

THE LEGAL SITUATION OF ANIMALS IN SWITZERLAND: TWO STEPS FORWARD, ONE STEP BACK – MANY STEPS TO GO

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I. INTRODUCTION

In the last several years there have been various reforms enacted in Swiss law that were intended to improve the status and protection of animals. In 1993 the “dignity of the Creature” was enshrined in the constitution¹ and, building on that, was taken up in 2008 as the “dignity of animals” in the completely revised Animal Protection Act. Additionally, in 2003 a change of law went into effect, a landmark article in the Civil Code stated that animals are not objects. This effected changes to tort law, inheritance law and title law. And in the spring of 2010 there took place the internationally much observed referendum on the Swiss-wide introduction of “Animal Attorneys” – an initiative which was unfortunately rejected.

Most of these reforms are the product of popular initiatives. Switzerland’s particular polity² – a semi-direct democracy with a highly developed right to popular votes, in particular popular initiative and the possibility of national referendums so as to change laws³ – has proven to be a perennial instigator of improvements in the

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¹ An english translation of the Federal Constitution of the Swiss Confederation is available at <http://www.admin.ch/ch/e/rs/c101.html> (last visited April 10, 2011). As english is no official language of the Swiss Confederation, the translation has no legal force.

² Although lying at the heart of Europe and surrounded by EU member-states, Switzerland is not a member of the European Union – though it has a variety of relationships with the EU.

³ See Walter Haller, *The Swiss Constitution in a Comparative Context*, Zurich/St. Gall 2009; for general information on the state system of Switzerland, also see <http://www.admin.ch/org/polit/index.html?lang=en> (last visited April 10, 2011).

protection of animals.⁴ With the instrument of initiative, a popular vote can be held with regard to topics that find no majority in parliament; such impulses come from parliament itself, from the general population, from animal protection organizations, and from interest groups. Of course these initiatives are not inevitable successes – for example, the three-time rejection of initiatives to abolish or at least drastically reduce animal experiments,⁵ or the recent initiative to introduce Animal Attorneys on a nationwide basis.⁶ The Swiss public is actively engaged in questions of animal protection, and the corresponding initiatives and law changes and revisions have great resonance among the general populace and are passionately debated.⁷ The instrument of referendum enables referendums on federal laws or the revision of laws; but in contrast to constitutional changes, referendums on laws are not compulsory.⁸ In order to ensure that a federal law (e.g. the Animal Protection Act) will survive a possible referendum, an elaborate consultation process takes place (the so-called *Vernehmlassungsverfahren*, or legislative process by consultation) in which all interested parties, interest groups (e.g. animal protection organizations) and cantons are consulted as to their respective positions on the topic at issue. Then the preliminary version of the law is worked over and adapted so that in any possible referendum it would receive a prospective majority. In this way it is possible to influence – at least within certain parameters – legislation in the sphere of animal protection.

The following article gives an overview of the situation of animals in Swiss law. Additionally, the notion of the dignity of the Creature and its implications for the Swiss legal system will be more closely analyzed, and then the cornerstones of the overhauled Animal Protection Act (revised in 2008) will be discussed and embedded in the European legal tradition. Following this section will be one treating the particular instruments of enforcement in animal protection, for example the Animal Attorney or allowing animal protection organizations the right to appeal. We will also be taking an in-depth look at the situation of animals in civil law, in particular the changes in the status of animals that were effected by a 2003 change of the law. In this context, we will focus on four major issues. Firstly, we will take a brief glance at the legal status of animals in Swiss law; secondly, we will focus on

⁴ For example, Thomas Gächter writes: the popular initiative frequently functions as an agent of innovation, as an engine of the political system. But this happens less by the way of direct acceptance of such initiatives through the people than through their indirect impact, as officials and parties are forced to develop direct or indirect counterproposals to the reform initiatives, which then often find majorities in national referendum.” (Andrea Büchler/Thomas Gächter, *Medical Law Switzerland*, in: Herman Nys (editor), *International Encyclopaedia of Laws, Medical Law*, Kluwer Law International 2010, at 18).

⁵ Referendums on the question took place in 1985, 1992, and 1993.

⁶ See *infra* Part III.C.

⁷ See Botschaft des Bundesrates zur Revision des Tierschutzgesetzes vom 9. Dezember 2002, in: Bundesblatt (hereinafter BBl) 2003, 657 et seq., at 661 et seq.

⁸ Art. 141 Swiss Const. states that an optional referendum has to take place “if within 100 days of the official publication of the enactment of a federal act any 50,000 persons eligible to vote or any eight Cantons request it.”

the computation of damages for an animal that is killed or injured by a third party; thirdly, we will show how exclusive ownership of a co-owned animal is acquired if the animal's human caregivers go their separate ways; and lastly we will discuss pets in wills and foundations.

The article will conclude with an annotated summary of the above and will propose steps to follow so as to further raise the status of animals within the context of law.

II. ANIMALS IN PUBLIC LAW

A. Protection of the Dignity of the Creature in the Swiss Federal Constitution

In 1992, by way of a national referendum, Switzerland became the first country in the world to take up protection of the dignity of the Creature into its constitution. Three-quarters of the votes and all of the cantons except for one approved the new constitutional article. Article 120 Const. (The Swiss Federal Constitution is called *Bundesverfassung* abbreviated as BV)⁹ stemmed from a popular initiative that demanded greater protection against abuses of gene technology. In the English translation (which has no legal force) the provision reads:

Art. 120 Const.

- 1 Human beings and their environment shall be protected against the misuse of gene technology.
- 2 The Confederation shall legislate on the use of reproductive and genetic material from animals, plants and other organisms. In doing so, it shall take account of the dignity of living beings [*Würde der Kreatur*] as well as the safety of human beings, animals and the environment, and shall protect the genetic diversity of animal and plant species.

Its original conception being to protect against the abuses of gene technology, protection of the dignity of the Creature is today not only recognized as a constitutional principle having general validity throughout the whole legal system but as one that should guide state action.¹⁰ To a certain extent the protection of the dignity of the Creature by the Swiss Federal Constitution thus succeeds in curbing

⁹ Before the complete overhaul of the Federal Constitution in 1999, the provision was enshrined in article 24novies.

¹⁰ See Lorenz Engi, Was heisst Menschenwürde? Zum Verständnis eines Verfassungsbegriffs, Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht (ZBl) 2008, 659 et seq., at 674; Peter Krepper, Tierwürde und Rechtentwicklung in der Schweiz, Aktuelle Juristische Praxis (AJP) 1998, at 1147; Nils Stohner, Importrestriktionen aus Gründen des Tier- und Artenschutzes im Recht der WTO, Bern 2006, at 103; Rainer J. Schweizer & Peter Saladin, Kommentar zu Art. 24novies, in: Jean-François Aubert et al. (editors), Kommentar zur Bundesverfassung der schweizerischen Eidgenossenschaft, Basel 1995, Abs. 3 BV para. 119.

the legal order's dominant anthropocentrism¹¹ and is in accord with the document's preamble, which obliges the constitution to adopt a responsible stance vis-à-vis the Creation. It is a matter of debate as to whether the dignity of the Creature encompasses each and every individual or living beings as a whole.¹² But even if one were to apply a restricted biocentric definition to this constitutional right, the German term *Kreatur* would necessarily encompass all of non-human animate life, namely plants and animals.¹³

Nonetheless the concrete implications of the guarantee of the dignity of the Creature is still an object of controversy. The difficulties generated by this new constitutional concept can be seen, among other things, in the fact that the term is not uniformly employed in the German and French versions of the Federal Constitution. Whereas the German version avails itself of the phrase *Würde der Kreatur*, the French version speaks of the *intégrité des organismes vivants*.¹⁴ This change – the French version originally had the phrase *dignité de la créature*, which is the obvious counterpart to *Würde der Kreatur* – was the doing of the Swiss translation bureau on the occasion of the complete overhaul of the Federal Constitution in 1999 and is not owing to a legislative decision. The Federal Ethics Committee on Non-Human Biotechnology (ECNH)¹⁵ then declared that the terms “integrity” (*intégrité*) and “dignity” (*Würde*) were not the same, having different implications;¹⁶ that is, not every encroachment on a living being's integrity is an injury inflicted on that being's dignity. Just as the preamble to the Swiss Federal Constitution obliges the document to adopt a responsible stance vis-à-vis the Creation – and similar to the term “fellow creatures” for animals (Tier als Mitgeschöpf) in German law¹⁷ – so too does the phrase *Würde der Kreatur* have theological roots.¹⁸ Even if its content

¹¹ See Rainer J. Schweizer, in: Bernhard Ehrenzeller, Philippe Mastronardi, Rainer J. Schweizer & Klaus A. Vallender (editors), *Die schweizerische Bundesverfassung, Kommentar*, 2nd ed., Zürich/Basel/Genf 2008, Art. 120 BV para. 17.

¹² Philippe Mastronardi, in: Bernhard Ehrenzeller, Philippe Mastronardi, Rainer J. Schweizer & Klaus A. Vallender (editors), *Die schweizerische Bundesverfassung, Kommentar*, 2nd ed., Zürich/Basel/Genf 2008, Art. 7 BV para. 11.

¹³ See Saladin & Schweizer, *supra* note 10, at para. 114; Philipp Balzer, Klaus Peter Rippe & Peter Schaber, *Menschenwürde vs. Würde der Kreatur*, 2nd ed., München 1999, at 35: “Biocentrism regards *all* living things and *only* living things as objects of moral considerations”; further Stohner, *supra* note 10, at 100.

¹⁴ The official English translation of the Swiss Federal Constitution, which has no legal force, takes a middle path through the French and German versions of the phrase, rendering it as “dignity of living beings” – the literal translation would be “dignity of the Creature.”

¹⁵ *Federal Ethics Committee on Non-Human Biotechnology ECNH*, <http://www.ekah.admin.ch/en/index.html> (last visited April 10, 2011).

¹⁶ *Federal Ethics Committee on Non-Human Biotechnology ECNH*, Stellungnahme vom März 2000 according the French version of Art. 120 Const.

¹⁷ § 1 Sentence 1 of the German Animal Protection Law reads: “As derived from humans' responsibility toward animals as their fellow creatures, the purpose of this law is to protect the lives and well-being of the latter.”

¹⁸ Klaus Peter Rippe, *Ethik im ausserhumanen Bereich*, Paderborn 2008, at 67; for a more detailed history of the concept of dignity, see Heike Baranzke, *Würde der Kreatur? Die Idee der Würde im Horizont der Bioethik*, Würzburg 2002, at 286 et seq.

cannot be theologically defined in a secular legal system, the phrase itself – *Würde der Kreatur* – has the emotional and symbolic power of a religious tenet.¹⁹

Various authors have come to grips with the notion of the dignity of the Creature in an attempt to nail it down conceptually.²⁰ In the literature treating the subject, there are, roughly speaking, two opposing schools of interpretation when it comes to the essential meaning of the dignity of the Creature. Whereas certain authors draw an analogy between the dignity of the Creature and that of humans,²¹ other authors make a conceptual distinction between the two.²² But irrespective of whether the dignity of the Creature is compared to or distinguished from that of human beings, the notion of human dignity itself has become central to the current debate:

Human dignity is – according to prevailing opinion – based on natural law and not on positive law and is thus anterior to and independent of the state decision-making process and the value judgments pertaining thereto.²³ Human dignity is a fundamental guarantee that human beings will be dealt with as independent subjects and the concept perforce forbids their degradation to the level of mere objects;²⁴ it protects a person in terms of “his or her inherent value and individual uniqueness and, where applicable, otherness;”²⁵ moreover, it is an unconditional right.²⁶ The constitutional guarantee of human dignity in a pluralistic society forms

¹⁹ Rippe, *supra* note 18, at 67.

²⁰ But highly conspicuous is the fact that in those standard works on the Federal Constitution the dignity of the Creature would seem to lead a shadowy existence; the topic is oftentimes not even addressed; and if it is addressed only in the most rudimentary fashion.

²¹ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999 SR 101, art. 7 (Switz.): “Human dignity must be respected and protected.”

²² Peter Kunzmann addresses the various viewpoints in detail: Kunzmann, *Die Würde des Tieres – zwischen Leerformel und Prinzip*, Freiburg/München 2007, *passim*.

²³ Philippe Mastronardi, *Menschenwürde als materielle „Grundnorm“ des Rechtsstaates?*, in: Daniel Thürer, Jean-François Aubert & Jörg Paul Müller (editors), *Verfassungsrecht der Schweiz*, Zürich 2001, at § 14 para. 8; Ina Praetorius & Peter Saladin, *Würde der Kreatur*, Gutachten, Bern 1996, at 29.

²⁴ Mastronardi, *supra* note 12, Art. 7 BV para. 42; Ulrich Häfelin, Walter Haller & Helen Keller, *Schweizerisches Bundesstaatsrecht*, 7th edition, Zürich 2008, at para. 335c; Jean-François Aubert & Pascal Mahon, *Petit commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999*, Zürich 2003, Art. 7 BV para. 5; For this view of human dignity, *see also* Günter Dürig’s established formulation in which human dignity as such is injured when the concrete individual is debased to the level of a mere object and means to an end; Günter Dürig, *Der Grundrechtssatz von der Menschenwürde. Entwurf eines praktischen Wertesystems der Grundrechte aus Art. 1 Abs. I in Verbindung mit Art. 19 Abs. II des Grundgesetzes*, in: *Archiv des öffentlichen Rechts* 81 (1956), 117 et seq., at 127; of course this established wording fell prey to criticism because human beings are often not only mere victims of circumstance but also objects of the law and must submit to it regardless of their own personal interests, whereas this established wording allows for only a limited ability to orient oneself; on this debate, *see* Engi, *supra* note 10 at 662 with further remarks.

²⁵ Swiss Federal Supreme Court, *decision No. 127 I 6 et seq.*, at 14 et seq.; Jörg Paul Müller & Markus Schefer, *Grundrechte in der Schweiz: im Rahmen der Bundesverfassung, der EMRK und der Uno-Pakte*, 4th ed., Bern 2008, at 1 et seq.

²⁶ Regina Kiener & Walter Kälin, *Grundrechte*, Bern 2007, at 113.

the philosophical and normative basis of all fundamental rights and freedoms²⁷ and serves as a “portal to the admission of extra-legal valuations in the law.”²⁸ Human dignity dictates a prohibition against the use of human beings simply as means to an end (e.g. so as to promote the common good), demanding that they always be considered ends in themselves.²⁹ The dignity inherent to human beings means that they are in and of themselves of value and do not merely assume such value when used for purposes alien to their own inherent value.³⁰ Human dignity is entitled to absolute and unrestricted protection³¹ and may not be compromised in any political weighing of interests. The basic imperatives entailed in human dignity³² – for example the prohibition against torture and any other form of cruel, inhuman or degrading treatment or punishment,³³ banishment of the death penalty³⁴ as well as equality before the law or the prohibition against discrimination³⁵ – are wholly independent of whatever political or other interests which might be at stake.³⁶

Certain authors emphasize that the core concept of *Würde*, or dignity, is invariably connected with the imperative to desist.³⁷ Consequently, the dignity of the Creature is also to be understood in this sense – as the dictate to always and everywhere refrain from certain actions and to forbear from bringing any political

²⁷ Thomas Fleiner, Alexander Mistic & Nicole Töpferwien, *Swiss Constitutional Law*, Berne 2005, at para. 479; Markus Schefer, *Die Kerngehalte von Grundrechten. Geltung, Dogmatik, inhaltliche Ausgestaltung*, Bern 2001, at 5; René A. Rhinow & Markus Schefer, *Schweizerisches Verfassungsrecht*, 2nd ed., Basel 2009, at para. 168; *see also* Bernhard Rütsche, *Rechte von Ungeborenen auf Leben und Integrität. Die Verfassung zwischen Ethik und Rechtspraxis*, Zürich/St. Gallen 2009, at 290: “Thus does human dignity form the basis of the right to life and personal integrity, at least as concerns the core areas pertaining to these rights. (...) Someone possesses the right to life and personal integrity *because* he possesses human dignity. By extension, someone possesses the right to life and personal integrity *if* he has human dignity. Therefore, creatures who possess human dignity also possess the right to life and personal integrity.”

²⁸ Mastronardi, *supra* note 23, at § 14 para. 7.

²⁹ This understanding of the concept of dignity goes back to the Enlightenment, in particular to Immanuel Kant. *See* Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*, edited by Theodor Valentiner, Stuttgart 2008, 63 et seq. (originally published in 1786); Kurt Seelmann, *Rechtsphilosophie*, 4th ed., München 2007, at § 12 para. 5; Rhinow & Schefer, *supra* note 27, at para. 163; Mathias Mahlmann, *Rechtsphilosophie und Rechtstheorie*, Baden-Baden 2010, at § 28 para. 24.

³⁰ Praetorius & Saladin, *supra* note 23, at 29.

³¹ Mastronardi, *supra* note 12, Art. 7 BV para. 52; Fleiner, Mistic & Töpferwien, *supra* note 27, at para. 559; Kiener & Kälin, *supra* note 26, at 116.

³² Cf. Häfelin, Haller & Keller, *supra* note 24, at para. 335c; Schefer, *supra* note 27, at 29.

³³ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999 SR 101, art. 10 par. 3.

³⁴ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999 SR 101, art. 10 par. 1.

³⁵ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999 SR 101, art. 8 par. 2: “No one may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability.”

³⁶ *See* Mastronardi, *supra* note 12, Art. 7 BV para. 44.

³⁷ But according to Rippe, the idea of the absolute imperative to desist, even in relation to human dignity, cannot be intersubjectively justified; *see* Rippe, *supra* note 18, at 77 et seq.

weighing of interests to bear.³⁸ Because consistency would dictate that the Federal Constitution not use the concept of “dignity” in two completely different ways, the dignity of the Creature and that of human beings necessarily share the same essential meaning.³⁹ As with human dignity, the dignity of the Creature is thus “to be understood as the specific inherent value and worth of animals and plants – as ‘integrity’.”⁴⁰ This interpretation of the dignity of the Creature – even if, like human dignity, it were only linked to a very elemental protection – would have far-reaching effects on our interaction with non-human beings. Their exclusive and total instrumentalization for our own human purposes – e.g. the keeping of farm animals on a mass scale and the utilization of animals in experiments – would not be consonant with any such understanding of dignity.⁴¹ The constitutional recognition of the dignity of the Creature would then have concrete effects in terms of legal policy on the forms of permissible uses to which animals are put.

Because of the far-reaching consequences of a dignity of the Creature that is understood in just this way, certain other authors assert that the dignity of the Creature concept should in fact be viewed in a way that is fundamentally different from the concept of human dignity.⁴² In particular, the dignity of the Creature – according to them – has no absolute value and therefore is open to any considered weighing of interests.⁴³ Furthermore, use of the phrase “take account of” in the relevant constitutional provision is indicative of the fact that the dignity of the Creature has no absolute applicability.⁴⁴

Depending on the precise form of argumentation, the categorial difference between human dignity and that of the Creature is based on the law’s anthropocentric orientation, according to which only members of the human species can possess

³⁸ Rippe, *supra* note 18, at 70.

³⁹ Schweizer & Saladin, *supra* note 10, Art. 24novies Abs. 3 para. 116; Engi, *supra* note 10, at 674 et seq.; he indicates further that even with recognition of fundamentally equal portions of dignity allotted to humans, animals and plants, there could still be no justification for equal legal claims – it is here that further distinctions are admissible, e.g. based on the varying capacities for suffering among humans, animals and plants; for a similar view, *see also* Stohner, *supra* note 10, at 100 et seq.; further Hermann Geissbühler, *Die Kriterien der Würde der Kreatur und der Menschenwürde in der Gesetzgebung zur Gentechnologie*, ZBJV 2001, at 230 et seq.

⁴⁰ Saladin & Schweizer, *supra* note 10, Art. 24novies Abs. 3 BV para. 116.

⁴¹ *See* Andreas Brenner, *UmweltEthik. Ein Lehr- und Lesebuch*, Fribourg 2008, at 171 et seq.; Engi, *supra* note 10, at 675 et seq.; Saladin & Schweizer, *supra* note 10, Art. 24novies Abs. 3 BV para. 116; Praetorius & Saladin, *supra* note 23, at 44; Antoine Goetschel, *Würde der Kreatur als Rechtsbegriff und rechtspolitische Postulate* daraus, in: Martin Liechti (editor), *Die Würde des Tieres*, Erlangen 2002, 141 et seq., at 144 et seq.

⁴² As noted by Balzer, Rippe & Schaber, *supra* note 13, at 41 et seq.; Rhinow & Schefer, *supra* note 27, at para. 169; *see further* Schefer, *supra* note 27, at 23 et seq.

⁴³ As noted by Aubert & Mahon, *supra* note 24, Art. 120 BV para. 9; Balzer, Rippe & Schaber, *supra* note 13, at 48; Andreas Kley, *Menschenwürde als Rechtsprinzip? Überlegungen zur Rolle der Menschenwürde als Argument in rechtlichen und politischen Verfahren*, in: Rainer C. Schwinges (editor), *Veröffentlichungen der Gesellschaft für Universitäts- und Wissenschaftsgeschichte*, Bd. 10, 259 et seq., at 270 et seq.

⁴⁴ Praetorius & Saladin, *supra* note 23, at 44; Stohner, *supra* note 10, at 100.

dignity in an absolute sense,⁴⁵ self-consciousness being the prerequisite for self-respect⁴⁶ as well as the human-immanent⁴⁷ capacity for reason and the potential for exercise of freedom of the will (autonomy).⁴⁸ Engi conclusively derives human dignity from the “indisposability” of humans – humans are beings that have become what they are and are not human products per se, and this becomingness is based on an extrapositive value that is not only to be respected but which ultimately forms the basis of their dignity.⁴⁹ But – as he argues – it is precisely this prerequisite that would apply to animals, for they too are not of human manufacture but rather living beings and thus, at core, likewise “indisposable.”⁵⁰ Like human dignity, therefore, the dignity of the Creature is a form of inherent dignity.⁵¹

In a joint statement of the Federal Ethics Committee on Non-Human Biotechnology (ECNH) and the Swiss Committee on Animal Experiments (SCAE) the attempt was made to concretize the dignity of the Creature in the following way:

Against the concept that humans alone are entitled to dignity and protection, the discussion concerning the dignity of Creation stands as a corrective to the immoderate and arbitrary way in which humans treat the rest of nature. Humans are required to show respect and restraint in the face of nature, due to their own interest in sustainable

⁴⁵ See e.g. Schefer, *supra* note 27, at 23 et seq.: “The understanding here is that all law ultimately concerns itself with human beings; it legitimizes itself insofar as it guarantees protection of the dignity of each and every human. This anthropocentric understanding of law and in particular fundamental rights clearly shows that the “dignity of the Creature” in article 120, paragraph 2 BV is ascribed a fundamentally different status than the human dignity of article 7 Const.: The defense of the “dignity of the Creature” remains instrumental for the defense of human dignity and is not some second, coordinated and at the same time fundamental and legitimizing topos of all law. From a practical standpoint this can be seen in the fact that in weighing the preservation of human dignity and an incursion on the integrity of an animal or plant, it is always the former – as a guarantee of that which is fundamental and inalienable – which takes precedence.” However, this legitimization of human dignity through reference to the particular species to which a being belongs exposes itself to accusations of speciesism – and with good reason; cf Seelmann, *supra* note 29, at 210 et seq.

⁴⁶ This according to Balzer, Rippe & Schaber, *supra* note 13, at 41 et seq., according to which Great Apes such as chimpanzees, bonobos, gorillas and orangutans are ascribed self-consciousness but no normative concept of individual personhood which might be transcribed with the concept of self-respect; see Rhinow & Schefer, *supra* note 27, at para. 169, who sees the basis of human dignity in his capacity for self-respect, something of which only human beings and – as he himself concedes – chimpanzees are capable. But it remains an open question as to why this characteristic – which, according to his own understanding of it, is not even human from a purely species-specific standpoint – should form the basis of a categorical difference between human dignity and the dignity of the Creature.

⁴⁷ It is evident that a recognition of human dignity cannot be based on individual characteristics such as reason or autonomy because otherwise a large part of humanity would then forfeit their human dignity and the right to life and personal integrity upon which it is funded.

⁴⁸ See Mahlmann, *supra* note 29, § 28 para. 6, para. 42 ff.

⁴⁹ Engi, *supra* note 10, at 665 et seq.

⁵⁰ See Engi, *supra* note 10, at 673 et seq.

⁵¹ Balzer, Rippe & Schaber, *supra* note 13, at 39.

resources as well as by dint of the inherent value ascribed to a fellow living creature. Living creatures should be respected and protected for their own sake.

In summary, one can safely assert that no single and uniform understanding of the content of the constitutional concept of the dignity of the Creature has as of yet crystallized.⁵² Nevertheless, prevailing legal opinion is that protection of the dignity of the Creature necessitates respect for the inherent value of animals (and in certain cases, even plants).⁵³ This inherent value is neither based upon nor exhausts itself in considerations as to what use animals can be put to by humans;⁵⁴ rather, it respects animals in their own being and otherness. The Business Review Commission of the Upper Chamber formulated the issue in the following way:

Animals are to be treated neither as humans nor as things but in accord with their dignity as living beings and according to the autonomous standard of their own needs. It is in this regard that their feelings are to be respected, their suffering reduced or avoided altogether, and their will to live respected. This emanates, for example, in their restrictive usage by humans.⁵⁵

Even if the balancing of legally protected interests were to be judged as harmoniously with a respect for the dignity of the Creature, it would, in no case be permissible to grant human interests a general and absolute precedence.⁵⁶ Such would undermine the quintessence of the dignity of the Creature and reduce it to an empty phrase. Praetorius and Saladin only recognize such justifications for encroachments on the dignity of the Creature as being appropriate when these are unavoidable and are matters of life and death: “Because if humans and non-human creatures are ascribed ‘value in and of themselves’ then human beings may only in principle seriously impair the life of other creatures if they would otherwise feel their own existence to be threatened.”⁵⁷ Recognition of the dignity of the Creature

⁵² See Schweizer, *supra* note 11, Art. 120 BV para. 16.

⁵³ Statement of the Federal Ethics Committee on Non-Human Biotechnology ECNH, The Dignity of Living Beings with Regard to Plants: Moral Considerations of Plants for Their Own Sake, retrievable at <http://www.ekah.admin.ch/en/documentation/publications/index.html> (last visited April 10, 2011).

⁵⁴ Mastronardi, *supra* note 12, Art. 7 BV para. 10; Stohner, *supra* note 10, at 102.

⁵⁵ Business Review Commission of the Upper Chamber on „enforcement problems in animal welfare“, November 1993, BBl 1994 I 618 et seq., at 5.

⁵⁶ Schweizer, *supra* note 11, Art. 120 BV para. 16; joint statement by the Swiss Ethics Committee on Non-Human Gene Technology (ECNH) and the Swiss Committee on Animal Experiments (SCAE), The Dignity of Animals, retrievable at <http://www.ekah.admin.ch/en/topics/dignity-of-living-beings/index.html> (last visited April 10, 2011);

⁵⁷ Praetorius & Saladin, *supra* note 23, at 44; likewise Beat Sitter-Liver, Würde der Kreatur: Grun-

forbids the exploitation of the animal and plant world *solely* for extrinsic purposes – and thus “human dignity and the dignity of the Creature are coherent in their programmatic content, which strives to achieve a life-form in which all of life should be respected and protected.”⁵⁸

It is through the recognition of the dignity of the Creature that one can at least derive the fundamental protection of life, for recognition of a living being and its own inherent value presupposes a recognition of that being’s right to existence.⁵⁹

The concept of animal dignity first emerged in two recent verdicts of Switzerland’s highest court, the Swiss Federal Supreme Court, in October 2009.⁶⁰ These were judgments with respect to animal testing, and it was here that the Tribunal invoked the principal of the *dignity of animals* for the very first time:

Even if it [the dignity of animals] cannot and should not be equated with human dignity, this indeed requires that natural creatures, at least to a certain degree, be regarded and valued as being of equal stature with humans. . . . The consanguinity existing between the dignity of animals and that of humans can be seen in particular with regard to non-human primates.⁶¹

Thus, the Swiss Federal Supreme Court does not equate the dignity of animals with that of human beings, while at the same time not drawing any categorical distinctions between the two conceptions but simply emphasizing their affinity. According to the Swiss Federal Supreme Court, this affinity is particularly pronounced in the case of non-human primates. This argumentation of course brings up the question as to whether the Federal Supreme Court regards this affinity, i.e. similarity, to humans as reason for stronger protections afforded by the concept of the dignity of animals – that is, the more that an animal is similar to human beings in terms of its cognitive ability, the more the protective sphere of the dignity of animals would be adapted to the protective sphere of human beings. Conversely this would also mean that animals whose cognitive ability is distinctly less than that of humans would still only be able to enjoy an attenuated protection of dignity. This hierarchization according to the prerequisite of similarity would to some degree contradict the concept of dignity as something that animals possess in and of

dlegung, Bedeutung und Funktion eines neuen Verfassungsprinzips, in: Julian Nida-Rümelin & Dietmar von der Pfordten (editors), *Ökologische Ethik und Rechtstheorie*, Baden-Baden, 1995, 355 et seq., at 363.

⁵⁸ Mastronardi, *supra* note 12, Art. 7 BV para. 10 with references; similar also Stohner, *supra* note 10, at 102.

⁵⁹ See also Stohner, *supra* note 10, at 109; Peter Krepper, *Zur Würde der Kreatur in Gentechnik und Recht*, Basel/Franfurt am Main 1998, at 389; Dietmar von der Pfordten, *Die moralische und rechtliche Berücksichtigung von Tieren*, in: Julian Nida-Rümelin & Dietmar von der Pfordten (editors), *Ökologische Ethik und Rechtstheorie*, Baden-Baden 1995, 231 et seq., at 243 et seq.

⁶⁰ Swiss Federal Supreme Court, decision No. 135 (2009) II 385 et seq. and No. 135 (2009) II 406 et seq.

⁶¹ Swiss Federal Supreme Court, decision No. 135 (2009) II 385 et seq., at 403.

themselves and through the inherent value of their very *otherness* – which of course would be independent of any similarity to humankind. Even if this gradation of protections can be discussed, in our view the concept of the dignity of the Creature would be better served were it to be linked with a creature’s capacity for suffering – as opposed to its genetic and sensory-physiological relatedness to human beings. It remains to be seen how case law might further nuance the concept of the dignity of the Creature.

B. The Protection of Animals as a Constitutional Task and a Federal Animal-Protection Law

1. Overview

It is only since 1981 that Switzerland has had a federal animal-protection law, namely the Swiss Federal Animal Protection Act (hereinafter TSchG). This is based on a constitutional amendment that was passed with a clear majority by the Swiss people and the various cantons (Article 25a of the old Constitution; Article 80 of the revised Constitution), which grants the federal government extensive powers to enact provisions in the sphere of animal-protection. The federal government is thereby both empowered and commissioned with enacting regulations for the protection of animals, in particular laws concerning the keeping and care of animals, experiments on animals, procedures carried out on living animals, the use of animals, the import of animals and animal products, the trade in animals and transport of animals, and the killing (including slaughter) of animals. We are dealing here with an endless list of areas which must be regulated. According to prevailing legal opinion, on the basis of this constitutional provision animal protection in Swiss law is a legally protected interest with constitutional status,⁶² enforcement of the regulations shall be the responsibility of the cantons, except where the law reserves this power to the federal government.

The First Federal Animal Protection Act of March 9, 1978 was wholly in the tradition of pathocentric animal protection, its primary goal being the avoidance of “unjustifiable suffering.”⁶³ The law’s implementary regulations were laid out in an Animal Protection Ordinance (hereinafter TSchV). The First Federal Animal Protection Act of March 9, 1978 and the accompanying Animal Protection

⁶² Antoine F. Goetschel & Gieri Bolliger, *Das Tier im Recht*, Zürich 2003, at 199; see further Andreas Steiger & Rainer J. Schweizer, *Kommentierung von Art. 80 BV*, in: Bernhard Ehrenzeller, Philippe Mastraonardi, Rainer J. Schweizer & Klaus A. Vallender (editors), *Die schweizerische Bundesverfassung, Kommentar*, 2nd ed., Zürich/St. Gallen 2008, at para. 6.

⁶³ See Art. 2 par. 3 Animal Protection Act (9. März 1979), in effect until October 31, 2008: «No one is authorised to cause an animal pain, suffering or impairment or to frighten it without justification.» The term «unjustifiable suffering» indicates that it is a matter of weighing of interests – consequently, there are actions which inflict suffering on an animal, but are at the same time justified by the Animal Protection Act of March 9, 1978. This of course doesn’t justify these actions from an ethical point of view; cf. also Gieri Bolliger, Antoine F. Goetschel, Michelle Richner & Alexandra Spring, *Tier im Recht transparent*, Zürich 2008, at 10.

Ordinance of May 27, 1981 remained in force. On September 1, 2008, after more than a decade of preliminary work, the completely revised and current version of the Animal Protection Act (TSchG)⁶⁴ and the attendant Animal Protection Ordinance (TSchV)⁶⁵ entered into force. According to article 1 of TSchG, along with *protecting the welfare of animals*, the law affords explicit *protection of their dignity*; however, in contrast to Switzerland's German-speaking neighbors,⁶⁶ the law only applies to vertebrates (mammals, birds, reptiles, amphibians, fish), cephalopods (octopuses and squids) and crustaceans (lobsters and crabs).⁶⁷ The decisive factor as to whether an invertebrate comes within purview of the Animal Protection Act is determined by scientific findings (which are of course controversially discussed⁶⁸) regarding the degree of sentience in invertebrates, which reveals the new law's close coupling with the capacity for suffering rooted pathocentric protection of animals.⁶⁹

The Animal Protection Act contains fundamental provisions regarding the keeping, breeding, and genetic modification of animals. It addresses the trafficking and transport of animals as well as pain-engendering procedures on animals such as experiments and other research, as well as animal slaughter. It naturally elaborates the sanctions to be imposed for violations of the Animal Protection Act (administrative measures and penal provisions).

The detailed provisions can be basically found in the Animal Protection Ordinance, but the Animal Protection Act itself contains a fair amount of individual provisions because the cantons as well as the animal-protection organizations – with their eye to both greater co-determination⁷⁰ and uniform enforcement of the law – had expressed their desire⁷¹ that, in terms of animal protection, there should be essential individual stipulations regulated at the level of the law itself.⁷²

In contrast to the previous version, the new law contains certain legal definitions; for example, in article 3 TSchG the welfare of animals is biologically defined as their keeping and feeding in a manner suitable to their bodily functions and behavior.

⁶⁴ Tierschutzgesetz vom 16. Dezember 2005, retrievable at <http://www.admin.ch/ch/d/sr/c455.html> (in german only). (last visited April 10, 2011).

⁶⁵ Tierschutzverordnung vom 23. April 2008, retrievable http://www.admin.ch/ch/d/sr/c455_1.html (in german only). (last visited April 10, 2011).

⁶⁶ Germany has a more nuanced law for the various groups of animals. The Austrian animal-protection law basically covers all animals, i.e. also invertebrates; see Antoine F. Goetschel & Gieri Bolliger, *Tierethik und Tierschutzrecht – Plädoyer für eine Freundschaft*, in: *Interdisziplinäre Arbeitsgemeinschaft Tierethik* (editors), *Tierrechte – Eine interdisziplinäre Herausforderung*, Erlangen 2007, at 185.

⁶⁷ Art. 2 par. 1 TSchG combined with Art. 1 TSchV.

⁶⁸ Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 8.

⁶⁹ See *Botschaft Tierschutzgesetz*, *supra* note 7, at 674; *Erläuterungen des Bundesrates der einzelnen Bestimmungen der Tierschutzverordnung*, at 1.

⁷⁰ Federal statutes as the Animal Protection Act are – in contrast to the Animal Protection Ordinance – subject to optional referendum; see Haller, *supra* note 3, at 228 and *supra* sec. I.

⁷¹ During the consultation procedure, all cantons, political parties, associations and other groups with particular interests in the subject matter are invited to express their views; see Haller, *supra* note 3, at 229 et seq.

⁷² See *Botschaft Tierschutzgesetz*, *supra* note 7, at 659.

Furthermore, the animals must be able to behave in a way that is consistent with their species, they must be clinically healthy, and their pain, suffering, and harm must be avoided. Article 4 TSchG also lays down the principle that those who deal with animals must accommodate the animals' needs to the best of their ability and care for the animals' welfare – only insofar as the animal's "designated use" (this the disturbing but revealing term used by the law) permits it. The keeping of farm animals en masse and animal experiments, naturally within certain limitations, are thus essentially permissible along with any attendant suffering of the animals.⁷³ Therefore, the new animal protection law only prohibits the infliction of pain, suffering, or harm on animals; provoking anxiety in animals; or in any way infringing on the animal's dignity when this act would be "unjustified" – that is, without the presence of sufficient legal justification. Requisite here is a balancing of legally protected interests with primarily human interests in each particular case. Grounds of justification include legal permission for a certain action or the presence of a situation that calls for self-defense or some other state of emergency.⁷⁴ In addition, animals may not be mistreated, neglected, or overstrained; any violations in this regard are to be punished as cruelty to animals.⁷⁵ Further detailed provisions – for instance the prohibition on tethering animals for extended periods of time⁷⁶ or the prohibition on cropping the tail and ears on dogs⁷⁷ – can be found in the Animal Protection Ordinance.

In revising the Animal Protection Act, in particular those parts addressing the keeping and treatment of pets, long needed modifications were undertaken with regard to findings of modern behavioral research. For example, greater emphasis is placed on animals' need for social contact. The legislators also undertook the revision so as to improve what was recognized as insufficient enforcement of the animal-protection provisions.⁷⁸ But unfortunately the conscious decision was made not to seize this opportunity and heighten the general level of protection afforded animals in the Animal Protection Act.⁷⁹

⁷³ In the Animal Protection Ordinance there are specific *minimum* requirements pertaining to the keeping and accommodation of animals. It is through the determined enforcement of these provisions that the living conditions of many animals can be substantially improved; but enforcement is still lax in many cantons, as verified by the Foundation for the Animal in the Law in its 2008 analysis of Swiss enforcement of animal protection: Bolliger/Richner/Gerritsen, *Schweizer Tierschutzstrafpraxis 2008, Sechster auswertender Jahresbericht über die Tierstraffälle-Datenbank der Stiftung für das Tier im Recht (TIR)*, Zürich, 23. September 2009, at 15 et seq.

⁷⁴ See Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 10.

⁷⁵ *Infra*, III.B

⁷⁶ TIERSCHUTZVERORDNUNG (TSCHV), ART. 3 PAR. 4 (2008).

⁷⁷ TIERSCHUTZVERORDNUNG (TSCHV), ART. 22 PAR 1 LIT. A (2008).

⁷⁸ See Botschaft Tierschutzgesetz, *supra* note 7, at 662 et seq., 665 et seq.; Business Review Commission of the Upper Chamber on "enforcement problems in animal welfare", *supra* note 55, at 618 et seq.

⁷⁹ As noted explicitly and repeatedly by the Federal Council, see Botschaft Tierschutzgesetz, *supra* note 7, at 659.

2. Protection of the Dignity of Animals

The Federal Animal Protection Act takes up the constitutional mandate in article 1 TSchG, where there is explicit protection afforded the dignity of the animal.⁸⁰ In article 3a TSchG, one also finds this concept legally defined; the dignity of the animal, as employed in the Animal Protection Act, means that the “inherent value” of the animal must be respected:

The dignity of the animal is regarded as having been violated if the animal’s burdening cannot be justified through preponderant interests. An animal is considered as being burdened, in particular, when pain, suffering or harm is inflicted upon it, or when it is caused to have anxiety or is debased, when its phenotype or its capabilities are profoundly impinged or if it is unduly exploited.

In the revised Animal Protection Act the concept of “the dignity of animals” thus continues to encompass those classic aspects of the animal-protection law such as the absence of pain, suffering, harm, and anxiety, but it goes even further by including not only the biological aspects of this protection but the ethical ones.⁸¹ But in the Animal Protection Act the legislators decided for those of the aforementioned conceptions of dignity that are susceptible to a weighing of interests. According to the Animal Protection Act, the dignity of animals is only violated when burdening the animal cannot be justified through “preponderant interests.” In contrast to human dignity, and according to the Animal Protection Act, the dignity of animals is given only a relative weight.⁸² In the opinion of the Swiss Federal Council it is presently impossible to define “dignity” in a more precise way – rather, it must be decided, on a case-by-case basis, and after a careful balancing of legally protected interests, whether or not an animal’s dignity has been violated.⁸³

But within the Animal Protection Regime itself, certain clarifications of animal dignity can be found. Certain excesses in animal breeding⁸⁴ or sexually motivated dealings with animals⁸⁵ injure the dignity of animals and are therefore prohibited. For instance, debasing an animal can consist in exhibiting it in such a way as to make it look ludicrous (e.g. dressed up in human clothes) or in training it to perform unnatural stunts so as to serve as a source of amusement or merriment for the public.⁸⁶ Violation of the dignity of animals is punishable as an act constituting cruelty to animals.⁸⁷

⁸⁰ The French version of the law likewise speaks of the “dignité de l’animal.”

⁸¹ Botschaft Tierschutzgesetz, *supra* note 7, at 674.

⁸² See Rütsche, *supra* note 27, at 310.

⁸³ See Botschaft Tierschutzgesetz, *supra* note 7, at 675.

⁸⁴ TIERSCHUTZGESETZ (TSCHG), ART. 10 PAR. 2 (2008).

⁸⁵ TIERSCHUTZVERORDNUNG (TSCHV), ART. 16 PAR. 2J (2008).

⁸⁶ See Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 18.

⁸⁷ TIERSCHUTZGESETZ (TSCHG), ART. 26 PAR. 1A (2008). See *infra* III.B.

3. No Protection of Life

In contrast to the animal-protection laws in the German-speaking world (Germany⁸⁸ and Austria⁸⁹) and to some degree in contrast to protection of the dignity of the Creature,⁹⁰ in the Swiss Animal Protection Act there is regrettably no protection for the life of the animal. This means that the killing of an animal is still fundamentally allowed so long as it remains within the parameters of the Animal Protection Act, and it requires no further justification. For instance, it is forbidden to kill animals in a way that inflicts anguish on them⁹¹, which is why the killing of vertebrates may only be undertaken by persons with the requisite knowledge and ability⁹². Vertebrates may only be killed if they are first placed under anaesthesia,⁹³ and with mammals the anaesthesia must be administered before it is bled to death⁹⁴, which excludes the ritual killing of animals undertaken without benefit of anaesthesia in certain belief systems.⁹⁵ Furthermore, the wanton killing of animals

⁸⁸ § 17 of the German animal protection law prohibits the killing of vertebrate animals without reasonable justification. The punishment is a prison sentence of up to three years or a fine; for the concept of “reasonable justification” see Ort/Reckewell, *Kommentierung von § 17*, in: Hans-Georg Kluge (editor), *Tierschutzgesetz, Kommentar*, Stuttgart 2002, § 17 para. 160 et seq.

⁸⁹ § 1 in combination with § 6 of the Austrian animal protection law forbids the killing of animals without “reasonable justification”. Moreover, it is also prohibited to kill dogs or cats so as to produce food or other products; for a more detailed discussion of this provision, see Regina Binder & Wolf-Dietrich Freiherr von Fircks, *Das österreichische Tierschutzrecht. Tierschutzgesetz und Verordnungen mit ausführlicher Kommentierung*, 2nd ed., Wien 2008.

⁹⁰ The legislators have explicitly accepted the fact that there is a tension between the protection of the dignity and welfare of animals on the one hand and the lack of protection of their lives on the other; see *Botschaft Tierschutzgesetz*, *supra* note 7, at 674; for example, Goetschel & Bolliger allude to the fact that a fundamental protection for animals’ lives can presently be derived from the constitutional principle of the dignity of the Creature; Goetschel & Bolliger, *supra* note 66, 186; the dignity of the Creature is discussed in detail above, section II.A.

⁹¹ TIERSCHUTZGESETZ (TSCHG), ART. 26 PAR. 1B (2008).

⁹² TIERSCHUTZVERORDNUNG (TSCHV), ART. 177 PAR. 1 (2008).

⁹³ TIERSCHUTZERORDNUNG (TSCHV), ART. 178 PAR. 1 (2008); *But see* TIERSCHUTZVERORDNUNG (TSCHV), ART. 178 PAR 2 LIT. B & ART. 185 PAR. 4 (2008) (exceptions including the killing of vertebrates when hunting and ritual killing of poultry).

⁹⁴ TIERSCHUTZGESETZ (TSCHG), ART. 21 (2008).

⁹⁵ In Switzerland the ban on religious slaughter without anaesthesia has been enshrined in the constitution since 1892 when a national referendum decided the issue against the will of parliament and the Swiss Federal Council. In the total revision of the Animal Protection Act, the Federal Council – for reasons of religious freedom – provided for a relaxing of the prohibition on religious slaughter in the preliminary draft; but then – because of the overwhelming rejection of this proposal in the Swiss legislative process by consultation with the cantons, animal protection organizations and the general public – the Federal Council finally decided against it (see *Botschaft Tierschutzgesetz*, *supra* note 7, at 679). In Switzerland the prohibition against religious slaughter without anaesthesia is still a contested point among scholars and, to a degree, jurists, as it concerns the conflicting claims of the protection of animals and religious freedom; see e.g. Yvo Hangartner, *Rechtsprobleme des Schächtverbots. Zugleich ein Beitrag zur Ungültigerklärung eidgenössischer Verfassungsinitiativen wegen Verletzung faktisch zwingenden Völkerrechts*, *Aktuelle Juristische Praxis (AJP)* 2002, at 1022 et seq.; Sibylle Horanyi, *Das Schächtverbot zwischen Tierschutz und Religionsfreiheit*, Basel 2004.

is forbidden as well as the carrying out of contests in which the animals are killed or caused to suffer anguish, for example dogfights.⁹⁶

4. Enforcement of the Animal Protection Act – the Sanction System

For all violations of the Animal Protection Act there is a two-track system of penalties applied. On the one hand there is the so-called administrative protection of animals, and on the other hand the law contains sanctions such as the elements of the offense of cruelty to animals, which is prosecuted by the penal authorities (penologic animal protection). Primarily responsible for enforcement of the provisions on the keeping of animals are the cantonal enforcement agencies and, as a rule, the cantonal veterinary services. In carrying out this task, the veterinary services have the authority to effect administrative measures and to impose administrative means of coercion.⁹⁷ For example, the Animal Protection Act says that the most severe administrative measure which can be leveled is that of prohibiting the keeping of animals on the part of someone who has repeatedly or gravely violated the animal's right to protection or who is unqualified to keep animals for whatever other reasons. Such prohibitions against keeping animals are valid throughout Switzerland⁹⁸ and are filed in a central register.⁹⁹ The authorities are obliged to intervene forthwith if they have ascertained that animals are being neglected or are being kept under totally inappropriate conditions¹⁰⁰; in such cases, they can confiscate the animals. If the cantonal veterinary services suspect any violations of the Animal Protection Act, then they file charges¹⁰¹.

The cantonal penal authorities deal with violations of the Animal Protection Act as well as with cruelty to animals¹⁰². Cruelty to animals is a criminal offense liable to public prosecution and is punished with a prison term of up to three years or with a fine¹⁰³. Qualifying as animal abuse is the maltreatment, neglect¹⁰⁴ or unnecessary overwork or overexertion of animals or violation of their dignity, the excruciating killing of animals, the staging of fights between animals in which they are killed or tormented, and the disregard of provisions pertaining to animal experiments as well as exposing an animal.¹⁰⁵ But as the Foundation for the Animal in Law has shown in its annual investigation of Swiss law enforcement of animal protection, at the cantonal level offenses against the Animal Protection Act are prosecuted with varying degrees of intensity.¹⁰⁶ Should there be a conviction,

⁹⁶ TIERSCHUTZGESETZ (TSCHG), ART. 26 PAR 1 (2008).

⁹⁷ See Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 53.

⁹⁸ TIERSCHUTZGESETZ (TSCHG), ART. 23 (2008).

⁹⁹ TIERSCHUTZVERORDNUNG (TSCHV), ART. 212A (2008).

¹⁰⁰ TIERSCHUTZGESETZ (TSCHG), ART. 24 (2008).

¹⁰¹ TIERSCHUTZGESETZ (TSCHG), ART. 24 PAR. 3 (2008).

¹⁰² TIERSCHUTZGESETZ (TSCHG), ART. 26 (2008).

¹⁰³ TIERSCHUTZGESETZ (TSCHG), ART. 26 (2008).

¹⁰⁴ Typical of such violations is leaving dogs in overheated cars; Bolliger, Richner & Gerritsen, *supra* note 73, at 29.

¹⁰⁵ But this is only rarely punished; *Id.* at 32 et seq.

¹⁰⁶ *Id.* at 19 et seq.

despite the wide range of possible sentences, as a rule people are let off with a fine of some several hundred Swiss francs.¹⁰⁷

Along with revision of the Animal Protection Act there was a strengthening of the prevention of violations of the Act. Therefore, as a supplement to the penal system, the federal government stipulated that the public should be educated and informed as to the proper handling of animals, a task that was assigned to the Federal Veterinary Office.¹⁰⁸ Also to be mentioned here, for example, is the compulsory training of dog owners, which is divided into theoretical and practical parts.¹⁰⁹

5. Evaluation

The Animal Protection Act sets limits to the use that humans can make of animals,¹¹⁰ but it does not throw that use into essential question. The range of protections afforded animals remains very unambitious – thus, the provision against the infliction of suffering is restricted owing to its subordination to human interests. Of course, from an international perspective, the revised Animal Protection Act is still relatively progressive;¹¹¹ even so, the Act is the result of a political compromise that would be able to survive an optional referendum, and so the protections it affords the suffering of animals is in our view too limited and – despite certain welcome improvements – fails to keep pace with recent developments.

In particular, it seems to us that – alongside expansion of the standard of protection – the next logical step is establishment of a protection for the life of the animal. Even if the practical impact of such a fundamental protection should not be too highly rated (as can be seen in the case of Austria and Germany), it would at very least be an expression of the change in attitude toward animals in our society. The change from a fundamental, albeit conditional, permission to kill animals to a fundamental prohibition of such with the requirement of justification in the case of violation of this principle – this can reasonably be termed a kind of paradigm shift. It was as early as 1989 that the Swiss Federal Supreme Court stated:

Only a comprehensive protection of the animal's life can do justice to today's ethical notions, and certain exceptions (food production, pest control) cannot unsettle its foundations. As within the scope of the Animal Protection Act, this principle at least applies to vertebrates.¹¹²

¹⁰⁷ Id. at 33 et seq.

¹⁰⁸ Informations on the Federal Veterinary Office are available at <http://www.bvet.admin.ch/index.html?lang=en>. (last visited April 10, 2011) .

¹⁰⁹ TIERSCHUTZVERORDNUNG (TSCHV), ART. 68 (2008).

¹¹⁰ See Botschaft Tierschutzgesetz, *supra* note 7, at 673.

¹¹¹ See Marc Bekoff (editor), *Encyclopedia of Animal Rights and Animal Welfare*, 2nd edition, Santa Barbara 2010, volume 2, at 362.

¹¹² Swiss Federal Supreme Court, decision No. 115 IV 248 et seq., at 254. Of course it is questionable as to whether food production in the present day can still suffice as justification; but in Germany and Austria this is the case.

C. Animal Attorney and the Right to Appeal of Animal Rights Organizations

In order to improve the recognizably inadequate enforcement of the Animal Protection Act, in 1991 the Canton of Zurich introduced the world's first office of the "Attorney for Animal Protection in Criminal Affairs" (Animal Attorney).¹¹³ In criminal prosecutions based on violations of the Animal Protection Law, the Animal Attorney looks after the interests of the animals concerned and represents these in penal proceedings.¹¹⁴ In both the investigatory and main proceedings the Animal Attorney has the same rights as an attorney working on behalf of any aggrieved human; that is, he can search a file, participate in fact-finding activities and trial dates, designate witnesses and experts as well as appeal verdicts and stop notices.¹¹⁵ The Animal Attorney is not bound up with any government authority but acts as a normal and fully independent lawyer.¹¹⁶ In the Canton of Zurich enforcement of the Animal Protection Act improved markedly after introduction of the Animal Attorney.

On March 7, 2010 a referendum took place on an initiative of Swiss Animal Protection to introduce Animal Attorneys throughout Switzerland, but it unfortunately ended in a clear defeat for the initiators (70 percent no-votes) – and the initiative was even rejected in the canton of Zurich (63 percent no-votes). It was from this referendum result that the cantonal health department not only drew the impermissible conclusion that the citizens of Zurich no longer backed the Animal Attorney but it felt thereby entitled to abolish the office of Animal Attorney through this provision's insertion into the initiative for introduction of a new federal code of criminal procedure in so unobtrusive a manner that the cantonal parliament only realized that it had abolished the cantonal Animal Attorney after the election was over.¹¹⁷ The populace was taken aback. From a democratic standpoint, such actions are extremely dubious and testify to a lack of diligence when it comes to handling referendums. There are presently efforts being made to reintroduce the office of Animal Attorney by means of a cantonal initiative. In any event, in the future in the canton of Zurich the cantonal Veterinary Office will look after animal rights. But it is doubtful whether this state post will pursue cases of cruelty to animals with the same determination as the Animal Attorney; inadequate state enforcement was the very reason why the Animal Attorney was created in the first place. And with

¹¹³ For the story behind establishment of the Zurich *Tieranwalt*, see Goetschel, Animal Welfare Legislation in Switzerland, A Report by the Foundation for the Animal in the Law, February 2002, at 7 and Animal Cloning and Animal Welfare Legislation in Switzerland, A Report by the Foundation for the Animal in the Law, September 2001, at 17 (both retrievable at http://www.tierimrecht.org/en/artikel/index.php?we_iv_start_0=10 (last visited April 10, 2011); further Antoine F. Goetschel, Der Zürcher Rechtsanwalt in Tierschutzstrafsachen, Schweizerische Zeitschrift für Strafrecht, Band 12 1994, Heft 1 68 et seq., at 73 et seq.

¹¹⁴ Bolliger, Richner & Gerritsen, *supra* note 73, at 19.

¹¹⁵ *Id.*

¹¹⁶ Daniel Kettiger, Tierschutzanwalt: Was lässt das Bundesrecht künftig noch zu?, Jusletter vom 29. März 2010, at para. 8.

¹¹⁷ See *Endgültiges Aus für den Zürcher Tieranwalt*, NZZ ONLINE, June 30, 2010, http://www.nzz.ch/nachrichten/zuerich/tieranwalt_bundesgesetz_1.6326868.html.

this shakeup much specialized knowledge has been lost. In any event, it will be important to watch closely how the situation develops for the main actors in this drama – the animals.

Other cantons have never had actual independent Animal Attorneys, but they nevertheless have certain procedural laws with regard to animal law that have likewise effected improvements in enforcing the statutes. For example the canton of St. Gallen, where there is a special prosecutor entrusted only with the enforcement of the Animal Protection Act. This criminal prosecutor can make use of every means of investigation as stated in Articles 139 et seq. of the code of criminal procedure. In the canton of Bern there is a kind of organizational right of appeal: the governing body of the Animal Protection Organization can be a plaintiff in a private criminal action¹¹⁸ and even has a right of appeal in administrative procedures – i.e. in those far more frequent procedures when it comes to the protection of animals. In Switzerland there has long been an organizational right of appeal for environmental organizations, but for animal protection organizations there has not been any such right at the federal level to date.

III. ANIMALS IN CIVIL LAW

A. General remarks

On April 1, 2003 a new era began in Swiss private law: after perennial preparatory work and heated public debates new provisions became effective in the Swiss Code of Obligations¹¹⁹ (hereinafter: Swiss CO) and the Swiss Civil Code (hereinafter: Swiss CC),¹²⁰ amongst other laws, which pertain to companion animals.¹²¹ The purpose of this legislation was to accommodate in the law the changed perception of the majority of the Swiss population towards animals in general¹²² and the valuation of specific companion animals by individuals in particular. Swiss private law should no longer be silent about those who are sometimes called 'significant others'¹²³ and their special value for their keepers. To that effect, the focus of the legislator was primarily on so-called non-commercial animals and legal issues concerning them, their keepers and third parties.

¹¹⁸ See Bolliger, Richner & Gerritsen, *supra* note 73, at 20.

¹¹⁹ Systematic Compilation of the Federal Legislation, No. 220 (hereinafter: SR No.).

¹²⁰ SR No. 210.

¹²¹ Switzerland's Criminal law and the law concerning debt recovery and enforcement have been revised too. These provisions will not be discussed in this paper.

¹²² See *Bericht der Kommission für Rechtsfragen des Ständerats, Parlamentarische Initiative. Die Tiere in der schweizerischen Rechtsordnung*, in BUNDESLATT VOL 25 (Jan. 2002), at 4166, available at http://www.bj.admin.ch/bj/de/home/themen/gesellschaft/gesetzgebung/abgeschlossen_projekte0/ (hereinafter: Parliament Initiative).

¹²³ Sheila Bonas, June McNicholas & Glyn M. Collis, *Pets in the Network of Family Relationships: An Empirical Study*, in COMPANION ANIMALS & US 212 (Anthony L. Podberscek, Elisabeth S. Paul & James A. Serpell eds., Cambridge University Press 2000).

B. The Legal Status of Animals

Mostly due to the prevailing Roman legal tradition Swiss law did not differentiate between things and animals before the legislative change in the year 2003. In fact, animals were not separately mentioned in the law of property at all, which simply referred to ‘things’. Domesticated animals were treated as property under the law and had no independent legal rights. On April 1, 2003, Article 641a of the Swiss CC came into effect stating the following: “1 Animals are not objects. 2 Where there exist no special regulations for animals, the provisions for objects apply.”¹²⁴

The formulation of Article 641a is very much like Germany’s Civil Code § 90a¹²⁵ and Austria’s § 285a¹²⁶. Similar to those countries, Switzerland did not take the step to introduce a separate legal category for animals into law. It was probably the result of opposition in the Swiss parliament and the prevailing fear of some interest groups that animals could be deemed juristic persons with their own independent legal rights (and thus e.g. be party to a lawsuit in court).¹²⁷ The new law simply states that animals are no longer ‘objects’. Obvious is the lack of a definition which clarifies their concrete legal status. Even though the legislator’s intention was to improve the legal status of animals, most ‘special regulations’ relating to animals mentioned in paragraph 2 do first and foremost improve the legal position of the animal’s owner or keeper, and not the animals’ itself. Correspondingly, it crystallizes from the legislative material that Article 641a of the Swiss CC is primarily of a declarative nature; the introduction of a separate legal category for animals was actually never intended.¹²⁸ Animals thus have neither gained legal personhood nor do they have human caregivers or guardians instead of owners. Of course the law states that they are no longer objects; but in most cases they are still treated as such. However, even though the provision is an obvious political compromise, it delivers an important message: Swiss law recognizes that animals are sentient beings and not just another object like a car or a chair. They are also not toys that can be disposed of at discretion. They are living and feeling fellow creatures with dignity – actual facts and legal realities that can no longer be ignored by courts, lawyers and private persons alike.

¹²⁴ Siegfried Wyler & Barbara Wyler (ed.), *Swiss civil code: English version*. Based on the translation by Ivy Williams (Zurich 2009). The English version is not considered to be an official version in Switzerland. In this paper, the terms ‘things’ and ‘objects’, as well as ‘pets’ and ‘companion animals’, will be used interchangeably. The original text in German has the following wording: „Article 641a II. Tiere. 1 Tiere sind keine Sachen. 2 Soweit für Tiere keine besonderen Regelungen bestehen, gelten für sie die auf Sachen anwendbaren Vorschriften.“

¹²⁵ § 90a BGB (Germany).

¹²⁶ § 285a ABGB (Austria).

¹²⁷ See Parliament Initiative, *supra* note 122, at 4167.

¹²⁸ See Parliament Initiative, *supra* note 122, at 4168.

C. Damages for the Injuring or Killing of an Animal

1. Tort Law

1.1 Preface: The Valuation of Property

There is no definition in Swiss law as to what constitutes damage (in German: ‘Schaden’). According to the Federal Supreme Court of Switzerland,¹²⁹ the basis for the computation of damage in Switzerland is the difference in the plaintiff’s wealth immediately before and after the defendant’s wrongful action or omission. In other words, damages (in German: ‘Schadenersatz’) are measured based on the idea that the plaintiff’s balance sheet shows a pecuniary loss as a result of the defendant’s actions. One whose property is damaged, converted or destroyed is not entitled to recover for sentimental attachment to the property, except where the defendant’s actions amount to a qualified injury of a person’s individual inherent rights (violation of the plaintiff’s personality).¹³⁰

Generally speaking, if personal property is completely destroyed, the cost of replacement with an equivalent is to be reimbursed. The same applies to mere harm to property, if the costs of repair together with other costs are disproportionate compared with the replacement value.¹³¹ If the harm to the property is minor, reasonable costs of repair as well as any remaining diminution in value constitute the measure of damages.¹³² In order to recover damages, a plaintiff must not only prove harm, but also unlawfulness of the defendant’s action or omission, fault and causation.

1.2 Traditional Approach with Regards to Animals

In keeping with the animal’s legal status of property, the measurement of damages followed the rules developed for personal property. So in principle, if an animal was injured or killed, its owner was entitled to recover the animal’s replacement cost or expenses incurred as a result of the curative treatment of the animal (veterinary expenses), as the case may be, as long as the latter were not higher than the replacement value. It has been noted by some commentators though, that the courts would not have ruled out the recovery of higher veterinary expenses in any case.¹³³

¹²⁹ See Federal Supreme Court of Switzerland, decision No. 133 III 462 at 471.

¹³⁰ Articles 47 and 49 of the Swiss CO.

¹³¹ Adjustments might be made if the replacement goods are worth more than the original.

¹³² See e.g. Heinz Rey, *Ausservertragliches Haftpflichtrecht* (4th ed. Zurich/Basle/Geneva 2008).

¹³³ See Parliament Initiative, *supra* note 122, at 4171 et seq. (however no cases officially reported).

1.3 Current Approach with Regards to Animals

a. Introduction

In 2003, Article 42 para. 3 and Article 43 para. 1^{bis} of the Swiss CO came into effect. Article 42 para. 3 concerns damages for incurred veterinary expenses, while Article 43 para. 1^{bis} gives the judge the power to award an amount for the sentimental value of an animal to its owner (in German: ‘Affektionswert’) under certain circumstances. These provisions quite clearly acknowledge that most of our companions’ value is not primarily financial, but emotional. Accordingly, the articles are only applicable if an animal is kept in the domestic environment and not for pecuniary or profit-making purposes.¹³⁴ Broadly speaking, the law differentiates between companion animals and animals of commercial importance (‘commercial animals’). It has to be pointed out, however, that it remains to be seen how a court would make the exact distinction between commercial and non-commercial animals. Through studying the legislative materials one comes so far to the conclusion that the injured or killed animal in question must be kept privately and in a certain spatial proximity to its owner or keeper.¹³⁵ Additionally, the sentimental interest in the animal must at least outweigh pecuniary interests. If pecuniary interests prevail and/or the animal is not kept privately, it is regarded as a commercial animal and damages will be determined according to the traditional valuation method as shown above.¹³⁶

b. Veterinary expenses

In Swiss law a judge can award veterinary expenses which incurred as a result of an injury to a companion animal, even if these costs are higher than the animal’s actual value. Article 42 para. 3 of the Swiss CO reads as follows:

In the case of animals that are kept in a domestic environment and are not kept for pecuniary or profit-making purposes, medical treatment costs may be asserted reasonably even if they exceed the value of the animal.¹³⁷

¹³⁴ The same precondition applies to several other provisions which have been added to the Swiss CO and the Swiss CC as well as other laws in 2003. – In German: „Tiere, die im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten werden (...)”.

¹³⁵ Article 43 para. 1^{bis} Swiss CO allows the judge not only to award damages to the owner but also to the keeper.

¹³⁶ Eveline Schneider Kayasseh, *Haftung bei Verletzung oder Tötung eines Tieres – unter besonderer Berücksichtigung des Schweizerischen und U.S.-Amerikanischen Rechts* (Zurich 2009), at 56 et seq.

¹³⁷ Swiss American Chamber of Commerce, *Swiss Code of Obligations. Volume I: Contract Law (Articles 1-551). English Translation of the Official Text* (Zurich 2008). In German: “Bei Tieren, die im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten werden, können die Heilungskosten auch dann angemessen als Schaden geltend gemacht werden, wenn sie den Wert des Tieres übersteigen.”

As discussed above, until recently, treatment costs would not be awarded if they were higher than the companion animal's actual value. Article 42 para. 3 shows that the importance of the animal's value for determining the proper measure of damages has become less because now, veterinary expenses that are higher than the replacement value can be claimed as long as these costs are reasonable. However, it is a well-known truth that what is reasonable for one person might not necessarily be reasonable in the eyes of another person. Since the law does not elaborate on this point, it is the scholar's and judge's task to develop an objective rule which can be used as a guideline. Consulting the legislative material we gather that the judge will have to consider how *a reasonable owner in the position of the plaintiff* would have acted if he had to pay for the incurred veterinary costs himself. Of course this 'reasonable person' must be someone who likes animals. Hence on the one hand the judge has to bear in mind that our society and laws understand the emotional relationship between a human being and a companion animal worthy of protection. But on the other hand a reasonable animal owner would also consider such factors as the animal species, its age and health, its value, the tenability of the treatment from the point of view of the veterinary science as well as the best interest of the companion animal with regards to animal welfare/animal protection.¹³⁸ In contrast the financial situation of the plaintiff is of no relevance. This is so because high treatment costs would never be reasonable in terms of how a reasonable owner in the plaintiff's shoes would act if he had serious money problems, a result which would be contrary to the legislator's intention.¹³⁹

c. Damages for Non-Pecuniary Loss

aa) Sentimental Value of the Animal to the Owner ('Affektionswert')

Before the legislative change in the year 2003, the German term 'Affektionswert' – generally speaking, the sentimental or emotional value¹⁴⁰ of a thing to a person – was not mentioned in any of Switzerland's laws. According to § 1331 of Austria's Civil Code, however, a plaintiff can recover the value of 'special affectation'. Albeit this provision is similar to Switzerland's Art. 43 para. 1^{bis} CO, a closer examination shows that it is in fact very different in some of its particulars. In Austria, the value of 'special affectation', or sentimental value, can only be recovered if an object was harmed wantonly, mischievously, or by an

¹³⁸ Cf. Schneider Kayasseh, *supra* note 136, at 90 et seq.

¹³⁹ Cf. for Germany: District court (in German: 'Amtsgericht') Idar-Oberstein, NJW-Rechtsprechungs-Report 1999, at 1629 „Auszuscheiden hat als Kriterium die wirtschaftliche Lage des Geschädigten, da man ansonsten dem Vermögenden jeden noch so aberwitzigen Aufwand ersetzen müsste, der nur den Heilungsprozess fördert, dem Sozialhilfeempfänger hingegen den Tierarztbesuch verweigern würde, da er sich in seiner wirtschaftlichen Lage noch nicht einmal die Spritze zum Einschlafen des Tieres leisten könnte.“ – Summarized translation: one would have to award the rich plaintiff even whimsical treatment costs whereas the poor plaintiff wouldn't even get the cost of the syringe with which the animal is put to sleep.

¹⁴⁰ 'Sentimental' and 'emotional' will be used interchangeably, both meaning the same in the context of this paper.

act contrary to the countries' criminal laws, which is not a prerequisite in today's Swiss law. Even though the killing of cats by using them as a target is mentioned in the doctrine, the provision does not seem to have much practical relevance in our neighboring country.¹⁴¹

During the lawmaking process in Switzerland it was highlighted that most animals which are kept as companions have an emotional value to their caregivers and that the hitherto existing valuation method was out-dated. It was recognized that where a living creature rather than a mere object is harmed unlawfully, the plaintiff should also be in a position to claim damages for the sentimental value.¹⁴² Hence, Article 43 CO was amended and para. 1^{bis} was added to the law, holding the following:

In the event of injury or death of an animal that is kept in a domestic environment, and is not kept for pecuniary or profit-making purposes, the judge may take into account to a reasonable degree the emotional value of such animal to the keeper or the persons close to him.¹⁴³

Interestingly, the law speaks of animal 'keeper' and not 'owner'. Ordinarily, in Swiss law, that person is entitled to damages who is the owner of a piece of property. Contrary to this basic rule, the new law recognizes that sometimes a mere animal keeper can develop a very special attachment to a companion animal whereas the same might not be true for the actual owner. Accordingly, the animal keeper does not necessarily have to be identical with the owner in order to be compensated. It further crystallizes that the keeper's or owner's relatives, as the case may be, have a separate claim for compensation, if they can successfully prove a qualified attachment to the diseased, injured or killed animal.¹⁴⁴ And most importantly, according to the legislative material, the sentimental value has to be compensated besides the mere replacement costs or veterinary expenses or even in addition to all of these costs, depending on the circumstances of the case.¹⁴⁵

The idea of awarding compensation for the sentimental value of an animal to its owner/keeper and/or relatives, which constitutes non-pecuniary loss, and the difficulty associated with determining whether and to what extent someone has suffered such loss, as well as the legal qualification of this award, have been hotly debated.¹⁴⁶ Additionally, the legislator and the doctrine voiced their concern about

¹⁴¹ Rudolf Reischauer, in: Peter Rummel (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch in 2 Bänden*, Band 2, Teilband 1-2: §§ 1175-1502 ABGB, Nebengesetze (Vienna 2004), § 1332a ABGB para. 5; Friedrich Harrer, in: Michael Schwimann (ed.), *ABGB Praxiskommentar*, Band 6, §§ 1293-1502 ABGB (3rd ed. Vienna 2005), at § 1331 ABGB para. 3.

¹⁴² See Parliament Initiative, *supra* note 122, at 4172.

¹⁴³ See Swiss American Chamber of Commerce, *supra* note 137. In German: "Im Falle der Verletzung oder Tötung eines Tieres, das im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten wird, kann er dem Affektionswert, den dieses für seinen Halter oder dessen Angehörige hatte, angemessen Rechnung tragen."

¹⁴⁴ Cf. Schneider Kayasseh, *supra* note 136, at 150 et seq. See also Peter Krepper, *Affektionswert-Ersatz bei Haustieren*, *Aktuelle Juristische Praxis (AJP)* 2008, at 704, 712.

¹⁴⁵ Cf. Schneider Kayasseh, *supra* note 136, at 147.

¹⁴⁶ See e.g. Roland Brehm, *Berner Kommentar. Band VI. Das Obligationenrecht. 1. Abteilung.*

the difficulty of differentiating between the ‘sentimental value of an animal to its keeper’ and compensation for emotional distress caused by an injury to individual inherent rights as per Article 49 of the Swiss CO.¹⁴⁷ These are interesting questions which have been rarely discussed in the doctrine so far. Remarkably, some of these points of interest were not even addressed by the legislator.

As a matter of fact, an exact computation of damages is virtually impossible where an emotional value has been harmed. But on the other hand, the same is true for claims for damages for emotional distress with which Swiss law has been familiar for decades. In order to define a sentimental value, one needs in a first step to address the special bond between caregiver and companion animal from a practical point of view. In fact, the importance of the bond between humans and other animals has been the topic of countless studies.¹⁴⁸ The results of some of these studies can be used in order to determine what makes the human-animal-bond so special for the society as a whole and for the individual in particular. Moreover, these studies allow us to develop a concept for the valuation of the emotional bond between caregiver and animal.

Generally speaking, the sentimental value of an animal represents to its human companion¹⁴⁹ a real, if non-pecuniary value and may be defined as the whole of the positively perceived aspects of the human-animal relationship. If a companion animal is injured or killed, this special value is either completely lost for its human caregiver or at least harmed. In order to compensate a plaintiff for the sentimental value, both its existence and extent must be established by objective evidence so that in a second step a monetary equivalent can be estimated. Schneider Kayasseh suggests to analyze the human-animal-bond on the following grounds: Quality and quantity of the time spent with the companion animal, the environment of the plaintiff (his or her age, health, family ties etc.), circumstances concerning the animal itself (circumstances surrounding its acquisition, its character, appearance, and life expectancy etc...), and last but not least, duration of the human-animal relationship. Because every relationship is different, the criteria and their weight can differ considerably, but they allow developing a pattern in order to determine if a human-animal relationship was particularly close or very loose. Once the intensity of the emotional bond and its duration are established, the court has the task to award a corresponding amount of money. As a rule of thumb, the more intense the

Allgemeine Bestimmungen. 3. Teilband, 1. Unterteilband. Die Entstehung durch unerlaubte Handlungen. Kommentar zu Art. 41-61 OR (3rd ed. Bern 2006); Guy Chappuis, Die neuen Rechte des Halters eines getöteten oder verletzten Tieres – Wie neu sind sie wirklich?, HAVE 2004, at 192 et seq.; Franz Werro, La responsabilité civile (Bern 2005), paras. 167 et seq. and 1300 et seq.

¹⁴⁷ See e.g. The Opinion of the Swiss Federal Council, BBl 1999, at 9541, 9545 and BBl 2002, at 5806, 5808 as well as the authors cited *supra* note 146.

¹⁴⁸ See e.g. amongst many others: Anthony L. Podberscek, Elisabeth S. Paul & James A. Serpell (eds.), *Companion Animals & Us* (Cambridge 2000), at 125 et seq.; Ian Robinson (ed.), *The Waltham Book of Human-Animal Interaction: Benefits and responsibilities of pet ownership* (1st ed., Melton Mowbray, Leicestershire 1995); Alan Beck & Aaron Katcher, *Between Pets and People, The Importance of Animal Companionship* (West Lafayette 1996).

¹⁴⁹ Who, in this case, can be the keeper, owner or relative.

bond between human and animal and the longer the duration of this relationship, the higher are the damages.

The whole of the monetary equivalent to the sentimental value has to be compensated if the animal was killed. If the animal escaped alive but its injury has a lasting impact on the human-animal relationship, the damages will be calculated by taking into consideration how badly the relationship has been harmed by the injury. Examples are the animal that has a lower life-expectancy due to the injury, is sick for a very long time, will need special care and/or food, manifests changes in its character, or has scars. However, because the companionship of the animal can in most cases still be enjoyed, the defendant only has to pay a certain percentage of the total compensation.¹⁵⁰

bb) Reparations for Severe Emotional Distress

Sometimes plaintiffs also claim to have suffered emotional distress due to the circumstances of the case. Swiss law grants a person who has suffered qualified emotional distress due to physical or mental injury or an unlawful injury to his or her individual inherent rights the right to recover non-pecuniary damages in the form of 'satisfaction' (in German: 'Genugtuung') under certain conditions (Articles 47 and 49 of the Swiss CO). As a general principle it can be said that only significant violations entitle a person to a monetary compensation for emotional distress. This is because damages for non-pecuniary loss are handled with some reserve in Switzerland and therefore no satisfaction is due for insignificant harm.

In connection with the present discussion, Article 49 para. 1 of the Swiss CO is of particular interest. This provision reads:

If individual inherent rights are injured, the damaged person may, where there is fault, claim compensation for damage sustained and, if the particular seriousness of the injury and of the fault justify it and has not been compensated otherwise, claim payment of a sum of money as reparations.¹⁵¹

The general reluctance of the Swiss courts to award an amount of money as reparations is of particular significance when the plaintiff is a grieving animal owner. According to commentators, the gravity of the offence may justify a monetary award for instance in the following circumstances: an animal was tortured to death, it was severely mutilated or in other cases of malicious intent and/or cruelty to animals.¹⁵²

¹⁵⁰ The 'total compensation' amounts to the whole monetary equivalent to the sentimental value. – See for a detailed analysis Schneider Kayasseh, *supra* note 136, at 155 et seq.

¹⁵¹ Swiss American Chamber of Commerce, *supra* note 137. Translated from German: "Wer in seiner Persönlichkeit widerrechtlich verletzt wird, hat Anspruch auf Leistung einer Geldsumme als Genugtuung, sofern die Schwere der Verletzung es rechtfertigt und diese nicht anders wiedergutmacht worden ist."

¹⁵² Schneider Kayasseh, *supra* note 136, at 177 et seq. See also Vito Roberto, Schweizerisches Haftpflichtrecht (Zurich 2002), at paras. 909 and 917.

cc) Punitive Damages

Punitive damages are not a concept recognized in Switzerland's legislation, and the Federal Supreme Court of Switzerland stated in a decision dating back to 2004 that punitive damages are contrary to Swiss *ordre public*.¹⁵³

2. Breach of Contract

In many instances the animal's owner may have been harmed by tort and breach of contract simultaneously (e.g. in many cases where the defendant is a veterinarian) and may therefore lodge a claim under both theories. If the animal's owner bases her claim on breach of contract, the sentimental value of the animal to the keeper may also be recovered, due to the reference in Article 99 para. 3 (contractual liability) to Article 43 (para. 1^{bis}) of the Swiss CO.

D. Allocation of Animals in Divorce Cases – Whose dog will it be?

1. Introduction

Many parties who file for divorce or dissolution of a registered partnership¹⁵⁴ are pet owners. Some of the couples will be able to agree on the division of marital assets and ownership structures as well as the eventual allotment of the animal between themselves. All a court will have to do is review the settlement agreement the parties have reached. But if both parties claim exclusive ownership of the pet, it will be the court's task to make a determination as to who is the legal owner of the companion animal and in cases of jointly owned animals (shared ownership),¹⁵⁵ it must also be ruled with whom the animal is supposed to live in the future. Swiss law holds, in Article 651a of the CC, that in case of dispute over ownership issues of jointly owned companion animals, the shared ownership must be abolished and the title vested in one party only. Thereby it is decisive which party, with regards to animal protection, ensures the better accommodation of the animal.¹⁵⁶ After

¹⁵³ Federal Supreme Court of Switzerland decision No. 5P.91/2004 of 24 September 2004.

¹⁵⁴ In Switzerland, same-sex partnerships can be registered federally since a federal government-proposed partnership law was approved by referendum by the Swiss, which was put into effect on 1 January 2007, see SR No. 211.231 "Bundesgesetz vom 18. Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (Partnerschaftsgesetz, PartG)."

¹⁵⁵ With regards to shared ownership (in German: 'gemeinschaftliches Eigentum' – which might not be exactly the same as U.S. 'joint ownership' therefore this term will be used loosely or avoided completely), Swiss law of property differentiates between co-ownership (in German: 'Miteigentum', Articles 646-651a Swiss CC), and ownership in common (in German: 'Gesamteigentum', Articles 652-654 Swiss CC). Co-owners share a thing by fractional shares while owners in common own a thing as a whole together. Contrary to co-owners, owners in common are joined in a community either by operation of law or by contract (e.g. all the rights and obligations comprised in an inheritance constitute common property until partition), cf. Peter Tuor, Bernhard Schnyder, Jörg Schmid & Alexandra Rumo-Jungo, Das Schweizerische Zivilgesetzbuch (Zurich 2009), at 827.

¹⁵⁶ During divorce proceedings, the judge may have to decide with whom the animal should live until it decrees the divorce. This is not yet a question of ownership but temporary allocation of property. The issue will be raised in connection with the detailed discussion of Article 651a of the Swiss CC.

determining that a companion animal is jointly owned, several issues must be addressed: What is the meaning of ‘better accommodation of the animal’? Does the party who loses his property rights have to pay maintenance for the companion animal? Does he have a claim for compensation and can the judge award visitation rights? And what happens with jointly owned commercial animals? These are some of the issues which will be discussed in the following.

2. Determination of Ownership Structure

As discussed, animals are in most instances treated like property under the law. Therefore, a companion animal would basically be treated like household goods which are the epitome of the family property and which must be divided up in the case of a divorce and/or dissolution of a registered partnership.¹⁵⁷ According to the Swiss matrimonial property system, in a first step the parties take back what is their separate property, examples include Article 205 para. 1 Swiss CC – participation in acquisitions and Article 242 para. 1 Swiss CC – community of property; the same applies to the marital state of separation of estates,¹⁵⁸ the latter ordinarily also applies to registered partnerships, see Article 18 of the Swiss PartG. According to the rules of evidence the claimant bears the burden of proof of sole ownership.¹⁵⁹ As a matter of fact, in the married state or in a registered partnership it is sometimes not easy to give proof of exclusive ownership. In Switzerland, there is a presumption of ownership if a movable chattel is in the sole possession of a party.¹⁶⁰ Possessor is he who has the effective control over something.¹⁶¹ However, according to the doctrine, the presumption stated in Article 930 para. 1 of the Swiss CC does not apply to persons living in the same household since the property situation is not compelling for the ownership title during matrimony or partnership respectively.¹⁶² Household pets often have no exclusive caregiver because both parties have the animal in their possession at one time or another and finance and care for it together. In such cases, it has to be presumed that both parties have effective control over

¹⁵⁷ Andrea Büchler & Heinz Vetterli, *Ehe Partnerschaft Kinder* (Basel 2007), at 59, 90. As we have discussed earlier, the law states that animals are not objects but it rules also that the provisions for objects apply where there exists no special regulation for animals (Article 641a of the Swiss CC). See for a discussion of animals and household goods; Myriam Grütter & Daniel R.T. Trachsel, *Aktuelle Aspekte des Eheschutzes*, *FamPra.ch* 4/2004, at 858, 864, see also Rolf Vetterli, in: Ingeborg Schwenzer, *Scheidung*, *Commentary*, Vol. I (2nd ed. Bern 2011), Article 176 Swiss CC para. 19.

¹⁵⁸ Büchler & Vetterli, *supra* note 157 at 82. (Participation in acquisitions is the ordinary matrimonial property system in Switzerland. However, the marital estate will be governed by the system of community of property or separation of estates if the parties provided so in a marriage covenant.).

¹⁵⁹ Article 8 Swiss CC; Article 200 para.1 Swiss CC - participation in acquisitions; Article 226 Swiss CC - community of property; Article 248 para.1 Swiss CC - separation of estates.

¹⁶⁰ Article 930 para.1 Swiss CC.

¹⁶¹ Article 919 para. 1 Swiss CC.

¹⁶² Emil W. Stark & Wolfgang Ernst, in: Heinrich Honsell et al., *Basler Kommentar zum Schweizerischen Privatrecht* (Basel 2007), at Article 930 Swiss CC para. 11 et seq.; Heinz Hausheer & Regina Aebi-Müller, in: Heinrich Honsell et al., *Basler Kommentar zum Schweizerischen Privatrecht* (Basle 2007), at Article 200 Swiss CC para. 13.

the companion animal and are therefore both possessors. Shared possession leads to the presumption of shared ownership. Corresponding to these general rules, the law presumes shared ownership in the area of marital property law, if the proof of sole ownership fails.¹⁶³

In the case of companion animals which live outside the marital home, the circumstances are generally clearer, especially if one party financially supports and cares for the animal alone. One example is the horse which is placed in a horse barn nearby and one party only is responsible for the animal's basic daily needs (like physical care, exercise, or grooming).¹⁶⁴ Sole proprietorship and thereby exclusive ownership can also be assumed for animals which have been acquired before marriage or have been bestowed upon one party only or have been inherited during the marriage or registered partnership.

Where the proof of sole ownership fails or it remains unclear which of the parties is exclusive owner of a companion animal, it is assumed according to the Swiss CC that the animal is owned by both spouses/partners jointly.¹⁶⁵ If the spouses are unable to reach an amiable property division agreement between themselves, the court must decide which party is better suited to look after the animal in the future and allocate ownership accordingly.

3. Allocation of Companion Animals decreed by the Court

3.1 Applicable provisions

In a divorce case or dissolution of a registered partnership, objects in shared ownership will be divided up according to the general rules applicable to the dissolution of co-ownership or ownership in common. Accordingly, where the owners cannot agree on the method of division, the court will order the division in kind if the joint object is capable of being divided without reducing its value considerably or the auctioning off of the object among the co-owners. The court may also have the object publicly auctioned.¹⁶⁶ Meanwhile the laws governing matrimonial property law and registered partnerships provide a further method of division: the allocation of exclusive ownership onto one of the spouses or partners against full indemnification of the other one, provided that a predominant interest can be proved by the party claiming that interest.¹⁶⁷ These rules will apply to objects as well as commercial animals.¹⁶⁸ Non-commercial animals however will be allocated to the party who, with regards to animal welfare, offers the best accommodation for

¹⁶³ See Article 200 para. 2 Swiss CC - participation in acquisitions; Article 248 para. 2 Swiss CC - separation of estates. See also Stark & Ernst, *supra* note 162, at Article 930 Swiss CC para. 12.

¹⁶⁴ Reto Gantner, *Die Zuteilung von Haustieren im Scheidungsverfahren*, FamPra.ch 2001, 20 at 31 (This paper discusses the legal situation before the introduction of Article 651a into the law).

¹⁶⁵ Stark & Ernst, *supra* note 162, at Article 930 Swiss CC para. 12.

¹⁶⁶ Article 651 para. 1 and 2 Swiss CC.

¹⁶⁷ See also Article 205 Swiss CC - participation in acquisitions

¹⁶⁸ See Article 641 para. 2 Swiss CC.

the animal.¹⁶⁹ This rule will be discussed in detail next.

3.2 Article 651a Swiss CC in particular

a. Preconditions

Article 651a of the Swiss CC holds the following concerning the allotment of jointly owned companion animals:

- 1 Animals which are kept within the domestic range and not as assets or for the purpose of earning money, the Court, in the case of dispute, assigns the animal to that party as sole owner that, with regard to animal protection, ensures the better keeping of the animal.
- 2 The Court can oblige the person to whom the animal is assigned to pay the other party an adequate compensation; the Court fixes the respective amount at its own will.
- 3 The Court makes the necessary precautionary arrangements, in particular as regards the provisional placement of the animal.¹⁷⁰

In essence, Article 651a of the Swiss CC states the following: firstly, there must be an animal which is kept within the domestic range and not as a commercial animal. Secondly, as a result of the systematic position of the provision within the Civil Code it crystallizes that the owners of the animal must share ownership (that is, they must be co-owners or owners in common).¹⁷¹ Thirdly, both parties must claim exclusive ownership and lastly, there must be at least one party who guarantees an accommodation of the companion animal in compliance with Switzerland's animal protection laws.

First of all, Article 651a of the Swiss CC is only applicable if the animal in question is a companion animal in the sense of the law as defined above (see B). Secondly, the law presupposes a 'dispute' over the allocation of the animal. The law stipulates further that that party shall be awarded exclusive ownership who guarantees a better keeping of the companion animal with regards to animal protection. According to the legislative materials, an animal's welfare encompasses not only its physical needs (e.g. basic daily needs including medical care) but also

¹⁶⁹ Article 651a Swiss CC.

¹⁷⁰ S. Wyler & B. Wyler, *supra* note 124 at 182. In German: „Tiere des häuslichen Bereichs¹ Bei Tieren, die im häuslichen Bereich und nicht zu Vermögens- oder Erwerbszwecken gehalten werden, spricht das Gericht im Streitfall das Alleineigentum derjenigen Partei zu, die in tierschützerischer Hinsicht dem Tier die bessere Unterbringung gewährleistet.“

² Das Gericht kann die Person, die das Tier zugesprochen erhält, zur Leistung einer angemessenen Entschädigung an die Gegenpartei verpflichten; es bestimmt die Höhe nach freiem Ermessen.

³ Es trifft die nötigen vorsorglichen Massnahmen, namentlich in Bezug auf die vorläufige Unterbringung des Tieres.“

¹⁷¹ Antoine F. Goetschel & Gieri Bolliger, *Das Tier: Weder Sache noch Mensch*, plädoyer 4/04, at 27.

its psychological well-being. In other words, the relationship between companion animal and human caregiver from the animal's perspective is a very important factor in the weighing of this issue. Contrary to Article 43 para. 1^{bis} of the Swiss CO, where the extent of the emotional value of a companion animal to its caregiver must be determined, it is the animal's best interest which counts here. The legislative materials state quite clearly that the relationship shall be analyzed exclusively in the *animal's interest*.¹⁷² Thus, the constitutionally guaranteed dignity of an animal is substantiated in the private law.¹⁷³ Bearing these issues in mind, one concludes that the courts must weigh both the physical as well as the psychological well-being of the companion animal from the companion animal's point of view. Accordingly, both objective and subjective criteria have to be contemplated. Additionally, we are of the opinion that in order to apply Article 651a of the Swiss CC at least one party must be in a position to accommodate the animal in compliance with our animal protection laws.

There is no room for doubt that the physical well-being influences the emotional well-being of humans and animals quite considerably.¹⁷⁴ Correspondingly, in order to determine what is in the animal's best interest with regards to accommodation, in a first step, the following issues have to be weighed: who can best pay attention to the animal's basic needs such as food, species-appropriate accommodation, exercise, play, and grooming. Switzerland's animal protection law and by-law substantiate the meaning of the said criteria from the standpoint of law. The applicable provisions stipulate for instance that social animals shall not be kept alone and therefore the division of several animals of the same kind could violate Switzerland's animal protection laws. Let us illustrate this issue as follows: a couple keeps two guinea pigs or two pet rabbits of which they share ownership. The couple files for divorce and both partners claim sole ownership of the animals. It would seem easy to resolve this issue: award one of the animals to each of the spouses. But in Switzerland, because it is scientifically proven that guinea pigs and rabbits – among other animal species – are social creatures, the law stipulates that they need a social partner of the same species in any case, because only a partner of the same species guarantees their emotional well-being. Therefore, concerning Article 651a of the Swiss CC, a split-up of said animals between the parties in order to assign sole ownership of one animal alone to each of the spouses would be out of the question.¹⁷⁵

Other factors that have to be considered are: The environment of the parties, which means their age, health, mobility, family situation, living quarters, along with other concerns discussed in the following paragraph. Obviously, all these factors depend on the particular animal species. And last but not least, the judge

¹⁷² See Parliament Initiative, *supra* note 122, at 4171.

¹⁷³ Grütter & Trachsel, *supra* note 157, at 863.

¹⁷⁴ See also Omblin de Poret, *Le statut de l'animal en droit civil* (Zurich 2006), at para. 1013.

¹⁷⁵ Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 241; Gantner, *supra* note 164, at 34 (There is a discussion of the case of two singing birds which would stop singing if they were separated.).

has to contemplate the financial situation of the parties to the dispute (see below). However, monetary considerations should generally not be decisive.

As we have addressed above, the legislator acknowledged that emotional aspects have to be weighed in order to guarantee an animal's best interest. Just like any other living being, companion animals develop special relationships to humans and other animals. In this context it is quite probable that a companion animal developed a strong emotional attachment to one of the parties and/or other household pets or the family's children. A separation from these 'partners' will most likely affect its feelings adversely and result in detriment of the companion animal's emotional well-being.

In many cases, the primary caregiver is the person with the greatest emotional attachment to the animal and vice versa. But what should happen if this person is not the one with the greatest ability to financially support the animal? This is left to the judge to weigh out in an equitable manner. Because the emotional well-being advances the physical health, a strong emotional bond has to be given priority, as long as the financial situation of the party does not make it impossible from an objective point of view to maintain and care for the animal properly.¹⁷⁶

b. Consequences

Taking into consideration all of the above facts, the court appraises the evidence freely and assigns the companion animal to the party who is best suited to care for the animal with regards to animal welfare. If the judge comes to the conclusion that none of the parties will be able to offer an adequate accommodation, the general rules regarding the cancellation of shared ownership will likely be applied and consequently, the animal will be auctioned off or sold.¹⁷⁷

The law stipulates that the judge can order the party who attains exclusive property of the animal to pay the other party an indemnification.¹⁷⁸ The amount of this indemnification is left to the discretion of the judge who must base his decision on principles of justice and equity.¹⁷⁹ Due to the wording of the applicable provision some commentators are of the opinion that the granting of an indemnification is in fact optional.¹⁸⁰ However, it has to be considered that one party loses her rights to the companion animals by court order and not voluntarily. Moreover, in the realm of matrimonial property law, one spouse has to be fully indemnified if exclusive ownership of an object is allocated to the other spouse because he could prove a predominant interest.¹⁸¹ There is no valid reason why an animal owner should in this respect be treated any different to the owner of a piece of furniture.¹⁸² Therefore

¹⁷⁶ See also de Poret, *supra* note 174, at para. 1012 et seq.

¹⁷⁷ De Poret, *supra* note 174, at para. 1015 et seq.

¹⁷⁸ Article 651a para. 2 Swiss CC.

¹⁷⁹ Article 4 Swiss CC.

¹⁸⁰ See also de Poret, *supra* note 174, at para. 1035.

¹⁸¹ Article 205 Swiss CC.

¹⁸² This is also the opinion of Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 243.

the indemnification is mandatory except in cases where the dispute was started arbitrarily in order to hassle the other party.

The text of the law mandates further that the indemnification must be reasonable. ‘Reasonableness’ in this context means according to the legislative materials that the legislator wanted the judge to take into consideration the objective value of the companion animal.¹⁸³ In doing so the judge might for instance consider the replacement value¹⁸⁴ of the companion animal but not a sentimental value.

However, in most cases the sentimental or emotional value of a companion animal to its owner is considerably higher than the objective or replacement value. In practice, apart from pedigree dogs or cats most companion animals do not have any market value whatsoever. Consequently, the judge could only award a nominal amount for compensation. But was it truly the intention of the legislator that most animal owners will have to leave the courtroom almost empty handed?

The answer has to be a definite no. In Switzerland, the emotional bond between animal and keeper – or owner, as the case may be – is recognized as a right worthy of protection. Additionally, in the realm of tort law, the relevant provision rules that the sentimental value of an animal to the keeper is a real albeit non-pecuniary value, which has to be compensated if a companion animal is injured or killed.¹⁸⁵ In this respect it seems unfortunate that Article 651a Swiss CC does not order the judge to take into consideration the sentimental value of an animal to its owner when determining a reasonable indemnification.¹⁸⁶ However, there are two faces of the same coin: because the law does not prescribe any factors to the judge to consider, she should be at liberty to consider both objective and sentimental value of the animal to the owner. Besides, despite the fact that the law foresees an indemnification, most parties will only receive a nominal amount of money if the animal’s objective value is the only factor to be taken into consideration. It is very difficult indeed to imagine that this result was the intention of the legislator. A person who loses any rights with regards to the companion animal will be punished doubly because he will not receive any indemnification to speak of. Therefore, we advocate that a proven sentimental value must be considered by the court when awarding an indemnification.¹⁸⁷

c. Precautionary Measures

¹⁸³ See Parliament Initiative, *supra* note 122, at 4171.

¹⁸⁴ Christoph Brunner & Jürg Wichtermann, in: Heinrich Honsell et al., *Basler Kommentar zum Schweizerischen Privatrecht* (Basel 2007), at Article 651a Swiss CC para. 7; De Poret, *supra* note 174, at para. 1029.

¹⁸⁵ See Article 43 para. 1^{bis} Swiss CO and *supra* sec. 1.3.

¹⁸⁶ This is probably why de Poret, *supra* note 174, at para. 1031 comes to the conclusion that a sentimental value of the animal to the owner is not one of the factors the judge should consider.

¹⁸⁷ An opinion, which is similarly advocated by Brunner & Wichtermann, *supra* note 184, at Article 651a Swiss CC para. 7. These authors ask for a modest consideration of the sentimental value while Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 243, advocate for a consideration without mentioning any restrictions regarding the level of indemnity.

From the date the litigation is pending on, the court can order the necessary provisional measures. The law only mentions the provisional placement of the companion animal without restricting the circle of possible measures. Further arrangements might include visitation and monetary support or maintenance payments. Precautionary measures can be ordered during the divorce procedure as well as the procedure leading to the dissolution of a registered partnership.¹⁸⁸

During the divorce procedure, or the procedure to dissolve a registered partnership, ownership is not the decisive factor for assigning temporary custody of a companion animal. The custody of a commercial animal will be awarded to the party to whom the animal is more useful or who provides evidence of a preponderant interest, for example, to the person who needs the animal for his professional endeavors such as his job as a police officer or farmer. But if the animal is classified as a companion animal, the essence of Article 651a Swiss CC has to be taken into account. Because this provision concretizes the constitutional principle of dignity of the creature, the animal welfare takes in any case precedence over the interests of a party in case of a clash of interests. The judge must therefore assign the temporary custody of the animal to that party who guarantees a better accommodation of the animal. At that point it is also conceivable to place the animal in a shelter if this solution is more beneficial to the animal's welfare,¹⁸⁹ or even to award the parties joint custody.¹⁹⁰

4. Particular Points of Interest

4.1 Visitation

During the court procedure, the parties remain joint owners of the companion animal even if custody is awarded only to one between them. Accordingly, most authors support a visitation right of the other party.¹⁹¹ But once the shared ownership of property by the parties is abolished and one party is awarded exclusive ownership, the situation is different. Because there is a lack of statutory authority to support a visitation right,¹⁹² it is not possible for the court to incorporate a visitation order into a divorce decree.¹⁹³ The only way is for the parties to draw up an arrangement for visitation outside of court, leaving contractual remedies available.¹⁹⁴

4.1 Monetary Support to the Exclusive Owner

¹⁸⁸ Article 276 of the Swiss Civil Procedures Law ("Zivilprozessordnung", SR 272) and Article 307 in connection with Article 276 Swiss Civil Procedures Law.

¹⁸⁹ Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 243; de Poret, *supra* note 174, at para. 1052 et seq.

¹⁹⁰ Gantner, *supra* note 164, at 29 (refers to the Federal Supreme Court of Switzerland's decision No. 119 II 193 (shared use of a holiday residence during divorce procedure)).

¹⁹¹ Goetschel & Bolliger, *supra* note 171, at 27 et seq.; Gantner, *supra* note 164, at 29; de Poret, *supra* note 174, at para. 1058; Vetterli, *supra* note 157, at 299 (different opinion).

¹⁹² The question was discussed during the lawmaking process but was later dismissed. *See* de Poret, *supra* note 174, at para. 1066 (fn. 946).

¹⁹³ *See* Gantner, *supra* note 164, at 30.

¹⁹⁴ De Poret, *supra* note 174, at para. 1063 et seq. with further references.

a. Pending Court Action

The law is also silent with regards to maintenance payments. As we have discussed, during the divorce proceedings and the proceeding for the dissolution of a registered partnership both parties remain owners of the companion animal. Therefore, concerning monetary support, the general provisions regarding co-ownership and ownership in common have to be consulted. In the absence of an agreement to the contrary, co-owners have to bear the costs of administration, taxes and other charges arising from co-ownership or burdening the co-owned property in proportion to their shares.¹⁹⁵ In contrast, the rights and duties of owners in common are determined by the rules of the statutory or contractual community in which they are joined.¹⁹⁶ Furthermore, the judge can order the necessary precautionary measures which can include maintenance payments.¹⁹⁷ As a result, one party can be ordered to pay monetary support to the custodial guardian until the shared ownership is cancelled.¹⁹⁸

b. After dissolution of the Shared Ownership

According to the provisions regulating property and family law, a party who is awarded exclusive ownership after the dissolution of co-ownership or ownership in common has no right for compensation for the maintenance costs of an object. For instance, if in the realm of matrimonial property law, a co-owned car is undividedly allotted to one party because she proves a preponderant interest in the car that party cannot claim monetary support for the maintenance of the car. Switzerland's property law statute does not contemplate support for personal property. The same is true for a companion animal which is assigned to one of the joint owners. There simply is no statutory authority for such payments. However, in the case of divorce or dissolution of a registered partnership it should be possible to include the maintenance costs for an animal in the monetary support as one of the ex-spouses has to pay to the other one under certain conditions.¹⁹⁹

Swiss law assumes in a general fashion that both spouses are responsible for their own maintenance after the dissolution of a marriage (principle of a 'clean break'). If, however, one spouse cannot be expected to provide for proper maintenance, inclusive of an equitable provision for old age by herself, the other spouse has to contribute an adequate amount to her means (principle of solidarity

¹⁹⁵ Article 649 para. 1 Swiss CC.

¹⁹⁶ Article 653 Swiss CC.

¹⁹⁷ Article 651a para. 3 Swiss CC.

¹⁹⁸ Goetschel, Bolliger, Richner & Spring, *supra* note 63, at 243; de Poret, *supra* note 174, at para. 1054 (more restrictive).

¹⁹⁹ See 'maintenance after the marriage', Article 125 Swiss CC. The maintenance payments of one registered partner to the other will not be discussed in this paper; however, the method of calculation is very similar to maintenance after the marriage. See Ingeborg Schwenzer, in: Andrea Büchler (ed.), *Eingetragene Partnerschaft. Kommentar* (Bern 2007), at Article 34 Swiss PartG para. 40.

after marriage). In determining a proper award of maintenance Switzerland's private law requires the judge to consider a list of factors when deciding the issue of maintenance payments.²⁰⁰ Commentators discuss various methods of calculation, but in the majority of cases the following method is applied: first, the minimum income needed to exist is calculated according to the method developed in the field of debt recovery and enforcement for both parties; second, this is calculated for the family; if there remain any surplus funds, both parties are entitled to participate therein.²⁰¹

According to the Federal Supreme Court of Switzerland, the amount necessary to maintain an animal is included in the amount a debtor retains for cultural activities and hobbies and not added to the cost of living, if, for instance, his wages are attached.²⁰² Many authors in the doctrine speak out against this conception.²⁰³ Because the emotional bond between animal and keeper is recognized as a right worthy of protection in Switzerland, and the keeping of a companion animal is for many people a basic social need, the concrete costs for the maintenance and care of an animal should be allowed for in the cost of living and not included in the basic amount for 'cultural activity' where the minimum income needed to exist has to be calculated. Because the minimum income needed to exist is the basis for the calculation of maintenance payments after marriage, the maintenance costs for animals should be automatically included in the monetary support one ex-spouse has to pay to the other. In one of the Swiss Cantons, the Canton of Solothurn, this has already become reality.²⁰⁴ Hopefully, this example will set a precedent.

²⁰⁰ See Article 125 para. 2 of the Swiss CC.

²⁰¹ Ingeborg Schwenger, in: Ingeborg Schwenger, *Scheidung. Kommentar* (Bern 2005) at Article 125 Swiss CC para. 75 et seq.; Heinz Hausheer, Thomas Geiser & Regina Aebi-Mueller, *Das Familienrecht des Schweizerischen Zivilgesetzbuchs* (4th ed. Bern 2010), at para. 10.123 et seq.

²⁰² See Federal Supreme Court of Switzerland decision No. 128 III 337, at 338: claimant filed a lawsuit for 500 Swiss Francs (costs of accommodation for 19 parrots). See also Parliament Initiative, *supra* note 122, at 4173 (where companion animals are qualified as a hobby').

²⁰³ See Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 243; Goetschel & Bolliger, *supra* note 171, at 27 (implicitly); Catherine Strunz, *Die Rechtsstellung des Tieres, insbesondere im Zivilprozessrecht* (Zurich 2002), at 66; Bernhard Isenring, *Das Haustier in der Zwangsvollstreckung, Blätter für Schuldbetreibung und Konkurs* 2004, at 41 et seq.; Vetterli, *supra* note 157, at 299. For a different opinion, see de Poret, *supra* note 174, at para. 1087 et seq.; Gantner, *supra* note 164, at 30.

²⁰⁴ Appellate Court of the Canton of Solothurn, Supervisory Authority for Debt Recovery and Enforcement (in German: 'Obergericht Solothurn, Aufsichtsbehörde für Schuldbetreibung und Konkurs'), 8 December 2004, SOG 2004 No. 9 (SO), *Schweizer Juristen Zeitung* (SJZ) 102 (2006), 285 et seq.

E. The Animal in the Law of Inheritance

1. Introduction

In Switzerland, animals are part of a deceased person's estate due to their lack of legal personhood. Because they are regarded as a piece of property, the deceased's animals will be distributed amongst the heirs just like any other object if he dies intestate. However, if the said animal qualifies as a companion animal, and there is discord amongst the heirs concerning the allocation of the animal, the rule of allocation in Article 651a of the Swiss CC will apply. Like in the U.S., in Switzerland, animals have neither the capacity to be heirs nor legatees. But in many instances, especially the owners of companion animals may wish to make sure that their pets will be cared for upon their death. In order to make this happen, a testator has the instruments of 'burdens and conditions', which means that she can attach burdens or conditions to her testamentary dispositions (wills or testamentary pacts). Furthermore, the testator has the ability to establish a foundation.²⁰⁵

2. Allotment of Animals

Under Swiss law, the heirs acquire all assets and all liabilities of the deceased at the moment of death. Where there are several heirs, they share ownership of the property forming part of the estate. The Community of the heirs is an example of ownership in common as per Swiss CC Articles 653 et seq., because the heirs form a simple partnership (in German: 'Einfache Gesellschaft') until the estate has been divided according to the applicable rules. Each heir has the right to demand the partition of the estate at any time.²⁰⁶ In the absence of a disposition to the contrary, the heirs have equal rights to the objects which are part of the inheritance.²⁰⁷ Assuming that the co-heirs cannot agree on the allotment of an animal, which is part of the estate, one of the following procedures will apply, depending on the qualification of the animal as commercial or non-commercial.²⁰⁸ Commercial animals will be allocated according to the general rules of the law of inheritance. Thus, the heirs have to divide the estate into as many shares or lots as there are heirs entitled.²⁰⁹ If they cannot agree on the distribution of the lots amongst themselves, lots will be drawn. Consequently, neither the relationship between heir and animal nor the heir's capacity to care for the animal will be considered. However, if the animal in question is a companion animal according to the law, Article 651a of the Swiss CC will apply and thus the rule that the animal's best interest with regards to animal welfare will be decisive.²¹⁰

²⁰⁵ The law of inheritance is very complex. Therefore, only general remarks can be made within the scope of this paper.

²⁰⁶ Article 604 para. 1 Swiss CC.

²⁰⁷ Article 610 para. 1 Swiss CC.

²⁰⁸ If none of the heirs wishes to adopt the animal, it will be sold or given away; see Bolliger, Goetschel, Richner & Spring, *supra* note 63, at 191; see also de Poret, *supra* note 174, at para. 887.

²⁰⁹ Article 611 para. 1 Swiss CC.

²¹⁰ See Parliament Initiative, *supra* note 122, at 4171. See also de Poret, *supra* note 174, at paras.

3. Testamentary dispositions

3.1. Overview

Under Swiss law, descendants, spouses and parents are statutory heirs who are protected by the mandatory rules on statutory legal portions. For this reason, a person can only dispose of his whole estate at his discretion if there are no statutory heirs. As the case may be, the testator can institute one or several heirs for the whole or for only a part of the inheritance²¹¹ or leave a beneficiary a legacy of some of his property.²¹² To both of these dispositions burdens or conditions can be attached. Where a testator owns one or more animals he has the possibility to attach the burden (charge) to care for the animal to the inheritance or to the legacy.

3.2. Burden to care for an animal

The testator determines the content of the charge within the framework of the legal permissibility himself.²¹³ His directions can either be very specific, the testator might leave detailed instructions regarding food, housing, or medical care; or just very basic instructions. It is sufficient to say: ‘I charge my son Peter with the burden to care for my dog, Stanley’. In this case, the type of care desired is not specified and Peter should care for Stanley, the dog, in accordance with the requirements of the Animal Protection laws.²¹⁴ However, he should also consider the hypothetical will of the deceased concerning the type of care desired for the pet and the amount of money involved. In any case, the burden must be formulated precisely in order to be enforceable by law. Nevertheless, the cautious phrasing ‘I beg my heirs to look after my dog’ can be qualified as a burden for the heirs to personally care for the dog or arrange for a third party to do so.²¹⁵

Of course it is possible to attach a burden to the inheritance as a whole. In this case all of the co-heirs are responsible for the enforcement of the burden; however, they can delegate the task to one individual heir or a third party.²¹⁶ We think that for practical reasons it makes more sense to attach the charge to one single disposition, or in other words, to charge only one heir or legatee to look after one’s animal and to inform this person accordingly so that she can prepare herself for the task.

849, 970 et seq., where the applicable proceeding is discussed in detail.

²¹¹ Article 483 Swiss CC.

²¹² Article 484 Swiss CC.

²¹³ An immoral or illegal charge or condition makes to disposition itself null and void (Article 482 para. 2 Swiss CC). Furthermore, the execution of the provision must be feasible and must not harm the heir’s individual inherent rights (Article 27 Swiss CC). Cf. Paul-Henri Steinauer, *Le droit des successions* (Bern 2006), at para. 599 et seq.

²¹⁴ See de Poret, *supra* note 174, at para. 468 et seq.

²¹⁵ Peter Breitschmid, Roland Fankhauser, Thomas Geiser & Alexandra Rumo-Jungo, *Erbrecht* (Zurich 2010), at 74, citing the Federal Supreme Court of Switzerland’s decision No. 90 II 476, at 482 (in this case the testator formulated a ‘wish’ concerning the use of a house).

²¹⁶ De Poret, *supra* note 174, at para. 478 et seq.

The burden exists as long as the specific animal lives. According to Article 482 para. 1 of the Swiss CC all interested parties – therefore also e.g. a Society for the Prevention of Cruelty to Animals – can call for the enforcement of the burden as soon as the disposition itself takes effect. In order to make sure that the burden will be enforced correctly, it is advisable to appoint one or more persons who have legal capacity to execute the testator's last will.²¹⁷

3.3. Provisions for animals in last wills

It has already been pointed out that animals cannot be heirs or legatees. However, it is not uncommon for people to include their animals in their wills. Under the former legal situation (until the end of March 2003) such dispositions would have been considered senseless or vexatious to other persons and thus held to be non-existent.²¹⁸ In order to clarify the situation, Article 482 para. 4 has been introduced into Switzerland's Civil code. This provision is a rule of interpretation and holds that an inclusion of an animal in a will must be converted into a burden to care for the animal:²¹⁹ "Where an animal is considered in the will, the respective disposition implies that the animal must be cared for as is appropriate for an animal."²²⁰ Contrary to Article 651a of the Swiss CC, Article 482 para. 4 does not stipulate a limited applicability of the law only to companion animals. Correspondingly, the statutory provision is applicable in any case where an animal is considered in a will as long as the execution of the burden is possible.²²¹ In such cases the deceased did of course not charge an individual heir or legatee with the burden to care for the animal because in his eyes, the animal itself is the heir. As a result of the conversion of the institution of the animal as heir to a charge to care for the animal, the community of the heirs as a whole will be charged with the burden (which they can, again, delegate). Furthermore it can be assumed that the testator did not leave instructions regarding the care desired for the animal. His provision might simply state 'My cat Muffy shall inherit 10'000 Swiss Francs'. Hence, the burdened heirs have to care for the animal in accordance with Switzerland's animal protection laws, also considering the standard of care the animal received from the hands of its owner (as long as this standard was higher than the basic requirements of the animal protection laws) and the amount of money 'left' to the animal.²²² As

²¹⁷ Article 517 Swiss CC et seq.; Steinauer, *supra* note 213, at para. 1159 et seq.

²¹⁸ Stephanie Hrubesch-Millaer, in: Marc Amstutz et al. (eds.), *Handkommentar zum Schweizer Privatrecht* (Zurich 2007), at Article 482 Swiss CC para. 8.

²¹⁹ See Parliament Initiative, *supra* note 122, at 4169.

²²⁰ S. Wyler & B. Wyler, *supra* note 124, at 141. In German: „Wird ein Tier mit einer Zuwendung von Todes wegen bedacht, so gilt die entsprechende Verfügung als Auflage, für das Tier tiergerecht zu sorgen.“

²²¹ See e.g. de Poret, *supra* note 174, at para. 581.

²²² See Steinauer, *supra* note 213, at para. 590a (concerning the question what should happen if the inheritance does not consist of an amount of money but of an object, such as a house.) – According to Omblin de Poret, *successio* 2008, at 125, the only guideline the heirs have to consider are Switzerland's animal protection laws.

is the case with burdens stipulated by the testator, interested parties again have the possibility to demand enforcement of the burden which came into existence by legal conversion.²²³

4. Foundations

Switzerland's laws provide the possibility for a testator to constitute a foundation upon his death: "1 The testator can devote the whole or any part of the devisable portion of the estate for some special purpose by way of a foundation. 2 But the foundation is valid only where it satisfies the requirements of the law."²²⁴ The question has been raised whether it is viable to create a foundation in favour of one single animal. In order to answer this question, attention must be given to the provisions regulating foundations in Swiss law, that is, Articles 80 et seq. of the Swiss CC.

In Swiss Foundation law there exist the basic principle of foundation or founder freedom which encompasses the freedom of every person to formulate a foundation and to shape it with regards to its specific purpose, funds and organisation in accordance with Switzerland's laws.²²⁵ From a legal perspective, the constitution of a foundation for the care of a designated animal is in principle valid. However, according to the doctrine, the set-up of such a foundation is not considered to be sensible. It is argued that the purpose is too restrictive and the duration of the foundation which corresponds to the duration of the animal's life is in many cases too short. Moreover, despite its narrow and private purpose, the foundation would be subject to the supervision of the administrative body of the Swiss Confederation, Canton or Comune with which its object is connected.²²⁶ One commentator suggests therefore to set-up a foundation with two concurrent or successive purposes. It would thus be possible to choose as primary purpose the monetary support of an animal which would be replaced by another purpose upon the animal's death. The second purpose could consist in another specific charitable purpose such as the care for stray cats. Through the selection of two purposes, one of which is wider and not restricted by time, the aforementioned objections to foundations in favour of one animal could be rebutted.²²⁷

²²³ See Parliament Initiative, *supra* note 122, at 4169.

²²⁴ Article 493 Swiss CC. In German: „1 Der Erblasser ist befugt, den verfügbaren Teil seines Vermögens ganz oder teilweise für irgend einen Zweck als Stiftung zu widmen. 2 Die Stiftung ist jedoch nur dann gültig, wenn sie den gesetzlichen Vorschriften entspricht.“ See S. Wyler & B. Wyler, *supra* note 124, at 143.

²²⁵ Harold Grüniger, in: Heinrich Honsell et al., *Basler Kommentar zum Schweizerischen Privatrecht* (Basel 2007) at Vor Artikel 80-89^{bis} Swiss CC para. 6 et seq.; Federal Supreme Court of Switzerland, decision No. 127 III 337, at 340.

²²⁶ See de Poret, *supra* note 174, at para. 720 et seq.; de Poret, *supra* note 222, at 126. See also Boliger, Goetschel, Richner & Spring, *supra* note 63, at 198.

²²⁷ De Poret, *supra* note 174, at para. 722 et seq.

IV. SUMMARY

The situation of animals in Swiss law is at one and the same time a matter of progress and regress in the effort to improve not only the legal position of animals but the protections afforded them by the law. Abolition of the *Tieranwalt* (Animal Attorney) of the Canton of Zurich after over twenty years of successful activity shows that reforms and innovations must be constantly defended and can never be taken for granted.

Swiss law has hitherto afforded no recognition to the subjective rights of animals, but it has extended recognition to certain interests that have been deemed worthy of protection – in particular, the interest of not having to suffer is protected within a certain framework. Furthermore, there is a fundamental albeit imperfectly realized recognition of the idea of the ethical protection of animals;²²⁸ that is to say, the notion of protecting animals as living and sentient beings for their own sake alone²²⁹ and not for the sake of human beings. As early as 1989, in a leading case, the Swiss Federal Supreme Court established that “the ethical protection of animals . . . recognizes animals to be living and feeling fellow creatures for whom respect and appreciation on the part of intellectually superior humans is a moral postulate.”²³⁰ By virtue of the recognition of the dignity of the Creature in the Swiss Federal Constitution, this principle was lent additional weight and must now be taken into consideration in any interpretation of legal norms.

As a result, Swiss legislation also recognizes the inherent value of animals beyond their practical utilization by human beings – as the Swiss Federal Council explicitly held to be the case in its remarks pertaining to the new Animal Protection Act and thus, according to its own statement, taking the first step toward recognition of an independent right to existence for animals.²³¹ There is naturally still a long way to go until this final goal is reached. It was in this regard that in 1992 the Business Review Commission of the Upper Chamber reprovved the instrumental relationship to animals, which is frequently encountered in the agricultural sector and which can best be summarized with the concept of “animal production”;²³² another highly problematic instance of the exclusive instrumental use of animals is the employment of animals in experiments.²³³ The next logical step along the path toward an independent right to existence for animals is the recognition of a right to life for animals and expansion of their protection against suffering.

²²⁸ The term „ethical protection of animals“ is discussed in detail by Albert Lorz & Ernst Metzger, *Tierschutzgesetz, Kommentar*, 6th ed., München 2008, para. 26, para 60 et seq.; Binder & von Fircks, *supra* note 89, Anmerkungen zu § 1.

²²⁹ Cf. report of the Business Review Commission of the Upper Chamber on „enforcement problems in animal welfare, *supra* note 55, at 621; Antoine F. Goetschel & Gieri Bolliger, *Das Tier im Recht*, Zürich 2003, at 198.

²³⁰ Swiss Federal Supreme Court, decision No. 115 IV 248 et seq.

²³¹ *Botschaft Tierschutzgesetz*, *supra* note 7, at 663; Business Review Commission of the Upper Chamber on “enforcement problems in animal welfare,” *supra* note 55, at 622.

²³² Business Review Commission of the Upper Chamber on “enforcement problems in animal welfare”, *supra* note 55, at 622 et seq.

²³³ See also Brenner, *supra* note 41, at 171 et seq.

Concerning the emotional relationship between humans and companion animals, their respective interests are protected by several provisions in Swiss private law. Statutory law not only stipulates that non-human animals are not things, but places special emphasis on their well-being when their owners separate, divorce, or die. On the other hand, a human beings' special interest in a companion animal is protected when his or her pet is injured or killed. Not only does the law acknowledge that non-commercial animals have a sentimental value to their owner and mandates its compensation in the realm of tort and contract law but it also allows a judge to award veterinary expenses that are higher than the animal's replacement value. These legal changes are a major step forward. However, it is in any case unfortunate that the so-called change in the animal's legal status did not result in the introduction of a theoretically conclusive separate legal category for non-human animals and Swiss law continues to distinguish between 'objects' and 'subjects' or 'things and 'persons' respectively, bestowal of this latter status restricted to human beings.

There is yet still much work to do at both the political and legal levels in order to finally achieve a better legal status for animals. Nonetheless, the first steps have indeed been taken, and now it is a matter of consequently continuing along this path.