

The Dignity of Whales

by Antoine F. Goetschel

You whale – me human. When asked about my attitude to whales and dolphins, I feel transported back into the time when I had the good fortune on ship or on land to encounter whales and dolphins in the wild. Often thrilled by the warm, dignified look one of the animals would cast in my direction – or was it looking directly at me? Thrilled after the encounter with the whale or dolphin, which touched me so closely.

Proximity and admiration

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I feel the proximity of the animal despite the distance in space. And genuine admiration for it overcomes me, an admiration of its size and agility, for what I interpret as the joy of play, for the largely unimagined and fortunately still uncharted cultural, social and cognitive abilities. I feel related to the whale swimming or splashing in front of me, or diving below me. A cloud of thoughts envelops me gently and calls up a message from the world of electronics, "a data transmission is taking place". This inner proximity captivates me.

Does the whale also feel close to me, or am I only a moving object like any other? At any rate, my warm feeling of bonding with it is dispelled by the urgent appeal to take a stand for more nature and for its right simply to be a whale.

Being human!

For humans, it is actually a matter of course. In principle, humans can always convince themselves, “Here I am a human, I am allowed to be here”. Their right to live and to cultivate human needs is based on the idea of *human dignity*, as guaranteed by the constitution – for Swiss, this means on Article Seven of the Swiss Federal Constitution of December 18, 1998. According to this article, the dignity of human being must be respected and protected. Although we might not be able to describe precisely what is understood as “human dignity” – in any case, no one would deny that any acts of discrimination, contentious harassment or offence constitute a violation of it.¹

Allowed to be a whale?

Animals are hardly granted the same rights under law. The legal systems of the world posit a dichotomy between humans and things, considering animals to be things (exceptions reserved), and prescribe certain rules for protecting animals and species. These aim at keeping animals from experiencing pain, suffering or damage caused to them by humans, if possible, by individual human beings, that is, potential offenders.² Criminal law demands as a rule that the offender be proven to have broken the law, as a consequence of assuming that one is innocent until proven guilty. In the area of animal welfare, this means that the pain, suffering or damage incurred by an animal must be proven beyond a doubt, preferably by means of expert veterinary opinions. It is not always easy to supply such evidence. How can a water-tight case for the “suffering” endured by a captive dolphin or orca be presented in court?



I consider the concept that animals are merely to be kept from enduring pain, suffering and damage to be outmoded. The new millennium should call upon us to enter into true partnership with animals and, if possible, grant them the same benefits as humans. Such as the right simply to be an animal; to be

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acknowledged as a different kind of animal; as an individual with its own “suchness” and its possibilities for development. Like humans, animals should not be used simply as a means to an end.³ How could this sort of right be made into law?

The dignity of animals

The need for a fundamental change in our relationship to animals gave rise to the idea of granting animals “dignity”. This term, coined by the Basel theologian Karl Barth in 1945, is modelled on the ideas of the Danish philosopher Lauritz Smith in the years 1790 and 1793, and on the biblical story of creation (Genesis 1)⁴, according to which human beings are not central to the cosmos, but creatures among other creatures. Smith asserts that animals, as sentient

beings, have a right to happiness that is given by God and thus always deserving of respect.⁵ This holistic approach is reflected in the phrase “dignity of animals” and was incorporated into the constitution of the Canton of Aargau (1980) and, following various legal efforts (including those of the author)⁶, into the Swiss Federal Constitution.⁷ To my knowledge, Switzerland is the only country to have enshrined the “dignity of animals” in its constitution.

The depth and breadth of the term have not been conclusively clarified. To be specific, the “dignity of animals” has not yet been incorporated into the Animal Welfare Act of the year 1978, although revision work is ongoing. However, it can be noted that various opinions are under discussion which consider “dignity” as, for instance, the natural integrity of an animal, that is upheld as long as it can retain its independent viability, its “otherness” as an animal, its specific “suchness” and its possibilities for development despite being exploited and bred by humans.

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Violation of the dignity of whales

When is the dignity of a whale violated? Not only if the animal is forced to suffer for long periods of time before death overcomes it when caught by whalers, but also when the whale, an intelligent, endangered species protected by law in various national agreements, must serve as a dubious delicacy and when it is comprehended and treated as no more than a means to an end, a mere object of our own entertainment,⁸ which can be the case not only in captivity,⁹ but also when harassed by impertinent whale watchers in the open sea.¹⁰

To have the dignity of animals declared as a general principle of law at the international level and in other countries is the thrust of our demand. This would usher in a new comprehension of animals based on partnership, a genuine change in attitude, which nations and the entire community of nations would be behoved to acknowledge. The “dignity of animals” is not merely an appeal. The expression could serve as a solid foundation for further demands to improve animal welfare.¹¹ National laws governing animal welfare and the protection of species would have to be strengthened, as well as private norms, such as guidelines for whale and dolphin watching, and on keeping cetaceans in captivity.

Better legal protection for whales!

The legal protection of animals can be improved on two levels, the material and the formal. Law tends to distinguish between the content of a provision, such as an article in an animal welfare law concerning the size of cages, the make-up of feed, permissible methods of killing or who can be considered as a tormentor of animals, and the application of laws (formal law).

Broadening responsibility under criminal law

This is why it is all too easy for tormentors of animals to slip through loopholes in material law, because when it comes to the protection of animals, criminal law, at least in the German-speaking countries of Europe, only considers those people to be tormentors of animals who have an individualised, personal relationship to the injured or slain animal. The prevalent popular attitude is that animal tormentors are sadistic perverts. Routine forms of cruelty to animals (excessively lengthy transport, dolphins being killed as “by-catch”, whales slaughtered in Japan or the Faeroe Islands, injuries and deaths of marine mammals due to shipwrecked tankers or other environmental disasters) all too often remain beyond the pursuit of criminal law and thus unrequited.¹² A broadening of responsibility under criminal law is being demanded to include those persons or groups who aid and abet cruelty to animals directly or indirectly, and who accept such ills as those due to acquisitiveness.¹³ At the international level, in particular, efforts should be made to put more of the blame on those who pull the strings in violations of animal welfare.

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Stronger implementation of law: animals' attorneys

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There is a great need for efforts to catch up in the area of more stringent application and implementation of laws regarding animal welfare and species conservation. The deficits in animal protection are due to several causes, such as for instance loopholes in material law (not concrete enough), staff problems (lack of staff, lack of specialists, executive bodies that are insufficiently trained in legal matters) and a lack of funds.¹⁴ There is also too little protection for animals and an imbalance when their interests are defended. In court cases involving cruelty to animals, alleged animal tormentors can defend themselves and appeal judgments against them. By contrast, there are no attorneys for animals, no one who would work for an application of animal welfare laws in the interests of animals in criminal investigations and proceedings.

The Zurich animals' attorney

In the Swiss canton of Zurich, efforts are being made to remedy this ill: under pressure of a popular initiative we helped devise, an office for an "attorney for animal welfare in criminal cases" was created, "animals' attorney" for short, to our knowledge, the only such office in the entire world. The animals' attorney represents the aggrieved animal in every criminal case involving cruelty to animals perpetrated in the canton of Zurich.¹⁵

This attorney for animal welfare in criminal cases is appointed by the government council in conformance with § 17 of the Animal Welfare Act ("TSchG/ZH") at the recommendation of animal welfare organisations¹⁶ and takes part in criminal proceedings involving violations of animal welfare legislation as the legal representative of the interests of the injured animals.

Rights of the Zurich animals' attorney

The sphere of competence of the said attorney defined by §§ 13-15 of the canton's animal welfare directive takes its basic orientation from the criminal code of the canton (StPO/ZH)¹⁷ and comprises all rights of participation and inspection of a proper representative of an aggrieved party both in the investigative process and in the main proceedings.

To be specific, he has the right to inspect records, to participate in investigative actions and court hearings open to the parties, to petition and claim damages, to call witnesses and expert opinions, to make use of all legal instruments at the cantonal and national level, and to claim reimbursement for non-court costs.¹⁸ The office holder can even take part in a case when the interests of the animal are already being represented by its keeper.¹⁹ In order that said attorney can exercise his authority, the criminal prosecution and court authorities are obligated to notify him of any criminal offences reported in cases involving cruelty to animals as well as the opening of investigations, any writs of supersedeas or judgments in this regard. Moreover, the Health Directorate of the Canton of Zurich is also entitled to all the procedural rights mentioned for the representation of aggrieved animals.²⁰



Exemption from direction of the Zurich animals' attorney

Although the attorney for cases of animal welfare holds a public office, is under the organisation of the Government Council and is paid by the state in accordance with the charges for compensation of parties, he is not subject to any direction regarding the exercise of his office. A special norm was created to protect the interests of animal welfare organisations: the animals' attorney is allowed to inform an animal welfare organisation of the status and outcome of a criminal case insofar as the proceedings are the result of charges filed by the respective organisation.²¹

Area of activity of the animals' attorney

The area of practical activity of said attorney, who exercises this function as a secondary occupation, is very broad. While the number of cases of animal welfare handled by him each year averaged fewer than seventy up to 1997, since then it has regularly been far more than a hundred cases per year. Most of these were concerned with domestic animals, either kept for agricultural use or as pets, in which in particular such violations of law as improper care or neglect came to light and in some cases took on serious dimensions.²² The animals' attorney also took action in connection with the keeping of sea lions in captivity, where he was vigorously supported by the Swiss Working Group for the Protection of Marine Mammals (ASMS).

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Appraisal of the Zurich animals' attorney

By introducing an attorney for criminal animal welfare cases, which has drawn appreciative attention far beyond the borders of the canton or the country and is generally still considered to be as yet unknown anywhere else in the world,²³ the canton of Zurich has broken new ground in the area of jurisprudence. By confronting the defendant with an opponent in the form of a well-informed, committed animal welfare representative who is entitled to assert all rights of an aggrieved party on behalf of the animals involved and thus can exercise an essential influence on the course of the proceedings, the desired balance of power in criminal cases of animal welfare has finally been achieved.

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In general practice, the Zurich attorney for criminal animal welfare cases has proven to be of immense value, even if this office is still the only one of its kind ten years following its introduction. Unfortunately, there is still no comparable institution anywhere else in Switzerland or other countries. The only exception is the canton of Bern, in which the umbrella organisation of the Bern animal welfare organisations has been entitled to take part in criminal cases as a private plaintiff since 1 January 1998.²⁴

Experience so far and the wide-ranging acceptance clearly show that it meets a genuine need and, especially owing to the great interest evinced by the media, is developing a remarkable significance not only in pursuing criminals, but also in view of educative and preventive animal welfare, i.e. the avoidance of further cruelty to animals.²⁵

Said attorney has not only raised the general level of awareness for criminal norms related to animal welfare, but also improved the motivation of the investigative and court authorities in charge of enforcement, who now give animal welfare more respect and no longer belittle crimes of this nature.²⁶

Demand for extending his competences

Despite all the positive aspects, the circumstance that the sphere of activity of the attorney is limited to criminal cases must be seen in a negative light (the designation used in practical parlance of "animals' attorney" or "animal welfare attorney" is thus not entirely accurate). He is not allowed to take part in administrative proceedings, for instance, not even those related to prohibitions of keeping animals or the granting of dispensations – he is not even informed of

these, although steps taken to this effect would be thoroughly pertinent to the criminal assessment of a perpetrator.

An attorney for marine mammals?!

The outstanding track record of the Zurich animals' attorney makes us ask whether we should establish a similar office for the protection of marine mammals in the open sea. A "whales' attorney" (to give him a grossly simplified designation) would represent the interests of marine mammals in criminal cases against those responsible for polluting oceans, in particular for accidents involving tankers, for the illegal slaughter of whales, for violations of the principles of planning and building in ocean bays, and for other adversities related to animal protection. The "whales' attorney" would motivate and support (and pressure) the local director of public prosecution and the local criminal courts to carry out stringent criminal investigations and to pass verdicts drastic enough to discourage potential wrongdoers. The actual areas of activity and competence of this attorney would have to be uncovered together with specialists in criminal law as related to animal and species protection, as well as maritime legislation. However, creating an independent, professionally competent agency to look after the right of marine mammals to lead a life with dignity and well-being is an important postulate of legal policy. The urgency of this is shown by the many inadequately penalised violations of national and international regulations protecting marine mammals brought up at the whale zone 02 conference.

Rights for whales and dolphins?

For decades, the demand to grant human rights to great apes, primarily voiced by the USA and Australia, has been growing increasingly strident.²⁷ Once this is implemented, whales and dolphins should also be granted these rights in view of their similarity to humans. In European law, this postulate is being expanded to cover all animals.²⁸ In principle, this is allied to the idea that animals must be liberated from their condition of being denied all rights, just as were slaves, women and children in former times. Exercisable rights would give them a position like that intrinsic to human beings – a weighty demand. Especially in regard of whales and dolphins, which are extremely advanced species, the parallels to humans are practically undeniable. And the similarity between humans and whales we briefly brought out at the beginning must also apply to immediate "human" rights for these animals, as well.

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Indeed, animals should be granted a substantially better legal rank. The existing instruments for implementing their protection are inadequate – in Switzerland and elsewhere. And the discussion on the rights of animals should be grating and incendiary. As should prickly questions such as why not lower vertebrates, or even invertebrates? Who should represent their rights in court? For at least in accordance with Swiss and German law, claims of certain people (children, the mentally ill) and estates (foundations) cannot be defended by anyone, but only by legal representatives commissioned for the specific case. The office of animals' attorney provides a satisfactory answer to this question.

Outlook for the future

An animals' attorney who represents the interests of animals in their application of criminal and administrative law should be established at both the national and international levels.

In my point of view concerning animal ethics and legal policies, the legal position of animals, namely of whales and dolphins, calls for considerable improvement. The laws, directives and guidelines protecting them must be given more bite. In principle, the dignity of these animals is worthy of being protected both nationally and internationally, as is their right to freedom from pain, suffering and injury. And all judicial norms should be easier to apply. An animals' attorney who represents the interests of animals in their application of criminal and administrative law should be established at both the national and international levels. In particular, a "whales' attorney" should be appointed who would obligate local public prosecutors and criminal courts to carry out stringent criminal investigations and to pass verdicts drastic enough to discourage potential wrongdoers.