

Animal Welfare Law in Motion? – Comment on the Latest Amendments to the Animal Welfare Act in Germany

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This article on the Amendments to the German Animal Welfare Act of 2013 is intended to provide a short overview² of the novel provisions in German animal welfare legislation, including comparison with the previous state of the law and providing an outlook going beyond the current state of the law.

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1. Introduction

The latest version of the German Animal Welfare Act underwent some revisions in 2006.³ At its core, the Animal Welfare Act⁴ had not been revised for many years. The latest developments in German Animal Law were on a constitutional level in 2002. In 2002 Article 20a of the Constitution⁵ was amended by adding the phrase that animals, too⁶, are protected by the Constitution.⁷ The third amendment to the Animal Welfare Act which has just been adopted will not touch the core of the Act itself.

2. Summary of the New Provisions

The German Parliament has already adopted the Amendment as a new legislative act.⁸ Also the

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2 This overview is only exemplary and not exhaustive in detail, but to conclude the general amendments.

3 See *BGBI. I* 2006, page 1206, 1313.

4 Means 'former version', abbreviated hereinafter as 'f.v.' in contrast to the amended, new version 'n.v.'.

5 The German Constitution is actually called 'Grundgesetz', which can be translated as e.g. 'Basic (Constitutional) Law'. In the following the term 'Constitution' is used as this reflects the meaning of the 'Grundgesetz' and serves simplification.

6 In addition to the already existing state objective clause which protected the environment since 1994.

7 To the implementation of this phrase and an evaluation after 10 years of its existence, see summarizing ALICE FERTIG / LENA HILDERMANN, 10 Jahre Staatsziel Tierschutz in Deutschland [10 years constitutional state objective Animal Welfare in Germany], in *Animal Law – Tier und Recht*, Developments and Perspectives in the 21st Century, published by MARGOT MICHEL / DANILEA KÜHNE / JULIA HÄNNI, Zürich, 2012.

8 The latest version of the new Animal Welfare Act within the legislative procedure was adopted in the

'Second Chamber' in Germany, representing the federal states and known as the 'Bundesrat', voted in favour⁹ of the Amendment on 1 February 2013.¹⁰ Before that it was uncertain if the 'Bundesrat' allowed the Amendment to pass.¹¹ As the legislative process has almost¹² come to conclusion, the Amendment will enter into force soon. According to Article 3 of the Amendment¹³ it will enter into force the day after its announcement.

2.1. Implementation of EU Directive on Animal Testing¹⁴

Directive 2010/63/EU¹⁵ had to be transposed into national legislation by 10 November 2012 and these laws, regulations and administrative provisions are to be applied subsequently from 1 January 2013.¹⁶ The Amendment achieves some of this implementation, with more detailed regulation and implementation of the Directive planned in another bill, the Animal Welfare Regulation on Animal Testing.¹⁷

Under Art. 8(3) of the Directive, animal testing on great apes is to be almost completely prohibited. This article requires member states to issue a general prohibition of animal testing on great apes. The German bill makes now use of the protection clause of the Directive¹⁸, which allows the member states not to prohibit tests on great apes in general. Great apes are the four species of the primates family apart from the human being himself, i.e. chimpanzees, bonobos, gorillas and

Bundestagsausschuss für Ernährung, Landwirtschaft und Verbraucherschutz [Committee on Nutrition, Agriculture and Consumer Protection] on 11 December 2012 by voting of the CDU/CSU and FDP parliamentary group. This latest version, Bundestagsdrucksache 17/11811, is summarized in the following and available on: <http://dipbt.bundestag.de/dip21/btd/17/118/1711811.pdf> (called 20130107). The basis for that version was the bill by the German Federal Government of a third amendment to the Animal Welfare Act, Bundestagsdrucksache 17/10572, available on: <http://dipbt.bundestag.de/dip21/btd/17/105/1710572.pdf> (called 20130107). The latest version of the Amendment was finally adopted by the German Parliament by voting of the CDU/CSU and FDP parliamentary group against the votes of the SPD, Bündnis 90 / Die Grünen and LINKE parliamentary group on 13 December 2012, see the official protocol available on: <http://www.bundestag.de/dokumente/protokolle/amtlicheprotokolle/2012/ap17214.html>, TOP 24 (called 20130107).

- 9 To explain the quite complicated procedure of participation of both houses would go beyond the scope of this comment.
- 10 See http://www.bundesrat.de/cln_340/nn_1934482/SharedDocs/Drucksachen/2013/0001-0100/4-13_28B_29.templateId=raw.property=publicationFile.pdf/4-13%28B%29.pdf (called 20130419).
- 11 The majority in the 'Bundesrat' is not the same as it is in the 'Bundestag' ['first chamber', the German Parliament], which means not a conservative-liberal (CDU/CSU-FDP) one, but other constellations including the Social-Democrats (SPD), the Greens and the Socialists (LINKE).
- 12 It only has to be issued and announced.
- 13 See <http://dipbt.bundestag.de/dip21/btd/17/105/1710572.pdf> (called 20130107), page 19.
- 14 The topic of implementation of the Directive only gets a cursory treatment here. For a comprehensive scrutiny, see the legal expert opinion by ANNE PETERS, Rechtsgutachten zu verschiedenen Fragen im Zusammenhang mit der EU-Tierversuchsrichtlinie [Legal expert opinion to several questions with regard to the EU Directive 2010/63/EU], on behalf of six German Animal Welfare Associations, published amongst others on: http://www.djgt.de/system/files/106/original/Rechtsgutachten_Umsetzung_EU-Tierversuchsrichtlinie.pdf (called 20130118) and the article of CHRISTOPH MAISACK, Zur Neuregelung der Tierversuche [To the latest regulation of animal testing], *NuR* 2012, page 745 to 751, free version published on: http://www.djgt.de/system/files/123/original/NuR20120916_Maisack_Umsetzung_EU_Tierversuchsrichtlinie.pdf (called 20130118).
- 15 See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010L0063:DE:NOT> (called 20130107).
- 16 See Article 61(1) of Directive 2010/63/EU.
- 17 See fn. 14 and the critical letter of six important Animal Welfare Associations in Germany addressed to the state level ministers for agriculture in the 'Bundesrat', based on the legal expert opinion by Prof. Dr. Anne Peters, LL.M. (fn.10), http://www.tierrechte.de/images/stories/Tierversuche/Brief_BR_Agrarausschuss_Versuchstiere.pdf (called 20130118).
- 18 Article 55 of the Directive, which originally was involved under influence of the German Government and which leaves a leeway of implementation to the member states - also legally correct to the detriment of Animal Welfare.

orangutans.¹⁹

Tests on other primates, for example rhesus macaques, which are not considered to be great apes but primates in general, are not reduced to a minimum or prohibited.²⁰ Animal testing on primates is not forbidden under the Directive, but it is strictly regulated under Article 8(1) and (2). The German implementation of the Directive on animal-testing does not impose any restrictions beyond implementation of the Directive itself and thus does not use the leeway of implementation in favour of animal welfare, but rather to the detriment of animal protection.

In addition, Article 9 of the Directive restricts the use of animals taken from the wild for animal testing. This principle is not reflected in the Amendment, as wildlife taking is subject to more general regulation under German law.²¹

Apart from the provisions governing animal testing on primates and wildlife, the Amendment constitutes a revision of the whole chapter on animal testing in the previous version of the German Animal Welfare Act. For example, the purposes for which animal testing may be used are extended to the promotion of animal husbandry conditions, species conservation and protection of the environment, forensic examination and (further) education.²² Furthermore, the Directive generally imposes approval requirements for animal testing, but the new version of the German Animal Welfare Act in many cases²³ only requires the filing of a notification with the supervisory authority. Thus, the approval procedure for animal testing has not been implemented in line with the Directive.

Even if Article 2(1) of the Directive states that the member states may impose stricter regulations with regard to the protection of animal well-being, at various points the leeway with regard to implementation is used to the detriment of animal welfare.²⁴ This legislative decision is extremely questionable if one takes into account the impact of the constitutional state objective of animal welfare under Article 20a of the German Constitution. In particular, the protection clause in Article 55 of the Directive, which already was inserted due to the effort of the German Government,²⁵ is transposed extensively, for example with regard to the permissibility of testing causing a maximum of pain or suffering.²⁶ The implementation of the Directive which transposes the permissibility of tests causing prolonged pain into the permissibility of testing that causes permanent pain might indeed be analysed as a violation of European Law.²⁷ The wording of the Directive certainly makes

19 Gibbons could be considered to be included of the wording, if other than the English or French versions of the Directive are analysed, as possibly only the colloquial meaning of 'Great Apes' is meant, see reasoning ANNE PETERS, fn.14, page 78.

20 The draft of the Animal Welfare Regulation is not published officially yet, as it is planned to be implemented after the Amendment of the Animal Welfare Act in a second step and then would base upon § 9(3) Animal Welfare Act n.v. The assessment herewith is therefore only based on a most likely draft to be published, as e.g. available on: <http://www.lv-westfalen.de/files/anlage%208.pdf> (called 201301020).

21 See § 9(4) no. 2 of the Animal Welfare Act n.v. in conjunction with § 20 of the Draft of the Animal Welfare Regulation on Animal Testing.

22 See § 7a(1) No. 2 lit c), 3, 7, 8 and sentence 2 Animal Welfare Act n.v.

23 See § 8a of the Animal Welfare Act n.v.

24 See summarizing CHRISTOPH MAISACK, fn. 10.

25 Ibid, page 3.

26 Ibid, page 4, 10.

27 See ANNE PETERS, fn. 14, page 57.

clear that testing causing permanent pain was supposed to be prohibited.²⁸ In summary, there are reasonable doubts as to the legality and correctness of Germany's implementation of the Directive at numerous points.

2.2. Prohibition on Torture Breeding

The Amendment also amends the pre-existing article of the Animal Welfare Act, Article 11b, which prohibits any breeding that causes suffering. The criteria, by which one determines whether breeding generally causes pain, suffering or physical harm, are now defined in greater detail. The foreseeability that breeding will entail missing parts of the body or missing organs and pain, suffering or physical harm is now premised on the knowledge of breeders. The original, broadly worded general and objective²⁹ expectation of the above-referenced criteria is now defined more narrowly by the condition that breeders must have knowledge that such symptoms may be expected.

This definition of torture breeding could be seen as an argument for foreseeability and legal certainty,³⁰ but on a substantial analysis the 'knowledge of breeders' does not provide any legal certainty in fact, as it even includes subjective opinions of one or more breeders. In addition, it tends to prefer breeder's associations, vesting discretion in them to decide on their own whether or not a given breed entails pain or suffering. It is likely that these bodies will not define many breeds as constituting torture breeding, and in consequence one may assume that fewer breeds will become prohibited.

Following consultations in December 2012 within the parliamentary Committee on Nutrition, Agriculture and Consumer Protection the prohibition on the exhibition of torture breeding animals was deleted.³¹ Thus, the latest version of the Amendment does not contain any additional prohibitions on exhibiting torture breeds.

2.3. Prohibition on Zoophilia

Article 3(13) of the new version of the German Animal Welfare Act expresses a clear prohibition on any sexual motivated interaction with an animal. This was incorporated during the legislative proceedings; before zoophilia used to fall under the general prohibition on treating animals in a way that causes pain, suffering or physical harm.³² This clarification may be regarded as an improvement, as there is now a general presumption that any sexual interaction between human and non-human creatures is adverse to animal welfare.

2.4. Other Changes

28 Ibid, page 57.

29 See ALMUT HIRTH / CHRISTOPH MAISACK / JOHANNA MORITZ, *Tierschutzgesetz, Kommentar* (Animal Welfare Act, Commentary), 2. Auflage, München, 2007, § 11 b, Recital 6 [cited as: HIRTH / MAISACK / MORITZ]; ALBERT LORZ / ERNST METZGER, *Tierschutzgesetz, Kommentar* (Animal Welfare Act, Commentary), 6. Auflage, München, 2008, § 11 b, Recital 5 [cited as: LORZ / METZGER].

30 See the *prima facie* correct argumentation of the governmental explanation, available on: http://www.bmelv.de/SharedDocs/Standardartikel/Landwirtschaft/Tier/Tierschutz/Versuchtierrichtlinie_Tierschutzgesetz.html#doc2631814bodyText5 (called 20130120).

31 See the reasons, available on <http://dipbt.bundestag.de/dip21/btd/17/118/1711811.pdf>, page 34 (called 20130119), (further explanations to this document see fn. 7) that if torture breeding is not allowed, the prohibition of the exhibition of those animals is self-explanatory.

32 See to the criminal legal aspects under § 17 Animal Welfare Act f.v., LORZ / METZGER, fn. 26, § 17, Recital 32.

Article 3(12) now imposes a prohibition on giving animals away as prizes in public competitions or lotteries, unless the potential winners are generally people expected to have the expertise to keep an animal. Under Article 3 in conjunction with Article 18 of the Animal Welfare Act, a violation of any of these prohibitions will be punished as a misdemeanour³³ by fine of up to € 25,000.³⁴

Animal keepers and animal producers are required to establish internal monitoring systems and indicate the level of animal welfare adhered to within their animal husbandry system. If one considers the grounds on this regulation the voluntary nature should be underlined.³⁵

Traditional horse thigh branding, which reflects the different breeders' associations, is required to be done under anaesthesia as of 2019. The proposal to prohibit thigh branding based on the fact that horses were easily identifiable by chipping was refused due to reasons of tradition.³⁶

The castration of piglets without anaesthesia is prohibited as of 2019, as a result of the deletion of the previous exemption³⁷ of the need to use anaesthesia when castrating piglets up to the 8th day of life.³⁸ This novel provision was a very contentious issue between Animal Welfare Associations, Animal Producers Associations and the regulating Ministry of Nutrition, Agriculture and Consumer Protection.³⁹ Thus the deadline for castration without anaesthesia was extended until the end of 2018 in order to give producers enough time to make adjustments.

The Amendment establishes the power to issue statutory ordinances to the Ministry of Nutrition, Agriculture and Consumer Protection with regard to the prohibition or limitation of animal wildlife in circuses.⁴⁰

Although not directly reflected in the Amendment itself, one consideration underlying the slow development of animal welfare legislation is intended towards the abolishment of so called 'curative interventions'.⁴¹ There is an end date foreseen for piglet tail and chicken beak shortening without anaesthesia. An awareness of the need not merely to adjust animals to their environment but to adjust the conditions around them to their requirements seems finally to have reached the

33 Recommending the classification of a misdemeanour in contrast to a criminal act with regard to the prohibition of zoophilia, see JOST-DIETRICH ORTH, Zur Sanktionierung zoophiler Handlungen [To the sanctions on acts of zoophilia], page 12, published on http://www.djgt.de/system/files/117/original/Verbot_Zoophilie_Okt_12.pdf (called 20130122).

34 § 18(4) distinguishes between general fines up to € 5,000 and greater misdemeanours up to a fine of € 25,000.

35 These considerations guide the whole bill according to the representative of the FDP parliamentary group, see the plenary protocol of the parliamentary debate on 13 December 2012, available on: <http://dip21.bundestag.de/dip21/btp/17/17214.pdf> (called 20130109).

36 See e.g. <http://www.trakehner-verband.de/home/schenkelbrand>; http://www.pferd-aktuell.de/7051_1&template=HTML (German Riders' Association - FN); <http://www.bauernverband.de/bundestag-erhoeht-tierschutzanforderungen> (called 20130120).

37 See the previous § 5(3) No. 1a) Animal Welfare Act f.v. which transposed EU Directive 2001/93 in 2006; see further details LORZ / METZGER, fn. 26, § 5, Recital 26.

38 See Article 5(1) S.1 of the latest bill version, BT-Drucksache 17/10572 in conjunction with BT-Drucksache 17/11811 (fn. 7) in conjunction with Article 21(1).

39 See only <http://www.bauernverband.de/bundestag-erhoeht-tierschutzanforderungen> or <http://www.tierrechte.de/themen/politik/interview-zur-novelle-des-tierschutzgesetzes> (called 20130120).

40 See § 11(4) of the Amendment.

41 See the considerations of the decisive ministry on the abolishment of 'curative interventions' available on: http://www.bmelv.de/SharedDocs/Standardartikel/Landwirtschaft/Tier/Tierschutz/Versuchtierrichtlinie_Tierschutzgesetz.html#doc2631814bodyText5 (called 20130120).

authorities.

3. Comprehensive Assessment

A comparison of the Amendment with the previous state of the law in terms of the provisions of the Animal Welfare Act is easily and quickly done. By contrast with what stakeholders and animal welfare lobbies have asked for, the new provisions are spare and not encouraging. As for example the 'Bundesrat'⁴² and non governmental parliamentary groups had demanded a complete and clear prohibition of animal wildlife in circuses, the Amendment only establishes a power to issue statutory ordinances. The main part of the Amendment only transposes⁴³ EU law⁴⁴ into national legislation, which was a due obligation and thus it was urgent. There remains a lack of really reforming or challenging contents. Whilst there are some amendments to areas of special regulation such as piglet castration or thigh branding, the Amendment produces no profound changes.

What might be considered interesting is the timing of the Amendment at the end of the legislative period, which is very similar to the timing of the first⁴⁵ German Animal Welfare Act in 1972.⁴⁶ Within the supportive parliamentary groups, there was great pressure to argue in favour of and defend this Amendment, particularly in reference to the emphasis on voluntary elements contained with this bill. Unfortunately, if Parliament emphasises the voluntary elements of a bill, what this means is nothing more than to say that the legislation has achieved nothing at all in terms of promulgating an actual legal norm.

4. Public Reactions and Future Perspectives

The legislative process between the first draft of the Amendment and the final, adopted version amounted essentially to a certain dearth of real legal changes.⁴⁷ Parliament rejected a fundamentally draft Amendment (which was much more ambitious) which had been prepared by the Green party.⁴⁸ That draft could have laid down much greater prohibitions on curative interventions than the final version contains, a reduction on the length of permitted animal transports, full implementation of the EU Directive on Animal Testing in line with the constitutional state objective of animal welfare, enhanced certification of expertise requirements in animal husbandry on the part of animal keepers, prohibitions on the use of wildlife in circuses, and might have introduced – at the federal level – the option of permitting animal welfare associations to file legal actions etc.⁴⁹ There were many, very substantial alternatives to the bill ultimately adopted by Parliament, but even in terms of the majority draft, the legislative process surrounding this Amendment was characterised by a real lack of concern for animal welfare. This was expressed and seen for example in very late debates in

42 In its decision on 20 September 2011, available on:

http://www.bundesrat.de/cln_340/nn_2034972/SharedDocs/Beratungsvorgaenge/2011/0501-600/0565-11.html
(called 20130419).

43 Which is unlikely to be in full compliance with the Directive, see 2.1 above.

44 Above mentioned Directive 2010/63/EU on Animal Testing.

45 After the previous version from November 1933, see HIRTH / MAISACK / MORITZ, fn. 26, Einführung, Recital 3.

46 See HIRTH / MAISACK / MORITZ, fn. 26, Einführung, Recital 5.

47 See only the last parliamentary debate on 13 December 2012 at approximately 11.30 pm, fn. 31.

48 See the official protocol available on:

<http://www.bundestag.de/dokumente/protokolle/amtlicheprotokolle/2012/ap17214.html>, TOP 24 (called 20130107).

49 See the bill of the green parliamentary group, Bundestagsdrucksache 17/9783, available on:

<http://dipbt.bundestag.de/dip21/btd/17/097/1709783.pdf> (called 20130120).

Parliament⁵⁰ and in emotional and impolite behaviour by parliamentarians during the parliamentary debates.⁵¹ All in all, public reaction might be characterised as disparaging to moderate. Animal welfare associations were greatly disappointed,⁵² whilst the public media tried to achieve a balance between the different positions⁵³ and animal producer's associations, which actually are treated quite mildly by the Amendment, called it challenging⁵⁴.

In summary, it can be ascertained that - enacting this Amendment - it is more than doubtful⁵⁵ that Germany acts in compliance with the EU Directive on Animal Testing.⁵⁶ Furthermore, this 'reform' is only a toothless tiger. From an already modest bill more and more regulations were weakened during the legislative process. This Amendment amounts very little in terms of substance. Yet, the Amendment does not undermine any animal welfare efforts. Other legislative majorities might discuss the more ambitious draft from the Green party again in the future.⁵⁷ But in 2013 the chance for a real reform in the German law of animal welfare was lost.

50 See only the last parliamentary debate on 13 December 2012 at approximately 11.30 pm, fn. 31.

51 See the protocol of the parliamentary debate on 13 December 2012 at approximately 11.30 pm, fn. 31.

52 See e.g. <http://www.tierrechte.de/presse-a-magazin/pressemitteilungen/14-dezember-2012-novellierung-tierschutzgesetz-regierungsfraktionen-stimmen-fuer-mehr-tierquaelerei> (called 20130120).

53 See two German daily newspapers <http://www.faz.net/aktuell/gesellschaft/neues-tierschutzgesetz-bauern-duerfen-ferkel-laenger-narkosefrei-kastrieren-11993706.html> or <http://www.taz.de/Tierschutzgesetz-Novelle/!107439/> (called 20130120).

54 See <http://www.bauernverband.de/bundestag-erhoeht-tierschutzanforderungen> and <http://www.topagrar.com/news/Home-top-News-847162.html> (called 20130120).

55 See ANNE PETERS, fn. 27 and the recommendation of the Committee on Agriculture and Consumer Protection of the 'Bundesrat' of 21 January 2013, page 1, available under:

http://www.bundesrat.de/cln_340/nn_1934482/SharedDocs/Drucksachen/2013/0001-0100/4-1-13.templateId=raw.property=publicationFile.pdf/4-1-13.pdf (called 20130419).

56 The Amendment is only in compliance with EU legislation considering the timing, not its content. As consequence of missing implementation the Directive will have direct effect, see Judgements of the European Court of Justice (ECJ) of 6 October 1970 in the case C-9/70 *Leberpfennig*, ECR [1970] p. 825; of 5 April 1979 in the case C-148/78 *Ratti*, ECR [1979] p. 1629; of 14 July 1994 in the case C-91/92 *Faccini Dori*, ECR [1994] p. I-3325.

57 If there were majorities formed according to the socialdemocratic-green majority within the 'Bundesrat' after the Parliament's election on the federal level on 22 September 2013.