

## **Animal Welfare in Switzerland – constitutional aim, social commitment, and a major challenge**

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*This article discuss Swiss animal law from an constitutional point of view challenging the principles of ‘sentient beings’ and ‘dignity’ in the enforcement.*

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## **1 Introduction**

There is no doubt that the protection of animals for their own sake as sentient beings with a capacity for suffering is one of the basic values of many modern western states. But since the enforcement of this moral postulate cannot be guaranteed solely through societal self-responsibility, it needs strong support from binding law. Even if national levels of animal welfare regulations are significantly diverging, all European states have set up legal requirements to govern the care of animals, and some countries have had relevant laws in place for more than 150 years.

All of them, even societies showing a long tradition of legislative animal welfare, are still facing the challenge of implementation. In that connection, the constitutional anchoring of ethical aims constitutes a major contribution to the enforcement of animal welfare regulations. The particular constitutions of Germany, Austria and Switzerland not only empower, but obligate the respective federations to enact provisions concerning the welfare of animals. In Switzerland, some animal welfare aspects have already been governed on federal level for 120 years. In 1893, the slaughtering of animals without anaesthetisation was banned and declared a constitutional principle by plebiscite.<sup>1</sup> Cruelty to animals is presumed to be a criminal act nationwide since 1942.<sup>2</sup> In 1973, a special article was added to the Federal Constitution, declaring animal welfare in general to be a state matter.<sup>3</sup> Thus, animals have been separated from the status of inanimate things and awarded a status intimately connected with a range of obligations for those being in charge of them.<sup>4</sup>

Since 1992, animal welfare has been strongly augmented by a constitutional provision warranting the protection of the "dignity of creature", explicitly conceding esteem to all non-human living beings, namely animals, at the highest legal level.<sup>5</sup> The principle encompasses all legal aspects of human-animal relations and is supposed to restrict treatment of animals compromising their interests. This concept contradicts the idea that human beings only are entitled to have dignity. At least to a certain degree, creatures such as animals and plants are regarded and valued as having a status comparable to humans.<sup>6</sup>

Establishing the protection of animals in a nation's constitution and basic legal background – as well as their dignity, as prescribed in Switzerland – has a far-reaching significance. It represents a considerable revaluation, since animal welfare becomes an interest protected by law with constitutional standing and a state goal that, as a matter of principle, is assigned the

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<sup>1</sup> The ban of this slaughtering method has originally been anchored in art. 25<sup>bis</sup> of the Federal Constitution (Const., see footnote 13) then in force. Later on, the prohibition has been regulated in the Animal Welfare Act. Detailed cf. Fleiner 11 et seqq.

<sup>2</sup> Detailed cf. Goetschel, Schweizer Tierschutzgesetz 258 et seq.

<sup>3</sup> The revised art. 25<sup>bis</sup> of the Federal Constitution assigned legislative competence and responsibility concerning animal welfare aspects to the confederation. In detail, the federal legislator has been obliged to codify animal welfare legislation and in particular provide provisions concerning the keeping and care of animals, the use of and trade with animals, the transportation of animals, interventions and manipulations in animals and animal experimentation, the slaughtering and killing of animals, the importation of animals and animal products.

<sup>4</sup> Cf. Fleiner 13. However the legal status of animals as objects has not been affected with the adoption of art. 25<sup>bis</sup> Const. and has been changed only in 2003, see Michel/Schneider Kayasseh 20.

<sup>5</sup> Although art. 120 Const. refers to reproductivity and gene technology, the fundamental denotation of the mentioned dignity of creatures is generally acknowledged and accepted as a constitutional principle, cf. Krepper 364; Bolliger/Richner/Rüttimann, Tierschutzstrafrecht 44 et seq.

<sup>6</sup> Cf. Swiss Federal Supreme Court, decision No. 135 (2009) II 384, consideration 4.6.1; cf. Michel/Schneider Kayasseh 10 et seq.

same status as other state goals.<sup>7</sup> Thus, it becomes an important part of the national legal system and must therefore be taken into consideration in all other areas of governmental or private activity – regional planning, social policy, nature and homeland conservation, environmental protection, and so forth.

Predicated on these constitutional principles, the parliament decreed an animal welfare act. In effect, the violation of animal welfare law is just as unacceptable as the violation of constitutional rights. In relation to basic rights, the constitutionality of animal welfare thus leads to an 'equality of weapons' of sorts, in which the privileges of science, art, and religion or, for example, the freedom to choose a profession do not have priority over animal welfare concerns. Indeed, in any conflict between constitutional rights and state goals interests must always be balanced. This means, for instance, that animal management must be adapted to the needs of animals and not depend solely on the economic interests of those who use animals.

Nevertheless, the protection of animals in its diverse facets, even in countries accounting it as high a value as Switzerland, still illustrates a compromise. The attribution of an animal's dignity displays the state legislator's efforts to ensure a regardful handling of animal living beings. However, in everyday life often dominated by economic deliberations, in many cases the keeping of the concerned animals' dignity is searched for in vain. This goes along with concrete shortcomings within the legislation as discussed below.

## **2 Legal Frame**

### **2.1 The Basics**

In Switzerland, the constitutional status of animal welfare as an essential principle of society resulted in an animal welfare act<sup>8</sup> that is based upon the dignity and well-being of animals and is prohibiting both cruelty to animals and disrespect of their dignity. Harsh punishment is entailed; maltreatment of animals can theoretically<sup>9</sup> be pursued with up to one million Swiss francs, depending on the culprit's income, and imprisonment up to three years.

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<sup>7</sup> In that sense, art. 25<sup>bis</sup> (today art. 80) of the Federal Constitution not only created an obligation for the confederation to regulate certain areas concerning the human use of animals, but has to be seen as a constitutional principle to respect animal welfare throughout all legislative acting, cf. Bolliger/Richner/Rüttimann, *Tierschutzstrafrecht* 36; Zenger 41; Fleiner 14.

<sup>8</sup> *Tierschutzgesetz vom 16. Dezember 2005 (TSchG)*, retrievable (in German only) on the official website of the Swiss Confederation (systematic compendium of federal law): <http://www.admin.ch/ch/d/sr/c455.html>.

<sup>9</sup> The average of the pronounced penalties amounts to some hundred or a few thousands of Swiss francs, and imprisonment is declared almost never for animal welfare delicts reclusively.

Based on the animal welfare act, which serves as framework,<sup>10</sup> the Swiss Federal Council passed an ordinance<sup>11</sup> materializing and shaping the demands of the act into more than 220 detailed provisions. Unfortunately, even though the ordinance rules are supposed to be fully within the scope of the act, many specifications dilute the targets of the act, each being an interpretation of the underlying statutory provision. This can be seen as an outcome of the democratic consultation process of the legal development in which many stakeholders are playing an important role. The ordinance is a compromise, taking into account all the various interests of the participating associations and interest groups, and is, therefore, nondistinctive in many aspects, allowing undesirable arbitrary decisions.<sup>12</sup>

On a lower level, the Federal Veterinary Office (FVO) and the respective department are competent to enact further binding decrees, defining technical and very specific requirements such as the contents of compulsory education for people keeping or handling animals, to mention one example. These specifications must again be within the limits laid down by the legislative authority.

For the time being, Switzerland defined the following animal welfare edicts: article 80 (animal welfare) and 120 (dignity of the creature) of the Constitution<sup>13</sup> as basic principles, the animal welfare act, the animal welfare ordinance, several departmental and FVO ordinances, and terms of reference of the FVO.<sup>14</sup>

Additionally, many rules relevant to the welfare of animals are distributed in other acts and ordinances, e.g. the legislation on epizootic diseases. Important are civil law clauses relevant to animal welfare which arose from the change in status of animals in 2003, which has run since 2004. Legally, animals are not seen as objects anymore, but have their own status between the status of objects and the one of humans.<sup>15</sup> This provision, embedded in the Swiss Civil Code<sup>16</sup>, article 641a, cardinally applies to all animals,<sup>17</sup> although its effects prevalently concern companion animals in inheritance and tort law, in questions of stray animals,

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<sup>10</sup> The act itself governs the most important issues roughly but quite clearly, while the ordinance comprises very specific directions.

<sup>11</sup> Tierschutzverordnung vom 23. April 2008 (TSchV), retrievable (in German only) at [http://www.admin.ch/ch/d/sr/c455\\_1.html](http://www.admin.ch/ch/d/sr/c455_1.html).

<sup>12</sup> See below, p. 9.

<sup>13</sup> Bundesverfassung der Schweizerischen Eidgenossenschaft vom 18. April 1999, available in German at <http://www.admin.ch/ch/d/sr/c101.html>. An English translation of the Federal Constitution of the Swiss Confederation is retrievable at <http://www.admin.ch/ch/e/rs/c101.html>. Please note that the English version is not an official document and therefore has no binding effect.

<sup>14</sup> All decrees are available in German at <http://www.bvet.admin.ch/dokumentation/01013/01014/index.html?lang=de>.

<sup>15</sup> See in detail Michel/Schneider Kayasseh 20.

<sup>16</sup> Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907, available in German at <http://www.admin.ch/ch/d/sr/c210.html>.

<sup>17</sup> Contrary to the animal welfare legislation which reduces its scope to vertebrates, cephalopods and reptantia (decapods) only, this includes invertebrates.

pertaining property pretensions in divorce proceedings and in debt collection.<sup>18</sup> In all these issues, the value of the individual animal and the relationship to its keeper lies within the focal point of the regulation. Animals kept for commercial purposes are not apprehended. Therefore, the provisions, although relevant and welcome to animal welfare, are highly anthropocentric, defining only those animals as especially valuable that were lucky enough not to be born as an object of utility.

## 2.2 The Purpose of Animal Welfare Law

There are two main intentions at the base of the animal welfare legislation: The protection of an animal's inherent dignity, and its well-being.<sup>19</sup> Animals have to be handled with greatest care, respecting their needs in the best possible way.<sup>20</sup> A huge restriction to this maxim is posed by the *designated use* of the respective animal;<sup>21</sup> a laboratory animal, for instance, has to be handled with the same care as other animals but at the same time may intentionally be harmed within the limits of the specific licence.<sup>22</sup>

Without justification(!), it is illicit to inflict pain, suffering, damage or anxiety upon an animal, or to violate its dignity by any other means.<sup>23</sup> In other words, it is legally accepted to do so if a hurtful action is considered to be more important than the animal's integrity. Of course, this is not a subjective decision, but the sum of a corporate balancing of the conflicting interests by assessing and weighing them. As animals are not deemed to be equivalent to humans, their existential interests succumb to often luxuriant human concerns in many cases.

However, the legislative authority accessorially established some incontrovertible prohibitions: *abuse*, *neglect* and *unnecessary overstrain* are interdicted and persecuted without appreciation of values.<sup>24</sup> It must be said in this regard that the assessment of the necessity to overexert an animal requires a balancing of interests itself. Strictly speaking, abuse and neglect are the outcomes of a preceding weighing, too. Not the magnitude of a harmful deed is the pivotal point to qualify it as abuse or neglect, but the motivation of the actor. Causing serious pain to an animal in the context of an authorized scientific study is considered to be justified, whereas the same action for the purpose of training the animal counts as abuse.

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<sup>18</sup> Michel/Schneider Kayasseh 21 et seqq. Article 641a of the Swiss Civil Code further states that the provisions for things (objects) are applicable to animals in legal areas where no special terms for animals are defined.

<sup>19</sup> Art. 1 TSchG.

<sup>20</sup> Art. 4 par. 1 TSchG.

<sup>21</sup> Art. 4 par. 1 lit. b TSchG.

<sup>22</sup> Further restrictions to the well-being (and dignity) of laboratory animals are made by lower legal requirements to their housing, see minimum requirements for the keeping of experimental animals in appendix 3 to the Animal Welfare Ordinance. Additionally, deviations from housing, handling or breeding conditions are admissible if essential to achieve the aim of the study and therefore approved by the authority.

<sup>23</sup> Art. 4 par. 2 sentence 1 TSchG.

<sup>24</sup> Art. 4 par. 2 sentence 2 TSchG.

## 2.2.1 Dignity

The protection of animals' dignity as a universal constitutional principle in Switzerland also found entrance into other orders such as the Act on Genetic Engineering<sup>25</sup>. The constitutional aim of the article on dignity originally targeted this issue.<sup>26</sup> The appreciation of an animal's dignity means an acknowledgement of its intrinsic value and a respect of animals in their being and otherness.<sup>27</sup> This value is inherent and therefore seen as pre-existing, not constituted by law.

Assigning animals an existence that is not linked to being a means to an end embraces a lot of denotations.<sup>28</sup> They can be divided into biological and ethical aspects.<sup>29</sup> Biological elements cover physical and mental factors such as pain, suffering, damage and anxiety. Their persecution is part of the scope of the protection of dignity. Ethical aspects are, for example, *humiliation* (even if the animal does not have the ability to be aware of it), or *immoderate instrumentalization*.<sup>30</sup> These facets illustrate the high value accorded to animals in Swiss law – even though factually there is not much to see of this fundamental commitment in view of husbandry, experimentation, and other forms of animal utilization in which animals are treated as mere marketable goods.<sup>31</sup>

The prohibition of zoophilia (sexuality with animals) in the Animal Welfare Act in 2008 shall be mentioned as a showcase for the implementation of the basic principle of the protection of animals' dignity.<sup>32</sup> While physical harm as a result of zoophilic actions has been defined as cruelty to animals already before 2008, the infliction of mental anguish has only been culpable if damage – e.g. abnormal behaviour – could clearly be verified. The new regulation incorporates violation of the animals' dignity, even if the animal has not suffered any kind of damage, physical or mental. Use of doping substances in animal sport activities, so-called torture or pain breeding or postal delivery of animals are further interdictions protecting not only the physical and mental integrity of animals but also their dignity. This means that these practices are illegal regardless of any physical or mental harm or suffering. Although it has not been the decisive reason in the parliament, dignity played a role in the recent resolution on the ban of the import of dolphins, which has only been possible because

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<sup>25</sup> Bundesgesetz vom 21. März 2003 über die Gentechnik im Ausserhumanbereich (Gentechnikgesetz, GTG), retrievable in German at [http://www.admin.ch/ch/d/sr/c814\\_91.html](http://www.admin.ch/ch/d/sr/c814_91.html). The protection of dignity is stated in Art. 8 GTG.

<sup>26</sup> Krepper 378 et seqq.

<sup>27</sup> A legal definition of dignity is provided by Art. 3 lit. a TSchG. Cf. ECNH/FCAE, Dignity 4; Michel/Schneider Kayasseh 9, with further references.

<sup>28</sup> Bundesrat 674; Steiger 229.

<sup>29</sup> Bolliger/Richner/Rüttimann, Tierschutzstrafrecht 46 et seq.

<sup>30</sup> Cf. Camenzind 59 et seq.

<sup>31</sup> See for example Petrus Klaus, Tiere als fragmentierte Subjekte, comment of 25<sup>th</sup> January 2013 on the website [http://www.tier-im-fokus.ch/mensch\\_und\\_tier/fragmentierte\\_subjekte/](http://www.tier-im-fokus.ch/mensch_und_tier/fragmentierte_subjekte/).

<sup>32</sup> Cf. Bolliger 85.

constitutional basic rights such as economic freedom are not weighed heavier than animal welfare aspects.<sup>33</sup>

Other issues such as the dehorning of cows and calves are qualified as an infringement of the protection of dignity by a legal expertise of the Foundation for the Animal in the Law.<sup>34</sup> In any case, this legal interpretation has not been accepted by the legislature until now, although a careful balance of interests clearly indicates a preponderance of the cow's integrity interests compared to the humans' economical interests. As a further inconsequence, the training and displaying of animals constrained to show unnatural behavior patterns in the circus are still accepted in Switzerland, although the respective circus acts are often highly degrading. A prohibition at least of wild animals in the circus, as seen in Austria, Hungary and many other countries, is unachievable in Switzerland at present.

Other juridical questions target topics like the mass elimination of male day-old chicks, or the downright exploit of animals bred and kept for experimental or nutritional purposes. On the other hand, the (painless) inking of an animal's coat for aesthetical reasons and degrading depictions of animals are indisputably banned,<sup>35</sup> even though exhibitions displaying equivalent representations still exist, such as fashion parades for dogs.<sup>36</sup>

There are some early judgments available in which not the physical harm of animals is subject of conviction, but the disregard for their dignity. In 2009, the Federal Supreme Court decided in favour of the dignity of primates instrumentalized in fundamental research experiments. Although the competency of the cantonal committees for animal experiments was the crucial factor leading to the respective verdict, dignity aspects have elaborately been the subject of discussion in the Supreme Court's finding.<sup>37</sup>

The acceptance of an animal's dignity leads to the question of whether the protection of an animal's life is covered by it or not. In other words: Is it possible to kill an animal without necessity and still preserve its dignity? Swiss animal welfare law does assertively protect the dignity and well-being of animals, but not their life. Although wanton killing out of reprehensible motives such as boredom or malignity, or as an act of defiance is prohibited,<sup>38</sup> the painless killing of an animal by its owner is considered to be legal albeit morally wrong. But

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<sup>33</sup> See posting of the Foundation for the Animal in the Law of 29<sup>th</sup> May 2012, available at [http://www.tierimrecht.org/de/veroeffentlichungen/Delfinimport\\_definitiv.php](http://www.tierimrecht.org/de/veroeffentlichungen/Delfinimport_definitiv.php); cf. Goetschel, Delfinarien 23 et seq.

<sup>34</sup> Bolliger/Spring/Rüttimann, Enthornen 62 et seq.

<sup>35</sup> Bolliger/Richner/Rüttimann, Tierschutzstrafrecht 47; q.v. ECNH/FCAE, Dignity 6.

<sup>36</sup> Cf. posting of the Foundation for the Animal in the Law of 20 July 2010, available at [http://www.tierimrecht.org/de/news/2010/07/Hundemodeschau\\_Animalia.php](http://www.tierimrecht.org/de/news/2010/07/Hundemodeschau_Animalia.php).

<sup>37</sup> BGE 135 II 405, E. 4.3.4; 135 II 384, E. 3.1 and 4.6.1.

<sup>38</sup> Cf. Bolliger/Richner/Rüttimann, Tierschutzstrafrecht 144 et seq.

this reading is not undisputed: it is not clear if the recognition of dignity covers some kind of right to live<sup>39</sup> or not.<sup>40</sup>

### **2.2.2 Well-Being**

Well-being means more than good health. It means to be in a state of physical and mental balance in the absence of pain and suffering.<sup>41</sup> Constrictions in respect to physical integrity or the satisfaction of behavioural needs of animals are not necessary prerequisites.<sup>42</sup> Both behavioural disorders and somatic mutations may refer to management mistakes and inappropriate husbandry. Reciprocally, fertility, sound condition and normal behaviour are no evidence of species-appropriate treatment.

While well-being is often reduced to the absence of negative impacts, the experience of positive emotions usually remains unconsidered in the evaluation of animal welfare aspects. Nevertheless, they are part of well-being, too.<sup>43</sup> In many housings,<sup>44</sup> animals are not allowed to attain feelings like 'happiness', but rather must be content with being free from hunger, thirst, pain, damage, fear, and distress. Meanwhile, they oftentimes live in bleakness, loneliness or boredom. The dividing lines between a fulfilled life and an empty one are fluent and often difficult to distinguish, especially in certain animal species and some individuals. But legal minimum requirements are so low that the chance of having a fulfilling emotional life are minor in minimalistic housing conditions. Still, the requirements in Switzerland are generous compared to most European countries.

## **2.3 Shortcomings within the Legislation**

In international comparison, Swiss animal welfare legislation is progressive, residing at the highest level with only a handful of other countries worldwide. With regard to animal protection, however, fundamental principles of respecting animals as living beings with intrinsic value, although clearly declared by the Constitution and the Animal Welfare Act, are restricted to a minimum and at times even ignored.

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<sup>39</sup>As animals are no legal entities, a 'right to live' cannot be admitted. However, it is feasible to protect their interest in being alive. It is beyond controversy that animals do have a vital interest or a 'will to live', cf. GPK-SR, Bericht Vollzugsprobleme 622; Bundesrat 663; ECNH/FCAE, Dignity 9. Q.v. de Fontenay 29 et seqq.

<sup>40</sup>Goetschel/Bolliger, 99 Facetten 215.

<sup>41</sup>Cf. Teutsch 262; Würbel 95.

<sup>42</sup>Bolliger/Richner/Rüttimann, Tierschutzstrafrecht 43.

<sup>43</sup>Balcombe 17 assumes that positive emotions are a natural facility to stimulate salubrious behaviour.

<sup>44</sup>This is an occurrence known to all areas of animal keeping: livestock, pets, wildlife husbandry, animals used for the purpose of sporting activities, and experimentation animals.



### 2.3.1 Imprecise Provisions and Many Exceptions

The animal welfare legislation is not a unilateral protection of creatures, but a political compromise due to democratic procedures and mechanisms. Changes in law and ordinance, but also in technical specifications usually undergo a comprehensive procedure, allowing all interested parties to express their opinions. Therefore many interests are included with the intention of achieving broad support. Thus, the authority's strategy is clearly not to forbid problematic practices, but limit them to some degree. Or, the other way round, to prohibit some actions, but define exceptions and leave margins of discretion. With these extensive accommodations to all parties, everyone benefits and is forced to concede at the same time. Thus, the opposition is minor at the end of the procedure.

The other side of the coin is regulatory overkill, making an ease of use impossible. Lack of transparency, a compulsion to seek for individual case solutions and the risk of legal inequality are the user's disadvantages. The downside for the animals is even higher: Many practices distinctively compromising the well-being and dignity of animals are – for certain species or in certain circumstances – still allowed.<sup>45</sup> Instead of axiomatic bans, incomprehensible exclusions and special cases as well as many ambiguities are included in the legislation.

### 2.3.2 Exploitation of Animals

As in other countries, Swiss society and authorities are not willing to stop the exploitation of animals. There are strict limits to the use of animals, but their disposability is not essentially in question. Of course, it has never been the intention of the legislator to materially change the status of animals by enacting specific rules of protection. In fact, creatures should be provided a certain amount of protection from the power difference between humans and animals.

This effort results in an alleviation of the heavy burden humans are putting on animals, without lifting the burden itself. For example, sows are conceded a little bit more space allowing them to turn over. Fish, for the short term placed in cages, must be supplied with fresh water of adequate quality. Also, the dehorning of calves has to be done under anesthesia. Along the way, the system itself is not subject to reassessment.

Pleasingly, in corresponding literature many advanced endeavours strictly push into a direction of fundamental changes in our treatment of animals.<sup>46</sup> *De lege ferenda*, a critical examination of the current interpretation of the rules concerning animal welfare issues is inevi-

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<sup>45</sup> E.g. electric bail across the tied cow's back to make it moving backwards for urination, tethered housing of goats, single housing of rabbits, fully slatted floor and no providing of litter to cattle. All of these examples are basically prohibited, but still allowed under restrictions.

<sup>46</sup> E.g. Michel/Kühne/Hänni 3 et seqq.

table. The acknowledgment of a dignity and a status of animals detached from the object status must have consistent consequences to the level and application of protection in order not to risk being an empty phrase.

### 2.3.3 No Protection of Life

A grave restriction on the protection of animals is the refusal of protection of life.<sup>47</sup> Being alive is a fundamental interest of every living being; its death can be deemed the most significant and irreversible damage of all.<sup>48</sup> Nevertheless, Swiss legislation does not attribute any claim to life to animals.

In contrast to the Swiss situation, German and Austrian law require reasonable grounds for the killing of animals.<sup>49</sup> The killing of animals is considered as 'reasonable' in all areas regulated, and implicitly permitted, by the legislator. Ultimately, the result in Switzerland is not too different from its neighbouring countries. The wanton killing of animals is accusable as much as the torturous or incompetent killing.<sup>50</sup> Vertebrates, cephalopods and decapods must not be killed without the necessary skills and technical knowledge.<sup>51</sup>

### 2.3.4 Importation of Goods Produced by Inhumane Methods

A considerable problem is the import of goods produced under conditions forbidden in Switzerland on ethical grounds, e.g. Foie Gras, fur, meat from animals ritually slaughtered without anaesthetics, or cage-reared animals, and many other animal products (eggs, milk, wool, leather, down and feathers, fat etc.) generated by methods not meeting the requirements of the Swiss animal welfare legislation.

Animal welfare organizations have been trying to ban the import of concerned goods for years.<sup>52</sup> Although a legal expertise by the Foundation for the Animal in the Law clearly demonstrated the compatibility of an import ban of fur products with the international trad-

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<sup>47</sup> Michel/Schneider Kayasseh 15 et seq.; Bolliger/Richner/Rüttimann, Tierschutzstrafrecht 58 et seqq.

<sup>48</sup> Goetschel/Bolliger, 99 Facetten 215. However moral philosophers debate this point, see Francione/Garner 180 et seqq.; Luy 49 et seqq.

<sup>49</sup> Germany: § 17 Section 1 Tierschutzgesetz in der Fassung der Bekanntmachung vom 18. Mai 2006 (BGBl. I S. 1206, 1313), das zuletzt durch Artikel 20 des Gesetzes vom 9. Dezember 2010 (BGBl. I S. 1934) geändert worden ist; Austria: § 6 par. 1 Bundesgesetz über den Schutz der Tiere (Tierschutzgesetz – TSchG), BGBl I Nr 118/2004.

<sup>50</sup> Art. 26 par. 1 lit. b TSchG.

<sup>51</sup> Art. 177 par. 1 TSchV; Art. 2 par. 1 TSchG in conjunction with Art. 1 TSchV.

<sup>52</sup> Recent examples are the petition of the organization Four Paws against the import of leather products made of reptiles, killed in a barbarous way, which has been documented on film, and the petition of the Franz Weber Foundation against the importation of seal fur products. Cf. the article of the Tages-Anzeiger from 29<sup>th</sup> September 2010, online at <http://www.tagesanzeiger.ch/schweiz/standard/Kein-Importverbot-fuer-Robbenfelle/story/17340126>.

ing regulations,<sup>53</sup> the legislator rejected the adoption of such a prohibition.<sup>54</sup> Instead, at least a duty of declaration passed the parliament successfully in some cases.<sup>55</sup>

### 3 Enforcement

#### 3.1 The Canton's Responsibility

The respective enforcement is a cantonal<sup>56</sup> matter, lying with the cantonal veterinary services. Although generally speaking, it is improving year by year due to specialized and qualified authorities,<sup>57</sup> in many cantons there still are considerable lacks both of administrative and penal law implementation.<sup>58</sup> Astonishingly there are huge differences throughout the country.<sup>59</sup>

The reason for this objectionable situation is the deeply anchored federalism which allows cantons to inset their preferred execution instruments. However, it strongly depends on the respective cantonal government's attitude how many people are entrusted with the implementation duty and what training they have to undergo concretely. Conspicuously small cantons without urban areas show more difficulties with providing enough personnel seriously to fulfil federal standards, although there are some positive exceptions.<sup>60</sup> Cantons like Glarus, Uri or Geneva have been doggedly denying their obligation to persecute animal torturers for years. They all report very few (sometimes none at all) criminal procedures concerning the violation of animal welfare law per year.<sup>61</sup> In other words, there seem to be nearly no breaches of law, which is simply unrealistic. This is a finding of the annual survey

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<sup>53</sup> Stohner/Bolliger 39.

<sup>54</sup> Interestingly, the National Assembly welcomed the idea of a ban, while the Council of States refused it.

<sup>55</sup> See for example the news from 23<sup>rd</sup> November 2009 and from 24<sup>th</sup> September 2009 on the website of the Foundation for the Animal in the Law at <http://www.tierimrecht.org/de/news/2009/11/Deklarationsverordnung.php>, respectively <http://www.tierimrecht.org/de/veroeffentlichungen/vernehmlassung/Pelzdeklarationsverordnung.php>.

<sup>56</sup> Cantons are the member states of the federal state of Switzerland.

<sup>57</sup> E.g. specialist departments for animal welfare required by article 33 of the Animal Welfare Act; specialized police officers and prosecutors in some cantons.

<sup>58</sup> In regard to the criminal law, more information is provided by the Foundation for the Animal in the Law in a database which contains all known Swiss penal cases concerning the Animal Welfare Act (see at [www.tierimrecht.org](http://www.tierimrecht.org), unfortunately only available in German). Administrative enforcement deficiencies are designated by investigations of the association against animal factories (Verein gegen Tierfabriken), published on its website [www.vgt.ch](http://www.vgt.ch).

<sup>59</sup> Bolliger/Richner/Künzli, *Tierschutzstrafpraxis* 2011 9 et seqq.

<sup>60</sup> As a rather positive example, Appenzell Innerrhoden, the canton with the lowest population of about 15'000 people, shall be mentioned. It regularly discloses a comparatively high number of procedures, see Richner/Gerritsen/Bolliger, *Tierschutzstrafpraxis* 2010 6; Bolliger/Richner/Künzli, *Tierschutzstrafpraxis* 2011 18.

<sup>61</sup> Cf. news of the Foundation for the Animal in the Law from 15<sup>th</sup> December 2011 on their website: [http://www.tierimrecht.org/de/news/2011/12/Straffaelle\\_2010.php](http://www.tierimrecht.org/de/news/2011/12/Straffaelle_2010.php) and Bolliger/Richner/Künzli, *Tierschutzstrafpraxis* 2011 58.

of the Foundation for the Animal in the Law analyzing all penal cases reported to the FVO.<sup>62</sup>

Notwithstanding, the situation in these cantons cannot easily be compared. While the government of Glarus simply seems not to be aware of the vast responsibilities and wide range of duties of the veterinary authorities which leave them permanently overburdened,<sup>63</sup> the canton of Nidwalden is affiliated to an amalgamation of four cantons, coordinating the various tasks in a well-organized way. Nevertheless, Nidwalden is not able to ensure the execution of animal welfare provisions and especially the sanctioning of perpetrators concerning animal welfare law. Meanwhile, the reasoning is not clear. Equally unclear are the reasons for the scarcities in the execution of the animal provisions in Geneva. This urban canton benefits from western Switzerland's agreement to share expert knowledge and infrastructure.<sup>64</sup> However, in the past thirty years, only 28 criminal cases have been reported by this canton.<sup>65</sup> Compared to St Gallen, a canton with about the same population density,<sup>66</sup> the numbers speak for themselves. In 2011 alone, 235 penalty procedures have been reported due to a specialist department attending to animal protection cases. All in all, St Gallen executed 1747 procedures concerning violations of animal welfare provisions in thirty years.<sup>67</sup>

The Foundation for the Animal in the Law traces the situation in all cantons with inadequate enforcement back to disinterest and indifference and concludes that offences against animal welfare prescriptions are still understood as trifles in many places. The implementation of specialised authorities or attorneys<sup>68</sup> could provide relief and heighten the awareness on enforcement.<sup>69</sup>

## 3.2 Selected Issues

### 3.2.1 Pain Breeding

Breeding of animals disregarding their needs, health or well-being as well as their dignity, is prohibited by the animal welfare legislation.<sup>70</sup> In many cases, breeding objectives do not

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<sup>62</sup> The legislative base for this survey is the 'Verordnung vom 10.11.2004 über die Mitteilung kantonaler Strafentscheide', available in German at [http://www.admin.ch/ch/d/sr/c312\\_3.html](http://www.admin.ch/ch/d/sr/c312_3.html).

<sup>63</sup> The Glarus government is providing a minimum set task of a single 100% position to fulfil the whole range of duties of the veterinary authority of which animal welfare is just a part. See Künzli/Gerritsen 100.

<sup>64</sup> Künzli/Gerritsen 100.

<sup>65</sup> Bolliger/Richner/Künzli, *Tierschutzstrafpraxis* 2011 14.

<sup>66</sup> Glarus: approx. 460'500 inhabitants; St Gallen: approx. 480'000 inhabitants.

<sup>67</sup> Bolliger/Richner/Künzli, *Tierschutzstrafpraxis* 2011 7.

<sup>68</sup> See below, p. 13.

<sup>69</sup> Specialised institutions already exist in several cantons, notably St Gallen, Bern, Zurich, Grisons and Solothurn. They differ in their organisation, level and division: There are specialised prosecutors, policemen, judges and commissioners, see in detail cf. Bolliger/Richner/Künzli, *Tierschutzstrafpraxis* 2011 9.

<sup>70</sup> Art. 10 par. 1 TSchG in conjunction with Art. 25 TSchV.

target the needs of animals, but are geared to other requirements such as growth in output and increased efficiency in agriculture, sports, and experimentation, or aesthetical and emotional aspects.<sup>71</sup>

Although the prohibition has run since 2008, not a single penal case throughout Switzerland has been carried out so far. This cannot be explained by the assumption that there is no practical relevance – there certainly is! Obviously, there has not been a claimant to date.<sup>72</sup> As offenses against the animal welfare legislation are delicts liable to public prosecution, the responsibility prevalently is a duty of the enforcement authorities.<sup>73</sup>

In November 2012, the Foundation for the Animal in the Law filed charges to set an example.<sup>74</sup> Seven breeders of different kinds of dogs, cats, and pigeons have been accused of violating animal welfare provisions. The reports are not directed to specific breeds, but to the purposeful selection of damaging or harmful physiological attributes. It remains see the judgments and, hence, the enforcement of the prohibition.

### 3.2.2 Animal Attorneys

In 1992, a worldwide unique case in the implementation of animal welfare regulations has been put into practice in the canton of Zurich: the *advocate for animal welfare in criminal cases*.<sup>75</sup> Zurich, always one of the leading cantons concerning animal protection matters, thus played a pioneering role in the enforcement of federal animal welfare law.

The animal attorney's range of duty includes the defense of animals that are victims of torture or abuse and other offenses. Provided with full party rights, the animal lawyer represents the counterpart to the offender, creating a level playing field. He also participates in the establishment of harmonizing recommendations of sanctions, together with the Public Prosecution Office. Unfortunately, no equivalent has been constituted in the administrative law area, affecting effective administrative measures. The enforcement authorities, being competent to take measures in order to restore a legitimate situation in cases of unlawful animal handling or keeping, need to take into account the offender's requirements, too. They are not considered to be spokespersons of animals.

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<sup>71</sup> Bolliger/Richner/Künzli, Tierschutzstrafpraxis 2011 36.

<sup>72</sup> Bolliger/Richner/Künzli, Tierschutzstrafpraxis 2011 49.

<sup>73</sup> Künzli/Gerritsen 88 et seq.

<sup>74</sup> See news of the Foundation for the Animal in the Law from 27<sup>th</sup> November 2012 on their website: [http://www.tierimrecht.org/de/news/2012/11/Tierschutzstrafpraxis\\_2011.php](http://www.tierimrecht.org/de/news/2012/11/Tierschutzstrafpraxis_2011.php).

<sup>75</sup> For more details see <http://www.tieranwalt.ch>.

Although proven of value in practice, the animal attorney's function, still being a Zurich singularity, has been discharged in 2010 as a result of an initiative defeat.<sup>76</sup> The legislative initiative demanded animal lawyers, in accordance to the Zurich model, in all cantons in Switzerland.<sup>77</sup> Regrettably, the idea could not wholly be put across and the population was not convinced. Many people suspected a humanization of animals, as the important assignments of an animal lawyer were not made clear to them.

## 4 Conclusion

A constitution always reflects the overall values of a society. The inclusion of animal welfare measures does not indicate a revolution in human-animal relations; rather it is an official and clear acknowledgement at the highest level of law that people cannot deal with animals at will and without limitations. Animals must be respected as sentient beings with a great capacity for suffering.

Just the fact of acknowledgement of an animal's dignity is promising and should lead to another perception of animals, irreconcilable with a treatment as merchandise. The addressed shortcomings within the legislation as well as the deficiencies in enforcement pointed out above are opposed to the appreciation of the animal's dignity.

Switzerland has a solid basis to improve the quality of its animals' lives. Therefore, we may appear to be complaining on a high comfort level. Still, animals are suffering and killed in Switzerland on the grounds of denying them elementary needs. The rabbit sitting in its box all day long, mentally and emotionally dwarfing, does not know about the high Swiss legal standard.

Thinking through diligently and consequently the Swiss concept, which states to protect the animal's well-being and dignity, the innumerable exceptions from the legal protection of animals are not able to withstand. The only reason for preserving the status quo is the fear of profound changes in societal structures regarding animal husbandry, private keeping of animals or animal experimentation.

In fact, the Swiss principles of protecting animals as sentient living beings with dignity provide a basis which allows for an abolitionist interpretation, refusing the use and killing of animals, but acts on a regulation level balancing the interests of animals against human

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<sup>76</sup> The popular initiative (*Eidgenössische Volksinitiative*) "Gegen Tierquälerei und für einen besseren Rechtsschutz der Tiere (Tierschutzanwalt-Initiative)" tried to implement animal attorneys in all Swiss cantons pleading the animal's case in all criminal proceedings, see at <http://www.admin.ch/ch/d/pore/vi/vis340.html>. The vote took place on 7th March 2010 with a clear negative result.

<sup>77</sup> <http://www.tierschutzanwalt.ch>.

use.<sup>78</sup> The acknowledgment of dignity paired with restrictions to it as soon as human interests are concerned is not satisfactory. Nevertheless, human interests – regardless their factual weight – are pled by weighty lobbies and will have the power to justify charges and restrictions on the animal's side for many years to come. Hence, our duty is to enhance the legal scope and – besides improving enforcement – to work out concrete postulations consistently derived from and doing justice to the significance that Swiss law is conceding to animals.

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<sup>78</sup> For the distinction between the animal rights/abolitionist position and the animal welfare/regulation position see Francione/Garner 4 et seqq.