaty regulating international trade, administered by the World Trade Organisation. As a general exemption, Article XX(a) of the GATT⁹⁵ provides that WTO Members may take measures that restrict trade if they are necessary to protect public morals. The WTO Appellate Body, in the 2014 seal products decision,⁹⁶ held that animal welfare fell within the public morals exception under world trade rules; hence the relevant trade restriction could be permissible.

4.4.3. Morality in Hong Kong Constitutional Law

Under English law, the protection of public morals is a legitimate aim for restricting the use of private possession. In the UK, the right of property is constitutionally guaranteed under Article 1, First Protocol to the ECHR.⁹⁷ The UK Hunting Act 2004 put a ban on the hunting of wild mammals and hares with dogs. This unsurprisingly attracted constitutional challenges. The Law Lords in *R (Countryside Alliance) v Attorney General*⁹⁸ recognized that the prevention of unnecessary suffering to animals form part of the public morals, and thus constitute a legitimate aim for restricting private ownership. Lord Bingham commented⁹⁹:

‘[The protection of morals] was in my opinion the aim of this Act, since the majority judged that the hunting of wild mammals (with the exceptions already noted) and the coursing of hares by greyhounds was morally objectionable and moral ends would be served by bringing the practice to an end.’

The same should apply in the Hong Kong context. Public morality is part of our usual constitutional terminologies. The Hong Kong Bill of Rights, just like the ECHR, expressly provides a number of grounds for limiting many constitutional rights.¹⁰⁰ Alongside with the

⁹⁵ The General Agreement on Tariffs and Trade (GATT) was a multilateral treaty regulating international trade, administered by the World Trade Organisation.

⁹⁶ The ruling stemmed from Canada’s challenge on the EU ban of seal products. WTO Appellate Body Report WT/DS400/AB/R; WT/DS401/AB/R (June 2014), at para 5.200-5.201, p 149. For concise summary and background, see Mayer Brown Legal Update, available at <http://www.mayerbrown.com/WTO-Appellate-Body-Finds-Public-Morals-Exception-for-Trade-Restrictions-Includes-Animal-Welfare-06-04-2014/> (visited on 28 Aug 2015). See also AB Thiermann and S Babcock, “Animal Welfare and International Trade” [2005] *Rev. sci. tech. Off. int. Epiz. (Scientific and Technical Review)* 24(2), 747-755.

⁹⁷ The European Convention on Human Rights (ECHR) is entrenched in the UK by the Human Rights Act 1998. Article 1 of the First Protocol to the ECHR: (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

⁹⁸ [2007] UKHL 52. See also the immediately next case of *Whaley v Lord Advocate* [2007] UKHL 53, which decided the constitutionality of the hunting ban in Scotland.

⁹⁹ *Countryside Alliance*, para 44. See also *Countryside Alliance*, para 151 per Lord Brown; *Whaley*, para 40, per Baroness Hale.

¹⁰⁰ The protection of public morals is an express ground for limiting the rights below:-
ECHR: Article 6 (Right to public hearing), Article 8 (Right to private and family life), Article 9 (Freedom of religion), Article 10 (Freedom of expression), Article 11 (Freedom of assembly and association), Article 2, 4th Protocol (Freedom of movement).
HK Bill of Rights: Article 8 (Liberty of movement), Article 10 (Right to public hearing), Article 15 (freedom

protection of public morals, these grounds include national security, public order (*ordre public*), public health, public safety, rights and freedoms (or reputations) of others. If protection of morals could be a legitimate aim for restricting other constitutional rights, then there are little reasons as to why it should not be equally applicable in restricting property rights.

The Siracusa Principles¹⁰¹ provides:-

‘Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.’

Our Legislature is supportive of animal welfare. In 2006, section 3 of the Prevention of Cruelty to Animals Ordinance (Cap 169) was amended by the Legislature. The maximum penalty for animal cruelty acts, such as beating, kicking and torture, was increased from a HK\$5,000 fine and a 6-month imprisonment to a HK\$200,000 fine and an imprisonment of three years.¹⁰² As recognized by the Court in *Lau Lap Kei*,¹⁰³ this represented a social and legislative consensus as to the importance of animal life and welfare. On 16 January 2008, the Legislative Council further passed a non-binding motion entitled ‘protecting the rights and interests of animals’, urging the Government ‘to adopt various measures to ensure that animals are protected under the law’.¹⁰⁴

The respect for animal welfare should be seen as one of the fundamental values of the Hong Kong community. Hence animal welfare, as embraced in public morality, is a good ground to justify interference with private property rights.

4.5. *Animal Welfare*

4.5.1. The Constitutional Difficulty – No Equality of Weapons

Animal welfare was a cited justification for the proposed regime along with public health. In fact, it appears to be the more dominant justification: (i) animal welfare was stated as the sole aim in the 2014 and 2015 Policy Agendas; (ii) animal welfare was in the title of the Consultation Paper and was mentioned even more frequently than public health .

of religion), Article 16 (Freedom of opinion and expression), Article 17 (Right of peaceful assembly), Article 18 (Freedom of association).

¹⁰¹ See note 81 at Part 4.3. above.

¹⁰² See press release by the AFCD, “Heavier penalty for animal cruelty offences approved” dated 6 Dec 2006, at https://www.afcd.gov.hk/english/publications/publications_press/pr649.html (visited 10 Oct 2015).

¹⁰³ See Part 4 above.

¹⁰⁴ Full text of the Motion available at http://www.legco.gov.hk/yr07-08/english/legco_rpt/legco_motion01172-e.pdf visited on 19 Oct 2015.

The concern for the welfare of animals, for their own sake, is based on the awareness that animals are sentient beings with a capacity for suffering. Consideration should therefore be given to their well-being when they are used for our purposes. A poorly operated breeding establishment would certainly lead to suffering of the dogs therein. Should animal welfare be considered a legitimate aim on its own? The hierarchy of law may present an issue. The recognition of animal welfare as a legitimate aim would be more appropriate for those countries where the notion of animal welfare has been expressly incorporated into the national constitution, e.g. Germany¹⁰⁵ and Switzerland.¹⁰⁶ Constitutional incorporation provides an ‘equality of weapons’,¹⁰⁷ allowing animal protection to be weighed with other constitutional provisions.¹⁰⁸

The approach of animal welfare as a direct legitimate aim is perhaps also available to the United Kingdom. Under parliamentary supremacy, constitutional changes can be effected by ordinary legislation. It is difficult to argue otherwise when the Animal Welfare Act 2006 and the Human Rights Act 1998 actually has the same status of law.

Hong Kong, however, follows constitutional supremacy. We do not have an equality of weapons. As property right is constitutionally protected under Basic Law, whereas animal welfare is not, it seems difficult for judges to readily accept that animals, being properties to mankind, have certain rights or interests on their own. The Legislature does not trump the Constitution. Simply citing legislative intent as support should not be sufficient.¹⁰⁹ Unless and until constitutional amendments are made, animal rights or welfares could not be a legitimate concern for hindering property rights, so the kennel owners would argue.

4.5.2. Recognizing Welfare – The Open-Ended Enquiry

So this is the problem. How can we weigh animal welfare against private ownership when the former is not even backed by the Constitution?

On a proper analysis, the notion of animal welfare is not assisted, but neither is it hindered by the Constitution. As there are no enumerated grounds for limiting rights in property, the identification of legitimate objectives must be an open-ended enquiry. A legitimate aim can be

¹⁰⁵ Article 20a of the German Constitution – ‘Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.’

¹⁰⁶ Article 80(1) of the Swiss Constitution – ‘The Confederation shall legislate on the protection of animals.’

¹⁰⁷ Gieri Bolliger, ‘Animal Welfare in Constitutions’, conference except on *Constitutional and Legislative Aspects of Animal Welfare in Europe*, Brussels, 1st February 2007. Available at http://www.tierimrecht.org/de/PDF_Files_gesammelt/Abstract_Bruessel_TIR_Papier.pdf (visited on 28 Aug 2015).

¹⁰⁸ Thomas G Kelch, ‘Globalization and Animal law: Comparative Law, International Law and International Trade’ (2011) *Kluwer Law International* 279-280.
Jessica Vapnek and Megan Chapman, *Legislative and Regulatory Options for Animal Welfare* (Rome: UN Food and Agriculture Organisation, 2010), pp 27-29.
Vanessa Gerritsen, ‘Animal Welfare in Switzerland – Constitutional Aim, Social Commitment, and a Major Challenge’ (2013) 1 *Global Journal of Animal Law* 3.

¹⁰⁹ This line of argument seems to be accepted in the UK in *Countryside Alliance* (para 85), and is also hinted at in *Lau Lap Kei*, supra note 62, (para 15(c)(ii)).

any purpose which ‘furthers the legitimate interests of society’.¹¹⁰ The society has an interest¹¹¹ in promoting the welfare of animals, in the same way that it has an interest in preserving the environment or natural wildlife, or even reducing food wastage. None of these aims requires textual basis in our Constitution.

Recognizing animal welfare as legitimate aim is different from conferring enforceable rights or legal personhood to animals. The proposed regime merely stipulates for proper conducts in breeding dogs and prohibits wrongs. The dogs have no standing to sue on their own behalf, nor a right to be compensated. And recognizing animal welfare as a legitimate aim is not the end.¹¹² Animal welfare would still be weighted and trumped if the restriction is considered to be disproportionate. It cannot be said that property rights would be undermined simply by recognizing animal welfare as a legitimate aim. Animal welfare, in its own right, should properly be considered a legitimate objective.

4.5.3. Distinguishing Welfare and Morality

In deciding cases, it is entirely possible for judges to lump together the notions of animal welfare and morality. Animal welfare and public morality come close to two sides of the same coin. This essay, however, made a deliberate move in distinguishing between the two. There are three reasons:

Firstly, our constitutional law does distinguish them. It is easier to argue for morality as it is an explicit legitimate aim under our constitutional framework, whereas animal welfare is a relatively new idea. As the limiting grounds to certain BOR rights¹¹³ (which are arguably the more fundamental rights) are explicit and exhaustive, restricting these rights would require framing animal welfare into the broad notion of protecting public morals.

Secondly, as a matter of advocacy, morality would be a weaker argument at the proportionality stage. The interests of animals tend to be objectively assessable, whereas the morality ground is more uncertain in nature, and can be destroyed by a lack of democratic mandate.

Thirdly, morality does not always stand together with animal welfare. Where moral duty to other human beings is implicated, any moral concerns to animals is likely to be trumped. For example, on the topic of animal experimentation, where benefits to mankind could be enormous, public morals would cease to be an agent for animal welfare. This reasoning is demonstrated in *Commissioners of Inland Revenue v National Anti-Vivisection Society*¹¹⁴ where the English Court of Appeal held that the pursuit of a total suppression of animal

¹¹⁰ *Kong Yunming*, supra note 58.

¹¹¹ Note, however, Article 119 of the Constitution indeed requires the Government to protect our environment

¹¹² Laurence H. Tribe ‘Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise’ (2001) 7 *Animal Law* 1.

¹¹³ They are Arts 15-18 of the HK Bill of Rights: freedom of thought, conscience and religion; freedom of opinion and expression; right of peaceful assembly and freedom of association.

¹¹⁴ [1946] 1 KB 185 (Eng CA) MacKinnon and Tucker LJJ, Lord Greene MR dissenting.

vivisection is ‘not beneficial to the community’, thus fell outside tax-exempted charitable purposes. However, here the public morals ground will certainly stand with animal welfare in justifying the breeder regulations.

4.6. *Preventing Cruelty of Animals*

Case law firmly supports anti-cruelty as a legitimate objective. In *Countryside Alliance*, Lord Hope suggested that the hunting ban is backed by the legitimate aim of ‘preventing cruelty to animals’. This ground is a composite aim comprising of public morals and animal welfare.¹¹⁵ On one hand it is an alternative formulation for the concerns of the interests of animals by emphasizing the need to prevent unnecessary suffering. On the other hand it involves a ‘moral overlay’ that causing suffering is wrong and unethical.

The argument worked well for hunting ban, but as a matter of strategy it could be weak in our case. Unlike the public morality ground or the animal welfare formulation, ‘preventing cruelty’ does not allow for the pursuit of positive interests or betterments for animals. An attempt to justify the breeder regulations with this aim runs the risk of failing proportionality: breeders would argue that the existing offences of animal cruelty¹¹⁶ would have been sufficient measures. A possible rebuttal is that the failure of the existing cruelty offences to prevent or deter breeder malpractice is amply demonstrated by the recent incidents, and thus a more elaborate regulatory regime is necessary.

Hence, all five legitimate objectives discussed above could *prima facie* serve as legitimate objectives in justifying the number cap. They are (i) public health and hygiene, (ii) protecting rights of others, (iii) public morality, and (iv) animal welfare.

5. **Ultra Vires – Mandate of the Empowering Ordinance**

5.1. *Cap 139 – Not a Device for Welfare*

It would be less than fair to argue that the Government intends to circumvent the LegCo by mere regulation-making. A licensing regime for breeders indeed involves the practicalities that render it appropriate to place the rules within a subsidiary legislation. Further, it is a somewhat natural response on the part of the Government to address the loophole in Cap 139B by amending it to introduce a comprehensive regime. And as mentioned above, enacting regulations by negative vetting is expedient. There are, however, fundamental problems in relying on a regulation-making power under Cap 139 to construct the said regime.

¹¹⁵ See the discussion in *Countryside Alliance*, paras 80-85. Lord Hope observed that the courts below consider the aim for hunting ban was composite one: to prevent or reduce unnecessary suffering to wild animals, overlaid by a moral viewpoint that causing suffering to animals for sport was unethical and should be stopped. The prevention of cruelty is therefore a mix of welfare and morality.

¹¹⁶ Section 3 of the Prevention of Cruelty to Animals Ordinance (Cap 169) provided for a number of cruelty offences. By s 3(1)(g), a person commits an offence by keeping under her control or on her premises, any animal in any way which may cause it needless or avoidable suffering.

Firstly, the Government runs a real risk of *ultra vires* (i.e. acting beyond powers).¹¹⁷ It would use Cap 139 as a public health ordinance in an incidental manner to regulate for and achieve animal welfare. Animal welfare is rendered an ulterior objective. On the face, the texts of the empowering section in Cap 139 do not restrict the power conferred therein. The Court is, however, bound to examine the nature, objects and scheme of the piece of legislation as a whole, so as to delineate the exact scope of power conferred.¹¹⁸ Taking into account irrelevant consideration could result in the piece of regulations being struck down.¹¹⁹ This calls into question the very legal basis of the regulatory regime.

It must be borne in mind that Cap 139 bears the name of Public Health (Animals and Birds) Ordinance. Its long title said nothing about animal welfare and instead mentioned ‘quarantine and the prevention of disease among animals and birds’. By *ejusdem generis*, the regulation of animal-related business trades and other activities should have the aim of preventing diseases.¹²⁰

The Government in enacting the Public Health (Animals) (Riding Establishment) Regulations (Cap 139J),¹²¹ has committed the same mistake in a glaring manner. Under r. 10(iii), licensed persons are restricted from permitting any horses to be used for the purpose of riding in such a condition that its riding is likely to cause suffering to the horse. This provision simply has nothing to do with public health. It will be struck down upon challenges in judicial review on the ground of illegality.

Ultra vires will not pull down the entire breeder regulations. This is because the decision of creating such a regime can be supported by the sole consideration of public health, and the object of the ordinance has not been ignored.¹²² The *ultra vires* concern nonetheless remains highly practical. If the regulations can only pursue public health and hygiene but not animal welfare, then all that the regulations can ask the breeder to do is to keep the dogs clean. A piece of public health regulations cannot legitimately require the breeder to prevent animal sufferings or to ensure their well-being. This effectively created a ceiling as to what the

¹¹⁷ See fn 34 above.

¹¹⁸ *Commissioners of Customs and Excise v Cure & Deeley Ltd* [1962] 1 Q.B. 340, at 367.

¹¹⁹ *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (UKHL). Swati Jhaveri, Michael Ramsden and Anne Scully-Hill, *Hong Kong Administrative Law* (Hong Kong: LexisNexis, 2010), p 334-335.

¹²⁰ The long title of Cap 139 (which is indeed very long) provides that Cap 139 is “[t]o consolidate and amend the law relating to quarantine and the prevention of disease among animals and birds, to make provision relating to the regulation of businesses, trades and other activities involving animals and birds and the licensing of such businesses, trades and activities and persons and places connected therewith, to make provision relating to the regulation of livestock keeping and connected activities, to make provision relating to the slaughter for human consumption of animals and birds, the processing and export of the carcasses thereof, the regulation and control of the sale of milk produced in dairies, and to provide for the protection and safety of the public at places where wild animals and birds are exhibited.”

¹²¹ The empowering section for Cap 139J is s.3, Cap 139 which same as that of Cap 139B.

¹²² *Capital Rich Development Ltd and others v Town Planning Board* [2007] 2 HKC 542 (Court of Appeal), paras 70 and 77; *Incorporated Owners of Wah Kai Industrial Centre & others v Secretary for Justice & others* [2000] 2 HKLRD 458, at 477I; *Fok Ho Chiu v The Chinese Temples Committee* [2003] HKCFI 1088, para 24.

proposed regulations can achieve for animal welfare. If a particular regulation or licensing condition requires anything beyond that line, it *will be* struck down.

5.2. *Pre-empting Welfare and Morality from Being Legitimate Aims*

Secondly, the *ultra vires* concern impacts on our search for legitimate aims. As animal welfare is not even a relevant concern under the empowering ordinance, as a matter of advocacy, the Government would be *pre-empted* from raising the grounds of public morality, animal welfare and animal cruelty as legitimate objectives. This is a highly procedural point of attack that the kennel owners could take. The Government would then be left with only the grounds of public health and rights of others (though they are likely to be sufficient for establishing constitutionality). The Government in the Consultation Paper suggested that the powers under Cap 139B could be used for safeguarding animal welfare.¹²³ By reason of *ultra vires*, I beg to differ.

One argument to counteract would be to state that the AFCD, apart from its duty in public health, also has a duty on animal management (as conferred by the Dogs and Cats Ordinance,¹²⁴ Cap 167), and a duty on preventing cruelty to animals (as conferred by the existing Prevention of Cruelty to Animals Ordinance,¹²⁵ Cap 169), but this view would be weak. It is one thing to give a generous interpretation to fundamental rights, but a *completely different* matter to construe liberally the statutory basis on which the Government is authorized to act.¹²⁶ Not to mention that Cap 139B has expressly cited section 3 of Cap 139 as the empowering section.

Regulation-making under Cap 139B is to be distinguished from the scenario that the empowering ordinance is not loaded with a particular concern. One approach is to have a newly-passed Dog Breeder Ordinance solely for the purpose of empowering the breeder regulations. In that case, be it morality, animal welfare or public health, the Court would be free to ascribe as legitimate objectives whatever rationales argued by the Government.

Another possibility is to rely on the existing Dogs and Cats Ordinance. Its long title merely suggests that the Ordinance concerns the regulation of dogs and cats and the prohibition against slaughtering them for food. It should be open to adopt the rationale of animal welfare in exercising the powers therein. Note however regulation-making pursuant to the Dogs and

¹²³ The Consultation Paper, para 2.1.

¹²⁴ s 3(1) Dogs and Cats Ordinance (Cap 167): ‘The Chief Executive in Council may, with the approval of the Legislative Council, by regulation provide for- ... (d) the control or prohibition of the importation, possession, keeping, breeding or movement of any dog or class of dogs;...’

Long title of the Dogs and Cats Ordinance provides: ‘To provide for the keeping, regulation and control of dogs and cats, for the prohibition of the slaughter of dogs and cats, and for related matters.’

¹²⁵ Long title of the Prevention of Cruelty to Animals Ordinance (Cap 169) provides: ‘To prohibit and punish cruelty to animals’.

¹²⁶ This is to be distinguished from the situation of sentencing in which judges can consider all rationales she consider relevant: c.f. *Lau Lap Kei*, supra note 62.

Cats Ordinance requires LegCo's positive approval.¹²⁷ Once the expediency is gone, we may just as well pass a new Ordinance. Further, the approach is restricted to dogs and cats only. Hong Kong is notorious for having inadequate animal welfare law. It has been said that animals are not protected by legislation beyond an animal cruelty and a public health law from the 1970s.¹²⁸ There are simply no Ordinances that expressly provide the mandate on the AFCD or the Hong Kong Government to pursue animal welfare.

The local Ordinances are to be contrasted with the more comprehensive UK Animal Welfare Act 2006, which (i) imposed a general duty to ensure animal welfare on responsible persons (section 9); and (ii) empowered national authorities to make regulations on licensing or registration *for the purpose* of promoting animal welfare (section 13). There is thus little problem with citing animal welfare-related grounds as objectives.

5.3. *Democratic Mandate and Public Morality*

Thirdly, public morality requires majority backing. Assuming *arguendo* morality can be raised as a legitimate objective, by relying on the long-existed Cap 139 for empowerment, this suggests a lack of recent, democratic mandate regarding breeder licensing. This could substantially weaken or even destroy the morality ground at the proportionality stage.¹²⁹

Nonetheless, the point regarding the lack of democratic mandate has to be conceded. Part 4.4.3 above mentioned that the LegCo has on two occasions expressed strong support for animal welfare. The LegCo first increased the penalty for animal cruelty in 2006 and then urged the Government to better protect animal welfare through a non-binding motion in 2008. There is indeed a recent and democratic consensus on welfare regulation. This however begged a question: given that we have a willing Legislature, why should we settle for a mere Cap 139B amendment?

5.4. *The Necessity of an Animal Welfare Ordinance*

Even though the Cap 139B amendment is pursued by the Government and activists as a piece of animal welfare regulations, at the end of the day it is merely public health regulations. Such an incidental approach being applied to Cap 139B cannot be readily transplanted to other areas of animal welfare concerns in which public health is not implicated.

In its 2008 motion, the LegCo urged the Government to *inter alia* '[improve] the situation of fragmentation of responsibilities in dealing with the rights and interests of animals'. In our legislative system, the Government has the primary responsibility in introducing bills to the Legislature¹³⁰. Apart from dealing with the specific issue of puppy farming, the Government

¹²⁷ s. 3(1), Dogs and Cats Ordinance (Cap 167).

¹²⁸ 'Hong Kong zoo animals 'need laws to protect their psychological welfare'', *South China Morning Post*, 3rd September 2014.

¹²⁹ This would be further discussed at Part 7.4 below.

¹³⁰ See Articles 62 and 74 and Part II, Annex II of the Basic Law.

(in particular the AFCD) as well as animal activists should have properly channeled the social and legislative consensus on animal welfare and work towards a general Animal Welfare Ordinance along the line of the UK 2006 Act. In simply amending Cap 139B, Hong Kong has missed an opportunity to conduct a holistic review on its position of animal welfare protection.

Regulation-making under Cap 139 *prima facie* provides sufficient legal basis for the breeder regulations. The proposal is nonetheless defective in the sense of *ultra vires*. A change on a statutory level is necessary, so as to (i) confer on the Government the proper legal basis to enact breeder and other regulations in the name of animal welfare; (ii) to legally recognize the public interests in animal welfare as an objective that is worthy of protection even at the expenses of limiting private ownership; and (iii) to confer a democratic mandate so as to substantiate the public morality justification for welfare regulation. Putting the proposed regime under the umbrella of a more comprehensive Animal Welfare Ordinance would be much welcomed.

6. Rational Connection with the Aims

6.1. *The Control on Number*

Why would a number cap rationally serve the legitimate aims? The mischief is crystal clear. As illustrated by the recent incidents of puppy mill cruelty,¹³¹ kennel owners have the commercial incentives to keep on increasing the number of breeding dogs, to an extent that they cannot properly care for the animals. This results in very poor conditions at the kennels, giving rise to all the concerns on hygiene and welfare.

Some form of a number cap is necessary. It cannot be right for an ABLB holder to be permitted to keep an unlimited number of breeding dogs. A large number would lead to an accumulation of smell, noise, as well as health and hygienic risk. It would also dilute the care, attention and resources available in taking care of the dogs. A number cap can put a stop to the current number-intensive mode of kennel operation in Hong Kong. There is therefore a rational connection between the number cap and the legitimate aims mentioned at Part 4 above.

6.2. *How to Arrive at a Number*

Further, the manner in which the number is arrived at must also have a rational basis. The position of Missouri, United States serves as a useful illustration. Reported to be home to over 30% of the puppy mills in the Nation, the State of Missouri is considered the ‘puppy mill capital’ of the United States.¹³² The Missouri Puppy Mill Cruelty Prevention Act¹³³

¹³¹ See Part 0 above.

¹³² Pamela M Prah, ‘Missouri’s puppy mill politics: Dog breeders outmaneuver animal-rights movement’ *Seattle Times*, 25th May 2011. Available at <http://www.seattletimes.com/life/lifestyle/missouris-puppy-mill-politics-dog-breeders-outmaneuver-animal-rights-movement/> (visited on 29 Aug 2015).

(commonly known as the Proposition B), as enacted in November 2011, contained a simple cap on owning 50 dogs:¹³⁴

‘Notwithstanding any other provision of law, no person may have custody of more than fifty covered dogs for the purpose of breeding those animals and selling any offspring for use as a pet.’

The American Kennel Club made a strong criticism on the basis that cruelty and negligence can occur regardless of the number of dogs a person has:¹³⁵

‘The proposal also seeks to limit the number of dogs an individual may own. This confuses the real issue of animal welfare, which focuses on the quality of care given to animals, not the number of animals an individual owns. Responsible breeders are not defined by the number of dogs kept, or whether they make a profit in selling dogs. Rather, responsible breeders are characterized by the quality of care and conditions that they provide their dogs and the quality (including health, temperament and breed type) of the puppies they produce.’

The simple cap on owning 50 breeding dogs was later repealed by the Missouri legislature in April 2011.¹³⁶ The Act is now replaced by a Canine Cruelty Prevention Act,¹³⁷ which the Governor said would protect dogs in a way that would not put responsible breeders out of business.¹³⁸ The new Act imposed no restrictions on the size of the breeding operations. Instead, breeders have to provide more space to dogs, and unfettered access to an outdoor exercise run. The Governor also increased the licensing fees, and promised additional funds to ensure compliance.

A same-size-fits-all simple cap that is applicable to all licensed persons (or all licensed premises) would be easy to apply, but it runs the risk of being arbitrary. Since the care, attention and resources etc. are the substantive concerns, we should directly monitor the underlying concerns instead of using a simple, arbitrary number cap as an agent.

6.3. *Merits of a Discretionary Cap*

A discretionary cap enables us to internalize all relevant factors that should have been considered in fixing a number cap. The criteria for determining the permissible number could

¹³³ Contained in s 273.345, Chapter 273 (Dogs-Cats) of the Missouri Revised Statutes. Available at <http://www.sos.mo.gov/elections/2010petitions/2010-085.asp> (visited on 29 Aug 2015).

For a concise summary of its background, refer to the Ballotpedia website. Available at [http://ballotpedia.org/Missouri_Dog_Breeding_Regulation,_Proposition_B_\(2010\)](http://ballotpedia.org/Missouri_Dog_Breeding_Regulation,_Proposition_B_(2010)) (visited on 29 Aug 2015).

¹³⁴ s 4 of the Missouri Puppy Mill Cruelty Prevention Act.

¹³⁵ American Kennel Club, ‘AKC Opposes Missouri Proposition B’ *AKC News*, 23rd September, 2010. Available at <http://www.akc.org/government-relations/legislative-alerts/akc-opposes-missouri-proposition-b/> (visited on 29 Aug 2015).

¹³⁶ Refers to Senate Bill 113. Available at <http://www.senate.mo.gov/11info/pdf-bill/tat/SB113.pdf> (visited on 29 Aug 2015).

¹³⁷ Available at <http://www.moga.mo.gov/mostatutes/stathtml/27300003451.html> (visited on 30 Aug 2015).

¹³⁸ See note 132 above.

be tailored to ensure proper management of the breeding establishment and proper care of the breeding dogs and the puppies. This contributes to public health and animal welfare. The number cap could depend on a list of non-exhaustive factors:¹³⁹

(i) Available Floor Area

The breeding dogs and the puppies should have sufficient space for free movement. This is likely to be a significant limiting factor in the Hong Kong context.

(ii) Sufficient Facilities

The establishment must have sufficient number of kennels, soft bedding and enclosures to support the number of breeding dogs and the puppies.

(iii) Limit on a Single Premises

A single premises, irrespective of floor area, should only be allowed to house, say 50 breeding dogs. This is for efficient evacuation in case of fire, and also for controlling the spread of diseases.¹⁴⁰

(iv) Neighborhood of the Premises

Consider a residential apartment of ordinary size in urban Yaumatei. Even if an ABLA is granted, it should be capped at just a pair of breeding dogs. Whereas if it is a stand-alone village house in Yuen Long, then the number could be capped at a higher level.

(v) Number of Trained Staff

Running a breeding establishment requires substantial efforts and manpower. Care and attention at the kennels should go beyond food and water. The dogs should be showered or cleaned on a regular basis, and their excretions have to be removed promptly. The birth process has to be supervised. The new-born puppies also require proper care. A large population of breeding dogs thus has to be supported by a proportional work force.

As a discretionary cap can internalize all relevant factors, it stands a much larger chance to survive the rational connection test. The preferred way is to link the number of breeding dogs with sufficient compliance costs, so as to prevent number-intensive dog breeding.

¹³⁹ Whitfort and Woodhouse (2010) on a comparative approach offered a very comprehensive analysis on how the Hong Kong pet industry should be improved. It even provided a table on how the size requirements should be imposed for different types of animals.

Amanda S Whitfort and Fiona M Woodhouse, *Review of Animal Welfare Legislation in Hong Kong*, HKU 7010-PPR-5 (Hong Kong, June 2010), pp 28-56.

¹⁴⁰ This is to be distinguished from the repealed rule in Missouri, as a number limit is rationally imposed on premises instead of a person.

6.4. *Capping the Premises or the Person?*

The number cap should be attached to a licensed premise, instead of a licensed person. Attaching a number cap on a licensed person could be arbitrary. The mischief is ultimately too many dogs in too small a space. From Part 6.3 above, the factors that should be considered in imposing a number cap tend to be associated with premises, instead of the licensed person. There are no real objections to a breeder operating 5 kennels, each housing 40 breeding dogs, provided that the kennels are properly managed by her through her staff. Imposing a number limit on a licensed person may be open to challenge.

A related issue is that a corporation should not be denied of its right to own and operate a breeding kennel. Corporations could be permitted to do so, insofar as they employ licensed individuals, as this enables the criminal liability of the regulatory regime to have its full deterrent effect.

7. **Proportionality – Necessary in a Democratic Society**

7.1. *Onerous Possession and Limited Utility*

In order to establish constitutionality, the Government has to show that the number cap is a proportionate response, and is no more than is necessary in a democratic society to accomplish the legitimate purposes in question. The freedom to use one's own private property is after all a constitutional right and a civil liberty. In order to demonstrate due regard to private ownership, the issue of proportionality cannot be taken lightly.

The phrase 'white elephant' is a metaphor for onerous possession and is used locally to refer to costly infrastructure with limited utility. The myth behind the phrase was that if a King of Siam became dissatisfied with a subordinate, the King would grant the subordinate a white elephant. As the white elephant is considered sacred, it cannot be put to work and the King could stand to see the recipient ruined by the extravagant cost of its maintenance.

The point is that, even if rational connection with the legitimate objectives can be established, the number limit so imposed could still be considered disproportionate. A discretionary number cap that requires on average 200 sq. ft. floor area or one supporting staff per breeding dog is bound to fail at the proportionality stage. The legitimate objectives cannot be pitched too high. Proportionality requires a proper consideration of the breeder's proprietary interests in the dogs, so as not to render the dogs a white elephant.

7.2. *Devices to Soften the Number Cap*

Discretionary cap and the right to apply for variation¹⁴¹ are flexible devices that would ensure all relevant factors are internalized in arriving at a suitable number cap. These devices make sure that the number limit imposed is linked to substantive factors, and is not heavy-handed. So long as the breeder could satisfy the AFCD that a larger number cap should be granted, the

¹⁴¹ See Part 1.4 above.

Department would adjust the licensing conditions accordingly. With discretionary cap available as a less drastic means, a simple cap is likely to fail on proportionality.

In an application for increasing the number cap, the AFCD must exercise the discretion in a genuine sense. By subjecting the discretion to stringent hurdles, the discretion would serve little help in establishing proportionality of the regulations.¹⁴² Where discretion is created to soften the restriction of a constitutional right, every exercise of the discretion is on its own open to the scrutiny of proportionality.¹⁴³ Provided that the number cap criteria are applied with an eye of the rights of the kennel owners, the approach of discretionary number limit should be considered proportionate with the legitimate objectives.

7.3. *Objective Assessment – Health, Rights of Others and Welfare*

The grounds of public health and rights of others are objectively assessable. The Courts should have little difficulty in assessing the proportionality of the number cap in achieving these objectives. The likely scenario is that the Courts would consider the number cap to be not onerous; that it achieves important objectives, and go on to uphold the number cap. Public health and rights of others are grounds strong enough to justify the number cap on their own, even without resorting to animal welfare or morality.

At the proportionality stage, animal welfare is a much stronger ground than morality: where a large number of animals are contained within a small area, animal suffering is undeniable. As animal welfare should be considered objectively assessable, assessing proportionality with animal welfare is likewise straight-forward.

7.4. *Morality as Sufficient Objective*

7.4.1. Legislative Deference

A more difficult issue would arise where the Courts consider that the notion of animal welfare involves moral judgment. Morality is inherently abstract and subjective. How to even argue that a restriction is necessary and proportionate for protecting public moral in a democratic society? Morality as a ground for restricting constitutional right is a dangerous course for the law. Its use must be circumscribed. This essay suggests that the three requirements below be read as cumulative hurdles. That is, in order for morality to be a sufficient and proportionate objective,

- (i) there must be a democratic, legislative mandate;
- (ii) the right restricted does not touch on human dignity; and
- (iii) the interference with the constitutional right is light.

The Courts can offer some degree of deference to the legislature on the issue of proportionality in moral judgments. The democratically-elected Legislature, acting on consultation, is in a much better position than the Courts to make moral judgments. Respect

¹⁴² *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, paras 129-132.

¹⁴³ *Leung Kwok Hung and Others v HKSAR* (2005) 8 HKCFAR 229, paras 54-58.

should thus be given to the democratic assembly, especially in relation to its recent deliberation.¹⁴⁴ The Courts, in performing their constitutional duty, would interfere only when the legislature's judgment is manifestly without reasonable foundation.¹⁴⁵

On the other hand, the Government can hardly argue that it has any role in making moral judgments for the society. Deference to the Executive is persuasive only where institutional competence exists, e.g. in allocation of public resources.

By way of negative vetting, the Legislature is bypassed in expanding the regulatory regime. *Prima facie* there is no moral judgment flowing from the Legislature. However, the LegCo's motion in 2008, in specifically urging the Government to improve the licensing and regulation of pet sale and breeding, provided such moral judgments. *Lau Lap Kei* and the amendment of the cruelty ordinance in 2006 can also be cited in support. The argument of legislative deference is available for justifying the breeder regulation on public morality ground.

7.4.2. Gravity of the Right Being Restricted

Kennel owners would argue that morality is not a sufficient objective. The Constitution should protect against ethical objection of the majority. The view of those who have less affection for animals should be given due consideration.

In response, the Government should take a *realistic* stance: Some rights are less important than the others.¹⁴⁶ Lord Brown in *Countryside Alliance* clearly pointed out that ethical objection by the majority should not be a sufficient aim for restricting right to private life, if engaged. He however considered the same sufficient for restricting property rights.¹⁴⁷ Property rights, though constitutionality entrenched, are more of economic rights than human rights.¹⁴⁸ The situation should be distinguished from rights which go to human dignity,¹⁴⁹ e.g. right to equality, freedom of religion and freedom of expression.

Even where the majority of the society disagrees with homosexuality, the Courts acting in their constitutional duty should have no hesitation in striking down homosexual offences.

¹⁴⁴ *Countryside Alliance*, supra note 98, paras 45 and 47 *per* Lord Bingham; para 75 *per* Lord Hope; para 124 *per* Baroness Hale.

¹⁴⁵ Such a margin of appreciation to the legislature is supported both by UK case law specifically on animal cruelty, and by Hong Kong case law.

Countryside Alliance paras 45-47 *per* Lord Bingham, paras 75-76 *per* Lord Hope, para 124-125, 129 *per* Baroness Hale, para 157 *per* Lord Brown; *Whaley v Lord Advocate* [2007] UKHL 53, para 32; *Adams v Scottish Ministers* (2004) SC 665, para 49.

Chan and Lim (2011), supra note 22, paras 16.058-59.

¹⁴⁶ *Countryside Alliance*, supra note 98, para 124 *per* Baroness Hale.

¹⁴⁷ *Countryside Alliance*, paras 153-159 *per* Lord Brown.

¹⁴⁸ The Court of Final Appeal has held that the right to welfare (i.e. social assistance) is not a fundamental right: See *Kong Yunning* para 42.

¹⁴⁹ Perrone (2014) argues that the public morality clause should not justify interference with human dignity, because the respect for human dignity, being a fundamental value of democratic societies, is itself a part of public morality.

Roberto Perrone, 'Public Morals and the European Convention on Human Rights' (2014) 47 *Israel Law Review* 361-378

However, where the majority of the society demands owners to take responsibility for the welfare of their animals, the Courts should consider giving effect to it, because such ethical judgment is well grounded in reason, and human dignity is not thereby restricted.

7.4.3. Degree of Interference against Moral Significance

The Courts should also directly assess the degree of interference on property rights against the moral significance of the subject-matter. As the degree of interference on property right by the discretionary number cap is slight, whereas the society attaches high moral status to dogs, the Courts should readily accept that the restriction on ground of public morality is proportionate¹⁵⁰.

There can be a morality argument that *specifically* strengthens the morality ground for breeder regulation. Pet keepers often see dogs as family members. Dogs are considered companion animals, and kennel owners engage in dog breeding with the full knowledge of their perceived moral status. When breeders are earning commercial profits out of the love and affection for pet dogs by the general public, it is just *fair* that the breeders should have some responsibility, moral or legal, towards the animals in their possession. In monetary terms, it should not be disproportionate for the owners to bear some compliance costs, out of the profit which they ripe from the love for animals.

8. Conclusion

In response to puppy mill cruelty, the Government proposed to introduce a breeder regulatory regime by amending the Cap 139B. The license is likely to regulate the number of dogs that a premises or a person is permitted to keep. The restriction against one's own use of property poses constitutionality concerns. Regulation-making power under section 3 of Cap 139 seems to have provided the legal basis for the amendment. The law will be clear and accessible if the criteria for fixing the number are explained by issuing guidance. Private ownership can thus be restricted with 'legal certainty'.

By analyzing a dog-eating case and the Consultation Paper, we unfolded five legitimate aims for justifying breeder regulation. Conditions at the kennels raise public health concerns, in view of the diseases and the hygienic risks that they carry. The smell and the noise are all nuisance affecting rights of the others. Being objective arguments, these two non-animal aims are the strongest grounds. Indeed they are the only objectives permitted by the empowering ordinance to justify the constitutionality of the breeder regulation.

Public morality has basis in our Bill of Rights. By English case law and international experience, the formula of welfare as morality supports the constitutionality of welfare legislation. The right thing to do may even be completely abolishing commercial breeding. The law adopts a liberal approach in identifying legitimate aims and readily recognizes the public interests in the pursuit of animal welfare. The fact that animal welfare is not

¹⁵⁰ *Countryside Alliance*, supra note 98, para 155 per Lord Brown.

constitutionally entrenched is not fatal to it being a legitimate aim on its own. The prevention of animal cruelty is a less preferred formula for pursuing the positive interests of animals.

The real problem is not the Constitution, but the bottleneck at the statutory level. There is no ordinance that explicitly empowers the Government to pursue animal welfare. Welfare, morality and anti-cruelty are all rendered irrelevant concerns as the Government creates the regulation under a public health ordinance. *Ultra vires* will substantially weaken the breeder regulation, as requirements that seek to pursue animal welfare but not public health is liable to be struck down.

Discretion in fixing the number limit can internalize all relevant factors including the floor area, supporting staff, facilities and resources. This can ensure that the number cap is rationally connected to the substantive objectives. Private ownership is a civil liberty and deserves due respect in assessing the proportionality of the regime. The discretionary limit will readily be recognized as proportionate for furthering the objective grounds of public health, rights of others and animal welfare. Where moral judgments flow from the Legislature and the extent of interference on constitutional right is limited, public morality is also strong enough to justify welfare regulation.

We see a receptive Constitution, a willing Legislature and an observant Judiciary. There are indeed no major obstacles in formulating a piece of welfare regulation that is rationally connected and proportionate for pursuing morality and welfare. Sadly, the Cap 139B amendment we longed for will result in a piece of breeder regulation that is constitutional against private ownership only to the extent of preserving hygiene and reducing smells. The Government and all stakeholders need to wake up to the lack of an Animal Welfare Ordinance in Hong Kong. In the pursuit of protecting the rights and interest of animals, we have so much more to do.