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Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives

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LEGAL PROTECTION OF ANIMAL DIGNITY IN SWITZERLAND: STATUS QUO AND FUTURE PERSPECTIVES

By
Gieri Bolliger*

Swiss law protects not only the well-being but also the dignity of animals. Since 1992, animal dignity protection has been a constitutional principle in Switzerland, and a main purpose of the national Animal Welfare Act since 2008. The animal dignity concept is still unique in the world and represents a biocentric expansion of Swiss law granting animals a moral value, irrespective of their sentience. This signifies protection for an animal's inherent worth, including ethical aspects that are not necessarily associated with any physical and physiological injury, such as protection from humiliation, ex-

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cessive instrumentalization, and substantial interference with an animal's appearance and abilities. Therefore, consideration of an animal's dignity goes far beyond its pathocentric protection from pain, suffering, harm, and anxiety. This represents a milestone for animal law in general and has received much attention all over the world. Against the background of the animal dignity concept, the Swiss legislature passed a number of reforms and amendments. However, in contrast to human dignity, animal dignity is only given a relative value in Swiss law, meaning that violations of animal dignity usually can be balanced and legally justified by prevailing human interests. As a result, various highly questionable uses of animals are considered legitimate and not subject to legal scrutiny in Switzerland, and many of the essential questions are not being asked. Consequently, the far-reaching conceptual reorganization of Swiss animal law has not yet led to a fundamental change in the human-animal relationship in practice. This Article first discusses in detail the concept of animal dignity protection, its systematic embedding within Swiss animal law, and its legal implications to date. Subsequently, the Article analyzes multiple everyday ways of engaging with animals in Switzerland that are consistent with dignity protection. Highlighting a number of deficits both in the implementation and enforcement of the concept, this Article finally suggests various improvements that demand more consistency and courage in legislation, enforcement, and jurisdiction, as well as a general increase in awareness for animal dignity and its protection both in society and legal institutions.

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Even to the life that lies far away from ours, we are capable, once we have escaped the carelessness, not to behave insensitive. . . . All life is secret; all life is valuable. . . . Only when man acknowledges his bond with all living beings does he possess true humanness.

—Albert Schweitzer (1875–1965)

I. INTRODUCTION

In 1992, Switzerland amended its Federal Constitution by adding a provision requiring the legislature to pass laws on the use of reproductive and genetic material from animals, plants, and other organisms, and in doing so, to take into account the “dignity of living beings.”¹ Swiss protection for the dignity of living beings, including animal dignity, is unique in the world at a constitutional level.² Subsequent to that constitutional provision, in 2008, Switzerland enshrined protection for animal dignity in the national Animal Welfare Act (AWA).³

For animal welfare, this is a milestone. The Swiss dignity protection concept is based on the conviction that animals exist—and have to be protected by law—for their own sake, not primarily for human interests. Under Swiss law, humans must respect animals’ species-specific characteristics, needs, and behaviors, and the inherent worth of animals is protected beyond physical and physiological stresses.⁴ In addition to the prevention of the pathocentric stress elements of pain, suffering, harm, and anxiety, Swiss animal law includes a biocentric

¹ Bundesverfassung [BV] [Constitution] Apr. 18, 1999, art. 120, para. 2 (Switz.).

² Vanessa Gerritsen, *Animal Welfare in Switzerland—Constitutional Aim, Social Commitment and a Major Challenge*, GLOBAL J. ANIMAL L. 1, 1–2 (Jan. 2013).

³ Tierschutzgesetz [TSchG] [Animal Welfare Act (AWA)] Dec. 16, 2005, SR 455, art. 1 (Switz.).

⁴ *Id.* art. 3 (Switz.).

component that grants animals a moral value irrespective of their sentience.⁵

However, despite this far-reaching conceptual reorganization of Swiss animal law, no essential change in the human-animal relationship has been observed in practice. To the contrary, in many areas animals still are exploited in ways that are hardly consistent with respect for their dignity. In order to provide true legal protection for animals' dignity, numerous forms of everyday animal use must be fundamentally questioned.

This Article explains the Swiss legal concept of animal dignity and its systematic embedding within Swiss animal law. The Article then analyzes various everyday ways of engaging with animals for their compatibility with the principle of dignity protection. In a critical conclusion, this Article finally demonstrates the deficits in the implementation and enforcement of the animal-dignity concept and suggests various improvements.

II. BACKGROUND ON SWITZERLAND AND THE SWISS LEGAL SYSTEM

Switzerland—also called the Swiss Confederation—is a federal state with a permanent resident population of approximately 8.325 million (2016), consisting of twenty-six partially sovereign member states known as 'cantons.'⁶ Situated in the heart of Europe, Switzerland is bordered by Germany to the north, Austria and the Principality of Liechtenstein to the east, Italy to the south, and France to the west. Consisting of more than 41,000 square kilometers (about 16,000 square miles), the country is roughly the same size as Denmark (without Greenland and the Faroe Islands) or the Netherlands, but two hundred times smaller than the entire United States and six times smaller than the U.S. state of Oregon. Although surrounded by member states of the European Union (EU), Switzerland does not belong to the EU. Accordingly, EU law does not apply within Switzerland.⁷

⁵ FED. FOOD SAFETY & VETERINARY OFFICE (FSVO), FED. DEPT. OF HOME AFFAIRS (FDHA), DIGNITY OF THE ANIMAL: EXPLANATORY NOTES ON THE "WEIGHING OF INTERESTS" 2 (Dec. 10, 2013).

⁶ *Cantons of Switzerland*, STATOIDS.COM, <http://statoids.com/uch.html> [https://perma.cc/N456-Q3R4] (accessed Feb. 20, 2016).

⁷ Nevertheless, Switzerland is a politically, economically, and culturally very close neighbor to the twenty-eight-nation EU. Over 1 million EU citizens live in Switzerland, and more than 280,000 commuters (almost 150,000 of them from France) cross the border at least once a week. On the other hand, almost 450,000 Swiss citizens live abroad (about 195,000 in France). FED. DEPT. OF FOREIGN AFFAIRS, SCHWEIZ-EU IN ZAHLEN: HANDEL, BEVÖLKERUNG, VERKEHR 19, 22 (2015). Relations between the EU and Switzerland are characterized in particular by strong economic ties. A series of bilateral treaties provide the framework for the close relationship to the EU, whereby Switzerland has adopted various provisions of EU law in order to participate in the EU's single market.

Of note, Switzerland's legal system, like those of most European countries, is based on the civil law tradition.⁸ As such, it largely depends on codified statutory law that is applied and interpreted by the courts in individual cases, in contrast to countries whose law is based on the common law tradition, such as the U.S. and Great Britain, where judicial cases (case law) are of primary importance.⁹ Civil law systems differ from common law systems in various ways, such as the substantive content of the law, the operative procedures of the law, legal terminology, the manner in which authoritative sources of law are identified, the institutional framework within which the law is applied, and the education and structure of legal professions.¹⁰ In short, in civil law, courts and other judging bodies apply statutory law, which means the legal principles embodied in codes (such as the Swiss Civil Code),¹¹ statutes (such as the Swiss Animal Welfare Act),¹² and ordinances (such as the Swiss Animal Welfare Ordinance),¹³ rather than turning to case precedent. Statutory law is designed to cover all eventualities and basically has precedence over custom and judicial decisions. Consequently, courts in civil law systems have a more limited role of applying the law to the case at hand, and their decisions do not have the same binding character as in common law systems and can be overruled. Further, doctrine (the writings of legal scholars who draft and interpret statutory law in books and articles), although not a formal source of law, carries immense authority in civil law jurisdictions and has a much greater influence on the development and interpretation of law than the writings of legal scholars in common law systems.¹⁴

III. ANIMAL LAW IN SWITZERLAND

A. *Constitutional Status of Animal Welfare*

For more than forty years, animal welfare has been a recognized and constitutionally protected national objective in Switzerland.¹⁵

⁸ *The World Factbook*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> [<https://perma.cc/6TG3-N7HC>] (accessed Feb. 26, 2016).

⁹ See generally John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3d ed. 2007) (describing the civil law system employed by Switzerland, as opposed to the common law tradition of the U.S.).

¹⁰ See generally Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, 74–84 (3d ed. 1998) (outlining comprehensive comparisons between civil law and common law systems).

¹¹ Schweizerisches Zivilgesetzbuch [ZBG] [Civil Code] Dec. 10, 1907, SR 210 (Switz.).

¹² AWA, Dec. 16, 2005, SR 455 (Switz.).

¹³ Tierschutzverordnung [TSchV] [Animal Welfare Ordinance (AWO)] Apr. 23, 2008, SR 455.1 (Switz.).

¹⁴ Merryman & Pérez-Perdomo, *supra* note 9, at 80–81.

¹⁵ National objectives are those constitutional norms that set up the principles and guidelines for state actions. See TANJA GEHRIG, *STRUKTUR UND INSTRUMENTE IM TIER-SCHUTZRECHT* 49 (1999) (providing further references).

However, certain limited aspects of animal protection have been enshrined for much longer; in 1893, Swiss people and the cantons¹⁶ voted in favor of a constitutional ban on any method of slaughter in which livestock was not stunned before exsanguination, contradicting the recommendation of the Federal Council and Federal Parliament.¹⁷ Amending the corresponding article to the Federal Constitution,¹⁸ Switzerland became the first country in the world to impose a duty to anesthetize animals prior to slaughter, thus prohibiting religious slaughter.¹⁹ That provision, despite being a subject of constant dispute, was valid for nearly eighty years.²⁰

In 1973, animal welfare in general was elevated to a separate constitutionally protected interest in Switzerland.²¹ That year, an overwhelming majority of the Swiss people and all cantons voted for a revision of the slaughter article amending the former Federal Constitution to include a general animal welfare clause.²² In so doing, Switzerland was the first European country to include animal welfare as a

¹⁶ An amendment of the Swiss Federal Constitution normally requires a majority of the votes of both the Swiss people and the cantons. BUNDESVERFASSUNG [BV][CONSTITUTION] Apr. 18, 1999, SR 101, arts. 140, 142 (Switz.).

¹⁷ See generally DANY ROTHSCILD, DAS SCHÄCHTVERBOT DER SCHWEIZERISCHEN BUNDESVERFASSUNG (1955); PASCAL KRAUTHAMMER, DAS SCHÄCHTVERBOT IN DER SCHWEIZ 1854–2000—DIE SCHÄCHTFRAGE ZWISCHEN TIERSCHUTZ, POLITIK UND FREMDENFEINDLICHKEIT, 52 *et seq.* (2000). [Editors Note: Due to the author's preference, and the foreign-language nature of many of the sources, the editors have decided to retain the use of "et seq." throughout this Article.]

¹⁸ Bundesverfassung [BV] [Constitution] May 29, 1874, SR 101, art. 25bis (Switz.) (effective from May 29, 1874 to December 31, 1999).

¹⁹ GIERI BOLLIGER, MICHELLE RICHNER & ANDREAS RÜTTIMANN, SCHWEIZER TIERSCHUTZSTRAFRECHT IN THEORIE UND PRAXIS 33 (2011). The underlying motion was the first popular initiative (i.e., a request submitted by a minimum of 100,000 voters to undertake a complete revision of the Federal Constitution, or to adopt, repeal, or amend a provision of the Constitution) in Swiss history that successfully amended the Federal Constitution. See KRAUTHAMMER, *supra* note 17, at 85 *et seq.* Notably, along with animal welfare concerns, anti-Semitic tendencies clearly contributed the support for the initiative. See ANTOINE F. GOETSCHEL, KOMMENTAR ZUM EIDGENÖSSISCHEN TIERSCHUTZGESETZ 150 (1986); KRAUTHAMMER, *supra* note 17, at 60 *et seq.* For the problematic topic of religious slaughter, see GIERI BOLLIGER, EUROPÄISCHES TIERSCHUTZRECHT—TIERSCHUTZBESTIMMUNGEN DES EUROPARATS UND DER EUROPÄISCHEN UNION (MIT EINER ERGÄNZENDEN DARSTELLUNG DES SCHWEIZERISCHEN RECHTS) 288 *et seq.* (2000) (providing further references).

²⁰ See generally KRAUTHAMMER, *supra* note 17, at 95 *et seq.*; SYBILLE HORANYI, DAS SCHÄCHTVERBOT ZWISCHEN TIERSCHUTZ UND RELIGIONSFREIHEIT—EINE GÜTERABWÄGUNG UND INTERDISZIPLINÄRE DARSTELLUNG VON LÖSUNGSANSÄTZEN 10 *et seq.* (2004).

²¹ See ANTOINE F. GOETSCHEL, TIERSCHUTZ UND GRUNDRECHTE 37 (1989).

²² For the history of the new Article 25bis of the former Federal Constitution that goes back to 1963, see Andreas Steiger & Rainer J. Schweizer, *Kommentar zu Art. 80 BV*, in DIE SCHWEIZERISCHE BUNDESVERFASSUNG 1412 *et seq.* (Bernhard Ehrenzeller et al. eds., 2d ed. 2008); Christoph Errass, *Kommentar zu Art. 80 BV*, in DIE SCHWEIZERISCHE BUNDESVERFASSUNG 1614 (Bernhard Ehrenzeller et al. eds., 3d ed. 2014); BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 34 *et seq.* (providing further references).

singular issue within its constitution.²³ The new provision declared substantive legislation on the entire subject of animal welfare to be exclusively a federal matter.²⁴ Consequently, the federal government was granted extensive power to regulate animal welfare in all its breadth and depth.²⁵ Indeed, under the constitutional amendment of 1973, the Swiss legislature is not only authorized to promulgate laws protecting animals but mandated to do so. Specifically, the animal welfare clause directs the legislature to take all necessary steps to ensure animal welfare as a federal task²⁶ and provides the basis for national, uniform regulation of Swiss animal welfare law. Concurrently, the duty to anesthetize animals before slaughter was deleted from the constitutional article since this was now supposed to be regulated on a statutory level.²⁷

Twenty-seven years later, within the context of a complete constitutional revision, the animal welfare clause was replaced by article 80 of the current Federal Constitution that came into effect in 2000.²⁸ However, the provision underwent only stylistic changes, remaining

²³ As of this writing, animal welfare has only rarely been fundamentally acknowledged in national constitutions. Only about fifty countries in the world mention animals at a constitutional level. Most of those constitutions reference animals in a primarily anthropocentric way (*see infra* note 317), focusing on human interests but not on protection for the animals themselves. For instance, most of the constitutions that acknowledge animals identify them only as mere agricultural objects, private property, or part of the environment in terms of species conservation. In contrast, some constitutional provisions protect individual animals' interests, but the latter type of provision exists only in a few countries, such as India, Brazil, Germany, Luxembourg, Slovenia, and Egypt, as well as in the fundamental treaties of the European Union.

²⁴ Bundesverfassung [BV] [Constitution] May 29, 1874, SR 101, art. 25bis (Switz.).

²⁵ Margot Michel & Eveline Schneider Kayasseh, *The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back—Many Steps to Go*, 7 J. ANIMAL L. 1, 11 (2011). Before 1981, due to the lack of competence of the national legislature, the cantons were responsible for regulating animal welfare issues. *See* Steiger & Schweizer, *supra* note 22, at 1412; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 35.

²⁶ *See* GEHRIG, *supra* note 15, at 43 *et seq.* (providing further references). In doing so, however, the national legislature is authorized to legislate regarding only the welfare of the animals themselves, but not regarding the protection of humans from animals. *See infra* note 53. *See generally* BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 35 *et seq.*

²⁷ *See* Gieri Bolliger, *Obligatory Stunning Prior to Cut: Example Switzerland*, in TIERSCHUTZ BEI DER RELIGIÖSEN SCHLACHTUNG/ANIMAL WELFARE AT RELIGIOUS SLAUGHTER 225 (Johannes Caspar & Jörg Luy eds., 2010). However, until the AWA entered into force in 1981 (*see infra* p. 9), religious slaughter still remained prohibited on the constitutional level due to Article 12 of the transitional provisions of the then Federal Constitution. BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 36.

²⁸ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 80 (Switz). The new Swiss Constitution was adopted by popular vote and replaced its predecessor, intending to bring the former constitution up to date without substantive changes. The Federal Constitution is retrievable in English on the official website of the Swiss Confederation at <http://www.admin.ch/opc/en/classified-compilation/19995395/index.html> [<https://perma.cc/C987-BT4L>]. Note, however, that the English version is not an official document and therefore it has no binding effect.

substantially the same.²⁹ As with the old one, the new animal welfare clause does not prohibit any particular activity, but rather requires the legislature to enact an animal welfare law applicable to the entire country.³⁰ Notably, the constitutional animal welfare clause applies to all animals, regardless of zoological classifications.³¹

In 1973, by establishing animal protection at the highest legal level, Switzerland made a seminal decision: Animal welfare is an autonomous constitutional principle³² recognized as both a public interest³³ and a national objective equal to other national objectives, such as spatial planning, social policy, nature and heritage protection, environmental and water protection, and forest conservation.³⁴ Further, due to this status, animal welfare has the same constitutional stance as fundamental rights of humans.³⁵ Thus, animal welfare goals can

²⁹ See Steiger & Schweizer, *supra* note 22, at 1413; Errass, *supra* note 22, at 1614. Article 80 of the Federal Constitution reads as follows:

1. The Confederation shall legislate on the protection of animals.
2. It shall in particular regulate:
 - a. the keeping and care of animals;
 - b. experiments on animals and procedures carried out on living animals;
 - c. the use of animals;
 - d. import of animals and animal products;
 - e. the trade in animals and the transport of animals;
 - f. the killing of animals.
3. The enforcement of the regulations is the responsibility of the cantons, except where the law reserves this to the Confederation.

BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 80 (Switz.).

³⁰ *Id.*

³¹ Steiger & Schweizer, *supra* note 22, at 1416; Errass, *supra* note 22, at 1617.

³² ANTOINE F. GOETSCHEL & GIERI BOLLIGER, DAS TIER IM RECHT—99 FACETTEN DER MENSCH-TIER-BEZIEHUNG VON A BIS Z 199 (2003); BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 36. The phrase *constitutional principle* is not clearly defined in Swiss law. According to doctrine, it includes fundamental values such as rule of law, welfare state, federalism, and democracy. See generally ULRICH HÄFELIN, WALTER HALLER & HELEN KELLER, SCHWEIZERISCHES BUNDESSTAATSRECHT 51 *et seq.* (8th ed. 2012).

³³ *Public interest* is a vague legal term in Switzerland. It includes everything that the state must provide in order to fulfill its duties. See HÄFELIN, HALLER & KELLER, *supra* note 32, at 102 *et seq.*

³⁴ GOETSCHEL, *supra* note 21, at 37; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 36; Errass, *supra* note 22, at 1618; Andreas Kley & Martin Sigrist, *Güterabwägung bei Tierversuchen—Intentionen des Gesetzgebers und erste Anwendungen*, in GÜTERABWÄGUNG BEI DER BEWILLIGUNG VON TIERVERSUCHEN 36 (Hans Sigg & Gerd Folkers eds., 2011); Federal Council, *Botschaft zur Revision des Tierschutzgesetzes*, 661 (2002). Due to its equal status, animal welfare is also to be included in the implementation of other national objectives. Thomas Fleiner-Gerster, *Kommentar zu Art. 25bis BV*, in KOMMENTAR ZUR BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT vom 29. Mai 1874, 6 (Jean-François Aubert et al. eds., 1989). In the case of conflicts with other constitutional interests, a balancing test is required in each individual case. GEHRIG, *supra* note 15, at 49.

³⁵ See Peter Krepper, *Tierwürde im Recht—am Beispiel von Tierversuchen*, 3 AKTUELLE JURISTISCHE PRAXIS 305 (2010) (discussing criminal punishment for violating animal dignity); Errass, *supra* note 22, at 1618; Bundesgericht [BGer] [Federal Supreme Court] Oct. 7, 2009 135 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGER-

restrict fundamental rights of humans that also are expressly guaranteed by the Federal Constitution. Animal welfare concerns are justified as being security-motivated and legally anchored barriers for fundamental rights as long as those concerns are balanced and perceived as proportionate, in the public interest, and of great importance.³⁶ Conflicts between human interests and animal welfare interests are conceivable within the realms of the right to personal freedom,³⁷ freedom of religion and conscience,³⁸ freedom of expression and information,³⁹ academic freedom,⁴⁰ the guarantee of ownership,⁴¹ and economic freedom.⁴² Therefore, beyond its symbolic intent as an official acknowledgement at the highest level of law that human treatment of animals must have limitations, the Swiss constitutional animal welfare clause has far-reaching practical significance.⁴³

B. Statutory Animal Welfare: Animal Welfare Act and Animal Welfare Ordinance

As a consequence of the constitutional mandate to adopt animal welfare regulations, the Swiss Parliament decreed the first national Animal Welfare Act (AWA) in 1981.⁴⁴ Together with the Animal Welfare Ordinance (AWO),⁴⁵ passed by the Federal Council,⁴⁶ the AWA

ICHTS [BGE] II 384 (Switz.) (discussing the balancing of interests between individuals' freedom of research and animal welfare).

³⁶ See BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 36 (Switz.) (restricting limitations on fundamental rights to specific instances); Steiger & Schweizer, *supra* note 22, at 1417. See *infra* note 251.

³⁷ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 10 (Switz.).

³⁸ *Id.* art. 15.

³⁹ *Id.* art. 16.

⁴⁰ *Id.* art. 20.

⁴¹ *Id.* art. 26.

⁴² *Id.* art. 27; see GOETSCHEL & BOLLIGER, *supra* note 32, at 199; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 20, at 37 (providing further references). See generally GOETSCHEL, *supra* note 19, at 2 *et seq.*

⁴³ It may require considerable reevaluation of existing human-animal relationships, since animal welfare becomes both a constitutionally protected interest and a national objective that, as matter of principle, is accorded the same status as other national objectives. Further, animal welfare legislation can require that human rights in owning and managing animals are balanced with, or trumped by, animals' own interests in fundamental aspects of their well-being. Consequently, it leads to a kind of 'equality of weapons,' in which the privileges of science and research, religion, art, and the freedom to choose a profession no longer have absolute priority over animal well-being. Indeed, in any conflict between different constitutional rights, interests must be balanced. This means, for instance, that animal management must be adapted to the needs of animals and not depend solely on the economic interests of those who use animals. See generally Gieri Bolliger, *Animal Welfare in Constitutions, in* CONSTITUTIONAL AND LEGISLATIVE ASPECTS OF ANIMAL WELFARE IN EUROPE 12 *et seq.* (Four Paws ed. 2007).

⁴⁴ AWA, AS 2965 (2008) (Switz.) (effective from July 1, 1981 to Aug. 31, 2008); see BBL I 662 *et seq.* (1978).

⁴⁵ AWO, AS 2985 (2008) (Switz.). The AWO came into force the same date as the AWA (July 1, 1981) and was effective likewise until August 31, 2008.

⁴⁶ Whereas federal statutes (such as the AWA) are passed by the Swiss Parliament, federal ordinances are subordinated to statutes and enacted by the Federal Council.

forms the core of Swiss animal welfare law. Both the AWA and the AWO were completely reviewed in the early 2000s.⁴⁷ The revised and current versions of both laws came into force in 2008.⁴⁸

The AWA is designed to provide a legal framework for animal protection.⁴⁹ In around fifty typically brief articles, it governs individual responsibility in the general treatment of animals,⁵⁰ as well as the most important issues in animal welfare (such as animal husbandry, breeding, experimentation, transport, and slaughter).⁵¹ Each major area of animal welfare is further addressed and governed by the much broader AWO, which includes more than two-hundred and twenty detailed articles and five comprehensive appendices.⁵²

Of note, Swiss animal welfare law covers all areas of the human use of animals, such as the handling of companion animals (pets),⁵³ farmed animals, laboratory animals, wild animals, and animals used for sports, entertainment, and advertising,⁵⁴ regardless of whether they are owned by a person or are useful or harmful to humans.⁵⁵ Further, unlike U.S. law, Swiss animal welfare legislation does not contain general exclusions for entire categories of animals according to their designated use. Consequently, under Swiss law, farmed animals

⁴⁷ AWA, AS 2965 (2008) (Switz.); AWO, AS 2985 (2008) (Switz.).

⁴⁸ The AWA (Tierschutzgesetz) of Dec. 16, 2005 (SR 455) and the AWO (Tierschutzverordnung) of April 23, 2008 (SR 455.1) came into effect on September 1, 2008 and are retrievable (in German) on the official website of the Swiss Confederation: <http://www.admin.ch/opc/de/classified-compilation/20022103/index.html> [<https://perma.cc/8N-YR-SAA2>] and <http://www.admin.ch/opc/de/classified-compilation/20080796/index.html> [<https://perma.cc/CC5E-EKHR>].

⁴⁹ See GEHRIG, *supra* note 15, at 105 *et seq.*

⁵⁰ Generally, the term *animal* refers to all living beings that do not belong to the zoological realm of plants, fungi, blue-green algae, or other microorganisms. See, e.g., RITA JEDELHAUSER, DAS TIER UNTER DEM SCHUTZ DES RECHTS—DIE TIERETHISCHEN GRUNDLAGEN EINES RECHTLICHEN SCHUTZMODELLS FÜR DAS TIERSCHUTZRECHTLICHE VERWALTUNGSHANDELN 13 *et seq.* (2011). In legal terms, animals are also distinguished from humans that are not subjects of Swiss animal welfare legislation. BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 51. For the widely limited scope of application of Swiss animal welfare law on vertebrates, see *infra* p. 41.

⁵¹ AWA, AS 2965 (2008) (Switz.).

⁵² AWO, AS 2985 (2008) (Switz.).

⁵³ Within this Article, the terms *companion animals* and *pets* will be used interchangeably. While the terms *domestic animals* and *pets* (both translated as *Haustiere*) are often colloquially used synonymously in German, Swiss animal welfare law differentiates between them. Pets are often a subcategory of domestic animals, namely those which a human keeps solely for emotional reasons in his immediate proximity, mostly in his own home. However, pets can also be wild animals (such as hamsters or budgerigars) since they are not considered domesticated. The crucial factor for the classification of a domestic or wild animal as a pet is that there is no economic goal being pursued with its keeping. BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 58. See generally GIERI BOLLIGER, ANTOINE F. GOETSCHER, MICHELLE RICHNER & ALEXANDRA SPRING, TIER IM RECHT TRANSPARENT 13 (2008) (discussing the relationship between humans and companion animals).

⁵⁴ For the legal definitions of the various animal categories in Swiss law, see AWO, AS 2985 (2008), art. 2, paras. 1–2 (Switz.).

⁵⁵ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 51.

and laboratory animals are basically protected like companion animals. For instance, an act of cruelty to a farmed animal or a laboratory animal must be prosecuted exactly the same as one to a pet or a wild animal.

C. Other Animal-Related Legislation

Swiss animal legislation is established primarily, but not exclusively, by the AWA and the AWO.⁵⁶ In addition to those laws, a number of other ordinances clarify the AWO. Such ordinances are issued by the Federal Council, the Federal Department of Home Affairs (FDHA), and the Federal Food Safety and Veterinary Office (FSVO),⁵⁷ which are responsible for animal welfare matters at a national level.⁵⁸ Additionally, many other federal statutes contain provisions that directly

⁵⁶ See *infra* section V.F.4 *et seq.* Substantively, Swiss animal welfare law is exclusively regulated by national legislation. The cantons are responsible for enforcing animal welfare laws but are prohibited from issuing differing or additional substantive provisions regarding animal protection. BOLLIGER, GOETSCHEL, RICHNER & SPRING, *supra* note 53, at 14. By way of contrast, the issue of any substantive regulation for the protection of humans against animals, such as poisonous animals or dangerous dogs, is the exclusive responsibility of the cantons, as long as no animal welfare aspects are regulated at the same time. BGer Nov. 30, 2009, 2C.166/2009 (Switz.); Errass, *supra* note 22, at 1617; ANDREAS RÜTTIMANN, MICHELLE RICHNER, URSINA LÜCHINGER & NORA FLÜCKIGER, PFERD IM RECHT TRANSPARENT 19 (2015); Steiger & Schweizer, *supra* note 22, at 1416. Such legislative measures are solely the responsibility of the cantons. Regarding the protection against dangerous dogs, every canton has its own dog law that can differ significantly from the law of other cantons. See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 93 *et seq.*; *Stiftung für das Tier im Recht* (TIR), TIER IM RECHT, <http://www.tierimrecht.org/de/tierschutzrecht/schweiz/hunde-recht/index.php> [<https://perma.cc/Z56X-AMY2>] (accessed Feb. 5, 2016) (providing all current cantonal dog laws in the corresponding cantonal languages).

⁵⁷ Originally, the FSVO, which until 2014 was called the Federal Veterinary Office (FVO), was a part of the Federal Department of Economic Affairs (FDEA) and was incorporated into the FDHA in 2013.

⁵⁸ See RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 17 *et seq.* To date, the Federal Council enacted the VERORDNUNG ÜBER DAS ELEKTRONISCHE INFORMATIONSSYSTEM ZUR VERWALTUNG DER TIERVERSUCHE [ORDINANCE ON THE ELECTRONIC INFORMATION SYSTEM FOR ANIMAL EXPERIMENTS] Sep. 1, 2010, SR 455.61 (Switz.), and the FDHA passed the VERORDNUNG DES EDI ÜBER AUSBILDUNGEN IN DER TIERHALTUNG UND IM UMGANG MIT TIEREN [ORDINANCE ON TRAINING IN ANIMAL HUSBANDRY AND HANDLING OF ANIMALS] Sep. 5, 2008, SR 455.109.1 (Switz.). The FSVO issued the VERORDNUNG DES BLV ÜBER DIE HALTUNG VON NUTZTIEREN UND HAUSTIEREN [ORDINANCE ON THE KEEPING OF FARMED ANIMALS AND DOMESTIC ANIMALS] Aug. 27, 2008, SR 455.110.1 (Switz.); the VERORDNUNG DES BLV ÜBER DEN TIERSCHUTZ BEIM SCHLACHTEN [ORDINANCE ON ANIMAL WELFARE AT SLAUGHTER] Aug. 12, 2010, SR 455.110.2 (Switz.); the VERORDNUNG DES BLV ÜBER DIE HALTUNG VON VERSUCHSTIEREN UND DIE ERZEUGUNG GENTECHNISCH VERÄNDERTER TIERE SOWIE ÜBER DIE VERFAHREN BEI TIERVERSUCHEN [ORDINANCE ON THE KEEPING OF LABORATORY ANIMALS AND THE BREEDING OF GENETICALLY MODIFIED ANIMALS AND ON ANIMAL EXPERIMENT PROCEDURES] Apr. 12, 2010, SR 455.163 (Switz.); the VERORDNUNG DES BLV ÜBER DIE HALTUNG VON WILDTIEREN [ORDINANCE ON THE KEEPING OF WILD ANIMALS] Feb. 2, 2015, SR 455.110.3 (Switz.); and most recently, the VERORDNUNG DES BLV ÜBER DEN TIERSCHUTZ BEIM ZÜCHTEN [ORDINANCE ON ANIMAL WELFARE IN BREEDING] Dec. 4, 2015, SR 455.102.4 (Switz.).

or indirectly enhance animal protection. These provisions are scattered throughout Swiss legislation and found in various parts of the Swiss Civil Code (for example, family law, law of succession, property law),⁵⁹ the Swiss Code of Obligations,⁶⁰ and the Swiss Criminal Code.⁶¹ Moreover, special federal laws, such as codes relating to epizootic diseases, hunting and fishing, gene technology, agriculture, food, debt enforcement and bankruptcy, and road traffic, include animal welfare provisions.⁶²

Further, since animal welfare is increasingly internationalized, like most areas of law, Switzerland has joined various international conventions on the protection of animals and animal species and has committed to their national implementation.⁶³ Of primary significance are the treaties of the Council of Europe regarding the regulation of transport animals,⁶⁴ farmed animals,⁶⁵ animals for slaughter,⁶⁶ laboratory animals,⁶⁷ and pets.⁶⁸ Switzerland has ratified all five Euro-

⁵⁹ SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] Dec. 10, 1907, SR 210 (Switz.).

⁶⁰ BUNDESGESETZ BETREFFEND DIE ERGÄNZUNG DES SCHWEIZERISCHEN ZIVILGESETZBUCHES (FÜNFTER TEIL: OBLIGATIONENRECHT) [FEDERAL ACT ON THE AMENDMENT OF THE SWISS CIVIL CODE (PART FIVE: THE CODE OF OBLIGATIONS)] Mar. 30, 1911, SR 220 (Switz.).

⁶¹ SCHWEIZERISCHES STRAFGESETZBUCH [StGB] [CRIMINAL CODE] Dec. 21, 1937, SR 311.0 (Switz.).

⁶² MICHELLE RICHNER, HEIMTIERHALTUNG AUS TIERSCHUTZSTRAFRECHTLICHER SICHT 45 (2014). For general overviews of the various Swiss laws relating to animals, see BOLLIGER, GOETSCHEL, RICHNER & SPRING, *supra* note 53, at 3 *et seq.*, and GOETSCHEL & BOLLIGER, *supra* note 32, at 19 *et seq.*

⁶³ See GOETSCHEL & BOLLIGER, *supra* note 32, at 86 *et seq.*

⁶⁴ EUROPÄISCHES ÜBEREINKOMMEN ÜBER DEN SCHUTZ VON TIEREN BEIM INTERNATIONALEN TRANSPORT (REVIDIERT) [EUROPEAN CONVENTION FOR THE PROTECTION OF ANIMALS DURING INTERNATIONAL TRANSPORT (REVISED)] Nov. 6, 2003, SR 0.452 (Switz.) C.E.T.S. No. 193.

⁶⁵ EUROPÄISCHES ÜBEREINKOMMEN ZUM SCHUTZ VON TIEREN IN LANDWIRTSCHAFTLICHEN TIERHALTUNGEN [EUROPEAN CONVENTION ON THE PROTECTION OF ANIMALS KEPT FOR FARMING PURPOSES] Apr. 16, 2008, SR 0.454 (Switz.); Protocol of Amendment to the European Convention for the Protection of Animals Kept for Farming Purposes, Feb. 6, 1992, C.E.T.S. No. 145; European Convention for the Protection of Animals Kept for Farming Purposes, Mar. 10, 1976, C.E.T.S. No. 87.

⁶⁶ EUROPÄISCHES ÜBEREINKOMMEN ÜBER DEN SCHUTZ VON SCHLACHTTIEREN [EUROPEAN CONVENTION ON THE PROTECTION OF ANIMALS FOR SLAUGHTER] Aug. 9, 2012, SR 0.458 (Switz.); European Convention for the Protection of Animals for Slaughter, May 10, 1979, C.E.T.S. No. 10.

⁶⁷ EUROPÄISCHES ÜBEREINKOMMEN ZUM SCHUTZ DER FÜR VERSUCHE UND ANDERE WISSENSCHAFTLICHE ZWECKE VERWENDETEN WIRBELTIERE [EUROPEAN CONVENTION TO PROTECT FOR EXPERIMENTAL AND OTHER SCIENTIFIC PURPOSES USED VERTEBRATES] Apr. 11, 2013, SR 0.457 (Switz.); Protocol of Amendment to the European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes, June 22, 1998, C.E.T.S. No. 170; European Convention for the Protection of Vertebrate Animals Used for Experimental and Other Scientific Purposes, Mar. 18, 1986, C.E.T.S. No. 123.

⁶⁸ EUROPÄISCHES ÜBEREINKOMMEN ZUM SCHUTZ VON HEIMTIEREN [EUROPEAN CONVENTION FOR THE PROTECTION OF PET ANIMALS] Sep. 27, 2011, SR 0.456 (Switz.); European Convention for the Protection of Pet Animals, Nov. 13, 1987, C.E.T.S. No. 125.

pean animal welfare conventions and adopted them into national law.⁶⁹ In contrast, the various animal welfare decrees of the European Union do not apply in Switzerland since it is not a member of the EU.⁷⁰ However, EU law may apply under certain exceptional circumstances, such as bordercrossing animal transports.⁷¹ Further, Switzerland has committed to partial adoption of EU law in terms of agreements related to agricultural trade.⁷²

IV. PROTECTION OF ANIMAL DIGNITY

In 1992, a second constitutional provision strongly enhanced the position of animal welfare in Switzerland. Article 120, paragraph 2 of the Federal Constitution⁷³ obligates the Swiss Confederation under the title “Non-Human Gene Technology” to regulate the use of reproductive and genetic material derived from animals, plants, and other organisms, and to protect the genetic diversity of animal and plant species while taking into consideration the “dignity of living beings” (*Würde der Kreatur*).⁷⁴

A. Concept of Dignity Protection

With the constitutional clause protecting the dignity of living beings, which is in accord with the preamble of the Federal Constitution

⁶⁹ See generally BOLLIGER, *supra* note 19, at 21 *et seq.*

⁷⁰ For the animal welfare law of the EU, see generally BOLLIGER, *supra* note 19, at 33 *et seq.*

⁷¹ See generally RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 382 *et seq.*

⁷² See ABKOMMEN ZWISCHEN DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT UND DER EUROPÄISCHEN GEMEINSCHAFT ÜBER DEN HANDEL MIT LANDWIRTSCHAFTLICHEN ERZEUGNISSEN [AGREEMENT BETWEEN THE SWISS CONFEDERATION AND THE EUROPEAN COMMUNITY ON THE TRADE IN AGRICULTURAL PRODUCTS] Mar. 21, 1999, SR 0.916.026.81 (Switz.).

⁷³ BUNDESVERFASSUNG?[BV] [CONSTITUTION] Apr. 18, 1999, SR 101 (Switz.). Formerly Article 24novies, paragraph 3 of the former Federal Constitution, *supra* note 18, effective from May 29, 1874 to December 31, 1999.

⁷⁴ “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 as well as the safety of human beings, animals and the environment, and shall protect the genetic diversity of animal and plant species.” The new Article was approved by about three-quarters of the votes of the people and by all Swiss cantons except one. For the history of the provision see generally HEIKE BARANZKE, *DIE WÜRDE DER KREATUR? DIE IDEE DER WÜRDE IM HORIZONT DER BIOETHIK* 17 *et seq.* (2002); CHRISTOPH ERRASS, *ÖFFENTLICHES RECHT DER GENTECHNOLOGIE IM AUSSERHUMANBEREICH* 21 *et seq.* (2006); Antoine F. Goetschel, *Würde der Kreatur als Rechtsbegriff und rechtspolitische Postulate daraus*, in *DIE WÜRDE DES TIERES* 139 *et seq.* (Martin Liechi ed., 2002); PETER KREPPER, *ZUR WÜRDE DER KREATUR IN GENTECHNIK UND RECHT: THESEN ZUM GENTECHNISCHEN UMGANG MIT TIEREN IN DER SCHWEIZ UNTER BERÜCKSICHTIGUNG DES INTERNATIONALEN RECHTUMFELDS* 347 *et seq.* (1998); Dagmar Richter, *Die Würde der Kreatur: Rechtsvergleichende Betrachtungen*, in *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKER (ZaöRV)* 319 *et seq.* (2007); Rainer J. Schweizer & Christoph Errass, *Kommentar zu Art. 120 BV*, in *DIE SCHWEIZERISCHE BUNDESVERFASSUNG* (Bernhard Ehrenzeller et al. eds., 3d ed.) 2145 *et seq.* (2014).

that emphasizes Switzerland's responsibility towards creation,⁷⁵ protection for the dignity of non-human beings was introduced and guaranteed for the first—and by now, still only⁷⁶—time in the world by a national constitution.⁷⁷ However, the term *dignity of living beings* is not a new invention, but rather a pre-existing idea in the animal welfare movement.⁷⁸ It transfers the dignity concept, which has been developed for humans,⁷⁹ into a broader (non-human) sphere that applies to every living being, at least in certain respects, in the same way as it does to humans.⁸⁰ Hence, the dignity of living beings concept contradicts the traditional idea that only human beings have dignity. Under

⁷⁵ “The Swiss people and the cantons, mindful of their responsibility towards creation, . . . adopt the following Constitution.” BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, preamble (Switz.); Richter, *supra* note 74, at 320.

⁷⁶ In other constitutions, as well as in international conventions, the terms *dignity of living beings* or *animal dignity* are missing by now. See, however, the European Parliament's 1994 Resolution on the Welfare and Status of Animals in the Community, where the European Parliament called on “broadcasting corporations and other radio and television organizations . . . not to broadcast in an uncritical manner events and scenes which violate the dignity of animals[.]” 1994 O.J. (C 44) 208.

⁷⁷ Already in 1980, the phrase *dignity of living beings* was included in the Constitution of the Swiss Canton of Aargau, which explicitly recognized the dignity of living beings as a good to be respected in teaching and research. See VERFASSUNG DES KANTONS AARGAU [CONSTITUTION OF THE CANTON OF AARGAU] June 25, 1980, § 14 (Switz.) (“The scientific teaching, research and artistic activities are free. Teaching and research have to respect the dignity of living beings.”); KURT EICHENBERGER, DIE VERFASSUNG DES KANTONS AARGAU, TEXTAUSGABE UND KOMMENTAR, 88 (1986).

⁷⁸ The historic roots of the term *dignity of living beings* are mostly theological and trace back especially to the Danish philosopher and theologian, Lauritz Smith (1754–1794), and the Basel theologian, Karl Barth (1886–1968). See generally Heike Baranzke, *Was ist die “Würde der Tiere?”*, in DIE WÜRDE DES TIERES 255 *et seq.* (2002); BARANZKE, *supra* note 74, at 223 *et seq.*; Richter, *supra* note 74, at 321 *et seq.*; KLAUS PETER RIPPE, ETHIK IM AUSSERHUMANEN BEREICH 67 *et seq.* (2008).

⁷⁹ See *infra* p. 20 *et seq.* Basically, the concept of *dignity* refers to an evaluative or normative rating that is awarded primarily to humans, but also to other beings. Today's use of the term traces back to the Latin opus *Oration on the Dignity of Man* (*Oration de hominis dignitate*, 1487) of the Italian philosopher Giovanni Pico della Mirandola (1463–1494) and later mainly, especially regarding the prohibition from instrumentalization, which derives from human dignity (see *infra* p. 19), to the work of the Prussian philosopher, Immanuel Kant (1724–1804). See, e.g., RIPPE, *supra* note 78, at 235 *et seq.*; Christoph Errass, *20 Jahre Würde der Kreatur*, in ZEITSCHRIFT DES BERNISCHEN JURISTENVEREINS (ZBJV) 149, 201 (2013). For the influence of the Kantian thinking on animal welfare, see Christine M. Korsgaard, *A Kantian Case for Animal Rights*, in ANIMAL LAW: DEVELOPMENTS AND PERSPECTIVES IN THE 21ST CENTURY [TIER UND RECHT: ENTWICKLUNGEN UND PERSPEKTIVEN IM 21. JAHRHUNDERT] 3 *et seq.* (Margot Michel et al. eds., 2012) [hereinafter ANIMAL LAW—TIER UND RECHT], which represents an interesting interpretation different from the common (rather animal unfriendly) Kantian exegesis.

⁸⁰ Schweizer & Errass, *supra* note 74, at 2150 (citing Beat Sitter-Liver, “Würde der Kreatur”—Eine Metapher als Ausdruck erkannter Verpflichtung, 106 PHILOSOPHISCHES JAHRBUCH 468 (1999)); Saskia Stucki, *Die “tierliche Person” als Tertium datur—Eine Extrapolation aus aktuellen tierschutzrechtlichen Subjektivierungsansätzen und kritische Reflexion aus feministischer Sicht*, in WÜRDE DER KREATUR 291 (Christoph Ammann et al. eds., 2015); see also Independent Swiss Complaint Authority for Radio and Television (ICA), b.595, E.3.2 (2009).

Swiss law, at least to a certain degree, other living beings are regarded and valued as having a status formerly accorded only to humans.⁸¹

Even if certain specific implications of the concept are still the subject of controversy,⁸² under the Federal Constitution, dignity of living beings refers to inherent dignity, meaning that dignity is permanent.⁸³ Due to their inherent dignity, non-human creatures must be

⁸¹ See BGer Oct. 7, 2009, 135 BGE II 384 (Switz.); Michel & Schneider Kayasseh, *supra* note 25, at 10 *et seq.*

⁸² This can be seen, for example, in the fact that the term *dignity* is not uniformly employed in the different national language versions of the Federal Constitution. All four national languages of Switzerland are official languages (BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 70, para. 1 (Switz.)) and of equal importance. While the German, Italian, and Romansh versions use 'dignity of living beings' (*Würde der Kreatur*, *dignità della creatura*, *dignitad da las creatiras*, respectively), the French version literally speaks of the integrity of a living organism (*intégrité des organismes vivants*). Originally having the phrase *dignité de la créature*, which obviously corresponded to the other three languages, the French version surprisingly was changed when the Federal Constitution was completely revised in 1999 (see *supra* p. 8) by the Swiss translation bureau, not owing to a legislative decision. Michel & Schneider Kayasseh, *supra* note 25, at 4; Margot Michel, *Law and Animals: An Introduction to Current European Animal Protection Legislation*, in *ANIMAL LAW: REFORM OR REVOLUTION?* 87, 103 (Anne Peters et al. eds., 2015). Subsequently, the Federal Ethics Committee on Non-Human Biotechnology (ECNH), see *infra* note 88, criticized that significant change declaring that the terms *dignity* and *integrity* do not signify the same thing, but rather have different implications. Not every harm to a living being's integrity means an injury inflicted on that being's dignity as well. Further, the term *integrity* is ambiguous, since it can refer to physical-biological, genetic, emotional, or metaphysical aspects. See ECNH, *Stellungnahme zur französischen Version des Art. 120 BV* (2000). Regardless, the French version of Article 120, paragraph 2 of the Federal Constitution was not changed back into its original form. See generally Richter, *supra* note 74, at 328 *et seq.*; Errass, *supra* note 79, at 192 *et seq.*; Klaus Peter Rippe, "Würde des Tieres" aus recht-philosophischer Sicht, in *TIERETHIK* 3, 9 *et seq.* (2011). For a comprehensive comparison of the terms *dignity* and *integrity*, see Kirsten Schmidt, *Würde oder Integrität—Verlangt die gentechnische Veränderung von Tieren neue tierethische Konzepte?*, in *ALTEX* 25, 313 (2008) (exploring the concepts of dignity and integrity in the realm of animal ethics). From an ethical standpoint, the meaning of the term *integrity* is unclear. Nevertheless, under no circumstances is the term synonymous with *dignity*. However, a limited interpretation was not intended and can also be excluded against the background of the German, Italian, and Romansh version. Schweizer & Errass, *supra* note 74, at 2145. In keeping with the international discussion, the Federal Constitution protects an inherent dignity of living beings. See Federal Ethics Committee on Non-Human Biotechnology/Federal Committee on Animal Experiments, *The Dignity of Animals* 3 (2008) [hereinafter ECNH/FCAE] (noting that the Swiss Federal Constitution includes language expressly protecting the dignity of living beings). The official English translation of the Federal Constitution (that, however, has no legal force) compromises between the different versions, speaking of 'dignity of living beings.' For the colloquial use of the term *dignity*, see generally Christoph Ammann, *Die Würde des Tiers—Begriffliche Erkundungen in ethischer Absicht*, in *WÜRDE DER KREATUR*, *supra* note 80, at 1 *et seq.*

⁸³ ERRASS, *supra* note 74, at 61; Errass, *supra* note 79, at 203; Schweizer & Errass, *supra* note 74, at 2150; Michel & Schneider Kayasseh, *supra* note 25, at 7. Basically, there are two types of dignity. The contingent dignity (with the three subcategories: aesthetic, social, and expressive dignity) is unevenly distributed in the different forms of life, since it is related to contingent characteristics dependent on cultural or individual consideration. In addition, it is a transient value that someone can acquire, lose, and

respected since they exist for their own sake and not for other purposes,⁸⁴ and their dignity must be understood as a specific intrinsic value. Creatures with inherent dignity possess a good of their own, that can be benefited or harmed, as well as the ability to pursue individual objectives, and they can be considered 'organic entities.'⁸⁵ Consideration for this intrinsic value of living beings requires from humans respect, prudence, care, and moderation in dealing with them.⁸⁶

B. Dignity of Living Beings Includes Animal Dignity

According to prevailing Swiss doctrine, the constitutional term *living beings* refers only to non-human beings. It definitely includes animals and plants,⁸⁷ and possibly certain other organisms, such as

reacquire in the course of life. In contrast, the inherent dignity is possessed equally by all living beings and not transitory. To the contingent dignity corresponds the respect of esteem, whereas to the inherent dignity corresponds the respect of moral consideration. For the entire issue, see generally PHILIPP BALZER, KLAUS PETER RIPPE & PETER SCHABER, *MENSCHENWÜRDE VS. WÜRDE DER KREATUR* 17 *et seq.* (2nd ed. 1999); Rippe, *supra* note 82, at 73; ERRASS, *supra* note 74, at 59 *et seq.*; Errass, *supra* note 79, at 202 *et seq.* (providing further references).

⁸⁴ Schweizer & Errass, *supra* note 74, at 2150; Errass, *supra* note 79, at 203; Errass, *supra* note 74, at 60.

⁸⁵ Errass, *supra* note 79, at 204 *et seq.*; ERRASS, *supra* note 22, at 1615; Schweizer & Errass, *supra* note 82, at 2151; Stucki, *supra* note 80, at 291. See generally Rippe, *supra* note 82, at 106 *et seq.*. The term *entity* refers to individuals, which are composed of mind and matter. Andreas Brenner, *Die Würde des Lebens*, in *ANIMAL LAW—TIER UND RECHT*, *supra* note 79, at 55; Rippe, *supra* note 82, at 23.

⁸⁶ Schweizer & Errass, *supra* note 74, at 2151 (providing further references). In a joint clarification between the FCAE and the ECNH, a national board made up of independent experts from various fields with the task of advising the Federal Council and the authorities on both legislation and enforcement of matters on non-human bioethics, stated unmistakably: "Against the concept that humans alone are entitled to dignity and protection, the discussion concerning the dignity of living beings 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 resources as well as by dint of the inherent value ascribed to a fellow living being. Living beings should be respected and protected for their own sake." ECNH/FCAE, *supra* note 82, at 4.

⁸⁷ See, e.g., Peter Saladin & Rainer J. Schweizer, *Kommentar zu Art. 24novies Abs. 3 BV*, in *KOMMENTAR ZUR BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT*, 62 (Jean-François Aubert et al. eds., 1995); NILS STÖHNER, *IMPORTRESTRIKTIONEN AUS GRÜNDEN DES TIER- UND ARTENSCHUTZES IM RECHT DER WTO* 100 (2006); Richter, *supra* note 74, at 330; Rippe, *supra* note 82, at 68; Samuel Camenzind, *Auf zu neuen Ufern: Rechtsphilosophische Überlegungen zur übermässigen Instrumentalisierung im schweizerischen Tierschutzgesetz*, in *ANIMAL LAW—TIER UND RECHT*, *supra* note 79, at 173, 183; Lorenz Engi, *Die Würde des Gewordenen und die Unverfügbarkeit der Tiere*, in *ANIMAL LAW—TIER UND RECHT*, *supra* note 79, at 77 [hereinafter Engi, in *ANIMAL LAW*]; Errass, *supra* note 79, at 200 (providing further references). Definitions of *dignity* were designed and implemented primarily with regard to animals. See the remarks regarding article 8 *et seq.*, *BUNDESGESETZ ÜBER DIE GENTECHNIK IM AUSSERHUMANBEREICH* (GENTECHNIKGESETZ) [GTG] GENE TECHNOLOGY ACT, March 21, 2003 [hereinafter GTA], SR 814.91 (Switz.) and article 3 of the AWA *infra* p. 21 *et seq.* However, the Federal Constitution assumes that plants also possess dignity, and the

bacteria, algae, and mildew.⁸⁸ Under the Federal Constitution, as with the animal welfare clause,⁸⁹ the term *animal* has no presuppositions in a legal context, which means that all animals are included in the scope of dignity protection, independent of their zoological classification.⁹⁰ However, while the dignity concept serves to protect individual living beings, most scholars argue that it includes neither entire species nor genus, nor whole habitats or biotopes.⁹¹

Since its inclusion in 1992, the concept of the dignity of living beings has been a topic of passionate discussions. Addressing the new principle, philosophers, ethicists, and legal scholars initially mostly debated the questions of the meaning of the term *dignity* and which living beings the concept would include.⁹² While some academics still

dignity of plants must be considered as a constitutional principle, too. This means that humans may not deal arbitrarily with plants and that any random harm to plants is morally impermissible. Further, respect for the dignity of living beings is highly relevant when examining the patentability of transgenic animals and plants, in interpreting legislation on therapeutic products (such as regarding healing herbs), and in food law. See Errass, *supra* note 79, at 219; Schweizer & Errass, *supra* note 74, at 2151 (providing further references). Since this Article focuses on animals, it would go beyond its scope to also address the highly controversial debate about the dignity of plants. Instead, see ECNH, *The Dignity of Living Beings with Regard to Plants: Moral Consideration of Plants for Their Own Sake*, 1–21 (2008) (providing proposals for the concretization of the ‘plant dignity’ concept). See generally ANDREA ARZ DE FALCO & DENIS MÜLLER, WERT UND WÜRDE VON “NIEDEREN” TIEREN UND PFLANZEN 111 *et seq.* (2001); Sabine Odparlik, *Und die Würde der Pflanze?*, in EINE WÜRDE FÜR ALLE LEBEWESSEN? 73 *et seq.* (Sabine Odparlik & Peter Kunzmann eds., 2007); Rippe, *supra* note 82, at 186 *et seq.*; LORENZ ENGI, WAS VERBIETET DIE WÜRDE DER KREATUR? ZU DEN PRAKTISCHEN KONSEQUENZEN DER VERFASSUNGSNORM 93 *et seq.* (2015).

⁸⁸ Errass, *supra* note 22, at 1615; Errass, *supra* note 79, at 200 *et seq.* (providing further references); Michel & Schneider Kayasseh, *supra* note 25, at 4; Camenzind, *supra* note 87, at 182 *et seq.*. According to article 5, paragraph 1 of the GTA, the term *organism* refers to “cellular or non-cellular biological entities capable of replication or of transferring genetic material. Mixtures, articles and products that contain such entities are also regarded as organisms.”

⁸⁹ See *supra* p. 7.

⁹⁰ ECNH/FCAE, *supra* note 82, at 6; Camenzind, *supra* note 87, at 184. This is contrary to the Swiss AWA, which largely applies only to vertebrates. See *infra* p. 41.

⁹¹ Schweizer & Errass, *supra* note 74, at 2151; FSVO, *supra* note 5, at 2. See generally ERRASS, *supra* note 74, at 61 *et seq.*; Errass, *supra* note 79, at 195 *et seq.*, (including humans in the definition of “living beings”, which is contrary to prevailing Swiss doctrine). But see INA PRAETORIUS & PETER SALADIN, *Die Würde der Kreatur* (Art. 24novies Abs. 3 BV), SCHRIFTENREIHE UMWELT, no. 260, 1996, at 107 *et seq.*; Andreas Steiger, *Die Würde des Tieres aus veterinärmedizinisch-biologischer Sicht*, in TAGUNGSBAND “DIE WÜRDE DES TIERES” 5 (Evangelische Akademie Bad Boll ed., 2011) (arguing that also the extinction of an entire species disregards the dignity of living beings).

⁹² In doctrine, there was, especially in the beginning, a lively debate about the relation between human dignity and the dignity of living beings. Roughly speaking, two different lines of interpretation can mainly be distinguished: Some authors focus upon human dignity in order to define the dignity of living beings and therefore seek to apply integral parts of human dignity to that of living beings as well. Others emphasize the substantial difference between the two concepts and distinguish the normative content of human dignity from that of living beings. For overviews of the most important standpoints, see PETER KUNZMANN, *DIE WÜRDE DES TIERES: ZWISCHEN LEERFORMEL UND PRINZIP* 13 *et seq.* (2007); Rippe, *supra* note 82, at 69 *et seq.*; Errass, *supra* note 79, at

argue about whether animals (and other non-human beings) have dignity or not, the Swiss legislature takes it as given that they do. Dignity is neither granted to animals by humans nor constituted by law, but inherent.⁹³ This is presupposed by the Federal Constitution, and the Federal Supreme Court has clearly stated that animals' dignity is generally presumed.⁹⁴

Of particular note, as the general constitutional welfare clause,⁹⁵ the clause concerning the dignity of living beings has a stance equal to that of fundamental rights.⁹⁶ Further, the protection of animal dignity is recognized as a general constitutional principle in Switzerland, although the Federal Constitution explicitly mentions it only in the context of non-human gene technology.⁹⁷ Accordingly, this principle, which is supposed to guide state action,⁹⁸ claims validity not only regarding the handling of transgenic animals but also must be considered unconditionally, always, and everywhere,⁹⁹ which means throughout the entire Swiss law system. It encompasses all legal aspects of the human–animal relationship, including legislation, application of the law, and judicial decisions.¹⁰⁰

190 *et seq.*; Margot Michel, *Die Würde der Kreatur und die Würde des Tieres im schweizerischen Recht—Eine Standortbestimmung anlässlich der bundesgerichtlichen Rechtsprechung, in NATUR UND RECHT (NUR) 34, 105 et seq.* (2012).

⁹³ See Gieri Bolliger, *Güterabwägung im Tierversuch aus rechtlicher Sicht, in GE-SUNDHEIT UND TIERSCHUTZ—GÜTERABWÄGUNG BEI TIERVERSUCHEN 18* (Animalfree Research ed., 2008); Errass, *supra* note 74, at 70 *et seq.*; Gerritsen, *supra* note 2, at 6.

⁹⁴ BGer Oct. 7, 2009, 135 BGE II 391 (Switz.); BGer Oct. 7, 2009, 135 BGE II 410 (Switz.).

⁹⁵ See *supra* p. 7.

⁹⁶ PRAETORIUS & SALADIN, *supra* note 91, at 89; Krepper, *supra* note 35, at 305; STOHNER, *supra* note 87, at 106 (providing further references); Peter Krepper, *Emotionale Aspekte der Tierwürde im schweizerischen Recht—am Beispiel von Tierversuchen, in PSYCHOLOGISCHE ASPEKTE ZUM TIER IM RECHT 27, 33* (Gieri Bolliger et al. eds., 2011).

⁹⁷ BUNDESVERFASSUNG [BV] [FEDERAL CONSTITUTION] Apr. 18, 1999, SR 101 art. 120, paras. 1–2 (Switz.).

⁹⁸ Michel & Schneider Kayasseh, *supra* note 25, at 3.

⁹⁹ See PRAETORIUS & SALADIN, *supra* note 91, at 89; Saladin & Schweizer, *supra* note 87, at 71; Jörg Leimbacher, *Zur rechtlichen Bedeutung der Würde der Kreatur, in WÜRDE DER KREATUR: ESSAYS ZU EINEM KONTROVERSEN THEMA 96* (Alberto Bondolfi et al. eds., 1997).

¹⁰⁰ See the decisions of the Federal Supreme Court 135 II 405; 135 II 384; Bolliger, *supra* note 93; PRAETORIUS & SALADIN, *supra* note 91, at 91; GOETSCHEL, *supra* note 19, at 148; Saladin & Schweizer, *supra* note 87, at 66; Steiger & Schweizer, *supra* note 22, at 1414; Errass, *supra* note 22, at 1616; GOETSCHEL & BOLLIGER, *supra* note 32, at 240; Bolliger, *supra* note 93, at 20 *et seq.*; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 45; Krepper, *supra* note 35, at 364; Peter Krepper, *Tierwürde und Rechtslung in der Schweiz*, 10 AKTUELLE JURISTISCHE PRAXIS 1147 (1998); Peter Saladin, "Würde der Kreatur" als Rechtsbegriff, in ÖKOLOGISCHE ETHIK UND RECHTSTHEORIE 369 (Julian Nida-Rümelin & Dietmar von der Pfordten eds., 2002); Antoine F. Goetschel & Gieri Bolliger, *Tierethik und Tierschutzrecht—Plädoyer für eine Freundschaft, in TIERRECHTE—EINE INTERDISZIPLINÄRE HERAUSFORDERUNG 182* (Interdisziplinäre Arbeitsgemeinschaft Tierethik ed., 2007); Rippe, *supra* note 82, at 10; Steiger, *supra* note 91, at 1; Engi, in ANIMAL LAW, *supra* note 87, at 77; Margot Michel, *Tierschutzgesetzgebung im Rechtsvergleich: Konzepte und Entwicklungstendenzen, in ANIMAL LAW—TIER UND*

C. Comparison with Human Dignity

Since the Federal Constitution does not specify the normative content of the dignity of living beings concept, this must be established by interpretation.¹⁰¹ Dogmatically, this principle is comparable to human dignity,¹⁰² which was incorporated simultaneously into the Federal Constitution in 1992.¹⁰³ Since then, Swiss law explicitly guarantees human dignity in the form of a constitutional provision of its own.¹⁰⁴ However, the concept of human dignity, unlike that of the dignity of living beings, had been unanimously accepted by doctrine and occasionally mentioned in case law prior to explicit constitutional recognition.¹⁰⁵

To substantiate the concept of the dignity of living beings, the idea of human dignity can be used as a reference value.¹⁰⁶ The similarities are obvious: both human dignity and the dignity of living beings are based on a defense against arrogance of power, and both terms cannot be legally defined in all their details.¹⁰⁷ Human dignity serves as a philosophical and normative foundation of, and a guiding principle for,

RECHT, *supra* note 79, at 609; STOHNER, *supra* note 87, at 103 (providing further references); Michel & Schneider Kayasseh, *supra* note 25, at 3 (providing further references); Leimbacher, *supra* note 99, at 95 *et seq.*; Michel, *supra* note 92, at 103; Michel, *supra* note 82, at 99; FSVO, *supra* note 5, at 2; Stucki, *supra* note 80, at 290.

¹⁰¹ Michel, *supra* note 92, at 103; Engi, in ANIMAL LAW, *supra* note 87, at 84 *et seq.* The Swiss Federal Supreme Court applies a pragmatic method when interpreting legal terms. All approved interpretative methods are of equal importance (so-called pluralism of methods). First, the grammatical method tries to deduce the meaning of a legal term from its literal sense. Second, the systematic method considers the context of the norm. Third, the historical method seeks to understand what the legislator wanted to regulate with the norm in question. Last, the teleological method tries to determine the purpose and function of the norm. For the interpretation of constitutional provisions in Switzerland, see, for example, THOMAS FLEINER, ALEXANDER MISIC & NICOLE TÖPPERWIEN, CONSTITUTIONAL LAW IN SWITZERLAND 67 *et seq.* (2012) and HÄFELIN, HALLER & KELLER, *supra* note 33, at 31 *et seq.*

¹⁰² Saladin, *supra* note 100, at 368; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 45 (providing further references). See also the decision of the Federal Supreme Court 135 BGE II 384, where the Court states that the dignity of living beings—even if it cannot be equaled with human dignity—establishes that over living beings of nature, at least in some respects, has to be equally reflected and evaluated as over humans.

¹⁰³ Both human dignity and the dignity of living beings were initially incorporated within Article 24 novies of the former Federal Constitution.

¹⁰⁴ Since the complete revision of the Federal Constitution (2000, *see supra* p. 7), Article 7 states: “Human dignity must be respected and protected.” On human dignity in Swiss law, see generally Philippe Mastronardi, *Kommentar zu Art. 7 BV*, in DIE SCHWEIZERISCHE BUNDESVERFASSUNG 187 *et seq.* (Bernhard Ehrenzeller et al. eds., 3d ed. 2014).

¹⁰⁵ Goetschel, *supra* note 74, at 145. *See generally* Errass, *supra* note 79, at 201 (providing an overview of the corresponding case law of the Federal Supreme Court).

¹⁰⁶ STOHNER, *supra* note 87, at 102; Michel, *supra* note 92, at 104.

¹⁰⁷ Goetschel, *supra* note 74, at 146; Krepper, *supra* note 35, at 310; Richter, *supra* note 74, at 340.

all fundamental rights and their implementation in Swiss law.¹⁰⁸ The core of human dignity cannot be conclusively defined, let alone stated in terms of positive law.¹⁰⁹ However, the crucial idea of human dignity is to fundamentally guarantee the treatment of humans as subjects and to prohibit their degradation to mere replaceable objects.¹¹⁰ Human dignity is a legally enforceable subjective right,¹¹¹ which is unconditional, meaning it has no prerequisites except being a human, independent of individual capabilities.¹¹² Every human is entitled to absolute and unrestricted dignity protection.¹¹³

Human dignity does not have a market price,¹¹⁴ and unlike other fundamental rights, it rejects any infringement. Since the guarantee of

¹⁰⁸ FLEINER, MISIC & TÖPPERWIEN, *supra* note 101, at 215. Human dignity is used in particular to determine the core content of fundamental rights and guarantees, for example, that the banishment of the death penalty (Article 10, paragraph 1 of the Federal Constitution), the prohibition against torture and any other form of cruel, inhumane, or degrading treatment or punishment (Article 10, paragraph 3 of the Federal Constitution), the equality before the law (Article 8, paragraph 1 of the Federal Constitution), the protection against discrimination (Article 8, paragraph 2 of the Federal Constitution), or the right to assistance when in need (Article 12 of the Federal Constitution) shall not be limited by any other interests. *See, e.g.,* Mastronardi, *supra* note 104, at 194; Michel & Schneider Kayasseh, *supra* note 26, at 6.

¹⁰⁹ FLEINER, MISIC & TÖPPERWIEN, *supra* note 101, at 215. The question of what constitutes the exact content of human dignity must remain open in a liberal society. Its meaning lies precisely in the prohibition to decree a particular conception of man. *See* Mastronardi, *supra* note 104, at 196. Moreover, a detailed description of human dignity would also include the risk to fix the degree of protection to a certain degree, which would limit its possibility to further develop. Margot Michel, *Instrumentalisierung und Würde der Kreatur—eine Annäherung an ein grundlegendes Verhältnis aus juristischer Sicht*, in *WÜRDE DER KREATUR*, *supra* note 99, at 275.

¹¹⁰ Mastronardi, *supra* note 104, at 197; HÄFELIN, HALLER & KELLER, *supra* note 32, at 111. *See also* Convention for the Protection of Human Rights and Fundamental Freedoms, art. III, Nov. 4, 1950, C.E.T.S. No. 194; KONVENTION ZUM SCHUTZE DER MENSCHENRECHTE UND GRUNDFREIHEITEN, Nov. 28, 1974, SR 0.101 (Switz.); International Covenant on Civil and Political Rights, art. X, Dec. 16, 1966, 999 U.N.T.S. 171; INTERNATIONALER PAKT ÜBER BÜRGERLICHE UND POLITISCHE RECHTE, Sept. 18, 1992, SR 0.103.2 (Switz.).

¹¹¹ The term *subjective right* is used in continental European legal tradition and refers to having a right that one can enforce oneself, as opposed to a right that is protected by law in an objective manner, but for which one does not have the ability to enforce this protection oneself. *See* Helge Dedek, *From Norms to Facts: The Realization of Rights in Common and Civil Private Law*, 56 MCGILL L.J. 77, 89 (2010) (comparing the discourse in common law proceedings and civil law proceedings).

¹¹² STÖHNER, *supra* note 87, at 101; Michel & Schneider Kayasseh, *supra* note 25, at 5; Michel, *supra* note 109, at 264; Engi, in *ANIMAL LAW*, *supra* note 87, at 22. Human dignity is a universal human right to which every human is entitled, regardless of any abilities, accomplishments, or characteristics, such as whether he or she is a Swiss citizen or a foreigner. *See* Mastronardi, *supra* note 104, at 196.

¹¹³ *See* ERRASS, *supra* note 79, at 68 *et seq.*; Michel & Schneider Kayasseh, *supra* note 25, at 6 (providing further references); Michel, *supra* note 109, at 271.

¹¹⁴ FLEINER, MISIC & TÖPPERWIEN, *supra* note 101, at 215 (referring to the Kantian formula: "In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is above all price and therefore admits of no equivalent has a dignity.") For discussion of

human dignity is congruent with its core content,¹¹⁵ there is no infringement on human dignity that would not also violate its core content.¹¹⁶ Further, human dignity includes a prohibition on exclusive instrumentalization, regardless of any other interests.¹¹⁷ Humans therefore must never be used exclusively as a means for another's purpose but must always be recognized and treated as an end in and of themselves.¹¹⁸ Consequently, any limitations of human dignity are prohibited.¹¹⁹

Admittedly, the dignity of living beings—and therefore also animal dignity—has neither exactly the same normative content nor precisely the same weight as human dignity. Animal dignity is a general constitutional principle,¹²⁰ but, in contrast to human dignity, animal dignity is not an individual right; rather, it signifies only an obligation for humans to respect and protect animals.¹²¹ Nevertheless, both human dignity and animal dignity protect beings from exclusive instrumentalization for others' purposes and have a programmatic content that seeks to esteem and protect all living beings.¹²² The Federal Constitution explicitly states that the essence—the core content that cannot be limited under any circumstances¹²³—of fundamental rights is sacrosanct.¹²⁴ Further, according to a general legislative principle that requires uniform terminology in order to avoid legislative

how the term *dignity*, according to Kant (see *supra* note 81), highly differs from the one in Swiss animal welfare law, see Camenzind, *supra* note 87, at 189 *et seq.*

¹¹⁵ See, e.g., Engi, in *ANIMAL LAW*, *supra* note 87, at 49; Lorenz Engi, *Würde und Abwägung—Zur unterschiedlichen Interpretation von menschlicher und kreatürlicher Würde und einer möglichen Zusammenführung der Würdeverständnisse*, in *WÜRDE DER KREATUR*, *supra* note 99, at 126 (providing further references) [hereinafter Engi, in *WÜRDE DER KREATUR*].

¹¹⁶ Mastronardi, *supra* note 104, at 200.

¹¹⁷ Michel, *supra* note 92, at 104; Michel, *supra* note 109, at 265; Engi, in *ANIMAL LAW*, *supra* note 87, at 79.

¹¹⁸ Michel & Schneider Kayasseh, *supra* note 25, at 5 (“Human dignity fundamentally guarantees the treatment of human beings as subjects and prohibits their degradation to mere objects.”). Thus, humans should never be used exclusively as a means to someone's end, such as the promotion of the common good, but must be recognized as an end in themselves (Michel, *supra* note 82, at 100 *et seq.*). See BGer Jan. 25, 2006, 132 BGE I 49 (Switz.) (discussing the idea of the ultimately incomprehensible being-as-such of an individual or of individuals and the recognition of every individual's uniqueness and otherness); see also PRAETORIUS & SALADIN, *supra* note 91, at 29; Michel, *supra* note 92, at 104 *et seq.* (providing further references).

¹¹⁹ See Michel, *supra* note 92, at 105 (noting that interventions into other fundamental rights, such as the right of personal liberty (Article 10, paragraph 2 of the Federal Constitution) can be lawful respecting the requirements of Article 36 of the Federal Constitution).

¹²⁰ See *supra* p. 16.

¹²¹ See PRAETORIUS & SALADIN, *supra* note 91, at 86 *et seq.*; Errass, *supra* note 79, at 205; Mastronardi, *supra* note 104, at 191.

¹²² Mastronardi, *supra* note 104, at 190.

¹²³ FLEINER, MISIC & TÖPPERWIEN, *supra* note 101, at 214; STÖHNER, *supra* note 87, at 119.

¹²⁴ See BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 36, para. 4 (Switz.).

contradictions, a term cannot have fundamentally different meanings within the same law.¹²⁵ Thus, according to a systematic interpretation¹²⁶ of the Federal Constitution, 'human dignity' and 'dignity of living beings' must share the same basic legal meaning and, at least in essence, provide the same level of protection for both humans and other living beings.¹²⁷ This common core of dignity lies in the specific intrinsic value and the integrity of all living beings. No one who possesses dignity can be seen and treated as a mere object or as an item for the interests of others.¹²⁸ The Federal Supreme Court followed this understanding regarding the dignity of living beings concept in 2009: "Even if it cannot and should not be equated with human dignity, it nevertheless requires that living beings, at least to a certain degree, be regarded and valued as being equal to humans."¹²⁹

According to prevailing Swiss doctrine, one significant difference between the two concepts is that human dignity is inviolable, whereas the dignity of living beings may be violated in a legalized way in order to serve higher interests.¹³⁰ With regard to animal dignity, different interests are weighed in a balancing test, and limitations of dignity must be proportional to the weight of competing interests.¹³¹ However, the two concepts cannot differ in any fundamental way. If the dignity of living beings is not granted an untouchable core content too, which does not allow any interference in its essential meaning and is therefore immune to a balancing of interests, it would have a completely different conceptual weight than that of human dignity. This imbalance would not only be highly hypocritical,¹³² but would also contradict the aforementioned Swiss legislative principle according to which a term must not have fundamentally different meanings within the same law.¹³³ Hence, any essential discrepancy between human dignity and the dignity of living beings must be overcome, and the dignity of living beings must also protect a core area that may not be denied and

¹²⁵ See Engi, in *ANIMAL LAW*, *supra* note 87, at 58 *et seq.* (providing further references).

¹²⁶ For the various elements of interpretation in Swiss law, see *supra* note 101.

¹²⁷ See, e.g., Saladin & Schweizer, *supra* note 87, 63; Saladin, *supra* note 100, at 366 *et seq.*; PRAETORIUS & SALADIN, *supra* note 91, at 85; STOHNER, *supra* note 87, at 101; Errass, *supra* note 79, at 203; ERRASS, *supra* note 74, at 60 (providing further references); Leimbacher, *supra* note 99, at 91; Michel & Schneider Kayasseh, *supra* note 25, at 7; Engi, in *WÜRDE DER KREATUR*, *supra* note 115, at 128 *et seq.*; Stucki, *supra* note 80, at 290.

¹²⁸ Saladin & Schweizer, *supra* note 87, at 63. See generally Engi, in *ANIMAL LAW*, *supra* note 87, at 31 *et seq.*

¹²⁹ BGer Oct. 07, 2009, 135 BGE II 384 (Switz.); see BGer Oct. 07, 2009, 135 BGE II 405 (Switz.).

¹³⁰ See PRAETORIUS & SALADIN, *supra* note 91, at 62, 91.

¹³¹ For the balancing procedure, see *infra* Section V.C (describing the proportionality test laid out in the AWA).

¹³² See Leimbacher, *supra* note 99 (arguing that if the constitution drafters did not intend to grant an untouchable core content to the dignity of living beings, a mere legal duty to respect living beings would have been sufficient).

¹³³ See *supra* p. 22 (discussing this general legislative principle).

violated, regardless of other competing interests.¹³⁴ Accordingly, there is a general upper stress limit that can be deduced from the constitutionally protected dignity of living beings.¹³⁵ Regarding animals, this must signify, for example, that highly cruel treatments (such as brutal catching or killing methods), a complete denial of an animal's essential natural needs, and severely stressful animal experiments are unconstitutional.¹³⁶

V. ANIMAL DIGNITY IN THE SWISS ANIMAL WELFARE ACT

As seen, the Federal Constitution obligates the Swiss legislature to regulate the protection of the dignity of living beings.¹³⁷ Accordingly, in recent years there has been remarkable lawmaking at the statutory level to implement this constitutional mandate. The dignity of living beings concept first impacted Swiss legislation in 2004 by affecting the Federal Gene Technology Act (GTA), which regulates the use of genetically modified organisms (GMOs), including in closed-system production, field tests, and marketing.¹³⁸ The GTA provides that the dignity of living beings may not be disregarded when modifying genetic material by gene technology, and it specifies what types of action are forbidden.¹³⁹ Accordingly, the GTA assumes that genetically modifying an animal and manipulating an animal's genetic material do not necessarily disregard that animal's dignity. To determine whether there is disregard, a balancing test of interests¹⁴⁰ is required.¹⁴¹ Since the GTA was enacted, the dignity of living beings has

¹³⁴ See STÖHNER, *supra* note 87, at 129; Engi, in WÜRDE DER KREATUR, *supra* note 115, at 80; Michel, *supra* note 92, at 273 *et seq.*

¹³⁵ See Gieri Bolliger & Vanessa Gerritsen, *Zum Verhältnismässigkeitsprinzip im deutschen Tierschutzgesetz*, in BELASTUNG VON TIEREN—WAS IST ETHISCH VERTRETBAR? 23 *et seq.* (Evangelische Akademie Bad Boll ed., 2010).

¹³⁶ See STÖHNER *supra* note 87, at 126 *et seq.* For an upper stress limit for animal experiments, see *infra* p. 66.

¹³⁷ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 120 para. 2 (Switz.).

¹³⁸ See generally Errass, *supra* note 79, at 110 *et seq.*

¹³⁹ See GTA, art. 8, para. 1 (Switz.).

¹⁴⁰ In particular, a violation is deemed to have occurred if genetic modification substantially harms species-specific properties, functions, or habits, unless this is justified by overriding legitimate interests. See GTA, art. 8, para. 2 (Switz.) (listing these particular legitimate interests). For the corresponding balancing test under the AWA, see *infra* Section V.C (discussing the balancing test).

¹⁴¹ Moreover, the GTA establishes that genetically modified vertebrates may only be produced and put into circulation for purposes of research, therapy, or diagnostics in human or veterinary medicine. GTA, art. 9 (Switz.). If genetically modified vertebrates are produced for other purposes, their dignity is not respected, whatever those purposes may be. In these cases their production is therefore prohibited. This ban is the result of an abstract weighing of interests already undertaken by the national legislature concerning all cases outside of research, therapy, or diagnostics. FSVO, *supra* note 5, at 3. Anyone who willfully violates article 8 or 9 of the GTA is liable to a custodial sentence not exceeding three years or to a monetary penalty. GTA art. 35, para. 1a (Switz.). At present, putting genetically modified organisms into circulation in Switzerland is prohibited. See GTA art. 37a (Switz.) ("No authorizations may be granted until 31 Decem-

also been integrated into a number of other national Swiss laws, namely in the Release Ordinance,¹⁴² the Patents Act,¹⁴³ the Xenotransplantation Ordinance,¹⁴⁴ and the Medical Professions Act.¹⁴⁵

The most important recognition and implementation of the dignity of living beings concept, however, was its incorporation as a guiding principle in the Swiss Animal Welfare Act (AWA) of 2008, in which it plays a fundamental role. This role is expressed in the very first article of the AWA, which states that the purpose of the Act is “to protect the dignity and well-being of the animal.”¹⁴⁶ With that, the protection for animal dignity was enshrined for the first time in national animal welfare legislation.¹⁴⁷ As protection for animal dignity—besides an

ber 2017 for putting into circulation genetically modified plants and parts of plants, genetically modified seeds and other plant propagation material and genetically modified animals for agricultural, horticultural or silvicultural purposes.”). See generally ERRASS, *supra* note 74, at 146 *et seq.*; Errass, *supra* note 79, at 220 *et seq.*; Schweizer & Errass, *supra* note 74, at 2146 (providing further references).

¹⁴² See VERORDNUNG ÜBER DEN UMGANG MIT ORGANISMEN IN DER UMWELT (FREISETZUNGSVERORDNUNG) [FrSV] [ORDINANCE ON THE HANDLING OF ORGANISMS IN THE ENVIRONMENT (RELEASE ORDINANCE)] Sept. 10, 2008, SR 814.911, art. 28, para. 2f (Switz.) (requiring license applications for marketing genetically modified organisms to prove, among other things, that the dignity of living beings is respected); FrSV art. 44, para. 1c2 (Switz.) (establishing that licenses are only approved if this requirement is met).

¹⁴³ See BUNDESGESETZ ÜBER DIE ERFINDUNGSPATENTE (PATENTGESETZ) [PATG] [FEDERAL ACT ON PATENTS FOR INVENTIONS] June 25, 1954, SR 232.14, art. 2, para. 1 (Switz.) (“Inventions whose exploitation is contrary to human dignity or that disregard the integrity of living organisms or that are in any other way contrary to public policy or morality are not patentable.”).

¹⁴⁴ See VERORDNUNG ÜBER DIE TRANSPLANTATION VON TIERISCHEN ORGANEN, GEWEBEN UND ZELLEN (XENOTRANSPLANTATIONSVERORDNUNG) [ORDINANCE ON THE TRANSPLANTATION OF ANIMAL ORGANS, TISSUES, AND CELLS] Mar. 16, 2007, SR 810.213, art. 28, para. 4d (Switz.) (requiring applications for xenotransplantations to prove, among other things, that the dignity of genetically modified animals, whose organs, tissues, or cells are used, was respected).

¹⁴⁵ See BUNDESGESETZ ÜBER DIE UNIVERSITÄREN MEDIZINALBERUFE (MEDIZINALBERUFEGESETZ) [MedBG] [FEDERAL ACT ON UNIVERSITY COURSES FOR MEDICAL PROFESSIONS] Apr. 18, 1999, SR 811.11, art. 10h (Switz.) (requiring graduates of veterinary medicine to respect the dignity of living beings).

¹⁴⁶ AWA, Dec. 16, 2005, SR 455, art. 1 (Switz.). Unlike with article 120, paragraph 2 of the Federal Constitution, *supra* note 82, also the French version of the AWA speaks of *dignité de l'animal* so that all language versions of the AWA are congruent in that regard. Note, that the AWA constantly uses the term *animal dignity* although, in accordance with the Federal Constitution, it should correctly speak of the “dignity of living beings.” See Rippe, *supra* note 82, at 11 (discussing the history of the constitutional language).

¹⁴⁷ In the meantime, the protection of animal dignity is also anchored at a legislative level in the Animal Protection Act of South Korea. Dongmulbohobeob [Animal Protection Act], Act No. 4379, May 31, 1991, *amended by* Act No. 7167, Feb. 9, 2004, art. 1. Further, in the Netherlands, the “intrinsic value” of the animal is explicitly recognized. See Evaluatie Wet op de dierproeven 12 januari 1997, art. 1a (referring to “intrinsic value”).

animal's well-being¹⁴⁸—is one of the pillars of Swiss animal welfare law, it must be considered in all areas regulated by the AWA.¹⁴⁹

A. Concept of Dignity Protection for Animals

Similar to the Federal Constitution,¹⁵⁰ the term *dignity* in the AWA refers to inherent dignity.¹⁵¹ Animals possess a specific *inherent worth* and should therefore be given moral consideration and legal protection for their own sake, not merely to serve human interests, since they are economically useful or aesthetically valuable to humans.¹⁵² An animal's inherent worth is based on an *inherent good*¹⁵³ that can be promoted or harmed. Due to inherent worth, a living being must be able to lead a life typical of its species and to pursue individual objectives.¹⁵⁴

¹⁴⁸ While the well-being of animals was already part of the purpose of the former Swiss Animal Welfare Act of 1978, "animal dignity" was only included in the 2008 revision. See AWA, Dec. 16, 2005, SR 455, art. 3b ("[A]nimal well-being is given especially when (1) the husbandry and feeding are such that their bodily functions and their behavior are not disturbed, and excessive demands are not made on their capacity to adapt; (2) they are able to behave in a species-specific manner within the limits of their biological capacity to adapt; (3) they are clinically healthy; and (4) pain, suffering, harm, and anxiety are avoided."). Accordingly, the term *well-being* means more than good health. It signifies a state of physical and mental balance in the absence of pain and suffering. Constrictions in respect to physical integrity or the satisfaction of behavioral needs of animals are not necessary prerequisites. See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 43 *et seq.*; Gerritsen, *supra* note 2, at 8 *et seq.* For more on the term *well-being*, see generally Kirsten Schmidt, *Wohlergehen*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN 422 *et seq.* (Arianna Ferrari & Klaus Petrus eds., 2015) (providing further references).

¹⁴⁹ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 46; FSVO, *supra* note 5, at 2. Moreover, animal dignity is explicitly mentioned in various further articles of the Swiss animal welfare law. See, e.g., AWA, Dec. 16, 2005, SR 455, art. 4, para. 2 (Switz.); *id.* art. 10, para. 2; *id.* art. 17; *id.* art. 26, para. 1a; AWO, Apr. 23, 2008, 455.1, art. 25, para. 1 (Switz.); *id.* art. 105, para. 1d (mentioning animal dignity).

¹⁵⁰ See *supra* pp. 12–14.

¹⁵¹ For the distinction between contingent dignity and inherent dignity, see *supra* note 92. With regard to animals, this means that the inherent dignity of an animal is always the same. For example, a cow always possesses the same inherent worth, regardless if it is worshipped as holy, as in India, or primarily used as a farmed animal, as in the U.S. or in Europe. See Camenzind, *supra* note 87, at 182.

¹⁵² See GOTTHARD M. TEUTSCH, DIE "WÜRDE DER KREATUR"—ERLÄUTERUNGEN ZU EINEM NEUEN VERFASSUNGSBEGRIFF AM BEISPIEL DES TIERES 38 *et seq.* (1995); Goetschel, *supra* note 74, at 143; STOHNER, *supra* note 87, 102; FSVO, *supra* note 5, at 2. For the term *inherent worth*, see Rippe, *supra* note 82, at 126 *et seq.*; Arianna Ferrari, *Eigenwert*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 88 *et seq.*

¹⁵³ To have an *inherent good* means to be able to take one's own position to flourish. This flourishing can be promoted or harmed. See generally Rippe, *supra* note 82, at 106 *et seq.*

¹⁵⁴ Errass, *supra* note 79, at 204 *et seq.* (providing further references). Whereas the Federal Constitution assumes that all plants and animals, as well as some other organisms, have an inherent good, see *supra* pp. 16–15, under the AWA the *dignity* term is confined to vertebrates, cephalopods, and decapods, see *infra* pp. 35–36, and under the GTA *dignity* is confined to animals and plants, see *infra* p. 21. FSVO, *supra* note 5, at 2.

Accordingly, the AWA defines dignity as the “inherent worth of the animal that shall be respected when dealing with it.”¹⁵⁵ Consistent with that understanding of the dignity of living beings, the inherent worth of an animal requires recognition of and respect for the fact that an animal is valuable in and of itself and is in possession of its own physical and psychological integrity. This legal prerequisite signifies both an appreciation of the uniqueness and otherness of animals and an acknowledgment of their intrinsic value.¹⁵⁶ This intrinsic value, which is pre-existing and not constituted by law,¹⁵⁷ conflicts with unlimited claims by humans regarding the utility of animals.¹⁵⁸ Protection for dignity requires that animals be granted an existence separate from any human purpose and not be considered or treated as a mere means for human interests or ends, but must be valued for their own sake and respected in their natural, species-specific characteristics, needs, and behaviors.¹⁵⁹

Recognition for animal dignity still covers the original concepts of animal welfare legislation, such as absence of pain,¹⁶⁰ suffering,¹⁶¹

¹⁵⁵ See AWA, AS 2965 (2008), art. 3a (Switz.) (defining dignity as the inherent worth of an animal and mandating legal respect in accordance with this definition).

¹⁵⁶ See Rippe, *supra* note 82, at 11 *et seq.*; Kley & Sigrist, *supra* note 34, at 38; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 45; Gerritsen, *supra* note 2, at 6.

¹⁵⁷ See *supra* pp. 12-15.

¹⁵⁸ Michel, *supra* note 92, at 104 (providing further references). By 1993, the Council of States Control Committee stated that “animals are to be treated neither as humans nor as objects, but appropriately to their ‘dignity as living beings’ and according to an independent standard of their needs. Here, their feelings and their will to live are to be respected, and suffering to be avoided or reduced. This leads, for example, to a restrictive use of animals.” VOLLZUGSPROBLEME IM TIERSCHUTZ: BERICHT ÜBER DIE INSPEKTION DER GESCHÄFTSPRÜFUNGSKOMMISSION DES STÄNDERATES AN DEN BUNDESRAT [ENFORCEMENT PROBLEMS IN ANIMAL WELFARE: REPORT OF THE INSPECTION OF THE CONTROL COMMITTEE OF THE COUNCIL OF STATES OF THE FEDERAL COUNCIL] BBL I 622 (1993).

¹⁵⁹ Steiger & Schweizer, *supra* note 22, at 1414; Kley & Sigrist, *supra* note 34, at 38; Katharina Friedli, *Die Würde des Tieres in der neuen Schweizer Tierschutzgesetzgebung*, 4 J. FÜR VERBRAUCHERSCHUTZ UND LEBENSMITTELSICHERHEIT 387, 388 (2009); BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 45 *et seq.* See also Saladin & Schweizer, *supra* note 87, at 63 *et seq.* (arguing that animals have needs worthy of protection: life, survival, living together, well-being, development, and the absence of suffering).

¹⁶⁰ Pain refers to an unpleasant sensory experience (sensation) that leads to physiological changes and behavioral responses designed to escape or avoid the negative experience. If a correlation with certain mimical indicators is not possible, animals’ sensation of pain should be determined on the basis of criteria such as the presence of nociceptors, brain structures required for pain perception, learning of avoidance behaviors, or suspension of normal behavior under the influence of noxious stimuli. See FSVO, *supra* note 5, at 5 (providing the examples of post-operative pain following castration in male piglets and pain during the branding of horses using a cold or hot brand). See generally ALMUTH HIRT, CHRISTOPH MAISACK & JOHANNA MORITZ, TIERSCHUTZGESETZ—KOMMENTAR 96 *et seq.* (3d ed. 2016); BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 69 *et seq.*; RICHNER, *supra* note 62, at 70 *et seq.*; Elisa Aaltola, *Schmerz*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 312 (providing further references).

¹⁶¹ Suffering means a long-lasting or permanent state experienced as stressful (such as continuing pain), accompanied by particular behavior or phenomenological expres-

harm,¹⁶² and anxiety,¹⁶³ but it extends far beyond protection from mental and physical impairments.¹⁶⁴ Animal dignity is, of course, always violated when the aforementioned injuries are inflicted (which may constitute animal cruelty, such as mistreatment, neglect, overwork, or cruel killing under the AWA).¹⁶⁵ However, protection for animals' dignity further guards animals from interference with their species-specific self-development by restricting or completely prohibiting certain activities that injure animals' integrity without affecting or causing any physical, physiological, or mental stress.

B. Ethical Aspects

AWA protection for animal dignity extends beyond limitations on the classic animal welfare concerns of avoiding pain, suffering, harm, and anxiety. Indeed, the AWA defines animal dignity as follows:

Inherent worth of the animal that shall be respected when dealing with it. If any stress imposed on the animal cannot be justified by prevailing interests, then this constitutes a disregard for the animal's dignity. Stress exists especially when pain, suffering, harm, or anxiety is inflicted on the animal, when it is exposed to humiliation, when there is substantial interference with its appearance or its abilities, or when it is excessively instrumentalized.¹⁶⁶

According to the Federal Council, a more precise legal definition of *animal dignity* currently is not possible, and decisions regarding pro-

sions. See FSVO, *supra* note 5, at 5 (providing the examples of heat stress in dairy cows and isolation of an individual animal that normally lives in a herd). See generally HIRT, MAISACK & MORITZ, *supra* note 160, at 99 *et seq.*; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 73 *et seq.*; RICHNER, *supra* note 62, at 71 *et seq.*; Elisa Aaltola, *Leiden, in* LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 220 *et seq.* (providing further references).

¹⁶² Harm refers to an impairment of species-specific properties, functions and habits, especially impairment of growth, reproductive capacity, adaptive capacity, mobility, and species-specific social behaviors. See FSVO, *supra* note 5, at 5 (providing the examples of harm to reproductive capacity due to castration and harm to species-specific social behaviors due to ear- and tail-docking in dogs). See generally HIRT, MAISACK & MORITZ, *supra* note 160, at 101 *et seq.*; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 76 *et seq.*; RICHNER, *supra* note 62, at 73 *et seq.*

¹⁶³ Anxiety means a sensation of threat accompanied by physiological responses and reflected in species-specific and/or individual behaviors. See FSVO, *supra* note 5, at 5 (providing the examples of restraint, e.g. holding, that can cause anxiety in many animals, especially if they are not accustomed to human handling and if this situation is also accompanied by an additional, unpleasant intervention, such as injection or blood sampling). See generally HIRT, MAISACK, & MORITZ, *supra* note 160, at 100 *et seq.*; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 77 *et seq.*; RICHNER, *supra* note 62, at 74 *et seq.*

¹⁶⁴ See, e.g., Michel, *supra* note 82, at 100.

¹⁶⁵ See AWA, AS 2965 (2008), art. 26, para. 1 (Switz.) (listing actions that constitute animal cruelties under the AWA).

¹⁶⁶ AWA, AS 2965 (2008), art. 3a (Switz.) The legal definition of dignity is mostly based on recommendations of the ECNH, which was delegated with the concretization of the term *dignity of living beings*. See Federal Council, *supra* note 34, at 674.

tection for dignity must instead be determined on a case-by-case basis after a balancing of interests.¹⁶⁷ However, Swiss animal welfare law contains a series of exemplary cases that state prohibited acts constituting disregard for animal dignity,¹⁶⁸ such as sexually motivated activities with animals¹⁶⁹ or excesses in animal breeding.¹⁷⁰ Moreover, the AWA clarifies that there are various ethical ways in which one can violate animal dignity, and they are not necessarily associated with physical injury.¹⁷¹ In other words, under protection for animal dignity, the AWA forbids certain types of activities affecting animals, even if an animal itself does not perceive them as harmful. The AWA identifies humiliation, excessive instrumentalization, and substantial interference with an animal's appearance or abilities as examples of such ethical aspects.¹⁷²

1. *Humiliation*

The term *humiliation* (or *degradation*) refers to any demeaning human conduct towards an animal that does not consider that animal's nature. Humiliation occurs where an animal is not treated or respected for what it is,¹⁷³ but rather like an object that can, for instance, be arbitrarily controlled or simply destroyed.¹⁷⁴ An act of humiliation can concern an individual animal as well as an entire species,¹⁷⁵ such as through a specific breeding objective, or a type of animal. Of note, an act of humiliation does not require that the animal itself possess an awareness of being humiliated.¹⁷⁶

¹⁶⁷ Federal Council, *supra* note 34, at 675. For the balancing test, see generally *infra* pp. 37 *et seq.*

¹⁶⁸ See *infra* pp. 49 *et seq.*

¹⁶⁹ AWO, AS 2985 (2008), art. 17, para. 2 (Switz.); see *infra* p. 49.

¹⁷⁰ AWO, AS 2985 (2008), art. 25 (Switz.). See generally RICHNER, *supra* note 62, at 196 *et seq.*

¹⁷¹ Michel, *supra* note 92, at 104.

¹⁷² The list is not exhaustive. BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 47. A further example for an ethical violation of animal dignity is when humans do not accept the *otherness and specific suchness* and the developmental possibility of animals, such as valuing them as deficient beings or keeping pets solely for prestige purposes. See TEUTSCH, *supra* note 152, at 55 *et seq.*

¹⁷³ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 47; FSVÖ, *supra* note 5, at 6.

¹⁷⁴ Rippe, *supra* note 82, at 22.

¹⁷⁵ For the doctrinal standpoint that the dignity of living beings should include not only individuals but also entire species, see *supra* note 91.

¹⁷⁶ There is no conclusive answer regarding the question whether an animal is able to feel humiliated. An analogy to human dignity is notable; humiliation of an individual is inappropriate even if the concerned person does not perceive it as such. Rippe, *supra* note 82, at 13; Stefanie Schindler, *The Animal's Dignity in Swiss Animal Welfare Legislation—Challenges and Opportunities*, 84.1 EUR. J. OF PHARMACEUTICS AND BIOPHARMACEUTICS 253 (2013). According to the ECNH, the intent behind the prohibition against humiliation of animals is therefore primarily an educational objective, which generally reflects respect for the animal's intrinsic value. ECNH/FCAE, *supra* note 82, at 7.

Acts of humiliation towards animals include, for instance, giving or forcing animals to ingest intoxicating substances (alcohol, tobacco, et cetera), dyeing animals' fur or feathers, applying 'body art' (such as tattoos or piercings) to animals, or exhibiting animals in an abnormal way, such as humanizing or otherwise ridiculing them by dressing them up in costumes or human clothes, styling their hair unnaturally, or shaving stilted patterns in their coats.¹⁷⁷ In addition, humiliation includes training animals to perform unnatural behaviors or tricks in circuses, exhibits, advertising, et cetera, as a source of amusement or public entertainment.¹⁷⁸ An act of humiliation can also be construed in the presentation of a submissive animal behavior designed to demonstrate human dominion over dangerous or physically powerful animals such as elephants, bears, lions, tigers, crocodiles, or poisonous snakes, especially when those animals are trained to perform such behavior patterns in zoos, circuses, and other animal shows in order to entertain an audience.¹⁷⁹ Moreover, acts of humiliation are present when humans pester or otherwise provoke animals in exhibitions that do not allow an animal to retreat from view,¹⁸⁰ in 'mechanizing' an animal that is perceived or used solely as a machine, such as the so-called 'Robo-Rat' (a remotely guided rat with electrical probes implanted into its brain),¹⁸¹ or in measures associated with an animal's complete loss of control, such as cyborgs (i.e., hybrids made of a living organism and a machine, whose bodies are permanently supplemented by artificial components).¹⁸²

Further, an act of humiliation exists where humans represent animals as inanimate things.¹⁸³ Similarly, humans deny an animal's intrinsic value when they treat it like a dead object with a primarily instrumental value for humans. Corresponding examples include the use of animals as biomedical measuring instruments, organ suppliers for xenotransplantation,¹⁸⁴ or food products in the context of breeding farmed animals,¹⁸⁵ or also the linguistic usage in scientific publica-

¹⁷⁷ BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 18.

¹⁷⁸ *Id.*; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 11.

¹⁷⁹ *Animal Circuses, Animal Suffering*, CAPTIVE ANIMAL PROTECTION Soc'y, <http://www.captiveanimals.org/news/2010/06/animal-circuses-animal-suffering> [https://perma.cc/F7GU-SMTK] (June 3, 2010) (accessed Feb. 27, 2016).

¹⁸⁰ GIERI BOLLIGER, ALEXANDRA SPRING & ANDREAS RÜTTIMANN, DAS ENTHORNEN VON RINDERN UNTER DEM ASPEKT DER TIERWÜRDE 51 (2011); Steiger, *supra* note 91, at 6.

¹⁸¹ See Sanjiv K. Talwar et al., *Rat Navigation Guided by Remote Control*, 417 NATURE 37, 37 *et seq.* (May 2002).

¹⁸² See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 47 (providing further references).

¹⁸³ FSVO, *supra* note 5, at 6.

¹⁸⁴ See generally Andrea Arz de Falco, *Die Würde des Tieres: Tierethische Aspekte in der ethischen Debatte um die Xenotransplantation*, in DIE WÜRDE DES TIERES 311 *et seq.* (2002).

¹⁸⁵ SAMUEL CAMENZIND, KLONEN VON TIEREN—EINE ETHISCHE AUSLEGEOEDNUNG 58 (2011).

tions or speeches on animal studies referring to animals as mere 'material.'¹⁸⁶

2. *Excessive Instrumentalization*

The term *excessive instrumentalization* (or *exploitation*) refers to any human conduct aiming to use an animal solely as a human tool without giving consideration to its interests or its physical and psychological needs.¹⁸⁷ Thus, the term *instrumentalization* includes not only a certain activity with an animal but also an attitude towards it.¹⁸⁸ Absent consideration, the animal is not perceived as a living being with its own point of view and interests, but instead as an instrument predominantly for human purposes and a means to a human end.¹⁸⁹ Instrumentalization leads to the objectification of animals, meaning that they are regarded and treated as being mere items and valued according to a market value, not according to their value as living beings.¹⁹⁰ As with humiliation, it is irrelevant whether an animal perceives instrumentalization as a stress.¹⁹¹

Note, the AWA only prohibits instrumentalization when it is 'excessive.'¹⁹² The question of when this is the case has not yet been fully clarified. Admittedly, with every animal use comes a certain degree of instrumentalization.¹⁹³ However, the AWA does not challenge instrumentalization that is otherwise allowed under Swiss law and therefore accepted by a majority of Swiss society. Examples include the legal instrumenalization of animals for the production of food and other goods, experimental uses (such as for medical purposes), sports and leisure, the production of luxury goods, entertainment, or for therapeutic and humanitarian purposes.¹⁹⁴ Nevertheless, even in those societally ac-

¹⁸⁶ Steiger, *supra* note 91, at 6.

¹⁸⁷ Rippe, *supra* note 82, at 22; Schindler, *supra* note 176, at 253.

¹⁸⁸ See Camenzind, *supra* note 87, at 192. For more on the term *instrumentalization*, see generally Michel, *supra* note 109, at 256 *et seq.*; Peter Schaber, *Instrumentalisierung*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 165 *et seq.*

¹⁸⁹ BALZER, RIPPE & SCHABER, *supra* note 85, at 48; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 48.

¹⁹⁰ TEUTSCH, *supra* note 152, at 46; PRAETORIUS & SALADIN, *supra* note 91, at 86. For the term *objectification*, see generally Klaus Petrus, *Verdinglichung*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 408 *et seq.* (providing further references).

¹⁹¹ Camenzind, *supra* note 87, at 191.

¹⁹² AWA, AS 2965 (2008), art. 3a (Switz.).

¹⁹³ It is a fact that humans instrumentalize animals—be it farmed animals, pets, laboratory animals, or wild animals—in various ambivalent ways. Among other things, animals are raised, slaughtered, and eaten as food; loved and pampered as actual friends; gazed at in zoos, circuses, and exhibitions; worshipped as gods; used in research, for breeding, or therapeutic purposes; and their skin, fur, and wool is worn as human clothing and shoes. All those animals are used to different degrees as a means to human ends, notwithstanding the keeping of pets even within the highest animal welfare law standards, because the pet husbandry always satisfies the emotional needs of the owner.

¹⁹⁴ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 48.

cepted areas, the AWA requires that exploitation of animals be minimized and not be excessive. An animal can legally be instrumentalized as long as its intrinsic value is considered.¹⁹⁵ In order to prevent the excessive exploitation of an animal, a human user must take into account an animal's conscious or subconscious self-interest in its own existence, including through meaningful interaction with the environment (self-assembly, self-preservation, and reproduction).¹⁹⁶ Although the term refers to an individual animal, the prohibition of excessive instrumentalization leads to a duty to keep animal use in general, for instance, in agriculture or animal experimentation, as low as possible.¹⁹⁷

Finally, and of particular note, the term *excessive instrumentalization* has to be distinguished from the term *exclusive (complete) instrumentalization*.¹⁹⁸ According to the wording of the AWA, excessive instrumentalization can, under certain circumstances, be justified by prevailing human interests.¹⁹⁹ Since dignity grants protection from denying any self-purpose²⁰⁰ and from exclusive utilization of a being with inherent worth for other ends,²⁰¹ this Article argues that any exclusive instrumentalization of an animal is inconsistent with the untouchable normative core content of animal dignity and is therefore unconstitutional.²⁰²

¹⁹⁵ *Id.*

¹⁹⁶ ECNH/FCAE, *supra* note 82, at 9; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 48.

¹⁹⁷ ECNH/FCAE, *supra* note 82, at 9.

¹⁹⁸ The following is an illustrative example for the difference between an excessive instrumentalization of animals that still considers the animal's intrinsic value, and a complete instrumentalization: A homeowner acquires a guard dog for protection against burglars and chooses a Dobermann from a recognized breeder for that purpose. Despite intensive training and due to its timidity against strangers, the dog does not meet the expectations of the owner. For that reason, the disappointed animal owner kills the Dobermann and buys a new dog. In this case there is a complete instrumentalization since the value of the dog coincides exclusively with its use. The dog is only of worth to its owner to the extent it can be used as a guard dog. In contrast, if the owner buys another dog and keeps and cares for the Dobermann as a pet, even if it is not qualified for being a guard dog, he attributes more than a mere instrumental value to the dog. Here, the dog owner recognizes the intrinsic value of the dog that exists independently of his own interests. See CAMENZIND, *supra* note 185, at 58.

¹⁹⁹ See *supra* p. 22 (explaining the AWA's language regarding animal dignity in relation to human dignity).

²⁰⁰ See *supra* p. 17 (detailing some elements of animal dignity protections in Swiss law and among animal law scholars generally).

²⁰¹ Sitter-Liver, *supra* note 80, at 485; Michel, *supra* note 92, at 104.

²⁰² For the core content of animal dignity see p. 20. The opinion of the author is supported, for example, by PRAETORIUS & SALADIN, *supra* note 91, at 44; Mastronardi, *supra* note 104, at 190; Michel, *supra* note 109, at 265, 277; CAMENZIND, *supra* note 185, at 192; Regina Binder & Petra Mayr, *Rezension zu Kunzmann: Die Würde des Tieres—zwischen Leerformel und Prinzip*, in ALTEX 4, at (2009); Brenner, *supra* note 85, 62 *et seq*; Michel, *supra* note 92, at 108; Michel, *supra* note 100, at 609.

Examples of complete instrumentalization include cloned laboratory animals²⁰³ that are used as disease models, other animals that serve solely as “laboratory test objects,”²⁰⁴ and animals that are used as playthings in competitions or game shows, such as fish for catching games.²⁰⁵ In those instances, the value of an animal depends exclusively on the animal’s applicability, meaning the benefit to humans.²⁰⁶

3. *Substantial Interference with an Animal’s Appearance or Abilities*

The phrase *substantial interference with an animal’s appearance or abilities* refers to activities that cause a change that is not in an animal’s interest.²⁰⁷ Such a change often results in a permanent or even irreversible loss of function,²⁰⁸ such as the loss of function suffered by dogs, cats, rabbits, fish, and doves due to selective breeding methods.²⁰⁹ Extensive selective breeding can result in substantial changes to animals’ appearance and abilities in order to achieve specific and often grotesque overemphasized body and plumage characteristics. Examples are English bulldogs, whose human-bred flat facial appearance and short neck often causes extreme difficulty with breathing;²¹⁰ naked “Sphinx cats” who possess neither fur nor whiskers and therefore are severely impaired in their ability to orientate;²¹¹ and overbred “Bubble Eye” goldfish whose sight is substantially impeded by enlarged and upwards-rotated eyes.²¹² Loss of functions due to overbreeding exist not only in pets, but also in laboratory animals

²⁰³ Sitter-Liver, *supra* note 82, at 485 (calling cloning an “instrumentalization *par excellence*” of animals). For the cloning of animals, see generally Camenzind, *supra* note 87, at 7 *et seq.*; CAMENZIND, *supra* note 185, at 196 *et seq.* (providing further references).

²⁰⁴ Vanessa Gerritsen & Andreas Rüttimann, *Neue Wege im Tierversuchsrecht*, in ANIMAL LAW—TIER UND RECHT, *supra* note 79, at 244.

²⁰⁵ See Independent Swiss Complaint Authority for Radio and Television (ICA), Feb. 20, 2009, b.595, E.4.3. See also *infra* p. 60 (stating that the instrumentalization of trout on a television show represented a danger for public morals).

²⁰⁶ See generally CAMENZIND, *supra* note 185, at 68 *et seq.* (explaining how the animal’s value is determined in the context of cloning); Camenzind, *supra* note 87, at 190 (explaining the test for determining the animal’s value in general).

²⁰⁷ See FSVO, *supra* note 5, at 5 (noting that major interferences with appearance are changes that result in a loss of function and are not temporary, while major interferences with ability are changes that amount to harm, which is defined as the “[i]mpairment of species-specific properties, functions and habits”).

²⁰⁸ FSVO, *supra* note 5, at 6.

²⁰⁹ See ECNH/FCAE, *supra* note 82, at 8 (“The debate on respect for the dignity of living beings has been sparked in particular in relation to the production, further breeding and use of genetically modified animals. This is an area in which the possibility to violate the dignity is particularly likely. At present, the production of genetically modified animals comes under the definition of animal experiments and, as such, requires a permit.”).

²¹⁰ *Id.*

²¹¹ *Id.* at 7. Hairless cats are bred to allow humans who suffer from allergies to keep cats as pets. The human interest “is of minor relevance, given the existence of other domestic animals which do not cause allergies.” *Id.*

²¹² *Id.* at 9.

and farmed animals, such as turkey hens who suffer from such severe weakness in the legs that they may be unable to walk since their skeleton and limbs cannot support their weight, especially in the breast muscles,²¹³ or cattle of the Belgian Blanc Bleu-type where a special gene (“Schwarzenegger gene”) results in double muscling in hips and hind legs that enhances meat-yield but also increases the risk of difficult births and usually requires Caesarean sections.²¹⁴ Also, the production of so-called hybrids—animals bred from wild and domestic²¹⁵ species, such as “zorses” (crossbred from zebras and horses) or “zonkeys” (crossbred from zebras and donkeys)—may constitute substantial interference with an animal’s appearance.²¹⁶

Substantial interference also includes amputation or cropping body parts in farmed animals, such as shortening or removing the horns of cows, calves, or goats; the tails of pigs; or the beaks of hens.²¹⁷ The same applies to animal castration, notwithstanding the justification that this practice is frequently necessary to avoid excessive reproduction resulting in the impoverishment and abandonment of unwanted animals.²¹⁸ An act of substantial interference also exists in the practice of injecting dye into fish or other animals to achieve a phosphorescent effect (such as in “glowfish” or “glowpets”).²¹⁹

A manipulation made in a figurative or filmic representation of an animal, and not to the animal itself, is not regarded as interference with an animal’s appearance and abilities.²²⁰ But if those manipulations constitute humiliation, they may nevertheless impact animal dignity.²²¹ Regardless, the three categories can overlap. As with the example of certain overbred animals, it is conceivable that a user simultaneously humiliates, excessively instrumentalizes, and interferes substantially with the appearance or abilities of an animal.

²¹³ *Id.* at 5.

²¹⁴ *Id.* at 7. For the entire animal breeding issue, see BOLLIGER, *supra* note 19, at 150 *et seq.*; RICHNER, *supra* note 62, at 196 *et seq.* According to Swiss animal law, breeding constitutes prohibited “torture breeding” if the breeding objective causes “any pain, suffering, harm, or behavioural disorders in the parent animals or their offspring.” AWA, AS 2965 (2008), art. 10, para. 1 (Switz.); *see also* RICHNER, *supra* note 62, at 209 *et seq.*

²¹⁵ For the distinction between wild animals and pets under Swiss law, *see infra* note 602.

²¹⁶ *See* RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 15.

²¹⁷ *See* FSVO, *supra* note 5, at 6 (noting that “permanent or irreversible” change, such as tail or ear docking, amounts to a “major interference with the appearance”).

²¹⁸ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 20, at 125 *et seq.*; RICHNER, *supra* note 62, at 220 *et seq.*; *see also* FSVO, *supra* note 5, at 6 (providing an example of “harm” to reproductive capacity: castration).

²¹⁹ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 20, at 49.

²²⁰ *See* FSVO, *supra* note 5, at 6 (defining “humiliation” as only acts which impact the animal itself).

²²¹ *See* discussion *supra* Part V.B.1.

C. *Balancing of Interests*

According to general Swiss doctrine, protection for animal dignity—in contrast to the dignity of humans, which is strictly deontologically regarded²²² as inviolable²²³—is not absolute.²²⁴ The legislature decided that animal dignity is to be given only a relative value,²²⁵ which is qualified through utilitarian considerations and is rightly criticized by animal law scholars.²²⁶ Although *every* stress on an animal, within the meaning of the AWA,²²⁷ constitutes a violation of that animal's dignity,²²⁸ certain violations may be justified from a legal perspective.²²⁹ If a justification by prevailing legitimate interests is possible, the dignity of a concerned animal can be considered “respected”²³⁰ despite the stress imposed on the animal, and the proposed intervention²³¹ may be permitted.²³² As a result, various uses of animals are socially, culturally, and legally considered legitimate and are not subject to legal scrutiny or fundamentally questioned in Switzerland.²³³

²²² The term *deontology* (from the Greek *deon* for “obligation” or “duty”) refers to the normative ethical position that judges the morality of an action based on the action's adherence to a rule or rules. See Klaus Peter Rippe, *Ein Lebensschutz für Tiere?*, in ANIMAL LAW—TIER UND RECHT, *supra* note 79, at 91 [hereinafter Rippe, in ANIMAL LAW].

²²³ See *supra* p. 19.

²²⁴ FSVO, *supra* note 5, at 2.

²²⁵ *Id.*; BALZER, RIPPE & SCHABER, *supra* note 83, at 49 *et seq.*; Steiger & Schweizer, *supra* note 22, at 1414; Rippe, *supra* note 82, at 13 *et seq.*; Steiger, *supra* note 91, at 2; Errass, *supra* note 22, at 1616; Michel & Schneider Kayasseh, *supra* note 25, at 14; Michel, *supra* note 109, at 273.

²²⁶ See, e.g., Engi, in WÜRDE DER KREATUR, *supra* note 115, at 127; Michel, *supra* note 109, at 101 (questioning whether it makes much sense to concretize the constitutional dignity-of-living-beings protection at the level of the animal welfare law and therefore relinquish a central norm of dignity—namely its absolute inviolability).

²²⁷ See AWA, AS 2965 (2008), art. 3a (Switz.) (“If any strain imposed on the animal cannot be justified by overriding interests, this constitutes a disregard for the animal's dignity. Strain is deemed to be present in particular if pain, suffering or harm is inflicted on the animal, if it is exposed to anxiety or humiliation, if there is major interference with its appearance or its abilities or if it is excessively instrumentalised.”); see also *supra* p. 25.

²²⁸ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 49.

²²⁹ See AWA, AS 2965 (2008), art. 3a (Switz.) (“If any strain imposed on the animal cannot be justified by overriding interests, this constitutes a disregard for the animal's interests.”) The implication is that a strain that *can* be justified does not violate the Act.

²³⁰ FSVO, *supra* note 5, at 2.

²³¹ The term *intervention* refers to all measures and actions that are “undertaken with the affected animals and that are to be assessed with respect to the animal's dignity.” Katharina Friedli, *The Dignity of the Nibble Fish—Weighing the Benefits*, in ANIMAL WELFARE REPORT 21–22 (FSVO ed., 2014).

²³² FSVO, *supra* note 5, at 2.

²³³ See Michel & Schneider Kayasseh, *supra* note 25, at 6–7 (While “[h]uman dignity dictates a prohibition against the *use* of human beings as a means to an end,” many believe that animal dignity still allows for “permissible *uses* to which animals are put.” (emphases added)).

In order to be justified, a user's interest (i.e., the objective the intervention in the animal's dignity is designed to produce) must clearly outweigh, on balancing,²³⁴ the animal's interest in being spared from the violation.²³⁵ If the user's interest is not sufficient to justify the violation, then the animal's dignity is not only *violated*, but impermissibly *disregarded*.²³⁶ A finding that animal dignity is disregarded establishes an animal cruelty offense under the AWA that is subject to prosecution.²³⁷ From an ethical view, however, stresses on animals always remain a problem, even in cases in which they can be legally justified by a balancing of interests.²³⁸

Of note, as a general constitutional principle,²³⁹ protection of animal dignity is on par with fundamental rights, such as property rights, economic freedom, and academic freedom of science and research, all of which also represent constitutional values,²⁴⁰ and are in the balancing of interests on the same normative level. Granting general and absolute priority to human interests would not be acceptable, since it would undermine the core content of animal dignity protection and reduce it to an empty phrase.²⁴¹ Moreover, certain situations defined by Swiss animal law constitute *a priori* a disregard for animal dignity, meaning that a balancing of interests is obsolete since human interests can never prevail over the violation of animal dignity.²⁴²

²³⁴ For the term *balancing of interests*, see generally Rippe, *supra* note 82, at 317 *et seq.*; Klaus Peter Rippe, *Güterabwägungen im Tierversuchsbereich: Anmerkungen zu einem ethischen Paradigmenwechsel*, in ALTEXethik 3 *et seq.* (2009); Engi, in ANIMAL LAW, *supra* note 87, at 51 *et seq.*; Arianna Ferrari & Vanessa Gerritsen, *Güterabwägung*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 139 *et seq.*

²³⁵ Saladin & Schweizer, *supra* note 87, at 71; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 49; Steiger, *supra* note 91, at 2. The same system applies under the GTA. See *supra* note 143.

²³⁶ The terminology used by the legislature is inappropriate since it leads to the result that animal dignity is violated although it is, through the balancing test, considered "respected." Further, in jurisprudence the term *violation* is typically used only if prevailing interests cannot justify an intervention in a legally protected interest. Camenzind, *supra* note 87, at 186.

²³⁷ See AWA, AS 2965 (2008), art. 26, para. 1 (Switz.) (criminalizing animal cruelty, which includes mistreating, neglecting, unnecessarily overworking, "or in any other way disregard[ing an animal's] dignity").

²³⁸ From an ethical point of view, a violation of animal dignity is no trivial offense that can be casually justified by appealing to prevailing human interests. Camenzind, *supra* note 87, at 186, 196.

²³⁹ See *supra* p. 16.

²⁴⁰ See *supra* p. 8.

²⁴¹ Michel & Schneider Kayasseh, *supra* note 25, at 9; Stucki, *supra* note 80, at 291.

²⁴² AWO, AS 2985 (2008), art. 16 *et seq.* (Switz.) (listing "prohibited actions in all species"); BOLLIGER, RICHNER & RÜTTIMANN *supra* note 19, at 50; see *infra* p. 49 and notes 279–80 (discussing examples of killing in a cruel manner or in the context of an organized animal fight).

1. *Threefold Proportionality Test*

Swiss law does not protect animals from every human activity that interferes with their dignity.²⁴³ However, every violation of animal dignity—i.e., every single human injury to animals—requires a legal justification.²⁴⁴ Carrying out a weighing of the interests answers the question of whether any stress or injury can be justified. Accordingly, and just as under the GTA,²⁴⁵ the dignity concept under the AWA includes a balancing of opposing interests on a case-by-case basis.²⁴⁶ The AWA itself does not specify how to conduct that balancing test, but the principle of proportionality, which is one of the main guidelines of Swiss administrative law, is the generally recognized procedure.²⁴⁷ It includes a threefold test, cumulatively requiring that an intervention is (1) suitable, (2) necessary to achieve a legitimate purpose, and (3) that a legitimate interest in the intervention prevails in a proportionality test over the severity of the stress that the intervention causes.²⁴⁸

²⁴³ Friedli, *supra* note 162, at 388.

²⁴⁴ *Id.*

²⁴⁵ See *supra* pp. 24–25, note 145 and accompanying text (discussing the GTA and its similar balancing test of interests).

²⁴⁶ Errass, *supra* note 22, at 1616. “It makes little sense to assess issues such as castration or breeding of animals across the board in a weighing of interests focused on whether or not animal dignity is respected. A given intervention may entail different strains on the one hand and different legitimate interests on the other hand, depending on the individual case. For example, the strain caused to an animal by neutering should be assessed differently depending on the animal’s species, gender and age, and on the neutering method used. In addition, different legitimate interests of varying importance come into play depending on whether the animal to be neutered is a cat, a horse or a piglet.” FSVO, *supra* note 5, at 3 *et seq.*

²⁴⁷ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 49 *et seq.* “The principle of proportionality is very important because administrative laws in Switzerland usually contain large and vague provisions giving the administration a great discretionary power. This power should therefore be exercised and used with restraint.” Thomas Fleiner, *Cantonal and Federal Administrative Law of Switzerland*, in *INTRODUCTION TO SWISS LAW* 27, 39 (F. Dessemondet & T. Ansay eds., 2004). According to the Swiss tradition, the principle of proportionality is considered to be part of the very basics of the rule of law and explicitly guaranteed by Article 5, paragraph 2, and Article 36, paragraph 3 of the Federal Constitution. Pursuant to Article 36, paragraph 3 of the Federal Constitution, any limitation of fundamental rights must be proportionate to the goals pursued. The underlying idea of the doctrine of proportionality is that a limitation of a fundamental right should not go further than is required by the public interest or for the protection of fundamental rights of others. The proportionality test has led to widely disseminated Federal Supreme Court case law. For some of the most important recent decisions, see FLEINER, MISIC & TOPPERWIEN, *supra* note 101, at 213.

²⁴⁸ See generally, e.g., BOLLIGER, RICHNER & RÜTTIMANN *supra* note 19, at 49 *et seq.* (discussing the principal of proportionality as applied to the AWA and analyzing factors considered); Camenzind, *supra* note 87, at 184 *et seq.* (discussing proportionality under the AWA as the balance between animal stresses and human interests). The FSVO established an “Animal Dignity Study Group,” which designed guidelines on how to proceed with animal dignity cases under the AWA and the GTO and, in particular, how to carry out the balancing of interests in a systematic and standardized way. FSVO, *supra* note 5, at 1 (providing a step-by-step guide to the analyses involved in the model proce-

Regarding protection for animal dignity, this means that, after a description of the aim²⁴⁹ of a proposed intervention and an exact presentation of the concrete facts of the individual case,²⁵⁰ any intervention must first demonstrate that it fulfills the intended purpose.²⁵¹ If it is clear from the outset that an intended aim cannot be achieved by means of the proposed intervention, the intervention is prohibited, and there is no need for a weighing of interests.²⁵² As a second step, an intervention must be necessary, meaning that there is no achievable measure that entails no stress or less stress for the animal but still promotes the user's interest.²⁵³ Thus, the question is whether an alternative to the proposed intervention exists which could also be used to achieve the intended aim but imposes little or no stress on the animal.²⁵⁴ If the first and second requirements are met, based on a full knowledge of the facts, a third and final determination is made as to whether the violation of the animal's dignity is proportional (appropriate).²⁵⁵ In order to examine appropriateness, the identified stress for the concerned animal—traditional aspects, such as pain, suffering, harm, and anxiety,²⁵⁶ as well as ethical aspects, including humiliation, excessive instrumentalization, and substantial interference with an animal's appearance or abilities²⁵⁷—must be weighed against the

dure). In the context of animal welfare law, the model procedure “[a]ims to help determine whether interventions are permissible . . . especially in the licensing of animal experiments. In the context of the GTG, it aims to help determine whether interventions are permissible in the production and marketing of genetically modified vertebrates.” *Id.* at 1. For the theoretical background of the procedure, see generally *id.* (discussing how to put the concept of dignity of animals into practice). Note, however, that these guidelines are not legally binding, but merely a suggestion for the cantonal law enforcement agencies.

²⁴⁹ FSVO, *supra* note 5, at 4. The question of what is to be achieved by an intervention “[i]s not trivial but vital in order to assess the intervention.” *Id.*

²⁵⁰ *Id.* Since a “weighing of benefits conducted without sound knowledge can lead to misjudgments,” the specific situation first has to be presented precisely. “This knowledge should include everything that could be relevant to assessing the intervention in question: what is done, and how, why, and by whom? Are there scientific insights that enable us to estimate the distress for the animal, but also the legitimate interests associated with it?” Friedli, *supra* note 231, at 22; *see also* FSVO, *supra* note 5, at 4 (describing these aspects of the “presentation of the facts”).

²⁵¹ Friedli, *supra* note 231, at 23.

²⁵² *See* FSVO, *supra* note 5, at 4 (providing the example of the use of “an unsuitable animal model” in the field of animal experiments, “e.g. selection of a species in which the results cannot usefully be transposed to humans on account of physiological differences”).

²⁵³ *Id.*

²⁵⁴ *Id.* (providing the example of animal experiments that can be replaced by procedures using cell cultures or by computer models).

²⁵⁵ *Id.* at 5 *et seq.*

²⁵⁶ *See supra* notes 165–68 and accompanying text (for definitions of the traditional stress aspects).

²⁵⁷ *See supra* Part V.B (providing definitions and discussion of the ethical stress aspects).

user's specific intentions and interests.²⁵⁸ If the result of this balancing clearly indicates that the intervention and the violation of animal dignity has significantly more value, then, and only then, the intervention is deemed legally justified.²⁵⁹

2. *Difficulty in Weighing Different Interests*

The balancing of interests is not an empirical method but a normative procedure.²⁶⁰ Its major difficulty is that it requires a moral judgment on the value of different interests that cannot be arrived at and verified by an appropriate scientific method but is based on non-quantifiable criteria.²⁶¹ The weighing of different interests allows a degree of discretion, but without being random.²⁶²

The primary problem lies in determining, weighing, and comparing the values underlying the interests of different categories (animal stress on the one hand and, for instance, human health or other scientific benefit on the other hand) in a harm-benefit analysis and trying to determine which interests ultimately carry the greater moral weight.²⁶³ A request for a weighing of interests questions whether a planned intervention justifies a violation of animal dignity.²⁶⁴ In practice, there is of course a potential risk that animal interests are a priori attributed less weight than human interests²⁶⁵ because respect for the

²⁵⁸ Friedli, *supra* note 231, at 24 (noting that only interests which are important to society as a whole are considered legitimate interests of the users, including the "health of people and/or the animal," "spread of knowledge," "preservation and improvement of ecological living conditions," and "protection from interference in basic rights such as commercial freedom, freedom of ownership, freedom of research, freedom of association").

²⁵⁹ Michel, *supra* note 109, at 273; *see generally* BOLLIGER, RICHNER & RÜTTIMANN, *supra* 19, at 80 *et seq.* (noting that any infliction of pain, suffering, or other violation of animal dignity that is *unjustified* on balancing constitutes a criminal act under the AWA).

²⁶⁰ FSVO, *supra* note 5, at 3 ("[A] normative judgment concerns the way something *should be*, not the way it *is*["].").

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* ("Consequently, [the balancing of interests] is not about describing or explaining an empirical situation or verifying a hypothesis. Rather, it is about substantiating a judgment based on moral considerations. However, empirical facts do play an important role: which animals are involved? What type of intervention is proposed? What effects would the intervention have on the individual's ability to lead a species-specific life? Empirical scientific knowledge is therefore vital in order to conduct a weighing of interests. However, this knowledge is not enough to arrive at a well-founded moral judgment. It requires normative criteria, which allow a weighting to be assigned to the interests for moral consideration on both the 'strain' side and the 'interests' side of the weighing of interests. Therefore, research scientists or those responsible for animal welfare enforcement cannot undertake the necessary weighing of interests (solely) from a scientific perspective. They need to expand their outlook and consider how an intervention's effects on the animals compare, from a moral perspective, with the interests described by the law as legitimate.").

²⁶⁴ *Id.*

²⁶⁵ Camenzind, *supra* note 87, at 195.

inherent worth of animals essentially depends on the attitude an individual person holds towards animals.²⁶⁶ Moreover, for example, regarding animal experiments for basic research,²⁶⁷ the expected benefit of an experiment is often hypothetical and cannot be quantified.²⁶⁸ Note, however, that since both animal welfare and the dignity concept have constitutional stance,²⁶⁹ it is not permissible to grant human interests a general and absolute preference.²⁷⁰

Since the AWA does not specify the sort of human interests that might prevail as legitimate (or more valuable),²⁷¹ the GTA's non-exhaustive specifications are adopted as a guide.²⁷² Under the GTA, the values underlying interests in human and animal health, guarantee of food security, reduction of harm to the environment, increase of knowledge, and "substantial economic, social, or environmental benefit for society" may all carry greater weight in a balancing test.²⁷³ Additionally, a user's interests can also include individual fundamental rights protected by the Federal Constitution.²⁷⁴ However, individual interests in the sense of specific private interests cannot be included in the balancing of interests.²⁷⁵

Consequently, not every interest is given consideration as a possible justification for an intervention in animal dignity, but rather only

²⁶⁶ *Id.* at 192.

²⁶⁷ See *infra* Part V.F.4.a (discussing animal experimentation).

²⁶⁸ Schindler, *supra* note 176, at 251.

²⁶⁹ See *supra* pp. 8, 16 (discussing Switzerland's constitutional clauses protecting animal welfare and animal dignity, respectively).

²⁷⁰ See ECNH/FCAE, *supra* note 82, at 3 ("We disregard an animal's dignity . . . if we give it no consideration and take it for granted that human interests take precedence.").

²⁷¹ See AWA, AS 2965 (2008), art. 3, para. 1 (Switz.) (defining dignity through the balancing test, without listing which human interests are to be considered in balancing). Only in connection with animal experiments is there an explicit reference to interests that may be used as justifications, interests that should therefore be included in the balancing test. These interests are listed in the AWO. AWO, AS 2985 (2008), art. 137, para. 1 (Switz.) (listing "the preservation or protection of the life and health of humans and animals[,] new knowledge on fundamental processes of life," and the protection of the natural environment as legitimate interests).

²⁷² Errass, *supra* note 79, at 230; FSVO, *supra* note 5, at 7.

²⁷³ See GTA, AS 4803 (2003), art. 8, para. 2 (Switz.) (listing legitimate interests that may warrant genetic modification); Errass, *supra* note 82, at 151. Note that the GTA does not speak of *overriding* interests (as article 3 of the AWA does), but of *legitimate* interests, and that the list of interests in article 8, paragraph 2 of the GTA, does not have an order of priority intended by the legislature. Accordingly, they cannot be put into an absolute order such that, for example, human and animal health could be said to take precedence over the other interests. However, relative weightings are possible. For example, it can be said that human health is relatively important *as a rule*, whereas increasing knowledge has relatively minor importance. The *as a rule* illustrates the importance of a case-by-case assessment, because the interests mentioned do not always carry the same weight. FSVO, *supra* note 5, at 8 (providing an example regarding health, in which "the development of a treatment for a life-threatening disease would be given more weight than one for a non-life-threatening disease.").

²⁷⁴ FSVO, *supra* note 5, at 8.

²⁷⁵ *Id.*

interests that are particularly valued in Swiss society.²⁷⁶ Underlying values and interests that are deemed legitimate in Switzerland, such as food production, pest control, and scientific inquiry,²⁷⁷ may thus override the protection of animal dignity. The same applies to artificial insemination for breeding purposes or the neutering of pets and stray animals.²⁷⁸ Even though all of these practices undoubtedly violate animal dignity, they are widely approved in Swiss society²⁷⁹ and therefore provide justification for an intervention in animal dignity as long as the requirements of Swiss animal welfare law (regarding slaughter, animal experiments, et cetera) are met.²⁸⁰

From an animal welfare view, however, most of the human interests the GTA considers legitimate are not at all convincing. For example, it is highly debatable whether the production of animal-source foods is necessary and relevant for the guarantee of food security.²⁸¹ Given that one-third of the meat produced in Europe is not eaten,²⁸² there is no question that this surplus is not necessary for the guarantee of food security. In this light, the breeding, keeping, and killing of animals for meat production, which is not necessary to guarantee food security, disregards animal dignity.²⁸³ On the other hand, there are cases, such as sexually motivated activities with animals (zoophilia), in which it is clear from the outset that animal dignity is not respected.²⁸⁴ In regards to zoophilia, the legislature has conducted an abstract weighing of interests (in anticipation of individual procedures) and preemptively imposed a general ban.²⁸⁵

Any change in an animal beyond what is normal must be evaluated if it represents a type of stress.²⁸⁶ If the stress is due to a non-natural cause, such as genetic modification, this means that there may be a disregard of the animal's dignity.²⁸⁷ For the assessment of stress, the Federal Food Safety and Veterinary Office (FSVO) distinguishes various degrees of stress—slight/mild stress, moderate/substantial

²⁷⁶ Friedli, *supra* note 231, at 24.

²⁷⁷ See *id.* (citing interests related to health, knowledge, and the “preservation and improvement of ecological living conditions” as legitimate interests).

²⁷⁸ RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 11 *et seq.*

²⁷⁹ See Gerritsen, *supra* note 2, at 8 *et seq.* (“Swiss society and authorities are not willing to stop the exploitation of animals.”).

²⁸⁰ See *id.* at 5, 7 (“Swiss animal welfare law does assertively protect the dignity and well-being of animals, but not their life.”).

²⁸¹ The general question of the necessity of consumption of animal food products is not discussed within this Article. Instead, see generally, e.g., JONATHAN SAFRAN FOER, *EATING ANIMALS* (2009), for a discussion of the societal expectations of eating meat. HILAL SEZGIN, *ARTGERECHT IST NUR DIE FREIHEIT: EINE ETHIK FÜR TIERE ODER WARUM WIR UMDENKEN MÜSSEN* (2014), for a discussion of the ethical need to live a strict vegan life.

²⁸² Camenzind, *supra* note 87, at 196 (providing further references).

²⁸³ *Id.*; see also *infra* p. 49 (discussing the mass killing of “one-day chicks”).

²⁸⁴ See AWO, AS 2985 (2008), art. 16, para. 2 (Switz.) (listing sexually motivated activities with animals as *a priori* violations of animal dignity).

²⁸⁵ AWO, AS 2985 (2008), art. 16, para. 2 (Switz.); see *infra* p. 42.

²⁸⁶ FSVO, *supra* note 5, at 6.

²⁸⁷ *Id.*

stress, and severe stress—based on the severity–degree classification under Swiss animal welfare law used in animal experiments.²⁸⁸ In other areas, the three stress categories form a relatively rough grid that frequently allows a measure of discretion.²⁸⁹ It is important to consider an animal's overall well-being when assessing how a particular stress will affect the animal's characteristics, functions, and habits.²⁹⁰

Of course, the identification in principle should include all stresses and all legitimate interests involved in an individual case. Note, however, that where there are several stresses or user's interests, factors are not aggregated in the balancing test.²⁹¹ Rather, in each particular case, the decisive factors are those that constitute the most severe form of stress for the animal on the one hand, and only those that constitute the most significant of the user's interests on the other hand.²⁹² Still, the proportionality test is not limited to a mere 'quality control' of interventions in animals.²⁹³ In fact, animals' interests must always be weighed appropriately and may not be routinely subordinated to human utility considerations.²⁹⁴

Generally, the more serious an interference in the dignity of animals and the more trivial, or even unnecessary, it is in terms of the

²⁸⁸ *Id.* For the severity degrees according to article 24 of the AWO, see *infra* p. 56 (listing the severity degrees and the corresponding stress levels). At least to some degree, for the weighing of animal interests one can also refer to criteria elaborated by the Federal Supreme Court. See BGer, Oct. 7, 2009, 135 BGE II 401 (establishing criteria for the weighing of animal interests); see also ERRASS, *supra* note 74, at 230.

²⁸⁹ FSVO, *supra* note 5, at 7 ("This applies to all of the criteria . . . with a view to species-specific properties, functions or habits. This is because the basic concept of a natural development is based on the existence of a particular range of normal properties, functions, and habits for each species. Differences within that range may not constitute a strain. Strain can be said to exist only if that range is exceeded, for example as a result of genetic modifications. However, because there are no clear boundaries in this regard, there is an unavoidable lack of precision.").

²⁹⁰ *Id.* ("For example, the loss of reproductive capacity (e.g. as a result of castration) is certainly a strain, but not necessarily a severe one. [The strain is not severe] if the other criteria to be considered in order to assess the animal's [well-being] as a whole are not adversely affected, i.e. if a castrated cat is able to lead an otherwise normal life for a cat.").

²⁹¹ Friedli, *supra* note 231, at 24 ("[T]he weightings of the identified types of distress and/or interests are not added together in order to weigh the benefits[.]"); FSVO, *supra* note 5, at 7 ("[Factors] cannot add up to a total that might lead to classification in a higher category. For example, if there is a mild degree of strain on several criteria (pain, suffering, anxiety, etc.), this does not mean that the overall strain becomes substantial or severe. Conversely, it also follows that, even if there is considerable strain across all criteria, it should be regarded as less important than a severe stress on one criterion only.").

²⁹² *Id.* ("The crucial factor in determining the overall weighting is therefore the greatest individual strain in each case. The same applies to the weighting of legitimate interests."); Friedli, *supra* note 231, at 24 *et seq.*

²⁹³ See generally FSVO, *supra* note 5 (noting that the balancing test will sometimes not justify an intervention).

²⁹⁴ BGer, Oct. 7, 2009, 135 BGE II 384; BGer, Oct. 7, 2009, 135 BGE II 406; Schweizer & Errass, *supra* note 74, at 2151; Michel, *supra* note 109, at 275.

human interests, the more critically it is evaluated.²⁹⁵ In contrast, the more negligible an intervention is for the affected animal and the more necessary it is in serving the interest of another living being, the more it is considered tolerable.²⁹⁶ In other words, the greater the impact to an animal and its dignity, the greater the requirements for the user justification. Only morally significant reasons may be considered sufficient justifications for violations of animal dignity.²⁹⁷ Consequently, luxury needs and pleasure, hobby, sports, and leisure interests can never be regarded legally justifiable.²⁹⁸ The same applies to violations of animal dignity that result from negative human emotions (such as aversion, intent to cause damage, reaction to emotional burdens, convenience, boredom, humor, lust, malice, revenge, retribution, sensationalism, tedium of the animal, resentment, arrogance, anger, or destructiveness).²⁹⁹ Further, pure economic interests alone never justify a violation of animal dignity.³⁰⁰

An illustrative example for the balancing of interests regarding animal dignity is the keeping and use of kangal fish (also known as “nibble fish” or “doctor fish”).³⁰¹ Due to their willingness to feed on human dead skin cells, kangal fish have been used for many years in the treatment of psoriasis, neurodermatitis, and other chronic skin diseases.³⁰² However, besides this therapeutic use, the use of kangal fish for cosmetic or recreational purposes recently became popular in nail

²⁹⁵ ECNH/FCAE, *supra* note 82, at 8; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 50.

²⁹⁶ ECNH/FCAE, *supra* note 82, at 8; Kley & Sigrist, *supra* note 34, at 37; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 50.

²⁹⁷ BALZER, RIPPE & SCHABER, *supra* note 83, at 60; Engi, in WÜRDE DER KREATUR, *supra* note 117, at 133; Rippe, in ANIMAL LAW, *supra* note 222, at 90.

²⁹⁸ See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 50 (noting that interests related to convenience or aesthetics are not sufficient).

²⁹⁹ See *id.*

³⁰⁰ See Bolliger & Gerritsen, *supra* note 135, at 17 (providing further references); Gieri Bolliger & Andreas Rüttimann, *Rechtlicher Schutz der Tierwürde—Status Quo und Zukunftsperspektiven*, in WÜRDE DER KREATUR, *supra* note 80, at 73; Engi, in ANIMAL LAW, *supra* note 87, at 90; Engi, in WÜRDE DER KREATUR, *supra* note 115, at 134 (remarking that this, however, does not reflect practice); see also § 1 of the German AWA (“No one may cause an animal pain, suffering, or harm without good reason.”); *infra* note 479. See generally HIRT, MAISACK & MORITZ, *supra* note 160, at 449; Christoph Maisack, *Lebensschutz für Tiere—Notwendige Erweiterung oder logische Folge des Würdeschutzes? Ein Blick auf das Lebensschutzkonzept im deutschen und österreichischen Tierschutzrecht*, in WÜRDE DER KREATUR, *supra* note 80, at 219 (providing corresponding case law).

³⁰¹ See *Fish Pedicures and Fish Spas*, CDC, http://www.cdc.gov/healthywater/hygiene/body/fish_pedicures.html [https://perma.cc/2DJ3-VJ4V] (May 7, 2012) (accessed Feb. 28, 2016) (referring to the fish as “doctor fish”). Kangal fish (*Garra rufa*) is a species that originally lives and breeds in the pools of some Turkish river systems and hot springs. Tim Kelsey, *The Miracle of the Fishes*, SUNDAY TIMES, Mar. 3 1996, at 7. See generally Friedli, *supra* note 231 (describing the medical and recreational use of “nibble fish” and applying the balancing test to each type of use).

³⁰² Friedli, *supra* note 231, at 22 (discussing how patients bathe afflicted skin patches in a tank or special therapy tub. The fish are moved from their aquarium to the designated tub for the duration of an individual treatment).

studios, wellness facilities, bars, and nightclubs across many countries, as a spa treatment³⁰³—i.e. a ‘fish pedicure.’³⁰⁴ In light of animal dignity, although the stress on the fish—caused by forced starvation and their living conditions consisting of a bleak environment in a tank or treatment tub without any opportunities to retreat—is likely to be similar with both types of use,³⁰⁵ at most the medical use of kangel fish can be considered justifiable.³⁰⁶ However, in contrast to the medical use, where patients with skin diseases find relief from chronic severe itching and therefore an increase in well-being, every use of kangel fish that focuses exclusively on relaxation, beauty, or entertainment clearly qualifies as excessive instrumentalization.³⁰⁷ Mere cosmetic, wellness, or recreational applications of the fish’s nibbling behaviors are not *necessary*, since there are numerous options for achieving the intended aims that do not depend on the use of animals.³⁰⁸ As a result, the stress imposed on kangel fish cannot be justified by overriding interests.³⁰⁹

D. Paradigm Shift from Pathocentric to Restricted Biocentric Approach

Animal protection can be based on various concepts.³¹⁰ In contrast to anthropocentric animal protection, which is framed by human requirements,³¹¹ in German, the term *ethical animal protection* refers to

³⁰³ *Id.*

³⁰⁴ CDC, *supra* note 301.

³⁰⁵ See Friedli, *supra* note 231, at 22 (describing the living conditions of fish used for the therapeutic purpose).

³⁰⁶ *Id.* at 25.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 23.

³⁰⁹ *Id.* at 25; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 82. The FSVO recommends in an official statement that the cantonal veterinary authorities not approve licenses for the use of kangel fish for non-medical purposes. FSVO, NUTZUNG VON KANGALFISCHEN (GARRA RUFA) (2012), <http://www.blv.admin.ch/themen/tierschutz/04013/04017/index.html?lang=DE> [<https://perma.cc/8737-4HQN>] (accessed Feb. 28, 2016).

³¹⁰ See generally, e.g., Camenzind, *supra* note 87, at 176 *et seq.*; Angelika Krebs, *Ökologische Ethik I: Grundlagen und Grundbegriffe*, in ANGEWANDTE ETHIK: DIE BEREICHSETHIKEN UND IHRE THEORETISCHE FUNDIERUNG 387 *et seq.* (Julian Nida-Rümelin ed., 2d ed. 2005); REGINA BINDER, BEITRÄGE ZU AKTUELLEN FRAGEN DES TIERSCHUTZ- UND TIERVERSUCHSRECHTS 23 *et seq.* (2010).

³¹¹ The anthropocentric position (from the Greek *ánthropos* for human) exclusively considers humans as objects of moral concern. *Anthropocentric Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/anthropocentric> [<https://perma.cc/8964-U97B>] (accessed Mar. 5, 2016) (defining the term as “considering human beings as the most significant entity in the universe,” or alternately, “interpreting or regarding the world in terms of human values and experiences”). Towards animals and plants, indirect duties may be recognized at best. See generally, e.g., Michael Allen Fox, *Anthropocentrism*, in ANIMAL RIGHTS AND ANIMAL WELFARE 66 *et seq.* (Marc Bekoff ed., 2d ed., vol. 1 2010) (defining *anthropocentrism*, under which “humans are at the center of things”); Gary Steiner, *Anthropozentrismus*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 28 *et seq.* (identifying various types of anthropocentrism).

the protection of animals for their own sake.³¹² Ethical animal protection is based on the moral postulate that animals, as living and sentient *fellow creatures*,³¹³ are to be respected and esteemed by the intellectually superior human.³¹⁴ These days, the ethical animal protection principle is recognized as a “legal imperative”³¹⁵ and a basic value in practically all modern occidental countries.³¹⁶

Ethical animal protection can further be divided into sub-classifications of pathocentric and biocentric animal protection. Pathocentric animal protection considers an animal’s sentience³¹⁷—its capacity to experience sensations (sentientism)—and suffering in particular, and it underlies most of the Western animal welfare laws.³¹⁸ According to the principle of equality, animal suffering must be approached like human suffering.³¹⁹ “Pain is pain, no matter what the species of the

³¹² This term may seem a bit strange within the English-language legal context, but it is widely used in German-speaking literature and jurisprudence. Michel, *supra* note 82, at 91. For the term *ethical animal protection* see, for example, TEUTSCH, LEXIKON DER TIERSCHUTZETHIK 59 *et seq.* (1987); *see also* BOLLIGER, *supra* note 19, at 5 *et seq.* (distinguishing anthropocentric and ethical animal welfare); Stucki, *supra* note 80, at 294 *et seq.*

³¹³ Although the term *fellow creature* is not explicitly used in Swiss animal welfare law, the legislature and the Federal Supreme Court sometimes refer to it, emphasizing the affiliation of all living beings, especially between humans and animals. *See, e.g.*, the statement of the Parliamentary Committee on Legislation of the Council of States, *supra* note 372; BGer, Feb. 8, 1989, 115 BGE IV 254 (Switz.). Contrary to the Swiss AWA, the German AWA uses the term *fellow creature*. Tierschutzgesetz [TierSchG] [Animal Welfare Act], May 18, 2006, BGBL I at 1206, § 1 (Ger.) (“The aim of this Act is to protect the lives and well-being of animals, based on the responsibility of human beings for their *fellow creatures*.” (emphasis added)). *See generally* HIRT, MAISACK & MORITZ, *supra* note 160, at 5 *et seq.*

³¹⁴ Michel, *supra* note 100, at 599. Already Jean-Jacques Rousseau (1712–1778) and Jeremy Bentham (1748–1832) recognized that animals require protection from pain and suffering. *See* BENTHAM, *infra* note 324, at 311; Eisenhart von Loeper, *Einführung zum Tierschutzgesetz*, in TIERSCHUTZGESETZ 37 (Hans-Georg Kluge ed., 2002) (describing the contributions of Rousseau and Bentham).

³¹⁵ Michel, *supra* note 82, at 91.

³¹⁶ *See* BOLLIGER, *supra* note 19, at 6 (providing further references); GOETSCHEL & BOLLIGER, *supra* note 32, at 183.

³¹⁷ *See generally, e.g.*, John Webster, *Sentience and Animal Protection*, in ANIMAL RIGHTS AND ANIMAL WELFARE (Marc Bekoff ed., 2d ed., vol. 2 2010) 507, 508 *et seq.* (discussing the term *sentience*).

³¹⁸ The pathocentric position (from the Greek *pathos* for suffering) includes any sentient entity in the community of living beings for purposes of moral consideration. *See generally, e.g.*, PETRA MAYR, DAS PATHOZENTRISCHE ARGUMENT ALS GRUNDLAGE DER TIERETHIK 45 *et seq.* (2003); Rippe, *supra* note 82, at 157 *et seq.* The need for protection of animals due to their ability to suffer is generally ascribed to Jeremy Bentham (1748–1832) and his famous quote: “[T]he question is not, Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?” JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 (Oxford Univ. Press 1879) (1789).

³¹⁹ *See* Peter Singer, *Cloning Humans and Cloning Animals*, in THE CLONING SOURCEBOOK 160, 166 (Arlene Judith Klotzko ed., 2001). There are some forms of pain that animals can feel “and which we must presume they feel in a manner similar to the way in which we would feel it.” *Id.*

being who feels it.”³²⁰ Pathocentric animal protection includes all sentient animals and focuses, on the one hand, on protecting them from cruelty by preventing pain, suffering, harm, and anxiety, and, on the other hand, on ensuring their well-being.³²¹ On the contrary, biocentric animal protection finds its justification in the animal’s mere existence and recognizes an inherent moral value in all living beings, regardless of their sentience or lack thereof.³²²

As discussed above, the Swiss dignity protection concept is based on the belief that animals are to be protected beyond mental and physical stresses, based on a recognition of their inherent worth.³²³ This introduction of the legal protection of animal dignity can be declared—not only in Switzerland but also worldwide—a new dimension in animal welfare law.³²⁴ In protecting aspects of animal welfare not nec-

³²⁰ *Id.*

³²¹ See generally, e.g., Michel, *supra* note 100, at 600 *et seq.* The concept of well-being is based mostly on the health of an animal and the animal’s freedom to conduct activities in a manner consistent with the animal’s species. Consequently, animal welfare legislation seeks to positively guarantee prerequisites providing for satisfactory living conditions for animals, such as appropriate food, shelter, exercise, and contact with conspecifics. The principle of well-being therefore seeks to take into account the physical and emotional needs of animals in a comprehensive manner and goes significantly further than mere avoidance of suffering. Under this principle, animals should be “able to live in a way consonant with their species and their nature,” and they should be able to fulfill their natural needs and desires.” Michel, *supra* note 82, at 93. See also BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 43 *et seq.* According to the 1979 definition of Great Britain’s Farm Animal Welfare Council, which in 2011 was replaced by the Farm Animal Committee (FAWC), well-being requires the guarantee of the so-called five freedoms, which are progressively being introduced into national animal welfare legislation. The five freedoms are: “1. Freedom from [h]unger and [t]hirst—by ready access to fresh water and a diet to maintain full health and vigour[;] 2. Freedom from [d]iscomfort—by providing an appropriate environment including shelter and a comfortable resting area[;] 3. Freedom from [p]ain, [i]njury or [d]isease—by prevention or rapid diagnosis and treatment[;] 4. Freedom to [e]xpress [n]ormal [b]ehavior—by providing sufficient space, proper facilities and company of the animal’s own kind[;] and 5. Freedom from [f]ear and [d]istress—by ensuring conditions and treatment which avoid mental suffering.” *Five Freedoms*, FAWC, <http://webarchive.nationalarchives.gov.uk/20121007104210/http://www.fawc.org.uk/freedoms.htm> [<https://perma.cc/F98U-4Q6A>] (Apr. 16, 2009) (accessed Mar. 5, 2016). For the term *well-being* according to the AWA, see *supra* note 148.

³²² The biocentric position (from the Greek *bios* for life) grants moral protection to all living beings for their own sake. See *Biocentric Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/biocentric> [<https://perma.cc/JQ2K-89ZJ>] (accessed Mar. 5, 2016) (defining the term as “considering all forms of life as having intrinsic value”). Not suffering, but criteria like dignity, integrity, or *telos* are morally related. See generally, e.g., Rippe, *supra* note 82, at 99 *et seq.*

³²³ Besides physical health and the avoidance of mental stress, well-being includes, first, a guarantee of the ability to engage in species-specific behavior and, second, protection against disturbance with bodily functions and behavior caused by excessive demands on the animal’s ability to adapt. Additionally, the concept of dignity recognizes animals’ inherent worth.

³²⁴ See Gerritsen, *supra* note 2, at 2 (recognizing the “far-reaching significance” of Switzerland’s conception of animal dignity); Schindler, *supra* note 176, at 253 (“The situation in Switzerland is unprecedented and unique, and . . . a lot might be at stake.

essarily associated with physical impairments, the biocentric criterium³²⁵ is unique in otherwise largely anthropocentric Swiss legislation.³²⁶ It signifies a remarkable shift from a pathocentric focus³²⁷ to a biocentric approach to animal welfare.

However, in Switzerland, the biocentric orientation—and the protection of animal dignity—is not fully implemented. For two primary reasons, Swiss animal law represents, according to prevailing doctrine, a restricted biocentric position,³²⁸ which weighs the inherent worth of various animals differently.³²⁹

First, in contrast to the animal welfare clause and the dignity of living beings clause in the Federal Constitution, which both include all animals,³³⁰ the AWA applies essentially only to vertebrates,³³¹ meaning only to mammals, birds, reptiles, amphibians, and fish. Except the two categories of cephalopods (octopuses, squids, et cetera) and decapods (lobster, crawfish, et cetera)—categories that are covered by the Swiss Animal Welfare Ordinance—all invertebrate animals are excluded from protection under Swiss animal welfare law,³³² despite often possessing unique and highly specialized sensory abilities.³³³

The departure from the pathocentric approach may open a new field of animal protection, which goes beyond not harming but actually influences our viewpoint toward regarding animals with more consideration and respect[.]”.

³²⁵ The biocentric aspect reflects, for example, the fact that it is irrelevant whether an animal itself perceives a humiliation or excessive instrumentalization as a stress. See *supra* p. 23.

³²⁶ Camenzind, *supra* note 87, at 195. Also, in Swiss law, belonging to the human species still is a central construction line. See Margot Michel & Saskia Stucki, *Vom Recht über Tiere zu den Legal Animal Studies*, in *DISZIPLINIERT TIERE? PERSPEKTIVEN DER HUMAN ANIMAL STUDIES FÜR DIE WISSENSCHAFTLICHEN DISZIPLINEN 239 et seq.* (Reinhard Spannring et al. eds., 2015).

³²⁷ Schindler, *supra* note 176, at 253.

³²⁸ FSVO, *supra* note 5, at 2; see also ERRASS, *supra* note 74, at 209 *et seq.*

³²⁹ Compared to that, an egalitarian biocentric approach to animal welfare, as it was characterized by Albert Schweitzer in his *Ethics of Reverence for Life*, posits equal moral status to all animals. See ALBERT SCHWEITZER, *KULTURPHILOSOPHIE* 301 (2d ed. 1992). See generally ALBERT SCHWEITZER, *DIE LEHRE VON DER EHRFURCHT VOR DEM LEBEN* (1963); Rippe, *supra* note 82, at 134 *et seq.* For the distinction between restricted biocentrism and egalitarian biocentrism, see generally *id.* at 111 *et seq.*

³³⁰ See *supra* pp. 7 and 15.

³³¹ AWA, AS 2965 (2008), art. 2, para. 1 (Switz.).

³³² See AWA, AS 2965 (2008), art. 2, para. 1 (Switz.) (“The Federal Council decides to which invertebrates [the AWA] applies and to what extent . . . guided by scientific knowledge.”). Up to this point, however, the Federal Council has acted very cautiously in protecting only cephalopods and decapods, considering only in these animals scientific evidence for the ability to suffer, expressed through postural harm and stress-induced behavioral changes. See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 53 (providing further references).

³³³ See, e.g., MAY R. BERENBAUM, *BUGS IN THE SYSTEM: INSECTS AND THEIR IMPACT ON HUMAN AFFAIRS* 38–43 (1995) (discussing the various unique sensory abilities of insects); Univ. of R.I., Graduate Sch. of Oceanography, *How Do Marine Invertebrates Detect Sounds?*, *DISCOVERY OF SOUND IN THE SEA*, <http://www.dosits.org/animals/soundreception/invertebrateshear/> [<https://perma.cc/9QCT-J5AH>] (accessed Feb. 13, 2016) (discussing the hearing abilities of marine invertebrates).

The Swiss legislature justifies this remarkable limitation and the legal discrimination against invertebrates—which constitute approximately 97% of all known animal species³³⁴ and include, for instance, snails, clams, worms, spiders, and insects—with a lack of unambiguous scientific evidence demonstrating that these animals possess conscious perception and the ability to experience pain and suffering.³³⁵

Second, the AWA protects an animal's dignity and well-being, but it does not protect an animal's life per se.³³⁶ Although being alive can be considered an animal's most fundamental interest and, while highly debated by philosophers,³³⁷ an animal's death can be deemed the most significant and irreversible harm,³³⁸ the AWA provides no general protection for animals' lives. The reason the Swiss legislature declines to recognize a fundamental life-claim for animals lies in the various legalized human uses that are largely inseparable from killing animals.³³⁹ Even though, according to Swiss law, the killing of an animal alone is not unlawful, at least some intentions by an actor and some manners of killing are illegal.³⁴⁰ Explicitly prohibited, for example, is

³³⁴ *Invertebrates*, CTR. FOR BIOLOGICAL DIVERSITY, <http://www.biologicaldiversity.org/species/invertebrates/> [<https://perma.cc/NVP9-UT6E>] (accessed Mar. 5, 2016).

³³⁵ See AWA, AS 2965 (2008), art. 2, para. 1 (Switz.) (“This Act applies to vertebrates.” In deciding, under its authority, whether to extend protections to invertebrates, the Federal Council “is guided by scientific knowledge on the sensitivity of invertebrate animals.”); see also FSV, *supra* note 5, at 2 (“[N]ot all living beings have the same inherent worth. Rather there is a hierarchy . . . [A] distinction is made between vertebrates [and] invertebrates.”).

³³⁶ GOETSCHER & BOLLIGER, *supra* note 32, at 215.

³³⁷ See generally Julian Nida-Rümelin, *Tierethik I: Zu den philosophischen und ethischen Grundlagen des Tierschutzes*, in ANGEWANDTE ETHIK: DIE BEREICHSETHIKEN UND IHRE THEORETISCHE FUNDIERUNG (2005) (discussing why the assumption that animals only live in the present and possess awareness neither of themselves nor of the future is highly controversial both in animal ethics and biological literature, and is mostly rejected by scholars); Rippe, *supra* note 82, at 279 *et seq.* (discussing whether killing an animal is ethically permissible).

³³⁸ UELI VOGEL, DER BUNDESSTRAFRECHTLICHE TIERSCHUTZ 159 (1980); GOETSCHER & BOLLIGER, *supra* note 32, at 215; STOHNER, *supra* note 87, at 109; Bolliger & Gerritsen, *supra* note 135, at 10; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 58; Steiger, *supra* note 91, at 3; RICHNER, *supra* note 62, at 63; HIRT, MAISACK & MORITZ, *supra* note 160, at 101 *et seq.*; Gerritsen, *supra* note 2, at 10; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 28; Klaus Petrus, *Schaden*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 306.

³³⁹ RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 12. As in most parts of the world, animals are killed in Switzerland by slaughter for obtaining food; by hunting and fishing; when they are old, severely injured, sick, or maladjusted; when they are considered ‘undesirable’ young animals, such as in case of ‘unusable’ day-old chicks, see *infra* p. 57; when they are used as laboratory animals; when they are used for the feeding of carnivorous animals; and when humans wish to combat ‘pests’ or certain animal diseases. *Id.*

³⁴⁰ See generally GOETSCHER & BOLLIGER, *supra* note 32, at 215 *et seq.* (comparing protections applicable to the killing of animals in Switzerland, Germany, and Austria).

the killing of a vertebrate, cephalopod, or decapod³⁴¹ in a cruel or mischievous way³⁴² or within the context of an organized animal fight.³⁴³

However, other ways of killing do not constitute a criminal offense as long as they do not cause any unnecessary pain, suffering, harm, or anxiety to an animal.³⁴⁴ Within these limits, the owner of an animal may decide on the animal's life and death.³⁴⁵ Consequently, in Switzerland, practices such as the production of animals in order to kill them, which is a fundamental, direct or indirect aspect of the production of meat, milk, and eggs, and of most animal experiments, are lawful, as is putting animals to sleep even if they are young, strong, and healthy. From an ethical and animal welfare point of view, however, euthanasia without good reason should clearly be rejected.³⁴⁶ Many scholars criticize both the lack of protection for an animal's life and the strongly limited scope of applying the AWA.³⁴⁷

³⁴¹ Due to their preclusion from the AWA generally, *supra* p. 36, all other invertebrates are completely excluded from any AWA protection from killing. GOETSCHER & BOLLIGER, *supra* note 32, at 216.

³⁴² See AWA, AS 2965 (2008), art. 26, para. 2b (Switz.) (criminalizing the act of "deliberately and without provocation [killing] an animal in a manner that causes it suffering[]"). See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 139 *et seq.*; RICHNER, *supra* note 62, at 93 *et seq.*

³⁴³ AWA, AS 2965 (2008), art. 26, para. 2c (Switz.); see BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 59. See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 146 *et seq.*; RICHNER, *supra* note 62, at 95 *et seq.*

³⁴⁴ Swiss animal welfare law sets strict general standards regarding the (lawful) killing of vertebrates, cephalopods, and decapods. Any unnecessary pain, suffering, harm, and anxiety for an animal must be avoided with its killing. This is consistent with the general principle of article 4, paragraph 2 of the AWA, which states that no one shall, without justification, inflict pain, suffering, harm, or anxiety on an animal. AWA, AS 2965 (2008), art. 4, para. 1 (Switz.). See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 63 *et seq.* (discussing prohibited and permitted methods of killing). The AWO determines guidelines for killing procedures that are as gentle, quick, and painless as possible. See AWO, AS 2985 (2008), arts. 177–79 (Switz.) (describing a training requirement for slaughterhouse personnel, including training on stunning and bleeding, and giving the FSVO authority to define lawful methods of killing). Animals may be euthanized only by persons who have the necessary knowledge and skills to do so. AWO, AS 2985 (2008), art. 177, para. 1 (Switz.). Further, vertebrates may only be killed after they have been rendered unconscious by stunning or anesthesia. AWO, AS 2985 (2008), art. 178, para. 1 (Switz.). If not all statutory requirements—which (along with the the lack of instruments) make a lawful killing largely impossible to a layperson—are met, the statutory offense of cruel killing must be considered. See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 58 *et seq.*; RICHNER, *supra* note 62, at 234 *et seq.*

³⁴⁵ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 59. The killing of animals that belong to someone else, however, affects property rights and can have both private and criminal consequences. *Id.* at 103; BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 48 *et seq.*; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 36 *et seq.*

³⁴⁶ See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 59 (criticizing an owner's entitlement to determine whether an animal lives or dies).

³⁴⁷ See *infra* notes 445, 457.

E. Implications and Consequences

The inclusion of the *dignity of living beings* concept in the Federal Constitution has led to a series of dignity-related amendments in Swiss law. In particular, besides the already-mentioned implementation in the GTA and some non-primarily animal-related statutes,³⁴⁸ the new Swiss animal welfare law of 2008 contains various provisions that are directly based on animal dignity protection.³⁴⁹ In addition, the general legal position of animals has changed.³⁵⁰

1. Change of Animals' Legal Status

The most representative revision of Swiss law against the background of animal dignity protection is the elimination of the animals' former legal status as mere "things."³⁵¹ In 2003, five years before the complete revision of the AWA, the Swiss Civil Code (CC)³⁵² was amended by a provision that explicitly states that "animals are not objects."³⁵³ This clarification, which at first glance would appear self-evident, signifies a legal "recognition of animals as living and feeling fellow creatures,"³⁵⁴ since animals were previously legally subsumed under the category of 'things' for many centuries in Switzerland (as around the world).³⁵⁵ To date, only a few countries have enacted legislation that frees animals from the legal status of mere objects.³⁵⁶

³⁴⁸ See *supra* p. 21.

³⁴⁹ E.g., AWO, AS 2965 (2008), art. 25, para. 1 (Switz.); AWO, AS 2965 (2008), art. 105, para. 1d (Switz.).

³⁵⁰ SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE] Dec. 10, 1907, SR 210, art. 641a, para. 1 (Switz.).

³⁵¹ Within this Article, the terms *things* and *objects* are used interchangeably. For the incompatibility of animal dignity and an animal's status as a thing, see CATHERINE STRUNZ, DIE RECHTSSTELLUNG DES TIERES, INSBESONDERE IM ZIVILPROZESS 8 *et seq.* (2002).

³⁵² See *supra* note 11.

³⁵³ ZGB, SR 210, art. 641a, para. 1 (1907) (Switz.) (situating the provision within the context of property law).

³⁵⁴ See PARLAMENTARISCHE INITIATIVE: DIE TIERE IN DER SCHWEIZERISCHEN RECHTSORDNUNG [PARLIAMENTARY INITIATIVE: ANIMALS IN SWISS LAW] BBL 4168 (2002) [hereinafter PARLIAMENTARY INITIATIVE].

³⁵⁵ It was due to this long legal tradition that it took until 2003 for the so-called "Amendment Act on Basic Principles Regarding Animals" (*Grundsatzartikel Tiere*) to finally be implemented. Michel, *supra* note 82, at 102 *et seq.* Note, however, article 641a, paragraph 2 of the Civil Code, which states that animals are still subject to the provisions pertaining to objects when no "special provisions" exist for animals. ZGB, Dec. 10, 1907, SR 210, art. 641a, para. 2 (Switz.). The term *special provisions* refers in particular to animal welfare legislation. This means that in all legal areas where it is not explicitly stated otherwise, the provisions regarding objects must be 'analogously' applied as long as they do not contradict Swiss animal welfare law. "This means that a property law regulation must then be applied to animals when its scope of protection might be extended to animals [consistent with the purpose of the amendment, and so] the regulation can also fulfill an animal welfare function." Michel, *supra* note 82, at 103.

³⁵⁶ Before Switzerland, only Austria (in 1988) and Germany (in 1990) had amended similar legal provisions regarding animals in their federal laws. See ALLGEMEINES

As a result, in Switzerland animals enjoy their own special legal status somewhere between persons and objects.³⁵⁷ The purpose of this revision was to reflect in the law a change in the general perception in Swiss society towards animals as sentient fellow creatures possessing dignity³⁵⁸ and, in particular, to acknowledge the increasing prevalence of pets.³⁵⁹ Accordingly, although the general change in legal status applies to all animals, it primarily affects pets. There were various special provisions implemented in Swiss law regarding lost, mislaid, and abandoned pets; pets in inheritance law;³⁶⁰ the acquisition of pets (particularly in the case of adverse possession); the allotment of pets in divorce or the dissolution of non-marital cohabitation or of a civil union;³⁶¹ calculating compensation claims for killed or injured pets;³⁶² the adjudication of the costs for healing injured animals;³⁶³ and the preclusion of distraint for pets.³⁶⁴ In these areas, provisions have been amended to improve the protection for the relationship between pet owners and their animals. Examples include an article in the Swiss Code of Obligations (CO),³⁶⁵ according to which a court is authorized to

BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 285 (Austria) ("Animals are not things; they are protected by special laws. The provisions in force for . . . things apply to animals only if no contrary regulation exists."); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 90a (Ger.) ("Animals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided.").

³⁵⁷ It is not entirely clear whether the Amendment Act on Basic Principles Regarding Animals of 2003 created an independent legal category for animals. Certain authors argue that animals have a *sui generis* legal status but do not constitute their own legal category, which of course gives rise to the question as to what the purpose of the amendment was, if not exactly to introduce a third legal category in addition to persons and objects. Indeed, it was a declared goal of the legislature to improve the legal status of animals. Michel, *supra* note 82, at 104; see PARLIAMENTARY INITIATIVE, BBL 4166 *et seq.* (2002). What these authors likely mean is that animals do not *de lege lata* constitute a special category lying somewhere between legal persons and legal objects, yet are still to be grouped with legal objects. Michel, *supra* note 82, at 104; see Michel & Schneider Kayasseh, *supra* note 25, at 20 (noting that animals are still treated as objects in most cases).

³⁵⁸ Michel & Schneider Kayasseh, *supra* note 25, at 20; BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 180. The Amendment Act on Basic Principles Regarding Animals is not explicitly based on the constitutional principle of *dignity of living beings* protection, but refers to it and represents a significant concretization of animal dignity, which does not rely on a balancing of interests. ERRASS, *supra* note 74, at 231; Stucki, *supra* note 80, at 288.

³⁵⁹ Steiger & Schweizer, *supra* note 22, at 1415; BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 180; Errass, *supra* note 22, at 1616.

³⁶⁰ Michel & Schneider Kayasseh, *supra* note 25, at 37–40.

³⁶¹ *Id.* at 27 *et seq.*

³⁶² *Id.* at 21 *et seq.*

³⁶³ *Id.* at 22 *et seq.*

³⁶⁴ See generally, e.g., STRUNZ, *supra* note 351, at 85 *et seq.*; OMBLINE DE PORET, LE STATUT DE L'ANIMAL EN DROIT CIVIL (2006); BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 179 *et seq.*; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 99 *et seq.*

³⁶⁵ BUNDESGESETZ BETREFFEND DIE ERGÄNZUNG DES SCHWEIZERISCHEN ZIVILGESETZBUCHES (FÜNFTER TEIL: OBLIGATIONENRECHT) [FEDERAL ACT ON THE AMEND-

consider the sentimental value (so-called “affectional value”) of a pet when that animal is killed or injured,³⁶⁶ and a provision in the Civil Code that empowers a court in divorce disputes to grant exclusive ownership over a pet to the party who can provide the best conditions for the animal.³⁶⁷

In each of these situations, the value of the individual animal and the relationship to its keeper is of particular significance. However, animals kept for commercial purposes are not considered under these provisions. Therefore, even if relevant to animal welfare, the amendments are highly anthropocentric, defining as especially valuable only those animals that are valuable from a human’s perspective, i.e., those that are “lucky enough not to be born as an object of utility.”³⁶⁸

Moreover, although animals are no longer considered objects under Swiss law, the amendment does not signify that they have gained legal personhood. The new provisions were not accompanied by any fundamental reform of the basic structures and functions of property law.³⁶⁹ Under Swiss law, animals still do not possess any subjective rights and remain subject to property law.³⁷⁰ Consequently, animals, including pets, in Switzerland—as everywhere else in the

MENT OF THE SWISS CIVIL CODE (PART V: THE CODE OF OBLIGATIONS)] Mar. 30, 1911, AS 27 317 (Switz.).

³⁶⁶ BUNDESGESETZ BETREFFEND DIE ERGÄNZUNG DES SCHWEIZERISCHEN ZIVILGESETZBUCHES (FÜNFTER TEIL: OBLIGATIONENRECHT [FEDERAL ACT ON THE AMENDMENT OF THE SWISS CIVIL CODE (PART V: THE CODE OF OBLIGATIONS)] Mar. 30, 1911, AS 27 317, art. 43, para. 1. *See generally* Michel & Schneider Kayasseh, *supra* note 25, at 22 et seq.; PETER KREPPER, *AFFEKTIONSWERT-ERSATZ BEI HAUSTIEREN* 9 et seq. (2011).

³⁶⁷ ZGB, SR 210 (1907), art. 651a, para. 1 (Switz.). *See generally* Eveline Schneider Kayasseh, *Die Gereichtliche Zuweisung von Familientieren in ehe- und partnerschaftsrechtlichen Verfahren*, in *ANIMAL LAW—TIER UND RECHT*, *supra* note 79, at 271 et seq. (discussing custody determinations regarding pets in family law proceedings).

³⁶⁸ Gerritsen, *supra* note 2, at 5.

³⁶⁹ Swiss animal law follows the so-called “protection of interests” principle. Accordingly, animals do not have subjective rights, *see supra* note 111 (defining *subjective rights*), but rather interests worth protecting, including physical and mental integrity. HORANYI, *supra* note 12, at 154. For the protection of interests principle, *see generally* BOLLIGER, *supra* note 19, at 6. Under the protection of interests principle, animals’ interests, which can also be described as needs, are not attributed to the animals by humans but are accepted by them, with the result that they perceive animals as holders of interests. JEDELHAUSER, *supra* note 50, at 43; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 52. However, Swiss animal welfare law restricts, as seen above, the protection of interests principle in various respects, protecting largely only vertebrates and excluding an animal’s most essential interest—its life—from the scope of application. *See supra* p. 36 (explaining the exclusion of invertebrates from the protected class of animals and the exclusion of an animal’s interest in life from the recognized interests under the AWA).

³⁷⁰ However, the recognition of the inherent worth of a non-human being, as it is represented by the animal dignity concept, is not a complete anomaly in Swiss law. The Swiss Federal Supreme Court grants a partial version of human dignity also to human embryos (*see* BGer, Dec. 22, 1993, 119 BGE Ia 460, but this can only apply as an objective constitutional principle and does not directly create a right to life. Michel, *supra* note 82, at 108 (providing further references); Engi, in *ANIMAL LAW*, *supra* note 87, at 49.

world—still can be legally disposed of, including by being bought, sold, and, under certain conditions, even killed by their owners.³⁷¹ Nevertheless, the incorporation of the amendment effected a modification of the legal order that went beyond a mere adaptation of legal terminology to the altered feelings of Swiss people towards animals: The strict dichotomy between persons and objects was broken up, and space was created for development of a distinct legal status for animals as sentient fellow creatures.³⁷²

2. Amendments in Animal Welfare Legislation

Many new provisions of the 2008 Swiss animal welfare law must be understood in light of the dignity concept. For instance, various statutory regulations on the keeping of animals are closely related to protection for animal dignity. An example is an AWO article, which is rather unique worldwide,³⁷³ stating that animals of sociable species must be allowed adequate social contact with conspecifics.³⁷⁴ In other words, Swiss animal welfare law requires that all social animals, including many pets, farmed animals, wild animals, or laboratory animals, shall be kept, according to their species-specific needs, at a minimum in pairs,³⁷⁵ even if this contradicts their owners' interests.

³⁷¹ See *supra* p. 43 (examining the legality of killing animals for various purposes). The status of animals as property has been fundamentally criticized by a number of philosophers and animal lawyers around the world. For an overview of the issue, see, for example, Klaus Petrus, *Eigentum*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 87 *et seq.* (providing further references).

³⁷² The result is that animals are not objects but *de lege lata* not persons either—they are not legal entities in terms of having any rights. See PARLIAMENTARY INITIATIVE, BBL 4168 (2002) (discussing animals' lack of legal rights). Accordingly, animals have neither subjective rights nor any legal obligations. They are basically still placed in the category of legal objects, but their legal status differs in many ways from that of other legal objects. Animals occupy a third and special status reserved for exceptional legal objects—living and feeling fellow living beings with their own dignity, to be protected for their own sake. See Michel, *supra* note 82, at 104 (providing further references); Stucki, *supra* note 80, at 288 (providing further references).

³⁷³ The Austrian Animal Welfare Act contains a similar provision. TIERSCHUTZGESETZ [TSCHG][ANIMAL WELFARE ACT] BUNDESGESETZBLATT [BGBl I] No. 118/2004, § 13, para. 2 (Austria); see REGINA BINDER, DAS ÖSTERREICHISCHE TIERSCHUTZRECHT 99 (3d ed. 2014).

³⁷⁴ AWO, AS 2985 (2008), art. 13 (Switz.); BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 163.

³⁷⁵ See BOLLIGER, GOETSCHEL, RICHNER & SPRING, *supra* note 53, at 133 (noting that most small animals qualify as social); RICHNER, *supra* note 62, at 145 (discussing the extent of socializing required for domestic dogs). Social interactions are not only enriching; they are part of the normal behavior of social animals, so these animals shall not be held isolated from conspecifics. This principle applies to wild animals, laboratory animals, particularly to farmed animals, such as cattle, pigs, sheep, goats, horses, and poultry, and finally to many pets, such as ornamental birds, aquarium fish, and most rodents. With regard to various animal species, the AWO defines the minimum requirements for social contacts. Whereas group housing is required for numerous animals (such as guinea pigs, budgerigars, or yaks), for others visual contact (such as for sheep and goats, AWO, AS 2985 (2008), art. 52, para. 4 and art. 55, para. 4 (Switz.)), or visual, auditory, and odor contact with conspecifics, is required (for example for horses, AWO,

An example is the keeping of budgerigars, which are highly social flocking birds, but previously were often isolated from conspecifics, making it easier to train them to sing or talk.³⁷⁶ Another provision prohibits in many instances the feeding of animals to other live animals due to the dignity of the feeders, such as live mice used as food for snakes and other reptiles.³⁷⁷

Other examples of new AWA provisions include mandatory educational courses for animal owners,³⁷⁸ such as for owners of dogs,³⁷⁹ ferrets,³⁸⁰ large parrots (macaws and cockatoos),³⁸¹ and horses,³⁸² in order to improve the owners' general understanding of the animals and their species-specific needs, as well as courses for fisherman to teach them to reduce pain for fish caught in angling.³⁸³ The most recent significant dignity-related AWA amendment is a provision that prohibits the import of dolphins and other cetaceans.³⁸⁴ The ban came into effect in 2013 and, as a result, ended the keeping of these animals in Switzerland.³⁸⁵

AS 2985 (2008), art. 59, para. 3 (Switz.). See also RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 63. If group housing is arranged, this should, however, be adequately applied or adapted when a social partner dies and the remaining animal is incompatible with new conspecifics. Cats and dogs may be held without constant contact with conspecifics if they instead have sufficient contact with humans and sufficient activity. BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 163.

³⁷⁶ ECNH/FCAE, *supra* note 82, at 3.

³⁷⁷ See AWO, AS 2985 (2008), art. 4, para. 3 (Switz.) ("Live animals shall only be fed to wild animals . . . [that exhibit] normal catching and killing behaviour [where] (a) the animal's nutrition cannot be assured with dead animals or other feed; (b) a reintroduction to the wild is planned; or (c) wild animals and predators are kept in a shared enclosure, where the enclosure shall also be set up in a manner appropriate to the animal of prey."). See generally BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 77 (explaining when live animals can be fed to animals kept as pets).

³⁷⁸ RICHNER, *supra* note 64, at 128.

³⁷⁹ See AWO, AS 2985 (2008), art. 68 (Switz.) ("People who want to acquire a dog shall provide proof of competence regarding their knowledge about keeping dogs . . . before they acquire the dog, unless they can show evidence of having already owned a dog."). See generally BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 90 (providing an example of how the law works in practice); RICHNER, *supra* note 62, at 136 (pointing out that compulsory training consists of a four-hour course).

³⁸⁰ See AWO, AS 2985 (2008), art. 85, para. 3a (Switz.) (requiring proof of competence for keeping ferrets at wild animal facilities); see also RICHNER, *supra* note 62, at 185 (describing the characteristics and needs of ferrets).

³⁸¹ See AWO, AS 2985 (2008), art. 85, para. 3b, art. 89d (Switz.) (requiring a license to keep large birds).

³⁸² See *id.* art. 31, para. 4b, art. 198 (explaining requirements for keeping horses). Note that the duty of educational courses applies only for owners of more than five horses. *Id.* See generally RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 94.

³⁸³ See AWO, AS 2985 (2008), arts. 97, 196 (Switz.) (describing course requirements for fishing).

³⁸⁴ AWA, AS 2965 (2008), art. 7, para. 3 (Switz.).

³⁸⁵ Although respect for animal dignity was not the decisive reason considered by the Swiss Parliament, it played an important role in the passage of the new provision. The ban was only possible since constitutional fundamental rights, such as economic freedom, are not weighed more than animal welfare factors. For the lawfulness of the ban

3. Criminal Provisions Sanctioning Disregard of Animal Dignity

Since protection for animal dignity is a fundamental principle of Swiss animal welfare law,³⁸⁶ its encroachment must be punishable.³⁸⁷ Consequently, since 2008 the AWA explicitly prohibits the disregard of animal dignity,³⁸⁸ and it includes a criminal offense for this in the rank of animal cruelty.³⁸⁹

This is equal to other severe animal welfare crimes, such as mistreatment, neglect, cruel or mischievous killing, or abandonment. Under the AWA, anyone who, for example, “mistreats, neglects, unnecessarily overexerts an animal, or disregards its dignity in any other way” commits an act of animal cruelty.³⁹⁰ As seen, disregarding animal dignity “in any other way” includes, for instance, humiliation, excessive instrumentalization, or substantial interference with an animal’s appearance or abilities as long as there is no justification by prevailing interests.³⁹¹ The statutory language clarifies that the mistreatment, neglect, or unnecessary overexertion of animals also constitutes a disregard of their dignity.³⁹² All animal cruelty in Switzerland qualifies as a misdemeanor—there is no animal welfare crime in the rank of a felony under Swiss law.³⁹³ Animal cruelty is penalized with a custodial sentence (imprisonment) of up to three years or a monetary penalty that can vary, depending on the offender’s income, at least theoretically, of up to more than 1 million Swiss francs (one Swiss franc corresponds more or less to one U.S. Dollar).³⁹⁴

see generally GIERI BOLLIGER & ANDREAS RÜTTIMANN, ZUR RECHTMÄSSIGKEIT EINES HALTE- BZW. IMPORTVERBOTS FÜR CETACEEN (WALARTIGE) (2012), http://www.tierimrecht.org/de/veroeffentlichungen/gutachten/Zulaes-sigkeit_Importverbot_Cetacea_TIR_def.pdf [<https://perma.cc/HVD6-TC79>] (accessed Feb. 21, 2016).

³⁸⁶ See *supra* Part IV.

³⁸⁷ BOLLIGER & RÜTTIMANN, *supra* note 300, at 73.

³⁸⁸ See AWA, AS 2965 (2008), art. 4, para. 2 (Switz.) (“No one may inflict pain, suffering or harm on an animal, induce anxiety in an animal or *disregard its dignity in any other way* without justification.” (emphasis added)).

³⁸⁹ AWA, AS 2965 (2008), art. 26, para. 1a (Switz.).

³⁹⁰ *Id.* art. 26, para. 1; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 191 *et seq.*; RICHNER, *supra* note 62, at 99. In Switzerland, punishment for animal cruelty has been regulated since 1942 at a national level (first under the Criminal Code, and since 1981 under the AWA). Before 1942, it was a matter of cantonal regulation, and all cantons enacted corresponding criminal animal cruelty provisions between 1842 and 1885. See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 97 *et seq.* (providing further references).

³⁹¹ See *supra* p. 37.

³⁹² Animal dignity can only be disregarded ‘otherwise,’ if the aforementioned actions are dignity disrespects as well. ANDREAS RÜTTIMANN, *Der Tierquälereitatzbestand der Vernachlässigung Eine kritische Auseinandersetzung mit dem Urteil des Bundesgerichts*, JUSLETTER, July 8, 2013 4.

³⁹³ AWA, AS 2965 (2008), arts. 26–28 (Switz.).

³⁹⁴ *Id.* art. 26. According to article 26, paragraph 2, the punishment is a monetary penalty of up to 180 daily penalty units if the offender acts negligently. *Id.* According to article 34 of the Swiss Criminal Code, for a monetary penalty the court defines first the

In addition to that general criminal offense under the AWA, the Animal Welfare Ordinance (AWO) contains a comprehensive catalogue of human behaviors towards animals that constitute a disregard of animal dignity and therefore are expressly forbidden.³⁹⁵ Of note, all listed activities are illegal and punishable, regardless of any physical or mental suffering, or harm of the concerned animals.³⁹⁶ Consequently, in all these cases the proportionality test is obsolete (since it was anticipated by the legislature), and no prevailing human interest can legally justify any of the listed actions.³⁹⁷ In these terms the AWO forbids, for example, and the beating of animals' eyes or genitalia and the breaking or squeezing of the tail,³⁹⁸ the use of animals for exhibition, advertisement, films, or other similar purposes if such use is obviously associated with pain, suffering, or harm for the animal.³⁹⁹ The AWO also prohibits the administration of substances and products for the purpose of improving performance or modifying an animal's outward appearance if it impairs the health or well-being of an animal ('doping'),⁴⁰⁰ participation in competitions and animal sport activities in which prohibited substances or products are used,⁴⁰¹ and parcel shipment of animals.⁴⁰² Likewise, absolutely forbidden are sexually motivated activities with animals (zoophilia).⁴⁰³ The Swiss statutory ban on zoophilia is a perfect example of the implementation of animal

number of daily penalty units according to the culpability of the offender (up to a maximum of 360 units). SCHWEIZERISCHES STRAFGESETZBUCH [StGB] [CRIMINAL CODE] Dec. 21, 1937, art. 34 (Switz.). Then the court decides on the value of the daily penalty unit according to the personal and financial circumstances of the offender at the time of conviction, and in particular according to his income and capital, living expenses, any maintenance or support obligations, and the minimum subsistence level. *See generally* RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 25 *et seq.* One daily penalty unit amounts to a maximum of 3,000 Swiss francs. *Id.*

³⁹⁵ AWO, AS 2985 (2008), art. 16 *et seq.* (Switz.); AWA, AS 2965 (2008), art. 4, para. 3 (Switz.) (authorizing the Federal Council to prohibit these actions in the Animal Welfare Ordinance). As a repetition, the AWO expressly prohibits in those catalogs also a number of activities already included as animal cruelty in article 26 of the AWA as a disregard for animal dignity, such as the killing of animals in a cruel manner, the mischievous killing of animals (including shooting at tame animals or animals in captivity), the organization of fights between or with animals in which the animals are tormented or killed, and the abandonment of animals. AWO, AS 2985 (2008), art. 16, paras. 2a–f (Switz.).

³⁹⁶ AWO, AS 2985 (2008), art. 24 (Switz.).

³⁹⁷ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 126; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 74, at 12.

³⁹⁸ AWO, AS 2985, art. 16, para. 2b (2008) (Switz.).

³⁹⁹ *Id.* art. 16, para. 2e.

⁴⁰⁰ *Id.* art. 16, para. 2g.

⁴⁰¹ *Id.* art. 16, para. 2h.

⁴⁰² *Id.* art. 16, para. 2k.

⁴⁰³ *Id.* art. 16, para. 2j. *See generally* GIERI BOLLIGER, SEXUALITÄT MIT TIEREN (ZOOPHILIE)—EINE RECHTLICHE BETRACHTUNG 83 *et seq.* (2011); Gieri Bolliger, *Sexualität mit Tieren (Zoophilie) in Psychologie und Recht*, in PSYCHOLOGISCHE ASPEKTE ZUM TIER IM RECHT 63 *et seq.* (Bolliger et al. eds., 2011); Gieri Bolliger, *Zoophilie*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 443 *et seq.*; RICHNER, *supra* note 62, at 282 *et seq.*

dignity protection. Sexually motivated activities with animals always constitute a disregard of animal dignity. Thus, they are absolutely forbidden, regardless of any physical harm or anxiety for a concerned animal.⁴⁰⁴

Besides prohibitions referring to actions involving all vertebrates, cephalopods, and decapods, the AWO also lists a number of species-specific bans on the disregard of animal dignity.⁴⁰⁵ Examples include docking of the tail in cattle;⁴⁰⁶ clipping of teeth in piglets;⁴⁰⁷ force feeding in domestic poultry;⁴⁰⁸ removing vibrissae in horses;⁴⁰⁹ docking of the tail, cropping of the ears, and surgical interventions to create floppy ears in dogs;⁴¹⁰ amputation of the claws of domestic cats and other feline species;⁴¹¹ angling with the intention of releasing fish back into the water;⁴¹² surgical interventions to facilitate the keeping of pets such as the resection of teeth; the clipping of wings, and the removal of secretion glands.⁴¹³

4. Dignity Protection for Dead Animals?

Swiss animal welfare law protects only living animals.⁴¹⁴ However, it is not clear whether dignity protection, or at least some impact

⁴⁰⁴ Before 2008, zoophile activities were punishable under Swiss animal law only in cases of physical suffering or harm that was clearly verified. BOLLIGER, *supra* note 403, at 82.

⁴⁰⁵ AWO, AS 2985 (2008) art. 17 *et seq.* (Switz.).

⁴⁰⁶ *Id.* art. 20a.

⁴⁰⁷ *Id.* art. 18b.

⁴⁰⁸ *Id.* art. 20e.

⁴⁰⁹ *Id.* art. 21e; see RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 76, at 23. For the criminal animal welfare provisions regarding the handling of horses in sports, see generally CLAUDIA V. BRUNNER, TIERQUÄLEREI IM PFERDESPORT—EINE ANALYSE DER STRAFRECHTSNORMEN DES TIERSCHUTZGESETZES 127 *et seq.* (2013).

⁴¹⁰ AWO, AS 2985 (2008), art. 22a (Switz.); BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 98; RICHNER, *supra* note 62, at 164 *et seq.*

⁴¹¹ AWO, AS 2985 (2008), art. 24a (Switz.); BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 126; RICHNER, *supra* note 62, at 173.

⁴¹² AWA, AS 2965 (2008), art. 23, para. 1a (Switz.).

⁴¹³ *Id.* art. 24, para. 2.

⁴¹⁴ Several articles of the AWA and AWO mention this fact explicitly. See, e.g., AWA, AS 2965 (2008), art. 3c (Switz.) (defining an animal experiment as any measure in which a live animal is used); AWO, AS 2985 (2008), art. 13 (Switz.) (stating that a license is required for commercial trading and for advertising purposes with live animals); AWO, AS 2985 (2008), art. 183, para. 2 (Switz.) (stating that live chicks shall not be stacked on top of each other). However, it applies to all the provisions. Under the AWA, an animal's life begins with hatching or with entry into the birth canal. BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 55; RICHNER, *supra* note 62, at 54. Not covered by the animal welfare law's scope of application are, therefore, eggs of birds and reptiles, or spawn of fish and amphibians, whereas animal embryos and fetuses within the womb are protected as part of the mother animal. GOETSCHER, *supra* note 19, at 14. An exception to that general rule applies in the area of animal experimentation and the production of genetically modified animals and mutants that have a significant clinical pathological phenotype. According to Article 112 of the AWO, these provisions apply not only to vertebrates (litera a), cephalopods and decapods (litera b), but also to mammals, birds, and reptiles in the last third of the gestation period prior to birth or hatching

thereof, ranges beyond an animal's death that goes beyond a respectful treatment of dead animals, especially in cases where animals are used for human purposes, but nonetheless are treated like garbage.⁴¹⁵ Since the AWA does not preclude a corresponding interpretation, it is not unreasonable to subsume the dignity of deceased animals under the scope of the statutory dignity protection, including the above-mentioned criminal prohibition on disregard for animal dignity.⁴¹⁶ Occasional case law,⁴¹⁷ and an analogous consideration of human dignity, support the application of the dignity provisions to dead animals. Because, as shown, the constitutional dignity concept cannot have a fundamentally different meaning regarding animals than it does regarding humans, and human dignity and animal dignity must mean the same at their core,⁴¹⁸ the legal effect of animal dignity cannot categorically exclude treatment of animals beyond death.⁴¹⁹ The prohibition of instrumentalization derived from human dignity begins before

(litera c), and for larval stages of fish and amphibians that take in food ad libitum (litera d). AWA, AS 2985 (2008), art. 112a–d (Switz.). This extension of the scope to certain animals in the prenatal period is justified by these animals' presumed ability to feel pain or suffering. Against this background, however, the question arises as to why appropriate animals are not generally covered by Swiss animal welfare law. A reason for the exclusive application to vertebrates, cephalopods, and decapods is the lack of scientific knowledge about the sentience of invertebrates. See *supra* p. 41 (explaining Switzerland's restricted biocentric position, in which there is different weighing of the inherent worth of different animals). However, if the legislature assumes that some animals already in a prenatal stage of development are capable of feeling pain and suffering, these other animals should also be generally protected by the animal welfare law. This applies even more because in accordance with article 2, paragraph 1 of the AWA, the legislature has to base the decision of which invertebrates should be included by Swiss animal welfare law on scientific evidence regarding sentient ability. BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 55 *et seq.*

⁴¹⁵ For cadavers, in any case, the provisions of the Swiss animal epidemic legislation must be considered. See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 56 (noting that while dead animals are not covered under animal welfare legislation, treatment of animal carcasses is still subject to animal disease legislation); BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 461–67 (discussing the several ways in which a pet owner can dispose of the pet's body and the applicable legislation for each method).

⁴¹⁶ AWA, AS 2965 (2008), art. 26, para. 1a (Switz.); see BOLLIGER & RÜTTIMANN, *supra* note 300, at 76; BGer, Oct. 30, 2009, BGE AG09/068 (Switz.).

⁴¹⁷ See BOLLIGER & RÜTTIMANN, *supra* note 300, at 76 (referring to a penalty order of October 30, 2009 in the Canton of Aargau, with which an animal keeper was sentenced by the District Office Aargau, among other things, for disregard of animal dignity since he had left a badly decomposed goat carcass for more than a week in his stable). The Stiftung für das Tier im Recht (TIR) is gathering all the criminal animal welfare law proceedings of Switzerland in a database. All around 16,000 criminal decisions in animal welfare matters since 1982 are available at <http://www.tierimrecht.org/de/faelle> [<https://perma.cc/9B6V-GBS9>]. The present case can be found under the internal case number AG09/068.

⁴¹⁸ See *supra* Part IV.C (comparing the constitutional animal dignity concept with the constitutional human dignity concept).

⁴¹⁹ BOLLIGER & RÜTTIMANN, *supra* note 300, at 76.

birth and does not end immediately with a human's death but instead lasts beyond.⁴²⁰

Accordingly, questionable customs must be scrutinized critically. These customs, which can be observed now and then in Switzerland, include "arts" with dead animals, the hanging of dead crows in order to deter conspecifics from agricultural fields, degrading presentations of body parts of animals (such as hunting trophies) or taxidermy, or the attaching of dead chicks on a Christmas tree as food for foxes (and in particular for visitors' entertainment) in an animal park.⁴²¹ The same is true for controversial rites like the old-style "*Gansabhauet*" in the Swiss townlet Sursee (Canton of Lucerne), where, once a year, blind-folded people try to behead a suspended dead goose with a sword,⁴²² or the throwing of dead fish into an audience that is practiced by the "*Zunft zur Schiffluten*"⁴²³ each year on the occasion of the "*Sechseläuten*," a traditional folk festival in Zurich.⁴²⁴

F. Claims for Necessary Legal Adjustments

Everyday practices of human–animal relationships in Switzerland demonstrate that the constitutional mandate to protect animal dignity—even if declared as a main purpose of national animal welfare law—is not sufficiently implemented into national legislation. Many current human ways of handling animals are hardly in line with respect for animal dignity but are still explicitly, or at least implicitly, legal. The AWA establishes the general principle that anyone who deals with animals must accommodate their needs as best as possible and care for the animals' well-being, but this is only insofar as the animal's "intended use" permits such care.⁴²⁵ Therefore, the AWA only

⁴²⁰ See Michel, *supra* note 82, at 268 (discussing the question of instrumentalization of human embryos, fetuses, and brain-dead people); see also BGer, Apr. 16, 1997, 123 BGE I 112 (stating that human dignity also includes the right to a decent funeral).

⁴²¹ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 51.

⁴²² See *Gansabhauet*, STADT SURSEE ONLINE, <http://www.sursee.ch/de/kultur/gansabhauet> [https://perma.cc/T78Y-FVRL] (accessed Feb. 16, 2016) (detailing the corresponding custom, which takes place each year on Nov. 11).

⁴²³ The German term *Zunft* refers to a historic federation of craftsmen. For the *Zunft zur Schiffluten* in particular see SCHIFFLEUTEN, <http://www.schiffleuten.ch/schiffleuten/index.html> [https://perma.cc/48FR-DYVF] (accessed Feb. 16, 2016).

⁴²⁴ See David Hesse, *Wüstes Brauchtum*, TAGES-ANZEIGER, <http://www.tagesanzeiger.ch/schweiz/standard/Wuestes-Brauchtum/story/11436912> [https://perma.cc/TG5Y-UV62] (Apr. 24, 2015, 7:18 AM) (accessed Feb. 16, 2016) (reporting on the tradition of Sechseläuten and its implication for contemporary notions of animal welfare). In January 2016, the *Zunft zur Schiffluten* finally announced that it is quitting its questionable custom. See Urs Bühler, *Ein Brauch am Zürcher Sechseläuten: Die toten Fische fliegen nicht mehr*, NEUE ZÜRCHER ZEITUNG, <http://www.nzz.ch/zuerich/aktuell/fische-sechselaeuten-1.18674000> (Jan. 9, 2016) (accessed Feb. 16, 2016) (describing the impetus for the abolition of the dead fish throw at Sechseläuten and the replacement of dead fish with chocolate fish instead).

⁴²⁵ AWA, AS 2965 (2008), art. 4, para. 1 (Switz.). See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 64 *et seq.* (discussing the requirements of article 4, paragraph 1 of the AWA).

prohibits the infliction of stress when an activity is “unjustified,” that is, without sufficient legal justification. Of course, this terminology is barely compatible with the animal dignity concept since it legalizes any suffering necessarily accompanying animals’ “intended use.”⁴²⁶ Discussed below are some obvious instances where current Swiss animal welfare legislation fails to adequately protect animal dignity, or where there are significant deficits in enforcement by criminal and administrative authorities.

1. *Extension of the AWA Scope of Application to All Animals*

As mentioned previously, due to the controversial state of science on the capability for perception and suffering of animals, the AWA applies only to vertebrates, cephalopods, and decapods.⁴²⁷ Hence, although the delineation of vertebrates from other animal groups is based on a morphological condition, and not on sentience,⁴²⁸ the pathocentric focus still prevails.⁴²⁹ Consequently, but in contrast to the constitutional dignity protection that includes all animals (regardless of their zoological classification),⁴³⁰ the AWA protects only the dignity of vertebrates, cephalopods, and decapods.⁴³¹

The considerable narrowing of the scope of Swiss animal welfare law in general is greatly criticized by animal law scholars.⁴³² Regard-

⁴²⁶ See Gerritsen, *supra* note 2, at 5 (“A huge restriction to this maxim is posed by the *designated use* of the respective animal; a laboratory animal, for instance, has to be handled with the same care as other animals but at the same time may intentionally be harmed within the limits of the specific license.”); see Michel, *supra* note 82, at 102 (giving the example of the intensive keeping of farmed animals and the use of animal experiments as being restricted, but still permitted in principle in keeping with the “designated use of the animal.”).

⁴²⁷ AWA, AS 2965 (2008), art. 2, para. 1 (Switz.); see *supra* p. 36 (discussing the AWA’s exclusion of many invertebrate animal species). However, various indications suggest that invertebrates also feel pain. See HIRT, MAISACK & MORITZ, *supra* note 160, at 97 *et seq.* For example, spiders bite off the leg on which they are stung by a wasp or a bee. See Rippe, *supra* note 82, at 310 (discussing an experiment in which researchers injected two different poisons on two of the spider’s legs—one of which was a painful poison, and the other was not painful—and the spider bit off the leg injected with painful poison. While this is an indication of the existence of sentience, the spider might have felt a different sensation than that of what humans recognize as pain, which resulted in the self-mutilation). For the fact that research constantly produces new findings about the pain and suffering ability of invertebrates, see generally Thomas Richter, *Artenschutz und Tierschutz bei Wirbellosen*, in *DAS BUCH VOM TIERSCHUTZ* 812 *et seq.* (Hans Hinrich Sambras & Andreas Steiger eds., 1997).

⁴²⁸ Fleiner-Gerster, *supra* note 34, at 5.

⁴²⁹ Friedli, *supra* note 164, at 388; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 53; Michel, *supra* note 30, at 102.

⁴³⁰ See *supra* Part IV.B (discussing the dignity of living being concept in Article 120, paragraph 2 of the Federal Constitution).

⁴³¹ See *supra* pp. 41 *et seq.* (discussing the criminal provisions of the AWA that refer only to actions with these animals).

⁴³² See, e.g., VOGEL, *supra* note 338, at 184 *et seq.*; GOETSCHER, *supra* note 19, at 20 *et seq.*; GOETSCHER & BOLLIGER, *supra* note 32, at 200; BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 9; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 54.

ing animal dignity in particular, the limitation suffers from an inner contradiction because, against the background of the biocentric Swiss dignity concept, according to which animals are to be protected beyond physical impairments, it is inconsistent to exclude most invertebrates, due to the lack of unequivocal scientific proof of their sentience.⁴³³ Since the AWA is also supposed to protect animals from stresses that are not accompanied by pain, suffering, harm, or anxiety, it is paradoxical that this broader protection ultimately benefits only those animals in which the ability for such perceptions is considered scientifically evident.⁴³⁴

In order to protect the dignity of all animals, as the Federal Constitution mandates, and in order to leave the “conceptual soil of pathocentric animal protection”⁴³⁵ in which the AWA somehow is still rooted, the legislature should extend the AWA scope to include invertebrates too.⁴³⁶ This would not signify that all animals are equal, but rather would leave space to satisfy the different needs of vertebrates vis-à-vis invertebrates by differentiated regulations.⁴³⁷ A modern legal animal welfare system should cover all animals, allowing for gradations in intensity of protection based on sentience.⁴³⁸ The legal possibility of this is evident in the examples of Germany⁴³⁹ and Austria.⁴⁴⁰ Both countries include essentially all animals in the scope

Animal law scholars question whether the Swiss legislature should protect all types of animals even when it is unclear from a scientific point of view that they are able to experience pain and suffering. Protection for animals should be the rule and not the exception; consequently, invertebrates’ lack of sentience should be proven in order to deny them protection. See VOGEL, *supra* note 338, at 184 *et seq.* (questioning whether or not Swiss legislators are truly looking to protect animals). This would be consistent with the general burden-of-proof rule of article 8 of the Swiss Civil Code that applies to the entire Swiss law and according to which the burden of proving the existence of an alleged fact rests on the person who derives rights from that fact. BIRGITTA REBSAMEN-ALBISSER, DER VOLLZUG DES TIERSCHUTZRECHTS DURCH BUND UND KANTONE 11 (1994); Strunz, *supra* note 283, at 13.

⁴³³ BOLLIGER & RÜTTIMANN, *supra* note 306, at 75.

⁴³⁴ *Id.*

⁴³⁵ Michel, *supra* note 82, at 102.

⁴³⁶ GOETSCHER, *supra* note 19, at 151 *et seq.*; STÖHNER, *supra* note 87, at 109.

⁴³⁷ See STÖHNER, *supra* note 87, at 109.

⁴³⁸ Michel, *supra* note 82, at 109.

⁴³⁹ The German animal welfare law basically protects all animals. HIRT, MAISACK & MORITZ, *supra* note 160, at 96. However, certain animal species or groups in different contexts are protected differently. *Id.* For instance, the provisions related to killing, interventions, amputations, trade, and breeding are valid only for vertebrates (such as the criminal provisions), whereas the standards on slaughter apply only to warm-blooded animals (mammals and birds). On the other hand, according to § 18, paragraph 2 of the German Animal Welfare Act, the causing of significant pain, suffering, or harm to an invertebrate without good reason is chargeable. See *infra* note 383 (discussing the language of the Act). Hence, even the unnecessary killing of an invertebrate animal, such as an ant or spider, could be punished in Germany. See generally HIRT, MAISACK & MORITZ, *supra* note 160, at 556 *et seq.*

⁴⁴⁰ See AWA, BGBl I, No. 118/2004, § 3, para. 1 (Austria) (stating that “[t]he subject Federal Act shall apply to all animals”). This act also bans cruelty to animals in § 5 and

of their national animal welfare acts—and this is so even without any protection of animal dignity, as the concept exists in Switzerland.

2. *Life Protection for Animals*

Swiss animal welfare law protects the well-being and dignity of an animal, but not its life *per se*.⁴⁴¹ Even if the legislature argues that a life sustainment principle is not intended to be part of the dignity protection concept,⁴⁴² the lack of life protection signifies a grave restriction on animal welfare⁴⁴³ and is, like the largely limited scope of the AWA, highly criticized by animal law scholars in general.⁴⁴⁴ Further, it stands in contradiction to the dignity concept. The question arises as to whether protection for animal dignity necessarily results in protection for an animal's life—i.e., whether a dignity protection that does not include the protection for life represents an inner contradiction.⁴⁴⁵ In other words: Is it possible to kill an animal without necessity and still preserve its dignity?

As seen, legal protection for animal dignity explicitly includes recognition of an animal's inherent worth.⁴⁴⁶ Given that an animal has a legally recognized value, it is not clear why this worth—and thus the animal's existence—should not be worthy of protection.⁴⁴⁷ It seems contradictory that a value recognized by law can be extinguished without any special requirements.⁴⁴⁸ Indeed a value can hardly be more ignored than by its complete destruction.⁴⁴⁹ If behaviors such as the humiliation or excessive instrumentalization of animals require justification as impairments of an animal, this must apply *a fortiori* to the

killing without reasonable cause in § 6, referring to all animals, including invertebrates. See generally BINDER, *supra* note 373, at 23 *et seq.*

⁴⁴¹ See *supra* p. 42.

⁴⁴² The Swiss legislature explicitly accepted the tension between the dignity and welfare of animals on the one hand and the absence of protection of their lives on the other. Federal Council, *supra* note 34, at 674.

⁴⁴³ See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 58 *et seq.* (exploring the notion that Swiss animal welfare laws protect an animal's dignity, but not an animal's life); Michel & Schneider Kayasseh, *supra* note 25, at 30.

⁴⁴⁴ See, e.g., VOGEL, *supra* note 338, at 159; GOETSCHER & BOLLIGER, *supra* note 32, at 215; BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 10 *et seq.*; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 58 *et seq.*; RICHNER, *supra* note 62, at 64; Gerritsen, *supra* note 2, at 10; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 12 *et seq.* See generally Rippe, *supra* note 82, at 295 *et seq.* (declaring that a killing ban should exist). For the issue of legal protection of an animal's life, see generally Jörg Luy, *Zum Problem gesetzlicher Regelungen des Lebensschutzes von Tieren*, in *PSYCHOLOGISCHE ASPEKTE ZUM TIER IM RECHT* 47, 49 *et seq.* (Gieri Bolliger et al. eds., 2011) (discussing the efficacy of laws which protect animals from wanton and painful deaths, but not from being killed altogether).

⁴⁴⁵ Rippe, *supra* note 82, at 95.

⁴⁴⁶ AWA, AS 2965 (2008), art. 3a (Switz.).

⁴⁴⁷ BOLLIGER & RÜTTIMANN, *supra* note 300, at 84.

⁴⁴⁸ RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 14.

⁴⁴⁹ *Id.*

killing of the animal itself.⁴⁵⁰ Consequently, dignity protection is inextricably linked to respect for an animal's life. Allowing the unconditional killing of animals constitutes a *per se* disregard for those animals' dignity.⁴⁵¹

In order to resolve this contradiction and to take due consideration of animal dignity, Swiss animal welfare legislation should explicitly guarantee legal protection of an animal's life.⁴⁵² In 1989, the Swiss Federal Supreme Court stated that only a comprehensive life protection for animals meets the ethical expectations of Swiss society.⁴⁵³ This would not exclude a lawful killing of animals under certain circumstances, even against the background of the dignity protection concept. However, in every case a killing would necessarily have been preceded by a careful balancing of interests.⁴⁵⁴ Practices such as the killing of animals for fashion or luxury goods,⁴⁵⁵ the putting to sleep of healthy animals, be it by veterinarians on request of the animals' owners⁴⁵⁶ or in animal shelters (because the animals cannot be placed),⁴⁵⁷ or the killing of "waste animals" that are a surplus in zoos⁴⁵⁸ or in pedigree breedings⁴⁵⁹ would hardly pass the balancing test, since, in most of the cases, they are not necessary.

Regardless, from both a legal and an ethical point of view, general protection for animals' lives would be a significant advancement in Swiss law. Although it is unknown how much animals are able to anticipate and experience fear of death,⁴⁶⁰ the result of killing them is that their most valuable interest—their interest in life—is taken from them.⁴⁶¹ With the sole exception of euthanizing animals to end suffer-

⁴⁵⁰ See Rippe, *supra* note 82, at 94 *et seq.*; Errass, *supra* note 79, at 229.

⁴⁵¹ BOLLIGER & RÜTTIMANN, *supra* note 306, at 84. See generally Rippe, *supra* note 82, at 93 *et seq.*

⁴⁵² See Goetschel, *supra* note 20, at 151 *et seq.*; GOETSCHER & BOLLIGER, *supra* note 32, at 215; BOLLIGER & RÜTTIMANN, *supra* note 300, at 84 *et seq.*

⁴⁵³ See BGer, 115 BGE IV 248 (holding food production or pest control would not contradict the protection of life principle).

⁴⁵⁴ BOLLIGER & RÜTTIMANN, *supra* note 300, at 85.

⁴⁵⁵ STÖHNER, *supra* note 87, at 109.

⁴⁵⁶ Steiger, *supra* note 91, at 4; see also ETHICAL PRINCIPLES OF THE FEDERATION OF SWISS VETERINARIANS (2005) ("Veterinarians perform euthanasia by following the rules of medical art, according to a precise diagnosis and prognosis, taking into account the quality of life of the animal, and with respect for the animal and the owner; the reject both an extension of suffering and a shortening and a shortening of life alone at the request of the owner").

⁴⁵⁷ See Steiger, *supra* note 91, at 4.

⁴⁵⁸ See GOETSCHER, *supra* note 19, at 159; GOETSCHER & BOLLIGER, *supra* note 32, at 214; Steiger, *supra* note 91, at 3 *et seq.*

⁴⁵⁹ For the "elimination" of unwelcomed puppies in pedigree breedings see GOETSCHER & BOLLIGER, *supra* note 32, 216 *et seq.*; RICHNER, *supra* note 62, at 229 *et seq.*; and generally BOLLIGER, *supra* note 19, at 189 *et seq.*

⁴⁶⁰ See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 78 (providing further references).

⁴⁶¹ *Supra* p. 42.

ing, every killing of an animal represents an inhumane act.⁴⁶² A general life protection for animals—or at least the requirement of a “reasonable cause” for the killing, as it is dictated by German and Austrian animal law⁴⁶³—would far better express the human responsibility for animals as fellow creatures that underlies ethical animal welfare in general and is explicitly recognized by the Federal Supreme Court in the aforementioned decision.⁴⁶⁴

3. *Legal Improvements for the Handling of Farmed Animals*

Intensive rearing of animals represents an instrumentalization *par excellence*.⁴⁶⁵ In order to produce animal-based foods at the lowest possible cost, farmed animals⁴⁶⁶ often are kept in restrictive circum-

⁴⁶² GOETSCHER & BOLLIGER, *supra* note 32, at 215; RICHNER, *supra* note 62, at 233; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 28. *See generally* BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 454 *et seq.* (finding that for a concerned animal itself the killing is probably never acceptable, regardless of the reasons and the used method). Accordingly, at least from an ethical point of view, any non-medically indicated animal killing is questionable. BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 40. For the question of the ethical legitimacy of animal killing, see generally BOLLIGER, *supra* note 23, at 271 *et seq.* (providing further references).

⁴⁶³ AWA, BGBL I at 1094, § 1, para. 1 (Ger.) (stating that the aim of the act is “to protect the lives and well-being of animals, based on the responsibility of human beings for their fellow living beings”). *Cf.* AWA, BGBL I, No. 118/2004, § 1 (Austria) (“The Federal Act aims at the protection of the life and well-being of animals based on man’s special responsibility for the animal as a fellow living being.”). Thus, in both Germany and Austria, legal protection refers to the animal’s life *per se*, and not only to the absence of pain or suffering caused by humans. Additionally, however, in Germany and Austria one has the right to kill an animal for certain purposes. Note, however, that any killing of an animal requires a so-called ‘good reason.’ *See* AWA, BGBL I at 1094, § 1 (Ger.) (“No one may cause an animal pain, suffering, or harm without good reason.”); AWA, BGBL I, No. 118/2004, § 6, para. 1 (Austria) (“It is prohibited to kill animals without proper reason.”). Without such a justification, the killing of animals is unlawful. Although German and Austrian law provide a number of “good” or “proper” reasons that legitimize the killing of animals, particularly in the context of food production, pest control, and animal experimentation, all these reasons are only exceptions which are not able to undo the basic life sustainment principle. *See generally*, Rippe, *supra* note 82, at 96 *et seq.*; HIRT, MAISACK & MORITZ, *supra* note 160, at 102 *et seq.* (discussing German animal welfare law); BINDER, *supra* note 310, at 98 *et seq.*; BINDER, *supra* note 373, at 71 *et seq.* (discussing Austrian animal welfare law).

⁴⁶⁴ Michel & Schneider Kayasseh, *supra* note 25, at 17.

⁴⁶⁵ Council of States Control Committee, *supra* note 457.

⁴⁶⁶ According to article 2, paragraph 2a of the AWO, Swiss animal welfare law defines farmed animals as “animals of species that are kept directly or indirectly for the production of food or for certain other benefit or are intended for such use.” AWO, AS 2985 (2008), art. 2, para. 2 (Switz.). Hence, farmed animals are kept not for emotional reasons, but for economic reasons and used in the agricultural sector as work aids, in particular in food production—namely for meat, milk, and eggs. However, the range of use of farmed animals extends far beyond this. They are used, for example, as hunting dogs, avalanche dogs, guide dogs, for riding, breeding, and as guard animals, or for the clothing industry. BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 13; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 16. *See generally* Klaus Petrus, *Nutztier*, in *LEXIKON DER MENSCH-TIER-BEZIEHUNGEN*, *supra* note 148, at 263 *et seq.* (defining the term *farmed animals*).

stances that do not meet their fundamental species-specific needs.⁴⁶⁷ Although the legal and practical situation for farmed animals in Switzerland is admittedly better than, for example, in the U.S.,⁴⁶⁸ from an animal welfare perspective, treatment of Swiss farmed animals is far from perfect.⁴⁶⁹ Also, in Switzerland, the value of millions of farmed animals⁴⁷⁰ is defined almost exclusively through their performance, which is reflected in efficiency-oriented husbandry governed by the principle of maximizing the economical applicability of its “product.”⁴⁷¹ Once an animal has reached its slaughter weight or once its milk producing or egg laying performance diminishes, the animal is typically slaughtered, since further housing of the animal is not profitable.⁴⁷² Moreover, body parts of farmed animals are often routinely cut or amputated so a producer can keep more animals in a smaller space. Common practices include the trimming of beaks in poultry,⁴⁷³ the grinding of teeth tips in piglets,⁴⁷⁴ and the dehorning of cattle and goats.⁴⁷⁵

Other consequences of factory farming’s unilateral focus on economics concern established practices in the husbandry of calves and laying hens. Every year, more than two million male chicks (so-called “day-old chicks”) in Switzerland are gassed or shredded immediately upon hatching as “production waste,”⁴⁷⁶ since they are useless for egg production and are therefore considered worthless.⁴⁷⁷ Additionally,

⁴⁶⁷ Petrus, *supra* note 479, at 263 *et seq.*

⁴⁶⁸ See generally THE CAFO READER—THE TRAGEDY OF INDUSTRIAL ANIMAL FACTORIES (Daniel Imhoff ed., 2010) (depicting the miserable life conditions of farmed animals in the U.S.).

⁴⁶⁹ By 1993, the Council of States Control Committee reproved the instrumental relationship with the animal, which is frequently found in Swiss agriculture, and could be best described by the term *animal production*. Council of States Control Committee, *supra* note 163, at 623.

⁴⁷⁰ In 2014, Switzerland had over 1.5 million cattle, 60,000 farmed horses, 1.5 million pigs, 400,000 sheep, 90,000 goats, and more than 10.6 million chickens. *Switzerland Statics*, FED. STAT. OFF., <http://www.bfs.admin.ch/bfs/portal/de/index/themen/07/03/blank/data/01/03.html> [<https://perma.cc/259J-NNHG>] (2016) (accessed Feb. 20, 2016).

⁴⁷¹ See Michel, *supra* note 82, at 108.

⁴⁷² See *Das kurze Leben der “Nutztiere”*, Tier im Fokus, http://www.tier-im-fokus.ch/nutztierhaltung/das_kurze_leben_der_nutztiere [<https://perma.cc/ST2Y-78DY>] (2006) (accessed Feb. 20, 2016) (comparing the natural life expectancy of farmed animals to their life expectancy under intensive production conditions).

⁴⁷³ See AWO, AS 2985 (2008), art. 20a (Switz.) (forbidding debeaking in domestic poultry). Allowed, however, is to trim the hook on the upper beak of the animals as long as a complete closing of beak is still possible. *Id.* Note, the trimming of the tips of beaks in domestic poultry is legal even without anesthesia as long as this is conducted by an expert. AWO, AS 2985 (2008), art. 15, para. 2 (Switz.).

⁴⁷⁴ See *id.* art. 15, para. 2 (Switz.) (explaining that the grinding of teeth tips in piglets is allowed even without any anesthesia).

⁴⁷⁵ See *id.* art. 32 (Switz.) (allowing animal keepers who have a corresponding certificate of competence to dehorn animals that are younger than three weeks).

⁴⁷⁶ See *id.* art. 183, para. 1 (Switz.) (naming this procedure in a euphemistic way ‘homogenization’).

⁴⁷⁷ Since the breeding of laying hens is concentrated on the highest egg production, these animals have only few muscle tissue that is edible for humans and are therefore

the calves of dairy cows are often separated from their mothers on the day of their birth so that milk can be used for sale rather than to feed young animals.⁴⁷⁸ Further, when male calves of dairy cattle are born, they are usually slaughtered a few days later because they are considered useless for milk production, and rearing would be inefficient due to their low muscle mass.⁴⁷⁹

Self-evidently, those practices run diametrically contrary to the basic idea of animal dignity protection.⁴⁸⁰ They represent severe interventions in the dignity and well-being of animals primarily serving to increase efficiency, i.e., pecuniary interests. However, those interests alone are insufficient to justify such massive impairments.⁴⁸¹ The dignity protection concept is not satisfied when purely economic interests qualify to justify almost complete disregards for an animal's intrinsic worth.⁴⁸² Current practices in farmed animal husbandry frequently represent exclusive instrumentalization of animals, which are disregarded in the core content of their dignity over a longer period of denying their essential needs, in particular for movement, reproduction, and social contacts. The need for appropriate social contacts is disregarded not only by solitary housing (which is prohibited under Swiss law),⁴⁸³ but also when animals are crowded together in a confined space and are therefore exposed to massive overstimulation.⁴⁸⁴ Only an optimal species-appropriate husbandry and handling of farmed animals, which reduces suffering to a minimum, passes the balancing of interests.⁴⁸⁵ Consequently, in light of dignity protection, the Swiss legal framework has to be designed to be much more animal-appropri-

not used for food. See Barbara Reye, *Das traurige Schicksal der Eintagsküken*, TAGES-ANZEIGER, <http://www.tagesanzeiger.ch/wissen/natur/Das-traurige-Schicksal-der-Eintagskueken/story/14867368> [<https://perma.cc/V7AX-SHAW>] (Apr. 9, 2012) (accessed Feb. 20, 2016).

⁴⁷⁸ See, e.g., Christine Frei et al., *The Production System and Disease Incidence in a National Random Longitudinal Study of Swiss Dairy Herds*, 32 PREVENTIVE VETERINARY MED. 1, 12 (1997), http://www.manu-ao.ac.nz/massey/fms/Colleges/College%20of%20Sciences/Epicenter/docs/ASVCS/Frei_et_al_1997.pdf [<https://perma.cc/9KQW-B9AM>] (accessed Apr. 2, 2016) (noting all farmers in a study separated calves from dairy cows at most in a couple days after birth).

⁴⁷⁹ Stefan Häne, *Sie leben keine sieben Tage mehr*, TAGES-ANZEIGER, <http://www.tagesanzeiger.ch/schweiz/standard/Sie-leben-keine-sieben-Tage-mehr/story/27801309> [<https://perma.cc/8VD6-72WJ>] (June 16, 2015) (accessed Feb. 20, 2016).

⁴⁸⁰ See Goetschel, *supra* note 74, at 155 *et seq.* See generally, e.g., Andreas Steiger, *Die Würde des Nutztiers—Nutzierhaltung zwischen Ethik und Profit*, in DIE WÜRDE DES TIERES 221 *et seq.* (Martin Liechti ed., 2002) (describing the economic rationalization used for treating farmed animals in a less humane manner than other animals); see Klaus Peter Rippe, *Schadet es Kühen, Tiermehl zu fressen? Überlegungen zur Würde des Nutztieres und zum Kriterium der Natürlichkeit*, in DIE WÜRDE DES TIERES 233 *et seq.* (Martin Liechti ed., 2002) (describing the economic rationalization used for treating farmed animals in a less humane manner than other animals).

⁴⁸¹ See *supra* page 37.

⁴⁸² *Id.*

⁴⁸³ AWO, AS 2985 (2008), art. 13 (Switz.).

⁴⁸⁴ STÖHNER, *supra* note 87, at 129.

⁴⁸⁵ *Id.* at 110 *et seq.*

ate. For that, the legislature must orient primarily to the actual needs of the animals and not to economic considerations.⁴⁸⁶

Absolute prohibitions are requested for practices where animals' body parts are trimmed or completely removed.⁴⁸⁷ Those interventions in the appearance and abilities of animals are carried out exclusively for pecuniary motives.⁴⁸⁸ But again, purely economic interests never suffice to justify such serious violations of animal dignity.⁴⁸⁹ Against the background of dignity protection, it is intolerable that animals are mutilated in order to squeeze them into husbandry systems arranged around economic efficiency.⁴⁹⁰ The conditions of farmed animal husbandry must rather be adapted to the needs of animals.⁴⁹¹ The Swiss legislature should, likewise, expressly prohibit (as a disregard of animal dignity) the killing of male day-old chicks or of calves only a few days after their birth. To these animals, any respect for their intrinsic worth is completely denied under the current legal situation.⁴⁹² Under this practice of mass elimination, producers can present only economic interests that are never able to prevail over the massive impairment of animal dignity.⁴⁹³

4. *Better Enforcement of the Animal Dignity Concept*

The position and protection animals enjoy in the legal system always reflect the esteem and importance that they have in society. Although both the principle of animal dignity protection in the AWA and the related criminal provisions are clear, their effectiveness, as with all laws, is ultimately determined not only by their wording, but mostly by their actual application, which means by their enforcement in practice.

Enforcement of Swiss animal welfare law is the responsibility of the cantons,⁴⁹⁴ which delegate this task to their cantonal authori-

⁴⁸⁶ BOLLIGER & RÜTTIMANN, *supra* note 300, at 86.

⁴⁸⁷ See generally BOLLIGER, SPRING & RÜTTIMANN, *supra* note 180, at 54 *et seq.* (regarding the dehorning of cows and calves, a legal expertise of the Stiftung für das Tier im Recht (TIR) qualifies this practice clearly as disregard for animal dignity). Of note, however, this legal interpretation has not been accepted by the Swiss legislature, although TIR's careful balancing of interests indicates a preponderance of the animal's dignity interests compared to the user's economic interests. *Id.*

⁴⁸⁸ As far as it concerns the safety of humans and animals, forced physical adaptations of animals to specific farming systems can be avoided by technical stable adaptations to the animals' needs for space, structure, and management, et cetera. See BOLLIGER, SPRING & RÜTTIMANN, *supra* note 180, at 57 (regarding the dehorning of cattle).

⁴⁸⁹ See *supra* p. 33.

⁴⁹⁰ *Id.*

⁴⁹¹ BOLLIGER & RÜTTIMANN, *supra* note 300, at 87.

⁴⁹² *Id.*

⁴⁹³ *Id.*; Steiger, *supra* note 91, at 4.

⁴⁹⁴ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, art. 80, para. 3 (Switz.); AWA, AS 2965 (2008), art. 32, para. 2 (Switz.).

ties.⁴⁹⁵ In line with the general division of Swiss animal welfare law into criminal matters and administrative matters⁴⁹⁶ in all cantons is a two-track enforcement system that applies to violations of Swiss animal welfare law.⁴⁹⁷ On the one hand, there is enforcement of the criminal animal welfare law provisions, meaning the prosecution and sanctioning of animal welfare law crimes by the cantonal criminal authorities.⁴⁹⁸ On the other hand, cantonal administrative agencies are responsible for the enforcement of administrative animal welfare law, which has to ensure compliance with the legal standards of the AWA and AWO.⁴⁹⁹ Both at the criminal and administrative levels, more consideration must be given to the protection of animal dignity, as the following examples demonstrate.

a. Enforcement of Criminal Animal Welfare Law

The enforcement of criminal provisions of the AWA lies in the hands of cantonal criminal authorities.⁵⁰⁰ To date, the animal dignity concept and the associated fundamental reorientation of Swiss animal welfare law have not yet been noticeably reflected in case law. Although there are numerous available criminal sentences for violations of absolute bans under the AWO (such as for zoophilia, docking and cropping in dogs, et cetera),⁵⁰¹ Swiss courts and other judicial bodies do not often identify prohibited activities as disregarding animal dignity.⁵⁰² In decisions where animal dignity is explicitly referenced, this happens typically in combination with other animal cruelty offenses.⁵⁰³ Regrettably, the autonomous AWA offense of disregard for

⁴⁹⁵ See AWA, AS 2965 (2008), art. 70, para. 1 (Switz.) (stating that the federal government ensures compliance, but the canton governments enact their provisions).

⁴⁹⁶ Criminal animal welfare law provides sanctions for violations of the criminal provisions of the AWA, whereas administrative animal welfare law serves primarily the guarantee of the well-being of animals through administrative measures. See GOETSCHEL & BOLLIGER, *supra* note 32, at 175 *et seq.*, 230 *et seq.*; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 28; Michel, *supra* note 82, at 597 *et seq.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ The cantonal authorities act in accordance with different procedural rules. STRAF-PROZESSORDNUNG [SR], FEDERAL CRIMINAL CODE [FCC], Oct. 5, 2007, SR 312 (Switz.) (explaining that criminal proceedings are handled uniformly). In administrative proceedings, the federal and cantonal administrative procedure law are applicable. The criminal and administrative authorities act basically independently of each other, but they often rely on mutual support. See generally BOLLIGER, GOETSCHEL, RICHNER & SPRING, *supra* note 53, at 52 *et seq.*; RICHNER, *supra* note 62, at 120; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 39 *et seq.*

⁵⁰⁰ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, art. 80, para. 3 (Switz.).

⁵⁰¹ AWA, AS 2965 (2008), arts. 16 *et seq.* (Switz.).

⁵⁰² See MICHELLE RICHNER, NORA FLÜCKIGER, ANDREAS RÜTTIMANN & CHRISTINE KÜNZLI, SCHWEIZER TIERSCHUTZSTRAFFPRAXIS 2012 25 (2013) (showing the extremely low percentage of cases that are strictly for violation of dignity).

⁵⁰³ See, for example, the penalty order of the office of the district attorney Baden of September 10, 2012, under which an offender who had held two cats by their hind legs in the air while inflicting pain on them had been convicted for mistreatment and disregard for animal dignity (case AG12/077 in the database of TIR, *supra* note 417), or the

animal dignity rarely has attained an independent significance in criminal enforcement practice so far.⁵⁰⁴ A positive exception can be found in a decision of the Independent Swiss Complaint Authority for Radio and Television (ICA), which in 2009 considered the use of living trout for a catching game on a national television show to be a non-justifiable excessive instrumentalization and therefore a disregard for the dignity of the fish.⁵⁰⁵

Nevertheless, convictions on the ethical aspects of animal dignity—i.e., protection from humiliation, excessive instrumentalization, and substantial interference with an animal's appearance or abilities—are still almost completely missing.⁵⁰⁶ Apparently, Swiss criminal authorities deliberately refrain from sanctioning human behavior that does not necessarily cause pain, suffering, harm, or anxiety to animals.⁵⁰⁷ However, neither from an animal welfare point of view nor from a legal standpoint is it acceptable that an official statutory offense is largely ignored.⁵⁰⁸ This is bolstered by the fact that the protection of animal dignity has constituted a main purpose of Swiss animal welfare law for eight years.⁵⁰⁹ Further, the disregard for animal dignity, as every other violation of the AWA, is an offense that must be prosecuted *ex officio* by the competent criminal prosecution authorities as soon as they have knowledge of a crime.⁵¹⁰

Increased engagement of criminal authorities with the ethical aspects of animal dignity is vitally important for the further specification of this concept, which is not yet conclusively defined. The aim must be to develop criteria in the form of case law that helps to assess which human actions, beyond physical and physiological stresses not already

penalty order of the office of the district attorney Graubünden of April 30, 2012, under which a pet owner was convicted of neglect and disregard for animal dignity because he had not taken care of a highly injured cow, which had to be put down thereupon (case GR12/025 in the database of TIR, *supra* note 417).

⁵⁰⁴ Enforcement of the criminal provisions of the AWA is an issue not only concerning disregard for animal dignity but in general regarding all animal cruelty provisions. See Gerritsen, *supra* note 2, at 11 *et seq.* See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 249 *et seq.* (discussing various deficits in criminal animal welfare law enforcement); and the reports of the Stiftung für das Tier im Recht (TIR), which each year comprehensively analyzes the practice of Swiss prosecution authorities in criminal animal welfare law matters at STIFTUNG FÜR DAS TIER IM RECHT, <http://www.tierimrecht.org/de/faelle> [<https://perma.cc/6Z9E-4L4D>] (accessed Feb. 20, 2016).

⁵⁰⁵ See *supra* note 420 (discussing the decision of the ICA which stated that the instrumentalization of fish represented a danger for public morals and therefore constitutes a violation of article 4, paragraph 1 of the Federal Act on Radio and Television (*Bundesgesetz über Radio und Fernsehen*) Mar. 24, 2006, SR 784.40 (Switz)).

⁵⁰⁶ BOLLIGER & RÜTTIMANN, *supra* note 300, at 77.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ AWA, AS 2965 (2008), art. 1 (Switz.).

⁵¹⁰ RICHNER, *supra* note 62, at 116. See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 230 *et seq.* The counterpart to the “offense prosecuted *ex officio*” in Swiss criminal law is the “offense prosecuted on complaint” that is only prosecuted in case the victim files a formal criminal complaint. SCHWEIZERISCHES STRAFGESETZBUCH [StGB] [CRIMINAL CODE] Dec. 21, 1937, art. 30 (Switz.).

covered by the various AWO bans, qualify as disregard for animal dignity.⁵¹¹

Of note, however, criminal prosecution authorities are only able to help expand the dignity protection concept to a certain degree. Many human behaviors that must be critically considered in light of the animal dignity concept cannot be sanctioned, since Swiss law legitimizes them.⁵¹² But at least those activities that are undoubtedly illegal must be prosecuted and sanctioned, and this ultimately contributes to a greater societal awareness of the issue of animal welfare.⁵¹³ Consequent punishment has to take place, for instance, in the case of obvious humiliation of animals used in entertainment. Degrading practices with animals that cannot be legitimized must be strictly prosecuted and sanctioned as disregarding animal dignity.⁵¹⁴ Examples include the unnatural performances of animals in circuses, which can still be observed in Switzerland, the coloring of animals' fur or feathers, and the exhibition of pets with ridiculous costumes, such as for 'dog weddings,' pet fashion parades, or during Halloween.⁵¹⁵ In these instances, results from the balancing test clearly favor the animals' interests: while already the existence of human necessity is doubtful, a justification fails upon examination of the requested reasonableness. As a result, the mentioned practices represent a clear disregard for animal dignity under the AWA.

Another area where the disregard for animal dignity is obvious, and consistent sanctioning is therefore needed, concerns animal breeding where various excesses typically occur.⁵¹⁶ Certain breeding practices that produce bizarre outer appearances and often a loss of function for the animals are still commonplace in Switzerland.⁵¹⁷ However, by summer 2016, not a single Swiss breeder had been sentenced for disregarding animal dignity under the AWA. Nevertheless, overbreeding is a clear intervention in the appearance and abilities of animals. Overriding interests cannot justify this, since breeders can only seriously argue aesthetic motives.⁵¹⁸

⁵¹¹ BOLLIGER & RÜTTIMANN, *supra* note 306, at 78.

⁵¹² See, e.g., *supra* p. 56 (discussing the handling of farmed animals).

⁵¹³ BOLLIGER & RÜTTIMANN, *supra* note 300, at 78.

⁵¹⁴ GOETSCHER & BOLLIGER, *supra* note 32, at 244.

⁵¹⁵ Despite a general increase of dressing animals, the situation in Switzerland is not comparable to the one in the U.S. where, in 2015, pet owners spent over \$350 million for Halloween outfits for dogs and cats. According to the National Retail Federation, Americans spend \$1 on pet costumes for every \$2.70 they spend on children's costumes. See Lou Carlozo, *Americans Will Spend \$350 Million on Halloween Costumes. For Their Pets*, CHRISTIAN SCI. MONITOR, <http://www.csmonitor.com/Business/Saving-Money/2015/1014/Americans-will-spend-350-million-on-Halloween-costumes.-For-their-pets> [https://perma.cc/CY5P-9FNN] (Oct. 14, 2015) (accessed Feb. 21, 2016).

⁵¹⁶ Samuel Camenzind, *Dignity of Creature: Beyond Suffering and Future*, in *THE ETHICS OF CONSUMPTION: THE CITIZEN, THE MARKET, AND THE LAW* 279, 282 (Helena Röcklinsberg & Per Sandin eds., 2013).

⁵¹⁷ See *supra* p. 26.

⁵¹⁸ BOLLIGER & RÜTTIMANN, *supra* note 300, at 79.

The lack of convictions regarding humiliating displays of animals and the disregard of dignity in animal breeding illustrates that Swiss law enforcement agencies generally are not sufficiently aware of the significance and implications of animal dignity protection. In order to develop true practical effects, the authorities should sharpen this awareness. Additionally, an increased awareness for the ethical aspects of animal dignity in Swiss society is essential. Criminal prosecution authorities can sanction illegal behavior only with corresponding knowledge, which in turn requires increased reporting of animal welfare offenses by attentive citizens.⁵¹⁹

b. Enforcement of Administrative Animal Welfare Law

In contrast to criminal animal welfare law, cantonal administrative agencies have the responsibility to enforce the administrative animal welfare law.⁵²⁰ For this purpose the cantons are equipped with cantonal veterinary services and specialized technical offices.⁵²¹ Their main task is to enforce the minimum legal standards of Swiss animal welfare law in order to guarantee that animals are not illegally subjected to pain, suffering, harm, or anxiety.⁵²² As a rule, the cantonal veterinary services carry out their tasks by effecting administrative measures and by imposing administrative means of coercion.⁵²³

⁵¹⁹ See SCHWEIZERISCHE STRAFPROZESSORDNUNG [StGB] [CRIMINAL CODE] Oct. 5, 2007, SR 101, art. 301, para. 1 (Switz.) (“Any person is entitled to report an offense to a criminal justice authority in writing or orally.”). See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 232 *et seq.* (reporting on animal welfare offenses); BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 498 *et seq.*; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 514 *et seq.*

⁵²⁰ Michel, *supra* note 82, at 613. See generally CHRISTINE KÜNZLI & VANESSA GERRITSEN, RECHTLICHER RAHMEN BEI PRIVATEN TIERSCHUTZKONTROLLEN 99 *et seq.* (2012). If criminal offenses against the AWA are found, the administrative enforcement authority shall report them. AWA, AS 2965 (2008), art. 24, para. 1 (Switz.). Note that only minor cases are excepted from that duty. Here, administrative authorities may decide not to report the criminal offense. AWA, AS 2965 (2008), art. 24, para. 4 (Switz.); see BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 263.

⁵²¹ AWA, AS 2965 (2008), art. 33 (Switz.). See generally BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 54; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 41 *et seq.*

⁵²² FSVO, SWISS VETERINARY SERVICE, BASED ON THE OIE TOOL FOR EVALUATING THE PERFORMANCE OF VETERINARY SERVICES 12, 14 (2014).

⁵²³ See generally REBSAMEN-ALBISSER, *supra* note 432, at 85 *et seq.*; JEDELHAUSER, *supra* note 50, at 125 *et seq.* For instance, the authorities may forbid people who have been sentenced for repeated or serious violations of Swiss animal welfare law or who are incapable of keeping or breeding animals for other reasons, for a specified or unspecified period, from keeping or breeding animals, or from trading in or working professionally with animals. AWA, AS 2965 (2008), art. 23, para. 1 (Switz.). Such prohibitions are valid throughout Switzerland, *id.* art. 23, para. 2 (Switz.), and filed in a central register, AWO, AS 2985 (2008), art. 212a, para. 2 (Switz.). See generally BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 55 *et seq.*; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 41 *et seq.* Further, the competent authorities must intervene immediately when it is found that animals are being neglected or kept under unsuitable conditions. The authority may seize the animals as a precautionary measure

Moreover, the cantonal veterinary services are responsible for the granting of licenses that Swiss law requires for various types of animal handling.⁵²⁴ In granting licenses, the administrative authorities always have to examine, among other things, whether a requested animal use is consistent with animal dignity protection.⁵²⁵ One example of an area of licensing where emphasis must be given to dignity protection is the use of living animals for promotional purposes that require a license according to Swiss law.⁵²⁶ The use of animals as an advertising medium represents a *per se* instrumentalization and must therefore be examined critically in each individual case.⁵²⁷ A license must be denied when animals are humiliated within the advertising shots, such as by unnaturally changing their appearances. Further examples where the granting of a license must be based on a thorough review of the respect for animal dignity include commercial animal breeding,⁵²⁸ animal fairs, animal markets, and animal exhibitions where animals are traded.⁵²⁹ Moreover, the cantonal veterinary services are responsible for the licensing of animal experiments and the commercial keeping of wild animals, which are discussed in more detail in the following Sections.

and house them at a suitable accommodation at the expense of the animal keeper. AWA, AS 2965 (2008), art. 24, para. 1 (Switz.). See generally BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 57 *et seq.*; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 44 *et seq.*

⁵²⁴ FSVO, *supra* note 523, at 14, 15.

⁵²⁵ Since the protection of animal dignity is a fundamental principle spanning all areas of Swiss animal welfare law, see *supra* p. 16, it also applies if this is not explicitly mentioned in the statutory licensing requirements. BOLLIGER & RÜTTIMANN, *supra* note 300, at 79.

⁵²⁶ AWA, AS 2965 (2008), art. 13, para. 1 (Switz.); see also AWO, AS 2985 (2008), art. 105, para. 1d (Switz.) (stating that a license according to article 13 of the AWA shall only be granted if it is ensured in advertisement that the animals do not suffer or endure harm, the transport conditions are met, and the animals' dignity is not disregarded in other ways). The term *advertisement* under Swiss animal welfare law refers to any activity by which attention is drawn with commercial intentions to a specific product, a company, or an activity with living animals. Examples include advertisements in press products; recordings for radio, film, and television; the performance of animals in department stores, fundraising, fashion shows, et cetera; the use of animals as shop window decoration; and the distribution of animals as giveaways. BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 508.

⁵²⁷ BOLLIGER & RÜTTIMANN, *supra* note 300, at 82.

⁵²⁸ AWO, AS 2985 (2008), art. 101, para. 1d (Switz.).

⁵²⁹ *Id.* art. 104, para. 3 (Switz.).

i. Animal Experiments

Just like in many other parts of the world, animal experiments⁵³⁰ are legal in Switzerland.⁵³¹ Statistics on animals used in research have been primarily constant for the last several years.⁵³² In 2014, more than 600,000 animals were experimented on in Switzerland—mostly mice, but also primates, dogs, cats, horses, and many other mammals.⁵³³ Almost 60% of these animals were used for basic research⁵³⁴ purposes.⁵³⁵

Swiss animal welfare law declares animal testing to be permissible, but at least it sets a series of restrictions.⁵³⁶ Most importantly, animal experiments must be limited to the absolute necessary minimum and are only allowed if they represent a so-called *ultima ratio*.⁵³⁷ Any person who wants to conduct an animal experiment needs a license from the cantonal veterinary service.⁵³⁸

⁵³⁰ See AWA, AS 2965 (2008), art. 3c (Switz.) (“[A]nimal experiment: Any measure in which a live animal is used with the aim of (1) testing a scientific assumption, (2) observing the effect of a particular measure in the animal, (3) testing a substance, (4) obtaining or testing cells, organs or bodily fluids, except when this is in the context of agricultural production, diagnostic or curative operations on the animal or for determining the health status of animal populations, (5) obtaining or replicating organisms alien to the species in question, (6) teaching or training.”).

⁵³¹ See Gerritsen & Rüttimann, *supra* note 204, at 242 (discussing various initiatives to abolish or largely limit animal experiments in Swiss law, which all failed in official referendums).

⁵³² *Number of Animals from 1983–2014*, FSVO, <http://tv-statistik.ch/de/statistik/index.php> [https://perma.cc/DW4Z-7UQB] (2014) (accessed Mar. 6, 2016).

⁵³³ *Id.*

⁵³⁴ ‘Basic research’ is driven purely by curiosity and a desire to expand knowledge. It tends not to be applicable to the real world in a direct way, but it furthers general information and enhances the understanding of the coherences in the world. In contrast, ‘applied research’ is used to answer a specific question that has direct applications and focuses on the solution of a concrete problem. BOLLIGER, *supra* note 19, at 360.

⁵³⁵ See TV STATISTIK, <http://tv-statistik.ch/de/statistik/index.php> (accessed Mar. 6, 2016) (illustrating figures on basic research experiments that have been increasing for several years).

⁵³⁶ AWA, AS 2965 (2008), art. 17 (Switz.); AWO, AS 2985 (2008), art. 6, para. 1 (Switz.).

⁵³⁷ BOLLIGER, *supra* note 93, at 9; BGer, 135 BGE II 384; see AWA, AS 2965 (2008), art. 17 (Switz.) (“Animal experiments that inflict pain, suffering, harm, or anxiety on an animal, substantially impair its general well-being, or may disregard its dignity in any other way, shall be limited to the absolutely necessary minimum.”).

⁵³⁸ AWA, AS 2965 (2008), art. 18, para. 1 (Switz.) For the granting of animal-experiment applications, the cantonal veterinary services are supported by cantonal committees on animal experiments consisting of experts for animal experiments, among whom animal welfare organizations must also be appropriately represented. *Id.* art. 34, para. 1. The committees examine applications and submit a proposal to the licensing authority. Further, they are consulted on the inspection of laboratory animal husbandry and the conduct of experiments. *Id.* art. 34, para. 2. See generally ISABELLE HÄNER, GIERI BOLLIGER & ANTOINE F. GOETSCHEL, GEHEIMHALTUNGSPFLICHT VON MITGLIEDERN DER TIERVERSUCHSKOMMISSIONEN 11 *et seq.* (2011); Krepper, *supra* note 35, at 311.

For a laboratory animal, regardless of whether it was genetically produced⁵³⁹ or raised through traditional breeding methods, an experiment (and its whole existence) represents a serious instrumentalization. Therefore, this constitutes a violation of animal dignity that, in addition, is frequently associated with massive suffering. In the balancing of interests, which also applies in the field of animal testing⁵⁴⁰ and has to be conducted for every single animal experiment,⁵⁴¹ this places high requirements on the side of the human user. Due to the general uncertainty regarding the transferability of findings from animal studies to humans,⁵⁴² often already the suitability of a planned experiment is doubtful.⁵⁴³ In the subsequent check of necessity, the burden of proof of showing the absence of alternatives lies with the researcher.⁵⁴⁴ Whenever an alternative for a planned animal experiment exists, a license must be denied. Further, in the final assessment of reasonableness, human concerns may not be given per se preference since animal welfare and the protection of animal dignity are equal to the fundamental right of academic freedom under the Federal Constitution.⁵⁴⁵ Moreover, because animal dignity must be valued in assessing an experiment, the killing of the concerned animals (which is typically part of animal experiments or which happens after them) also has to be justified since it disregards an animal's value.⁵⁴⁶ Further, if instrumentalization of laboratory animals is not only excessive but exclusive, such as with cloned animals used as disease models, this should generally be prohibited as a non-justifiable disregard for animal dignity.⁵⁴⁷

⁵³⁹ See generally Regula Vogel, *Zur Achtung der Würde von gentechnisch veränderten Versuchstieren*, in *DIE WÜRDE DES TIERES* 304 *et seq.* (Martin Liechti ed., 2002) (discussing the dignity of genetically modified laboratory animals).

⁵⁴⁰ See generally BOLLIGER, *supra* note 19, at 13 *et seq.*; Rippe, *supra* note 85, at 320 *et seq.*; Krepper, *supra* note 35, at 308 *et seq.*; Krepper, *supra* note 96, at 38 *et seq.*; Franz P. Gruber, *Güterabwägung aus der Sicht des Tierschutzes*, in *GESUNDHEIT UND TIERSCHUTZ—GÜTERABWÄGUNG BEI TIERVERSUCHEN* 41 *et seq.* (Animalfree Research ed., 2008).

⁵⁴¹ See Rippe, *supra* note 234, at 3.

⁵⁴² Of course, there is the question of whether animal experiments are generally superfluous. According to various reputable scientists, animal experiments are a scientifically dubious research method whose results can hardly be fully applied to humans and which should therefore be avoided not only from an animal welfare view, but also from a scientific perspective. For the corresponding topic, which cannot be discussed here, see generally, for example, ANDREW KNIGHT, *THE COSTS AND BENEFITS OF ANIMAL EXPERIMENTS* (2011) (explaining that there are few human benefits to animal experiments).

⁵⁴³ See Gerritsen & Rüttimann, *supra* note 204, at 246 (providing further references).

⁵⁴⁴ See Krepper, *supra* note 35, at 313; Krepper, *supra* note 96, at 41.

⁵⁴⁵ See *supra* pp. 8 *et seq.*

⁵⁴⁶ Errass, *supra* note 22, at 1620; Rippe, *supra* note 82, at 94 *et seq.*

⁵⁴⁷ See *supra* p. 28. Swiss law prohibits only the cloning of human beings, such as forbidding producing human embryos for research purposes. ZUSATZPROTOKOLL ZUM ÜBEREINKOMMEN ZUM SCHUTZ DER MENSCHENRECHTE UND DER MENSCHENWÜRDE IM HINBLICK AUF DIE ANWENDUNG VON BIOLOGIE UND MEDIZIN ÜBER DAS VERBOT DES KLONENS VON MENSCHLICHEN LEBEWESSEN [SUPPLEMENTARY PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND HUMAN DIGNITY WITH REGARD TO THE

In addition, the constitutional guarantee of an inviolable core content of animal dignity⁵⁴⁸ must manifest in a general upper stress limit for animals that cannot be exceeded.⁵⁴⁹ This is of particular importance in the field of animal experiments.⁵⁵⁰ Swiss animal welfare law expresses the stress, which is inflicted on animals in experiments, by so-called severity degrees⁵⁵¹ that range in a scale from severity degree 0 (no stress)⁵⁵² to severity degree 3 (severe stress).⁵⁵³ Note that even experiments qualified with severity 0 or severity 1 (mild stress)⁵⁵⁴ usually lead to the death of the concerned animals⁵⁵⁵ and may constitute a disregard for animal dignity.⁵⁵⁶ However, experiments with severity degree 3 inflict such a high stress level on an animal⁵⁵⁷ that they can never be justified in light of the core content of animal dignity, regardless of the purpose pursued by an experiment. Thus, these experiments represent a per se disregard for animal dignity. As a consequence of this fundamental incompatibility of severity degree 3 experiments with the Federal Constitution, these experiments should not be approved by cantonal veterinary authorities and should be generally prohibited by the legislature.⁵⁵⁸

APPLICATION OF BIOLOGY AND MEDICINE ON THE PROHIBITION OF CLONING HUMAN BEINGS] Jan. 12, 1998, SR 0.810.21 (Switz.); see Michel, *supra* note 109, at 260 *et seq.*

⁵⁴⁸ See *supra* p. 20.

⁵⁴⁹ BOLLIGER & RÜTTIMANN, *supra* note 300, at 87.

⁵⁵⁰ *Id.*

⁵⁵¹ See article 24 of the VERORDNUNG DES BLV ÜBER DIE HALTUNG VON VERSUCHSTIEREN UND DIE ERZEUGUNG GENTECHNISCH VERÄNDERTER TIERE SOWIE ÜBER DIE VERFAHREN BEI TIERVERSUCHEN [ORDINANCE ON THE KEEPING OF LABORATORY ANIMALS AND THE BREEDING OF GENETICALLY MODIFIED ANIMALS AND ON ANIMAL EXPERIMENT PROCEDURES] Apr. 12, 2010, SR 455.163 (Switz.).

⁵⁵² *Id.* art. 24(a). Animal experiments with severity degree 0 are procedures and actions performed on animals for experimental purposes that do not inflict pain, suffering, or harm on the animals, engender anxiety or impair general well-being. *Id.*

⁵⁵³ *Id.* art. 24(d). Animal experiments with severity degree 3 are procedures and actions performed on animals for experimental purposes that cause medium- to long-term moderate pain or severe pain, medium- to long-term moderate harm or severe harm, long-term severe anxiety or a severe impairment of general well-being. *Id.*

⁵⁵⁴ *Id.* art. 24(b)–(c). Animal experiments with severity degree 1 are interventions and procedures in animals for experimental purposes that cause short-term mild pain or harm, or a slight impairment of the general condition, whereas animal experiments with severity degree 2 (moderate stress) are interventions and procedures in animals for experimental purposes that cause short-term moderate or medium- to long-term mild pain, suffering, or harm, short-term moderate anxiety, or a short- to medium-term severe impairment of the general condition. *Id.*

⁵⁵⁵ For example, the killing of animals for the purpose of removal of tissues and organs is legally considered as an animal experiment with severity degree 0.

⁵⁵⁶ See Franz P. Gruber, *Haltung oder Experiment—der Respekt vor der Würde des Tieres*, in *DIE WÜRDE DES TIERES* 301 (Martin Liechti ed., 2002).

⁵⁵⁷ An example is the so-called LD50 test for the determination of the toxicity of a substance. See BOLLIGER, *supra* note 19, at 416. Animals are injected with different doses of the substance in order to detect the amount by which exactly half of the animals die. Depending on the experimental setup, the extremely excruciating agony of the animals may drag for several days. See, e.g., *id.*

⁵⁵⁸ BOLLIGER & RÜTTIMANN, *supra* note 300, at 88.

Finally, the constitutional animal welfare clause is also contradicted by the “Three R Concept” (replacement, reduction, and refinement)⁵⁵⁹ to which researchers in Switzerland usually refer to as an established guiding principle for a “more ethical” use of laboratory animals.⁵⁶⁰ The concept is also promoted by the Federal Food Safety and Veterinary Office.⁵⁶¹ The Three R Concept should be considered unconstitutional since it springs from the assumption that human interests in using laboratory animals are more important than the interests of animals.⁵⁶² Again, this contradicts the principle that the constitutional animal welfare clause and fundamental rights, such as academic freedom, are equal.⁵⁶³

In practice, however, animal experiments are still regarded as the “Golden Standard” (i.e., the automatic choice as an established method) in medical and pharmaceutical research in Switzerland, and researchers are hardly ever denied a license. From 2010 to 2014, nationwide only 45 out of 5,426 applications—and the use of more than two million laboratory animals—were rejected by the cantonal veterinary services.⁵⁶⁴ In the Canton of Zurich, where most applications are submitted, not a single animal experiment was denied in this period.⁵⁶⁵ In 2014, almost 13,000 animals (including primates, dogs, and rodents) nationwide were used in animal experiments with a severity degree 3.⁵⁶⁶ Such licensing practices do not satisfy the dignity protection concept and must therefore be fundamentally rethought.⁵⁶⁷ Further, the dignity concept also requires the legislature to undertake serious efforts to avoid impairments of laboratory animals, even if experiments with them might be considered justified in legal terms.⁵⁶⁸ The AWA expressly requires the national government to promote the development, acceptance, and application of methods that replace

⁵⁵⁹ The concept dates back to the work of William M. S. Russell and Rex L. Burch, *PRINCIPLES OF HUMANE EXPERIMENT TECHNIQUE* (1959), and is based on methods which avoid or replace the use of animals in research (replacement); the use of methods that enable researchers to obtain comparable levels of information from fewer animals, or to obtain more information from the same number of animals (reduction); and the use of methods that alleviate or minimize potential pain, suffering, or distress, and enhance animal welfare for the animals used (refinement). *See, e.g.*, Bolliger, *supra* note 19, at 383 *et seq.*

⁵⁶⁰ Brigitte Rusche, *The 3Rs and Animal Welfare—Conflict or the Way Forward?*, 20 ALTEX 63, 65 (Supp. 1) (2003).

⁵⁶¹ FSVO, *Alternatives / 3R*, SWISS CONFEDERATION, <http://www.blv.admin.ch/themen/tierschutz/00777/03580/index.html?lang=EN> [https://perma.cc/4LAE-69TD] (accessed Feb. 2, 2016).

⁵⁶² Errass, *supra* note 22, at 1620. *See generally* Rippe, *supra* note 84, at 7 *et seq.*

⁵⁶³ *See supra* p. 7.

⁵⁶⁴ *Permits for Animal Experiments by Canton*, FSVO, <http://tv-statistik.ch/de/bewilligung/index.php> [https://perma.cc/5UVX-LTQ3] (accessed Feb. 16, 2016).

⁵⁶⁵ *Id.*

⁵⁶⁶ *Number of Animals 1983–2014*, *supra* note 533.

⁵⁶⁷ Vanessa Gerritsen, *Evaluation Process for Animal Experiment Applications in Switzerland*, 4.1 ALTEX PROC. 37 *et seq.* (2015).

⁵⁶⁸ Gerritsen & Rüttimann, *supra* note 204, at 244.

animal experiments.⁵⁶⁹ Nonetheless, both the promotion and financing of such alternative methods are highly neglected by the Swiss government.⁵⁷⁰

ii. Commercial Keeping of Wild Animals

In Switzerland, every commercial keeping⁵⁷¹ of wild animals⁵⁷² requires a license⁵⁷³ that is granted by the cantonal veterinary services. In examining these applications, the veterinary service has to determine, among other things, whether a requested use of animals is consistent with the protection of the animal's dignity. This applies, for example, to the keeping of animals in zoos. If it is not possible to pro-

⁵⁶⁹ See AWA, AS 2965 (2008), art. 22, para. 2 (Switz.) (requiring the national government, in collaboration with universities and industries, to “promote, in particular, the development, acceptance, and application of methods that replace animal experiments, that reduce the number of used laboratory animals, or that reduce stress for the animals”). See generally Gerritsen & Rüttimann, *supra* note 204, at 243 *et seq.* Of note, however, methods that only reduce animals' stress are, as discussed above, actually unconstitutional. Also, the stance of animal welfare is a national objective. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 80 (Switz.). Further, the same duty derives from Article 64 and 118 of the Federal Constitution, see Gerritsen & Rüttimann, *supra* note 204, at 245, and from the AWA mandate to reduce animal experiments to an absolutely necessary minimum. AWA, AS 2965 (2008), art. 17 (Switz.); see, e.g., Krepper, *supra* note 36, at 305 *et seq.*

⁵⁷⁰ See generally Gerritsen & Rüttimann, *supra* note 204, at 247 *et seq.* (providing an illustrative description of the stark inadequacy in financial means with which the Swiss government supports, on the one hand, projects involving animal experiments and, on the other hand, projects in research for alternative methods).

⁵⁷¹ See AWO, AS 2985 (2008), art. 90, para. 2a (Switz.) (providing that the following are deemed to be commercial keepings of wild animals: “zoological gardens, circuses, safari parks, wild-life parks, small zoos, dolphinariums, aviaries, public aquariums, public terrariums, permanent animal shows, and similar facilities that can either be visited for money or can be visited free of charge but are operated in conjunction with commercial facilities such as restaurants, shops, or recreational facilities”). Also included are facilities in which wild animals are kept or used commercially for medical treatments, for the production of eggs, meat, or fur or for similar purposes, *id.* 2b, and facilities in which wild animals are bred for hunting or fishing. *Id.* 2c.

⁵⁷² The term *wild animal* refers under Swiss animal welfare law to all vertebrates, cephalopods, and decapods, which are not domestic animals. AWO, AS 2985 (2008), art. 2, para. 1b (Switz.). As domestic animals, the AWO lists domesticated animals of the equine, bovine, porcine, ovine and caprine species (excluding exotic species); domesticated yaks and water buffalos; lamas and alpacas; domestic rabbits, dogs, and cats; and domestic pigeons and poultry, such as domestic hens, turkeys, guinea fowl, geese, and ducks. AWO, AS 2985 (2008), art. 2, para. 1a (Switz.). Accordingly, wild animals under Swiss law are those animals that have not been domesticated and therefore remain largely unaffected by humans in their behavior and reproduction. *Id.* They live not only in the outdoors, but are also kept in zoos, animal and wildlife parks, and in private households. *Id.* Because they are not regarded as domesticated, from a legal point of view many traditional pets, such as guinea pigs and hamsters, are also classified as wild animals, although they are kept in private households. See BOLLIGER, GOETSCHER, RICHNER & SPRING, *supra* note 53, at 12; BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 56 *et seq.*; RÜTTIMANN, RICHNER, LÜCHINGER & FLÜCKIGER, *supra* note 56, at 14 *et seq.*

⁵⁷³ AWO, AS 2985 (2008), art. 90, para. 1 (Switz.).

vide an animal in a zoo with an environment in which it can undertake its natural behavior in an unimpeded, species-specific way, the veterinary authority has to examine whether human user interests, such as imparting knowledge about animals or entertaining visitors, clearly prevails over any impairment of animal dignity. Moreover, in considering the necessity of the animal use, the question arises whether the exhibition of animals at a zoo is actually needed in order to provide interested people with information about animals' behaviors and habitats.⁵⁷⁴ Given that many zoo visits primarily serve entertainment purposes, various alternatives (such as books, magazines, Internet articles and films, or television programs) appear to be at least as appropriate for transferring knowledge about animals. Against the background of the animal dignity concept, humans cannot assume to have a claim to a certain animal use.⁵⁷⁵ Licensing practices must take this into account by rejecting applications if the balancing test does not clearly result in favor of the applicant.⁵⁷⁶ Further, regardless of whether a wild animal is kept as a pet or in a zoo, a license must generally be refused if the husbandry requires interventions in its abilities, such as the trimming of the wings of birds in order to prevent them from flying away.⁵⁷⁷

Other applications that have to be critically examined are those for the keeping of wild animals in circuses.⁵⁷⁸ Even though the last Swiss circus which still had elephants in its program stopped such practice at the end of 2015,⁵⁷⁹ there still exists highly questionable presentations of lions, camels, zebras, grey rheas, et cetera, in Swiss circus rings. Among experts there is an increasing consensus that species-specific behaviors are commonly denied to wild animals being kept in circuses.⁵⁸⁰ This is due in particular to the lack of adaptability of undomesticated wild animals to a life in captivity and the ever-changing venues. Consequently, in recent years, many countries all over the world (such as Austria, Belgium, Bulgaria, Denmark, Greece, the Netherlands, Slovenia, Israel, Costa Rica, Bolivia, Colombia, El Salvador, Mexico, Panama, Peru, and Singapore) have passed general or at

⁵⁷⁴ BOLLIGER & RÜTTIMANN, *supra* note 300, at 81.

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*; Steiger, *supra* note 91, at 6.

⁵⁷⁸ AWO, AS 2985 (2008), arts. 90, 94 (Switz.).

⁵⁷⁹ Urs Geiser, *Circus to End its Elephant Show Tradition*, SWISSINFO, http://www.swissinfo.ch/eng/knie_circus-to-end-its-elephant-show-tradition/41598800 [<https://perma.cc/NER7-YVDY>] (Aug. 12, 2015) (accessed Feb. 16, 2016).

⁵⁸⁰ See, e.g., Press Release, Federal Veterinary Chamber, The Federal Veterinary Chamber Calls for Ban on Wild Animals in Traveling Circus (Apr. 20, 2010), http://www.bundestieraerztekammer.de/index_btk_presse_details.php?X=20120222210840 [<https://perma.cc/EE9V-QYG3>] (claiming a ban of wild animals in circuses). See generally Sabrina Brando, *Zirkus*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, 431 *et seq.* (providing further references).

least partial bans on keeping wild animals in circuses.⁵⁸¹ Further, the license-granting veterinary authority must also consider that presentations in which animals are forced to perform unnatural tricks often constitute both evident humiliations and excessive instrumentalizations that serve only the entertainment of an audience and must therefore be qualified as disregarding animal dignity. Given the constitutional dignity protection, it is incomprehensible that Switzerland lags behind the animal law standard of numerous other countries in protecting circus animals. Because housing problems and humiliating performances of wild circus animals both violate animal dignity to a degree that clearly prevail over human interests, animal dignity can only be taken into consideration with a general ban on wild animals in circuses.⁵⁸²

VI. CONCLUSION AND OUTLOOK

With the inclusion of the dignity of living beings concept in the Federal Constitution and, in particular, with its substantiation regarding animals in the AWA, Switzerland entered into a new era of animal law. Recognition and protection for animal dignity goes beyond a purely sentientist position and represents a fundamental shift in legal principles and policies aimed at guarding animals against injuries not necessarily associated with physical or mental aspects, but which otherwise affect an animal's self-purpose. Together with the change in legal status of animals, which represents another remarkable legislative step, protection for animal dignity delivers an important message: Swiss law acknowledges animals as autonomous beings with an inherent worth to be protected for their own sake, and not merely as a reflection of their owners' rights.⁵⁸³

Unquestionably, this essential conceptual shift in Swiss animal welfare law cannot just be symbolic, but must lead to crucial changes in the everyday realities of human-animal relationships. However, by now, such changes are regrettably only rudimentary. In Switzerland, many animals are still instrumentalized in a way that is incompatible with respect for their dignity. The Swiss legislature has decided to

⁵⁸¹ See *Verbote der Haltung von Wildtieren in Zirkussen auf städtischen Flächen*, PETA DEUTSCHLAND, <http://www.peta.de/VerbotWildtiereImZirkus> [<https://perma.cc/7P6Q-S57A>] (accessed Feb. 11, 2016) (providing an overview of countries that have enacted corresponding prohibitions).

⁵⁸² BOLLIGER & RÜTTIMANN, *supra* note 300, at 88.

⁵⁸³ This insight reflects the opinion of the Swiss Federal Supreme Court, which stated clearly in 1989: "The basic attitude of man to animal, however, has evolved over time in terms of responsibility for these living beings to so-called 'ethical animal welfare' (BBL 1977 I 1084), which goes further than the protection of inanimate things, and recognizes animals as living and sentient beings, as fellow living beings, whose respect and esteem is a moral postulate for the intellectually superior humans." See BGer, Aug. 2, 1989, 115 BGE IV 254 (Switz.) (finding lawful the behavior of a car driver who caused a rear-end collision due to slowing down abruptly to avoid running over a fox that crossed the road).

grant only a relative value to animal dignity in favor of a dignity conception that allows for the assessment of interests. Thus, although the dignity of living beings (including animal dignity) must always be considered,⁵⁸⁴ it is not absolutely protected. However, even if legal protection for an animal's dignity does not exclude its instrumentalization—because the normative content of dignity means to be in the world for one's own sake—at a minimum, an animal's exclusive instrumentalization is inconsistent with the Federal Constitution. The constitutional requirement to take animal dignity into consideration includes at the very least a programmatic obligation on the part of the government to focus on finding alternatives regarding exclusive instrumentalization of animals whenever possible and to promote and subsidize these alternatives.⁵⁸⁵ Such research for alternatives is completely insufficient at present, for instance, in the area of animal experiments, although Swiss animal welfare law clearly establishes that animal experiments may only be conducted as *ultima ratio*.⁵⁸⁶ Other examples of practices used, despite existent alternatives, include governmental programs for the eradication of epizootic diseases for which there are available alternatives (such as vaccinations) and which therefore are primarily politically and economically motivated,⁵⁸⁷ or national subsidies for factory farming that completely deny the animal's inherent worth, turning them into a mere means of production.⁵⁸⁸

Thus, the vouchsafed standard of Swiss legal animal protection typically depends neither on an animal's need for freedom from pain, suffering, harm, and anxiety, nor on its need for well-being or protection of its dignity, but largely on an animal's "intended use."⁵⁸⁹ Consequently, not only animal experimentation, but also other highly debatable practices such as the intensive keeping of farmed animals or the performance of wild animals in circuses are legally regulated

⁵⁸⁴ BUNDESVERFASSUNG [BV] [CONSTITUTION] APR. 18, 1999, SR 101, art. 120, para. 2 (Switz.); see *supra* p. 12; Michel, *supra* note 109, at 276 *et seq.* (discussing the distinction between the dignity of humans and the dignity of animals according to their legal status as natural persons and legal objects, respectively).

⁵⁸⁵ Michel, *supra* note 109, at 108.

⁵⁸⁶ See *supra* p. 64.

⁵⁸⁷ See Michel, *supra* note 109, at 108 (referencing the prohibition on the vaccination against aphtous fever, the 'foot-and-mouth' disease).

⁵⁸⁸ *Id.*

⁵⁸⁹ See Michel, *supra* note 82, 110 (providing the illustrative example of the vouchsafed standard of protection accorded to a dog, which highly depended on the fact that the dog is kept and used within the framework of animal experiments or within the framework of pet keeping, although dogs in both circumstances have the exact same needs).

(maybe better than elsewhere)⁵⁹⁰ but are still permitted.⁵⁹¹ In other words, Swiss law still legitimizes the use of animals in general, and even the national animal welfare law itself contains numerous provisions that allow severely harming animals for various “intended uses.” Further, an obvious tension remains between the core content of animal dignity and an animal’s legalized complete instrumentalization when human interests have been deemed to take priority.⁵⁹² Consequently, many animals in Switzerland are still used as a mere means to someone else’s end.

All this stands in clear contradiction to the spirit of the animal dignity concept. The constitutional mandate is not sufficiently considered if the purpose of the AWA unambiguously commits to protecting animal dignity, while numerous other statutory provisions run diametrically contrary to it. Respect for animal dignity cannot be limited to an attitude, but must entail specific legal requirements or prohibitions. Although Swiss animal law might be considered progressive by international comparison, it continues to lag in its protection of animals in highly problematic and exploitive fields, such as agriculture, breeding, research, and entertainment. To fully integrate and implement the dignity concept, many established social, cultural, and legal practices of animal use must be scrutinized and fundamentally questioned on both a legal and a societal level. If these practices do not pass the balancing of interests test, then they must be consistently forbidden.

Significant deficits exist not only in Swiss legislation, but also in the enforcement of the animal dignity concept by the cantonal criminal and administrative authorities. As discussed, protection for animal dignity is still hardly reflected in judicial decisions. At a minimum, there does exist a few primary and important basic approaches. In 2009, animal dignity played a significant role in two different, yet very similar, groundbreaking decisions by the Federal Supreme Court, which declared the approval of animal experiments on non-human primates in the field of neuroinformatic basic research unjustifiable. For

⁵⁹⁰ Note, however, that the Swiss animal welfare law provisions regarding the keeping of farmed animals represent only minimum standards, AWA, AS 2965 (2008), art. 6, para. 2 (Switz.), whose disregard legally constitutes an animal welfare law offense, often even an animal cruelty crime. See generally BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 161 *et seq.* (explaining that respecting these provisions does not ensure species-appropriate animal husbandry). Birgit Christensen, *Person oder Würde des Tiers?—Rechtsphilosophische und rechtshistorische Anmerkungen zur Begründung von Rechten für Tiere*, in WÜRDE DER KREATUR, *supra* note 80, at 108.

⁵⁹¹ See Klaus Petrus, *Würde*, in LEXIKON DER MENSCH-TIER-BEZIEHUNGEN, *supra* note 148, at 425 (illustrating an example of a Swiss farm cow, which is artificially inseminated and whose calves are taken away from her shortly after their birth; which grows up in an anonymous environment, although it is a gregarious animal; which lives during 275 days a year on a space of 100 x 185 centimeters (about 40 x 73 inches); which is fed with concentrate; and which is treated prophylactically with antibiotics—everything in accordance with current Swiss animal welfare law).

⁵⁹² Michel, *supra* note 82, at 100.

the very first time, the highest Swiss court referred to animal dignity, and a crucial part of its rationale relied on recognition of the dignity of primates. The Federal Supreme Court decided that the interests of the primates outweighed the possible benefits of the proposed research.⁵⁹³ Those decisions demonstrate the great innovative potential of the animal dignity concept in setting clear boundaries on the instrumentalization of animals. They also represent a possible change in priority of academic freedom over animal welfare concerns.⁵⁹⁴

However, the two primate verdicts of 2009 still represent rare exceptions to court decisions regarding animal-dignity-related matters.⁵⁹⁵ Even in criminal cases in which offenders obviously violate absolute animal welfare prohibitions,⁵⁹⁶ judicial authorities barely recognize and address the forbidden activities as disregarding animal dignity.⁵⁹⁷ Further, judgments on the ethical aspects of animal dignity are still almost nonexistent. The criminal authorities seem to refrain from addressing and sanctioning activities that are not necessarily associated with pain, suffering, harm, or anxiety for animals. However, neither from a constitutional standpoint nor from an animal welfare view, is it acceptable that the statutory animal cruelty offense of disregard for animal dignity⁵⁹⁸ is largely ignored in practice. As a result, there is a lack of lawsuits concerning even obvious disregards for

⁵⁹³ Although the competency of the cantonal committee on animal experiments, see *supra* note 539, was the crucial factor leading to the respective verdict, dignity aspects have elaborately been the subject of discussion in the Federal Supreme Court's finding. BGer, Oct. 7, 2009, 135 BGE II 384 (Switz.). The Federal Supreme Court stated: "Even if [animal dignity] 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." BGer, Oct. 7, 2009, 135 BGE II 405 (Switz.). For the hierarchical gradation of laboratory animals in Swiss law, see AWA, AS 2965 (2008), art. 20, para. 2 (Switz.) ("Experiments on evolutionarily superior animals may only be conducted if the purpose of the experiment cannot be achieved on animal species that are lower on the evolutionary scale, and if no suitable alternative methods are available"). Note, however, although apes have a high level of 'human' traits (such as self-awareness, individuality and reasoning powers), this view is of course rather speciesistic and neither consistent with the animal dignity concept, nor with a general pathocentric approach, which is based on the sentience of a living being and not on genetic proximity. Dignity includes the protection of an animal's inherent worth, regardless of any similarity to man. Michel & Schneider Kayasseh, *supra* note 25, at 10 *et seq.*; Michel, *supra* note 82, at 108. See generally, e.g., BOLLIGER, *supra* note 19 at 365 *et seq.* (discussing problematic primate experiments); Ursula G. Sauer, *Primatenversuche in der Grundlagenforschung und die Würde des Tieres—eine kritische Erörterung*, in WAS HEISST "TIERWÜRDE"? 31 *et seq.* (AnimalFree Research ed., 2009).

⁵⁹⁴ Michel, *supra* note 82, at 109.

⁵⁹⁵ Compare BGer, Mar. 14, 2013, 6B_635/2012 BGE II 384 (Switz.) (mentioning animal dignity in a decision regarding an animal neglect case in 2013), with RÜTTIMANN, *supra* note 321, 1 *et seq.* (explaining that the Court inadmissibly constricted the term and meaning of *animal dignity*).

⁵⁹⁶ AWO, AS 2985 (2008), art. 16 (Switz.).

⁵⁹⁷ BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 137.

⁵⁹⁸ AWA, AS 2965 (2008), art. 26, para. 1 (Switz.).

animal dignity, such as excesses in animal breeding or unnatural performances of wild animals in circuses. This is even more troubling as animal dignity protection represents, as described, a central purpose of Swiss animal welfare law, and its disregard, like any other animal cruelty, constitutes an offense that must be prosecuted and punished ex officio by the competent authorities.⁵⁹⁹

These circumstances clarify the urgent need for better education of Swiss law enforcement agencies regarding animal welfare law in general and the meaning and significance of the dignity concept in particular. Additionally, an increase in awareness of animal dignity protection is essential in Swiss society as a whole, especially since offenders can only be prosecuted if the competent authorities are informed about criminal acts, and this requires willingness to file criminal charges by attentive and educated citizens.⁶⁰⁰ In this context, the media are prompted to treat critically any events and scenes that disregard the dignity of animals.⁶⁰¹ Moreover, procedural institutes, such as the right to appeal for animal welfare organizations in animal welfare matters in order to participate in animal cruelty proceedings (which Switzerland still lacks),⁶⁰² would valuably strengthen public focus.⁶⁰³

Furthermore, the cantonal veterinary authorities responsible for the administrative enforcement of Swiss animal welfare law are obliged to take animal dignity into account to the best of their ability. Especially when deciding on the granting of licenses required for specific animal uses, these authorities always have to consider the dignity protection concept. However, established uses of animals, such as animal testing or the keeping of wild animals in zoos and circuses, are not fundamentally questioned by the veterinary authorities, even

⁵⁹⁹ See *supra* p. 61.

⁶⁰⁰ See BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 299 *et seq.* (explaining the importance of informed citizens reporting criminal acts).

⁶⁰¹ See generally Marianne Sommer, *Ape for Ape's Sake—Die Würde des Tieres in den Medien am Beispiel von National Geographic*, in *DIE WÜRDE DES TIERES* 341 *et seq.* (Martin Liechti ed., 2002).

⁶⁰² By now, only the Umbrella Association of the Bernese Animal Welfare Organizations has the right in the Canton of Bern to be involved in cantonal criminal animal welfare law proceedings. BOLLIGER, RICHNER & RÜTTIMANN, *supra* note 19, at 240 *et seq.* In contrast, rights to appeal for national organizations in the fields of environmental protection exist on a national level. BUNDESGESETZ ÜBER DEN UMWELTSCHUTZ [FEDERAL ACT ON THE PROTECTION OF ENVIRONMENT] Oct. 7, 1983, SR 814.01, AS 1122 (1984), art. 55 (Switz.). Regarding the protection of nature and cultural heritage, see BUNDESGESETZ ÜBER DEN NATUR- UND HEIMATSCHUTZ [FEDERAL ACT ON THE PROTECTION OF NATURE AND CULTURAL HERITAGE] July 1, 1966, SR 451, AS 1637, art. 12 (Switz.).

⁶⁰³ Michel, *supra* note 82, at 614; see PRAETORIUS & SALADIN, *supra* note 91, at 120 *et seq.* (discussing the claim for the right to appeal in animal welfare matters); GOETSCHEL, *supra* note 74, at 159 *et seq.*; GOETSCHEL & BOLLIGER, *supra* note 32, at 222 *et seq.*; STÖHNER, *supra* note 87, at 112 *et seq.* See generally GIERI BOLLIGER & ANTOINE F. GOETSCHEL, *WAHRNEHMUNG TIERLICHER INTERESSEN IM STRAF- UND VERWALTUNGSVERFAHREN* 34 *et seq.* (2011) (explaining the right to appeal process).

though this is exactly what a consistent implementation of the dignity concept demands. Accordingly, veterinary authorities must consider animals' concerns in each licensing process, and they must reject applications if no clear prevailing usage interests are asserted.

In conclusion, irrespective of contradicting philosophical views,⁶⁰⁴ various open questions, skeptical astonishment, and derision from all over the world, the introduction of animal dignity protection in Swiss law is a fact. It is rightly stated that animals deserve dignity—and this is also unequivocally confirmed by the Federal Supreme Court⁶⁰⁵—regardless of whether the animals themselves are aware of their dignity and can perceive a disregard for it. Dignity cannot be explained from functional contexts, but only intrinsically in recognition of the inherent worth of the dignity-holder. The insight that animals, like all forms of life, possess this independent inherent worth⁶⁰⁶ puts all living beings in relation to each other.⁶⁰⁷ Denial of the inherent worth of an animal and its reduction to an instrumental value ignores not only that animal's dignity but also threatens its life. However, for humans, recognition of animal dignity is not free. Although it is legally considered only a relative value, it is a moral one that includes concrete obligations⁶⁰⁸ and requires a departure from established ways of industrial economic handling of animals. It must lead, expressed in positive terms, to a reconstruction of food production practices without industrial breeding, keeping, and killing of animals, to a renewal of medical

⁶⁰⁴ For an overview of the various arguments of philosophers and ethicists against the Swiss animal dignity concept, see generally Rippe, *supra* note 82, at 16 *et seq.* (providing convincing counterarguments in favor of legal animal dignity protection). Regrettably, even some animal law scholars are skeptical regarding the animal dignity concept in general. See generally, e.g., Regina Binder, *Würde erster und zweiter Klasse?—Überlegungen zur Forderung nach Anerkennung der Würde aus tierschutzrechtlicher Sicht*, 3 TIERETHIK 32 *et seq.* (2011) (arguing from an overly pessimistic standpoint that the animal dignity concept would only awaken expectations that cannot be fulfilled, resulting in no clear benefit for animal protection, and can be termed “no more than a second class dignity”). For better cooperation between animal ethicist and animal lawyers in general, see GOETSCHEL & BOLLIGER, *supra* note 100, at 190 *et seq.*

⁶⁰⁵ BGer, Oct. 7, 2009, 135 BGE II 384 (Switz.); BGer, Oct. 7, 2009, 135 BGE II 405 (Switz.).

⁶⁰⁶ See generally Engi, in ANIMAL LAW, *supra* note 87, at 72 *et seq.* (illustrating that animals, like humans, are not ‘created’ but ‘become’ (i.e., without creation by someone else)). Animals possess their own reason to exist, which leads to the fact that they should not get in a relation of complete disponibility but should be respected and protected in a fundamental unavailability. *Id.*

⁶⁰⁷ Some philosophers emphasize in this context that human dignity demands respect for animal dignity. See, e.g., Jean-Claude Wolf, *Tierschutz und Würde des Menschen*, in DIE WÜRDE DES TIERES 61 *et seq.* (Martin Liechti ed., 2002); Petra Mayr, *Die Würde des Tieres ist antastbar—Zur Überlegenheit des pathozentrischen Arguments in der Tierethik*, in WÜRDE DER KREATUR, *supra* note 80, at 233 *et seq.*; or the often cited quote of Albert Schweizer: “Who does not respect the dignity of animals, cannot take it from them, but he loses his own dignity.” Although this view is undoubtedly right, it does not give a rationale of animal dignity, but focuses on human dignity. Brenner, *supra* note 85, at 64.

⁶⁰⁸ Rippe, *supra* note 222, at 90.

and pharmaceutical research that require no animals, and to pet-keeping, sports, and entertainment industries that do not involve animal suffering.⁶⁰⁹

In juristic terms, the introduction of the dignity concept has been relatively recent, and the possible implications have yet to be fully understood. This takes time and patience, but various positive, incipient stages in Swiss animal law are obvious. Even if the recognition of animal dignity neither signifies that the use of animals by humans is questioned, nor that animals are provided with their own rights, the animal dignity concept unquestionably represents a milestone for animal welfare law. With this fundamental new approach, Switzerland has taken an ambitious and farsighted step forward into a new sphere of legal animal protection. Admittedly, there are still many other—and perhaps more important—animal welfare issues to solve than protecting animals from non-physical stresses such as humiliation or excessive instrumentalization. However, the dignity concept includes a programmatic dimension,⁶¹⁰ the importance of which should not be underestimated. Protection of animal dignity has strong appeal,⁶¹¹ and demands from humans are not only scientifically objective and logical, but also empathetic and require a deep personal commitment when judging an animal's interests.⁶¹² One can assume that once the dignity concept has found broad acceptance, both in society and in legal institutions, general awareness of the need to protect animals from any kind of cruelty will have risen enormously. In other words, a progressive animal welfare concept like the Swiss goal of animal dignity protection can indeed prove to be the motor of change in societal perceptions that subsequently paves the way for further developments in animal welfare legislation and the interpretation of other laws, as well as for improvements in jurisdiction.⁶¹³

Against the background of an increasingly and highly welcomed international collaboration in animal law matters,⁶¹⁴ the Swiss animal dignity concept can hopefully serve as a model for other countries, re-

⁶⁰⁹ See Brenner, *supra* note 85, at 65; Engi, in *ANIMAL LAW*, *supra* note 87, at 81 *et seq.*

⁶¹⁰ Michel, *supra* note 82, at 109.

⁶¹¹ Rippe, *supra* note 82, at 30.

⁶¹² Krepper, *supra* note 35, at 303.

⁶¹³ Michel, *supra* note 82, at 88 (citing Christoph Engel, *Die Grammatik des Rechts—Funktionen der rechtlichen Instrumente des Umweltschutzes im Verbund mit ökonomischen und politischen Instrumenten*, 3 GEMEINSCHAFTSGÜTER: RECHT, POLITIK UND ÖKONOMIE, PREPRINTS AUS DER MAX PLANCK-PROJEKTGRUPPE, RECHT DER GEMEINSCHAFTSGÜTER 21 *et seq.* (2000) (discussing the power of normativity and the motivating effect of legal norms)).

⁶¹⁴ This international approach and collaboration is reflected not only in the mutual adoption of established animal law concepts between national legislatures all over the world but also in the education of international animal lawyers at renowned institutes, such as at the Center of Animal Studies (CALs) at Lewis & Clark Law School in Portland, Oregon. See Natasha Dolezal, Pamela Frasch & Kathy Hessler, *Animal Law—A Global Phenomenon*, 1 GLOBAL J. ANIMAL L. 1, 1 *et seq.* (2014).

ardless of terminology. It is irrelevant whether an animal's inherent worth is called 'dignity,' 'intrinsic value,' or otherwise. Of primary importance is that national legislators realize that animals deserve to be protected beyond freedom from infliction of pain, suffering, harm, and anxiety. The Swiss Federal Council rightly considered the legal recognition of animal dignity as a first step towards acknowledging animals' independent right to exist.⁶¹⁵ However, this first step requires a commitment to take further, more deliberate steps, and this applies to Swiss law and enforcement as well. Even if there are still several complex questions to answer, namely how to conduct a fair balancing test to elaborate the distinction between a justified violation of animal dignity from a punishable disregard, the concept must lead to concrete changes in policy, legislation, and law application.⁶¹⁶ These changes will inevitably open new areas of animal welfare not yet covered by Swiss legislation. However, they require both the legislature and the enforcement authorities to consequently consider and courageously implement the animal dignity concept in practice, especially when examining traditional, everyday areas of animal use. This is the only way to ensure that animals and their dignity are truly granted the respect and protection they deserve and are entitled to by law. As in the classic novel *Utopia* by Thomas More (1478–1535), legal protection of animal dignity in a largely still anthropocentrically aligned society has as a counterpicture two sides: One side is the demonstration of an ideal state towards which one should strive. The other is the critical questioning of reality.⁶¹⁷

⁶¹⁵ Federal Council, *supra* note 34, at 663.

⁶¹⁶ See Engi, in *ANIMAL LAW*, *supra* note 87, at 78 *et seq.* (discussing proposals for a stronger emphasis of animal dignity *de lege ferenda*).

⁶¹⁷ Camenzind, *supra* note 87, at 197 (citing THOMAS MORE, *UTOPIA* (1516)).

