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The Animal Voice: Ensuring Interests Through Law

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Summary

Animals are worldwide legally regarded as property that can be possessed by humans. But the status of property does not automatically lead to inferiority. Several countries, including Switzerland¹, Germany², Austria³ and Slovenia⁴, have enacted legislation to include animal welfare in their national *constitutions*. With this step a balance is found between the animal owner's fundamental right of property and the animal's interests in freedom from unnecessary suffering from pain, damage and fear. Animal welfare must be valued in the same way we value the fundamental constitutional rights of property, freedom of commerce, of teaching and of religion.

¹ Art. 80 Bundesverfassung (Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101 <http://www.admin.ch/ch/e/rs/101/a80.html>); see also Margot Michel and Eveline Schneider Kayasseh: The Legal Situation of Animals in Switzerland, in: Journal of Animal Law, Michigan State University, College of Law, May 2011, Vol. VII, 2011, p 1–42.

² Article 20a Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, 23 May 1949), http://www.bundestag.de/bundestag/aufgaben/rechtsgrundlagen/grundgesetz/gg_02.html, English version at http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf.

³ Article 11(1)8. Bundes-Verfassungsgesetz (Federal Constitutional Law, Austria, 1 October 1920), http://www.jusline.at/11_B-VG.html, English version at http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf.

⁴ Article 72 Ustava Republike Slovenije (Constitution of the Republic of Slovenia, Official Paper RS, Nr. 33/91, I,42/97, 66/00, 24/03, 69/04 and 68/06, of 23 December 1991), English version at http://www.wipo.int/wipolex/en/text.jsp?file_id=180804.

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In Germany⁵, Austria⁶, Switzerland⁷, France⁸ and Poland⁹, animals have been given a status elevating them above simple property. Animals are treated as a distinct *category by civil law*, as far as their legal standing is concerned. This has led to positive changes. Compensation in case of injury or death of an animal and reasonable costs for veterinary care have to be paid¹⁰. In Switzerland for example judges are legally entitled to assign ownership from one person to another, if the other person is a better keeper, even if he/she is not the original owner, like in divorce cases¹¹. And an animal's claim for inheritance under an owner's last will is foreseen¹². Establishing a common belief in the need for animal protection is an important first step in protecting animals from suffering pain, damage and fear.

How far can humans go in using or abusing animals for our own purpose or desire? If we acknowledge the *dignity of animals*, then we can question whether the use of an animal for purposes as varied as scientific experimentation, fur, or even sexual interest is legitimate, or if an inherent value requires bans of specific practices. In Swiss legislation¹³, a "fair balance" between human needs and the animal's interests has been realized. The legitimacy of certain animal experimentation, for example, has been banned by the Swiss high court¹⁴. Switzerland feels that specific animal experimentation unfairly violates the interests and the dignity of animals.

Countries that have adopted animal welfare legislation typically protect only vertebrates. Protected classes include: farm animals, animals used in scientific experimentation, pets, wild animals, zoo animals, and animals that are hunted or fished. This protection is based on the view of their capability of suffering. In the eye of the legislators there is still doubt whether even highly-developed *invertebrates* can suffer or at least express dislike of pain. As a remedy against poor law enforcement, an animal welfare attorney should be installed, who officially represents the animal's interests in criminal and administrative procedures against his owner.

⁵ Sections 90a, 251 and 903 Bundesgesetzblatt (German Civil Code, 27 July 2011), English version at http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf; Sections 765a, 811c Zivilprozessordnung (German Code of Civil Procedure, 5 December 2005), English version at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html.

⁶ Sections 285a and 1332a Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code of 1811), [http://www.jusline.at/Allgemeines_Buergerliches_Gesetzbuch_\(ABGB\)_Langversion.html](http://www.jusline.at/Allgemeines_Buergerliches_Gesetzbuch_(ABGB)_Langversion.html).

⁷ Art. 641a Zivilgesetzbuch (Swiss Civil Code of 10 December 1907), English version at <http://www.admin.ch/ch/e/rs/2/210.en.pdf>.

⁸ Art. 524 and Art. 528 Code civil des Français (French Civil Code, 21 March 1804), English version at http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf.

⁹ 9 Art. 1 Polish Animal Protection Act (1997), English version at http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=045007&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL and <http://www.animallaw.info/nonus/statutes/stpoapa1997.htm>.

¹⁰ Section 1332a Austrian Civil Code; Section 251 German Civil Code; Art. 42 Obligationsrecht (Federal Act on the Amendment of the Swiss Civil Code (Part 5: The Code of Obligations) of 30 March 1911), English version at <http://www.admin.ch/ch/e/rs/2/220.en.pdf>.

¹¹ Above n 7, Art. 651a.

¹² Above n 7, Art. 482.4.

¹³ Above n 1, Art. 120; Art. 1, 3, 4.2, 17, 26 Swiss Animal Welfare Act of 16 December 2005, English version at <http://www.bvet.admin.ch/themen/tierschutz/index.html?lang=en>; and Art. 16.2, 25 and 105 Animal Welfare Ordinance of 23 April 2008.

¹⁴ *Zurich University Institute for Neuroinformatics and Politechnical Institute v Zurich Anima Experiments Commission*, 2C_421/2008 and 2C_422/2008 (7 October 2009) (Federal Court of Switzerland).

Property or sentient being

Within certain circles, especially American legal academics including Gary Francione, a barrier is discussed where no forward step for animals can be taken unless their status of being possessed by humans is abolished. Although acknowledged worldwide as a human right, the object in possession is not completely in the owners will. Animal welfare legislation has to be enforced also against the owners will, e.g. in the case of mistreating animals.

To bring the animal's interest of not being mistreated to the same level of the owner's interest of property, animal welfare issues should gain status as an important duty of the state, clearly defined in a way that reduces the omnipotence of the animal's owner. This can be achieved by acknowledging animal welfare as a state duty in the constitution, creating a balance between the interests of the owner on one side and of the animal on the other. It goes beyond property (e.g. of farm animals, animals in experiments, pets and 'puppy mills') to freedom of research (to reduce unnecessary and excessive animal experiments), business (e.g. of slaughter house owners), personal freedom (e.g. practicing unlimited hunting) and to freedom of religion (e.g. participating in unnecessary suffering by ritual slaughter).

In countries like Germany¹⁵, Austria¹⁶, Slovenia¹⁷, and Switzerland¹⁸ animal welfare has risen to constitutional level. In other countries animal welfare risks failure when owners are protected from legislators and judges for example in the field of animal experiments when scientists fight for the unbounded freedom of science.

When discussing improved constitutional recognition of animals, animal's "sensitivity" is considered, for example in Art. 13 of the *Treaty on the Functioning of the European Union* (TFEU) (introduced by the Treaty of Lisbon)¹⁹. Attention should be paid to the protection of animals as a whole, not limited to their sensitivity. Otherwise, the law enforcement process risks being restricted to consideration only of whether a particular animal's sensitivity has been affected. If 'animal welfare' is recognized at the constitutional level, sensitivity must not be the only consideration; interest of freedom from suffering pain, damage and fear must be a strong basis for due process of law making and law enforcement.

When speaking of animal's sensitivity in the political process, risks exist to exclude the immensely big world of invertebrates from legal protection. The discussion concerning their capability to suffer and feel pain is still at the early stages and will unlikely result in the animal's favor soon.

¹⁵ Above n 2.

¹⁶ Above n 3.

¹⁷ Above n 4.

¹⁸ Above n 13, Art. 80.

¹⁹ "In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage."

The animal as a simple object or a specific category of its own

Discussion of the legal status of animals in civil law is often undervalued in the legal commentary on the legal changes of the Civil Code in Germany and Austria in 1988 and 1990 which changed the status of animals from one of simple object to a particular category between human beings and simple objects²⁰. Animal welfarists are mainly focused on steps ahead in the animal welfare legislation and often leave the discussion on civil law aside. From my point of view it is very important to know whether the animal is treated as a simple object in legislation or has a status of his or her own: by upgrading the animal here, the legislator and society get a sharper focus on animal issues. Mainly within society the animal is not regarded as a simple object. Pets are often seen as partners in a family, meat is eaten but the concern of how it has been produced still is an issue. And whether or not primates are used in animal experiments is not a negligible question. By acknowledging an animal's status in civil law, other animal issues find a better understanding in society. Nobody can protect his abusive intentions by declaring his animal a simple object of which he has unlimited property rights. No farmer for example can justify unacceptable housing conditions by saying he can do with his objects what he wants. Therefore an analysis on the animal within legislation should not only be focused on cage sizes, but on the legal status as a whole.

Germany, Austria, Poland²¹, Switzerland²² and France²³ have taken this first step of recognizing the legal status of animals as a category between objects and human beings. Other states should follow and recognize the high emotional value of the animals in their societies. In order to maintain a higher status of animals in society, these states need to revise their legislation periodically as the status of animals develops.

Imagine a couple gets divorced. During their 12 years of marriage, the husband bought Simca, a German Shepherd, who played an important role in the education of their children. They loved him and the wife brought Simca to the vet, read a lot on dog education and went to dog education courses. It would be unfair if Simca would be forced to go with the husband buyer, where his wife and the children have taken much more care of the dog and considered him as part of the family. Without clear legislation the judge cannot allocate Simca to the place where he will likely live in better circumstances, the dog risks following the husband and the rest of the family loses him. If an animal is no longer a simple object, his or her status has to be reconsidered during a divorce: should he directly go to the person who bought him or, in the case of common property, to the place where he will have a better life? The judge has to allocate the domestic animal to the place where he or she will have, from the animal's point of view, better living conditions. This described solution has been created in Swiss legislation²⁴.

²⁰ Above n 5, n 6.

²¹ Above n 9.

²² Above n 7, Art. 641a, 651a, 482.4, 720a, 722, 728, 651; Above n 10 Code of Obligations, Art. 42.3, 43; Art 110, 332 Strafgesetzbuch (Swiss Criminal Code of 21 December 1937), English version at <http://www.admin.ch/ch/e/rs/311.0.en.pdf>; Art. 92 Bundesgesetz über Schuldbetreibung und Konkurs (Federal Statute on Debt Enforcement and Bankruptcy of 11 April 1889), http://www.admin.ch/ch/d/sr/281_1/a92.html.

²³ Above n 8.

²⁴ Above n 7, Art. 651a.

In France the emotional value of animals is acknowledged through jurisdiction: The person responsible for the damage of the animal – the judgments started with the horse « Lunus » in 1962²⁵ – has also paid gratification for personal suffering of the owner. France also entitles tenants to keep an animal in apartments²⁶.

Is the sensitivity of an animal protected enough?

Before starting the discussion whether the sensitivity of animals should be protected by legislation, the status quo has to be analyzed. In several countries including France, Italy, Australia, Canada, Argentina and China, there is a lack of complete and unified animal welfare legislation. The application of several aspects like the welfare of companion animals is more difficult when not found in one coherent piece of legislation. Such legislation seems to be first priority, even if it is based on the traditional concept of protecting animals against unnecessary pain, damage, fear and suffering. Incorporating the ‘sensitivity’ of animals in the law making process to avoid unnecessary opposition to it is a question of smart lobbying.

In any case animal welfare legislation – with or without protection of animal sensitivity – is lacking in application and enforcement. Following legal discussions worldwide, lawyers and researchers who specialize in the field of animal law complain of the lack of political will in the process of law enforcement as far as animals are concerned. It is indeed a difficult task to create successful animal friendly legislation in industrial sectors such as farm animals and animal experiments, dog and cat breeding. The influence of these very well organized animal owners on law enforcement authorities, judges and politicians can hardly be underestimated when making progress in the name of animals.

Legally speaking, there might be a conflict of interests: on the one hand there is the animal owner interest in maximum profit and on the other hand his responsibility for the well-being of his animals within the framework of animal welfare legislation.

How can this conflict be resolved? One opportunity could be to appoint an independent ‘animal welfare attorney’ in criminal cases against the animal’s owner for animal mistreatment²⁷. It is not sufficient to leave that duty to the police, the state attorney or other authorities. They are thankful for support in their duty by a specialist in the field who can defend the animal position and also have full insight into investigations. This person needs to be entitled to appoint witnesses and make appeals against far too weak judgments that protect the owner’s position.

²⁵ Cass civ 1, 16 January 1962 D 1962.199 (Lunus); see Recueil Sirey, November 1962, p. 19 and 282–284.

²⁶ Article 10, Act No. 70-598 of 9 July 1970 amending and supplementing Law of 1 September 1948 amending and codifying legislation to the reports of landlords and tenants or occupants of housing or commercial, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000321622&dateTexte=>.

²⁷ Imogen Foulkes, ‘Swiss ask whether animals need lawyers’ *BBC News* (online) 6 March 2010 <http://news.bbc.co.uk/2/hi/europe/8550028.stm>; Deborah Ball, ‘Scales of Justice: In Zurich, Even Fish Have a Lawyer’ *The Wall Street Journal* (online), 6 March 2010 <http://online.wsj.com/article/SB10001424052748703915204575103520836794314.html?KEYWORDS=goetschel>; Leo Hickman, ‘This man’s last client was a fish’ *The Guardian* (online), 5 March 2010 <http://www.guardian.co.uk/world/2010/mar/05/lawyer-who-defends-animals>.

The Swiss Canton of Zurich created such a position from 1991–2010 with great success via modern legislation²⁸. The animal-welfare lawyer of the canton of Zurich, which was a worldwide first within the field of animal law, was an officially recognised person, who had the right of appeal in cases concerning the interests of animals in criminal law since 1992 until 2010. The position was anchored in the Animal Welfare Act of Zurich, which says:

In criminal procedures referring to violation of provisions in the national animal-welfare legislation, the administration of the Canton and a lawyer appointed by the cantonal government at the suggestion of the animal-welfare organizations safeguard the interests of the injured party.

This lawyer had unfettered access to all case files, investigations and court proceedings. He had to be informed in full of all decisions and could appeal against them. He was subject to legal ethics but had no natural person or legal entity as a client. He was not bound by any instructions, neither from the animal owner, animal-welfare associations nor the authorities.

I was closely involved in the legislative process to establish the post from 1985 until 1992 and was the animal-welfare lawyer of the canton of Zurich from 2007 to 2010. As animal welfare attorney, I was involved from the beginning of a case and received a copy of the interrogation and of the complaint, mainly by the veterinary office, was invited to interrogate by the state attorney and could contribute in the case by providing insight into similar past cases. I also had power to appeal against inadequate decisions and represented the animal's voice as if the animal would have had an attorney for his or her own against the animal owner. Based on the Zurich animal welfare legislation, the animal welfare attorney was proposed by animal welfare organizations, designated by the Government and paid for by the state – on a low fee – by the hour. This office has unfortunately been abolished due to unification of the Swiss Criminal Procedure Code which did not allow the Cantons to maintain those specific offices. During the time of the animal welfare attorney there were far more animal welfare cases than in other Cantons, higher fines and a better motivation by the authorities to enforce laws as part of their daily routine as far as animals were concerned.

Public awareness of animal issues has increased in Switzerland within the last 20 years. Farm animals for example are mainly kept in relatively expansive conditions and are to be taken outside periodically²⁹. Consumers are mainly prepared to pay higher prices for more organically and

humanely produced meat³⁰. Companion animals for example, who need social contacts like guinea pigs and several birds, are to be held as pairs or in groups, and decisions to conduct animal experiments can be resolved in court when the

²⁸ Section 17 Kantonales Tierschutzgesetz (Cantonal Animal Welfare Act of 2 June 1991, Zurich), [http://www2.zhlex.zh.ch/App/zhlex_r.nsf/WebView/C1256C610039641BC1256036003AE538/\\$File/554.1_2.6.91_22.pdf](http://www2.zhlex.zh.ch/App/zhlex_r.nsf/WebView/C1256C610039641BC1256036003AE538/$File/554.1_2.6.91_22.pdf); Sections 13 – 15 Kantonale Tierschutzverordnung (Cantonal Animal Welfare Ordinance of 11 March 1992, Zurich) [http://www2.zhlex.zh.ch/App/zhlex_r.nsf/WebView/C1256C610039641BC1256036003AE55F/\\$File/554.11_11.3.92_23.pdf](http://www2.zhlex.zh.ch/App/zhlex_r.nsf/WebView/C1256C610039641BC1256036003AE55F/$File/554.11_11.3.92_23.pdf).

²⁹ Above n 13.

³⁰ Swiss Federal Veterinary Office, *2nd Animal Welfare Report* page 35 (September 2012) Federal Administration <http://www.bvet.admin.ch/themen/tierschutz/index.html?lang=en>.

interests of the researchers and the animals are too misbalanced³¹. Fines for animal mistreatment have increased remarkably³² and the number of the cases have also increased due to public and scientifically based pressure not to leave animal mistreaters untouched.

Similar measures have to be discussed in every state. One area could focus on enlarging the official animal welfare attorney's powers into administrative procedures involving official permits on keeping and using animals in special circumstances like for experiments, for farming purposes as far as the buildings and housing conditions are concerned, for keeping a zoo or other wildlife facilities. Animals need a legally binding voice here also.

An important consideration for the law enforcement authorities and for the animal welfare attorney is the existence of a complete, neutral, official database on every decision in animal welfare cases. It could start with the criminal field and court judgments and those of public prosecutors and lower courts. By knowing exactly how the law is being enforced academics in Universities and/or on independent private bases can compare those judgments and identify which jurisdictions enforce the law better than others. In Switzerland such a public database with all cases since 1981 is run by the Foundation for the Animal in the Law in cooperation with the authorities.

The dignity of animals and the inherent value as modern concepts

To acknowledge animal sensitivity and to make it widely known in society is an important step ahead for creating awareness of animal issues. Societies where legislative bans on animal mistreatment are in force and where it is at least acknowledged that vertebrates have capacity for suffering, damage, pain and fear, would probably be more likely to accept the concept of animal sensitivity. This concept is traditionally based on the English philosopher of the 19th century Jeremy Bentham's position of animal protection 'because they can suffer'. Legislation is therefore mostly restricted to vertebrates. It hardly protects the immense world of the invertebrates, making very little exceptions for some special highly developed life forms, like Cephalopodae and Reptantiae. In the mid-term, perhaps we can expect that Drosophilae and other often used invertebrates for experiments will be protected.

A modern concept of animal welfare does raise the question of the animals 'dignity', partly parallel to the dignity of human beings, like the Swiss Constitution and in South Korea³³, or at least of an 'inherent value' of animals, like in the Netherlands³⁴. By this innovative step the legislator acknowledged an interest of the animal of being as it is and the animal interest in being freed from human interests in using or –depending on the point of view – abusing them.

Conclusion

³¹ Ibid at pages 4-7.

³² Foundation for the Animal in the Law, *Annual report on the animal criminal cases of Switzerland*, page 8 (27 November 2012) Foundation for the Animal in the Law
http://www.tierimrecht.org/de/PDF_Files_gesammelt/GutachtenStrafpraxis2011.pdf.

³³ Article 3 Animal Protection Act 2007 (South Korea), English version at
<http://www.koreananimals.org/animals/apl/2007apl.htm#a3>.

³⁴ Article 1.3 Dutch Animals Act 2011, <https://zoek.officielebekendmakingen.nl/stb-2011-345.html>.

Animals have to be protected as sentient beings in the future in every aspect of legislation. This reflects the public interest and pressure of being taken seriously in its concern of what happens to animals in farms, animal experiments, as wild animals and also as companions of us human beings. If not yet, existing unified, strong and applicable animal welfare legislation has to be created in every state. Animals do need a voice in various procedures, also in criminal cases of mistreatment especially when the mistreater is the owner himself. Those structures can be worked out by legislators with the help of national and international specialists in the field, supported by objective and scientific databases on animal cruelty and other animal related cases. Universities need to include animal law and ethics in their curricula, with the next step being the protection of animals 'dignity' or – at least – animals' inherent value by law.

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