



The dignity of animals and the evaluation of interests in the Swiss Animal Protection Act

A position paper issued by the Ethics Committee for Animal Experimentation of the Swiss Academies of Arts and Sciences

Introduction

The fact that the concept of dignity is enshrined in the Swiss Federal Constitution implies that animals are to merit moral consideration for their own sake. The purpose of the Swiss Animal Protection Act of 16 December 2005 is to protect not just the welfare but also the dignity of animals.

But what does this mean in practice for researchers conducting animal experiments? This question is not clearly answered either by the Animal Protection Act or by the Ordinance. The formulations used in the German version, in particular, are not consistent. The question thus arises how account is to be taken of the dignity of animals as required by the Federal Constitution. In addition, what constitutes – and what is the difference between – a *violation of dignity* and *failure to respect dignity*? In the mandatory evaluation of interests, researchers face the question of whether violation of dignity needs to be taken into consideration as a stress factor in its own right.

In this position paper, the Ethics Committee for Animal Experimentation wishes, firstly, to set out its views on the use of the term "dignity". The paper is also intended to provide guidance for researchers on interpreting the Animal Protection Act with regard to the dignity of animals and the conduct of the evaluation of interests.

Purpose

The goals of this position paper are threefold:

- it draws attention to a certain lack of consistency in the use of terms such as "failure to respect", "violation" and "protection" of dignity and "taking account of dignity" in the Swiss Federal Constitution¹, the Animal Protection Act (TSchG)² and the Animal Protection Ordinance (TSchV)^{3,4},
- it investigates the meaning of the terms "respect for" and "failure to respect" dignity in the procedure for the evaluation of interests, and
- it proposes that the recommended formulations should be consistently applied.

¹ Federal Constitution of the Swiss Confederation of 18 April 1999 (SR 101) (English version: www.admin.ch/ch/e/rs/101/index.html)

² Animal Protection Act of 16 December 2005 (SR 455) (www.admin.ch/ch/d/sr/c455.html)

³ Animal Protection Ordinance of 23 April 2008 (SR 455.1) (www.admin.ch/ch/d/sr/c455_1.html)

⁴ The terms "failure to respect dignity" (*Würdemissachtung*) and "violation of dignity" (*Würdeverletzung*) are used alongside each other in the German version. The French version consistently uses the term "porter atteinte à la dignité", and the Italian version "ledere la dignità".

Constitutional basis for the "dignity of living beings"

The principle that, in federal legislation, account is to be taken of the dignity of living beings has applied in Switzerland since it was approved in the popular vote of 17 May 1992⁵. In the current Federal Constitution⁶, it is specified in Article 120 Paragraph 2⁷ on non-human gene technology⁸:

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.

This article on the assignment of responsibilities⁹ gives the Confederation a law-making mandate¹⁰ to protect humans and the environment against abuses of biotechnology, together with the "material directive" to take account of the dignity of living beings in this process.¹¹ With the adoption of the concept of "dignity of living beings", the Swiss Federal Constitution currently goes further in its protection requirements than comparable Constitutions – e.g. those of other European countries or the US. Meeting these requirements is highly challenging.

Legal foundations for the dignity of animals

The Animal Protection Act and the Animal Protection Ordinance which came into effect on 1 September 2008 comply with the above-mentioned directive. The purpose of the Animal Protection Act is "**to protect the dignity and welfare of animals**".¹²

In Article 3 of the Animal Protection Act, "dignity" is defined as follows:

*the inherent value of the animal, which is to be respected by anyone who handles it; the dignity of animals is not duly respected if they are subjected to stress which cannot be justified by overriding interests; stress involves in particular the infliction of pain, suffering or harm on animals, frightening or degrading them, profoundly altering their appearance or capacities, or unduly instrumentalizing them.*¹³

⁵ Popular vote of 17 May 1992 on the Federal Decree concerning the popular initiative "against abuses of reproductive technology and biotechnology in humans" (counterproposal). For detailed results of the vote and the Federal Council's explanatory pamphlet see: www.admin.ch/ch/d/pore/va/19920517/index.html.

⁶ The new, fully revised Federal Constitution came into force on 1 January 2000. Article 120 Paragraph 2 thereof reproduces the wording of the clause approved in the popular vote of 17 May 1992 (Dispatch of 20 November 1996 on a new Federal Constitution, No. 96.091, re Article 110 in: Federal Gazette 1997, Vol. 1, pp. 1–642).

⁷ Art. 120 of the Federal Constitution of the Swiss Confederation (www.admin.ch/ch/e/rs/101/a120.html).

⁸ According to prevailing doctrine and case law, living beings are endowed with dignity independently of non-human gene technology: Ehrenzeller et al. (Eds), Die Schweizerische Bundesverfassung, St Galler Kommentar, 2008, commentary on Art. 80, margin no./Rz 8. Cf. also the justification given by the Federal Supreme Court in its two decisions on the banned Zurich primate experiments: «Die Beachtung der Würde der Kreatur wird zwar nur in der Kompetenzvorschrift der Gentechnologie im Ausserhumanbereich ausdrücklich erwähnt, dort aber als etwas Existierendes vorausgesetzt. Nur etwas Existierendem kann Rechnung getragen werden. Kreaturen kommt deshalb unabhängig von der Gentechnologie im Ausserhumanbereich Würde zu.» (Schweizerisches Bundesgericht, Urteile vom 7. Oktober 2009 (www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm), Nr. 2C_421/2008 und 2C_422/2008, Erwägung Ziffer 3).

⁹ The Confederation only has legislative responsibilities in those areas explicitly transferred to it by the Constitution (Articles 3 and 5, Federal Constitution). In all other areas, responsibility remains with the cantons.

¹⁰ Ehrenzeller et al. (Eds), Die Schweizerische Bundesverfassung, St Galler Kommentar, 2008, commentary on Art. 120, Rz 13.

¹¹ Dispatch of 20 November 1996 on a new Federal Constitution, No. 96.091, re Article 110 in: Federal Gazette 1997, Vol. 1; Ehrenzeller et al. (Eds), Die Schweizerische Bundesverfassung, St Galler Kommentar, 2008, commentary on Art. 120, Rz 15.

¹² Art. 1 TSchG (www.admin.ch/ch/d/sr/455/a1.html).

¹³ Art. 3 TSchG (www.admin.ch/ch/d/sr/455/a3.html).

This legal definition links the dignity of animals to the instrument of the evaluation of interests, making it clear that dignity itself is not a component of the interests to be evaluated in the assessment of an animal experiment. According to this definition, respect for the dignity of animals calls for a careful evaluation of interests, taking a variety of possible stresses into consideration. These include not only pain, suffering, harm and anxiety – listed from a pathocentric viewpoint in the old Animal Protection Act of 1978 – but also alterations of animals' appearance or capacities, degradation and instrumentalization. This means that account is to be taken of the dignity of animals by means of an evaluation of interests. The evaluation of interests, forming part of the definition of the dignity of animals under Article 3 TSchG, is thus an essential requirement whenever animals are handled, not only in animal experiments.

From this it follows that dignity is not duly respected in cases where an evaluation of interests is not performed or where, despite an evaluation yielding a negative result – i.e. the stresses are not justified by overriding interests – animals are still treated or handled as planned¹⁴ (see Figure).

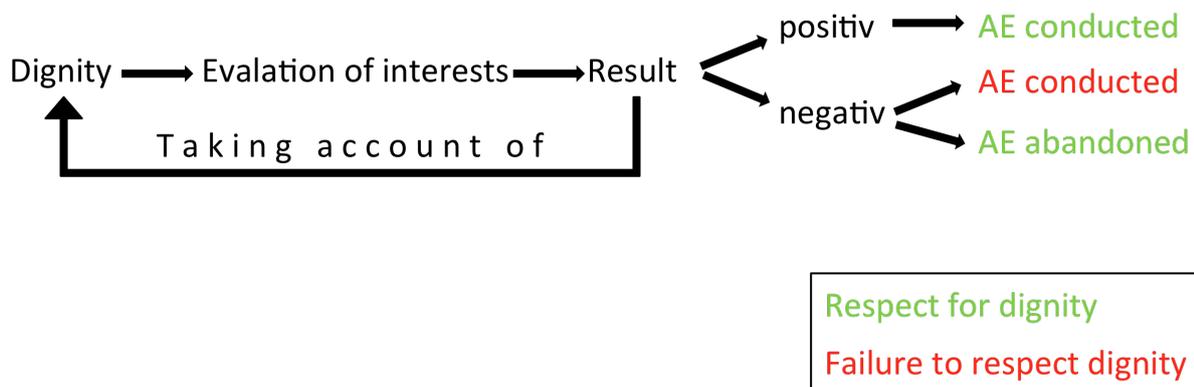


Figure: Respect for the dignity of animals involves performing an evaluation of interests and being guided by the result (AE = animal experiment).

Application of the concept of dignity in the evaluation of interests

This line of argument is not universally accepted. A rival view holds that the dignity of animals should itself be taken into consideration in the evaluation of their interests.

For example, in various articles of the new Animal Protection Act, it is stated that a certain way of handling animals is not permissible if it subjects them to pain, suffering or harm, frightens them, or "otherwise fails to respect their dignity" (see Annex). Formulations of this kind imply that there are specific individual actions which in themselves *fail to respect* animals' dignity, thereby placing the dignity of animals on the same level as types of stress (pain, suffering, anxiety, etc.). However, respect for the dignity of animals is not linked to specific characteristics or actions, but demands an ethically responsible approach to animals – i.e. performing a careful evaluation of interests and being guided by the result.

¹⁴ Ehrenzeller et al. (Eds), Die Schweizerische Bundesverfassung, St Galler Kommentar, 2008, Art. 120, Rz 16ff.

In the Animal Protection Act, impairments and stresses are sometimes described as a *violation of dignity*. From this it follows that the dignity of animals is respected if the violation of their dignity can be justified via a careful evaluation of interests¹⁵. The consequence of this conception would be the classification of violations of dignity into degrees of severity. However, the Committee takes the view that dignity is to be regarded not as a quantitative, but as a qualitative, all-or-nothing concept. It is thus opposed to the description of stress and impairment of animals as a "violation of dignity".

Placed in the scales on the animals' side are the pathocentric stresses and impairments to which they are subjected. To these have been added the non-pathocentric stresses of degradation, alteration of appearance or capacities and undue instrumentalization. To permit the assessment of pathocentric stresses in animal experiments, the Federal Veterinary Office has issued guidelines on prospective classification of experiments by severity level^{16,17}. In the view of the Committee, guidelines on severity are not possible for the violation of dignity, but are only to be defined for the individual stress factors¹⁸. The dignity of animals lies above the scales in which competing interests are weighed. By performing a careful evaluation of interests and being guided by the result, it is ensured that adequate account is taken of the dignity of animals.

In several articles of the Animal Protection Act, the expression "otherwise" is used to shorten enumerations of impairments and stresses. In the view of the Committee, it is important to emphasize that "otherwise" cannot be taken to mean stresses additional to those enumerated in the definition given in Article 3 TSchG. This is true irrespective of whether the expression "otherwise" is used in conjunction with the (recommended) wording "fail to respect dignity" or the (deprecated) wording "violate dignity". The Committee does not rule out in principle the possibility that criteria for animals' impairment or subjection to stress other than those included in the legal definition given in Article 3 may be developed in the future. However, this is not a question for discussion at present since, in the Committee's view, the criteria are for the time being exhaustively enumerated in Article 3.

¹⁵ The dignity of animals. A joint statement by the Federal Ethics Committee on Non Human Biotechnology (ECNH) and the Federal Committee on Animal Experiments (FCAE), concerning a more concrete definition of the dignity of creation with regard to animals. Originally published in 2001, reissued in 2008 (www.ekah.admin.ch/fileadmin/ekah-dateien/dokumentation/publikationen/EKAH_Wuerde_des_Tieres_10.08_e_EV3.pdf).

¹⁶ Articles 24 and 25 of the FVO Ordinance of 12 April 2010 on the keeping of experimental animals and breeding of genetically modified animals and on animal experiment procedures (Animal Experiments Ordinance) (www.admin.ch/ch/d/sr/c455_163.html).

¹⁷ Einteilung von Tierversuchen nach Schweregraden vor Versuchsbeginn/Classification prospective des expériences sur animaux selon leur degré de gravité. Federal Veterinary Office, 1995 (<http://www.bvet.admin.ch/themen/tierschutz/00777/00778/index.html?lang=de>).

¹⁸ It remains an open question whether guidelines on severity levels can also be developed for the new, non-pathocentric types of stress. Under Articles 24–26 of the FVO Ordinance of 12 April 2010 on the keeping of experimental animals and breeding of genetically modified animals and on animal experiment procedures (Animal Experiments Ordinance) (www.admin.ch/ch/d/sr/c455_163.html), this is neither mandatory nor ruled out. If it is impossible to develop severity-level guidelines for non-pathocentric types of stress, consideration should be given exclusively to pathocentric stresses in the evaluation of interests prior to animal experiments.

Position of the Committee and recommended formulations

In line with Article 3 of the Swiss Animal Protection Act, the Ethics Committee for Animal Experimentation of the Swiss Academies of Arts and Sciences takes the following position:

For any handling of animals, the following is applicable:

- Animals are endowed with dignity.
- Taking account of the dignity of animals means that, whenever animals are handled, it is imperative that their interests are considered in an evaluation of interests.
- If the evaluation of interests shows that the stresses are justified by overriding interests, the dignity of animals is **respected** when the planned action is carried out.
- If the evaluation of interests shows that the stresses for animals are not offset by overriding interests, the planned action involving animals must be abandoned. Otherwise, the dignity of animals is **not duly respected**.
- Failure to perform an evaluation of interests also represents a failure to respect dignity.
- The Committee takes the view that the stresses¹⁹ enumerated in Article 3 TSchG cannot be described as a "violation of dignity" or an "impairment of dignity"²⁰, since dignity is to be regarded not as a quantitative, but as a qualitative, all-or-nothing concept.

For animal experiments in particular, it follows that:

- In the evaluation of interests for the assessment of experiments (Art 19 Para. 4 TSchG)²¹, the dignity of animals is not itself to be placed in the scales on which their interests are weighed. Dignity thus does not need to be assessed and weighed.

On this basis, the Committee proposes that the following formulations should be consistently applied:

- The terms "violation of dignity" or "impairment of dignity" are to be avoided.
- **Account is taken of** the dignity of animals by performing the evaluation of interests.
- If an evaluation of interests is not performed, or if despite an evaluation of interests yielding a negative result the planned action involving animals is still carried out, the dignity of animals is not **respected** in the sense of the legal definition²² – i.e. it is **not duly respected**.
- The stresses for animals to be considered in the evaluation of interests are exhaustively enumerated in Article 3 TSchG. Expressions such as "otherwise" have no material content beyond what is specified in Art. 3. They are misleading and are to be avoided.

This position should help to clarify discussions of the dignity of animals and be applied in subsequent legal regulations.

¹⁹ Inflicting pain, suffering or harm on animals, frightening or degrading them, profoundly altering their appearance or capacities, or unduly instrumentalizing them.

²⁰ The term "impairment of dignity" is not used in the Act or in the Ordinance, but it is otherwise widely used.

²¹ Art. 19 TSchG (www.admin.ch/ch/d/sr/455/a19.html).

²² Art. 3 TSchG (www.admin.ch/ch/d/sr/455/a3.html).

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Annex: Comments of the Ethics Committee for Animal Experimentation of the Swiss Academies of Arts and Sciences on – in some cases – contradictory formulations concerning the dignity of animals in the Swiss Animal Protection Act and Animal Protection Ordinance.

Art. 3 Letter a TSchG (Terminology) (www.admin.ch/ch/d/sr/455/a3.html)

In this Act, the following definitions apply:

dignity: the inherent value of the animal, which is to be **respected** by anyone who handles it; the dignity of animals is **not duly respected** if they are subjected to stress which cannot be justified by overriding interests; stress involves in particular the infliction of pain, suffering or harm on animals, frightening or degrading them, profoundly altering their appearance or capacities, or unduly instrumentalizing them.

Comments: This article provides the basis for interpretation of the term "dignity" in the legislation. The relevant types of stress are exhaustively enumerated.

Art. 4 Paragraph 2 TSchG (Principles) (www.admin.ch/ch/d/sr/455/a4.html)

No one may, without justification, inflict pain, suffering or harm on animals, frighten them or otherwise fail to respect their dignity. Maltreating, neglecting or making excessive demands on animals is prohibited.

Comments: According to this provision, it is not permissible to fail to respect dignity without justification. From this it could be concluded that there are possible justifications for failure to respect dignity. However, failure to respect dignity cannot be justified, as it arises from not performing, or ignoring the result of, an evaluation of interests. Here, "fail to respect their dignity" should be replaced by "subject them to stress". The "otherwise" can refer only to the types of stress enumerated in Art. 3 TSchG, not to additional types.

Art. 4 Paragraph 3 TSchG (Principles) (www.admin.ch/ch/d/sr/455/a4.html)

The Federal Council shall prohibit other actions involving animals if they constitute a failure to respect the animals' dignity.

Comments: This formulation is misleading. Failure to respect the dignity of animals does not arise from specific actions involving animals, but from actions being not adequately, or not reflectively, justified. Nor is the intention that the Federal Council should be able to specify additional stress factors which would play a decisive role in the assessment of respect for dignity in accordance with Art. 3 TSchG.

On the interpretation of "failure to respect the dignity of animals" advocated here, this provision amounts to granting the Federal Council the authority to dictate or invalidate the results of the evaluation of interests for certain ways of handling animals.

Art. 11 Paragraph 4 TSchG (Mandatory licensing for genetically modified animals) (www.admin.ch/ch/d/sr/455/a4.html)

It [the Federal Council] may provide for exceptions from mandatory licensing or for a simplified licensing procedure in cases where it is established that no pain, suffering, harm or behavioural disorders occur in animals as a result of the production and breeding methods used, and account is also taken of the animals' dignity in other respects.

Comments: Account is not taken of the dignity of animals by selecting particular methods of production or breeding, but by means of an evaluation of interests. If the evaluation shows that the stresses are justified by overriding interests, the animals' dignity is respected if the planned action is then carried out, although a licence will still have to be obtained for this purpose. The intended meaning of this article is, rather: A licensing procedure can be simplified if "no pain, suffering, harm or behavioural disorders occur in animals as a result of the production and breeding methods used, and the animals are not subjected to any other types of stress."

Art. 12 Paragraph 1 TSchG (Mandatory notification for genetically modified animals) (www.admin.ch/ch/d/sr/455/a12.html)

Genetically modified animals which, as a result of production or breeding, undergo pain, suffering, harm or behavioural disorders, or whose dignity is otherwise violated, are to be notified to the cantonal authority.

Comments: Here, the Committee recommends that "or whose dignity is otherwise violated" be replaced by "or are otherwise subjected to stress", or that the stress factors mentioned in Art. 3 TSchG be enumerated.

Art. 17 Paragraph 1 TSchG (Animal experiments; restriction to the essential minimum) (www.admin.ch/ch/d/sr/455/a17.html)

Experiments which may cause animals pain, suffering or harm, frighten them, substantially impair their general welfare or otherwise fail to respect their dignity are to be restricted to the essential minimum.

Comments: If one adheres to the definition of dignity given in Art. 3 TSchG, there are no grounds justifying "failure to respect the dignity of animals". This also applies to animal experiments, whose admissibility depends on the same evaluation of interests that is used in the definition of the dignity of animals. It is misleading and incorrect to say that such experiments are to be restricted to the essential minimum since they will not be approved at all. Here, "or otherwise fail to respect their dignity" should be replaced by "or otherwise subject animals to stress".

Art. 26 Paragraph 1 Letter a TSchG (Penal provisions) (www.admin.ch/ch/d/sr/455/a26.html)

Anyone who deliberately maltreats, neglects, or makes excessive demands on an animal, or otherwise fails to respect its dignity shall be liable to a term of imprisonment or a fine.

Comments: Here, it is made clear that failure to respect the dignity of animals is a criminal offence. What is misleading is that the expression "otherwise" appears to relate to maltreatment, neglect and making excessive demands, from which it might be concluded that these three forms of cruelty to animals always represent failure to respect the dignity of animals. Whether this is in fact the case should be left open here.

The expression "otherwise" does however fit in with the earlier enumerations if it is intended to refer, as previously, to the other stress factors mentioned in the definition of dignity given in Art. 3 TSchG. There is no room for other forms of failure to respect dignity than that specified in Art. 3 TSchG.

This passage could equally well read: "Anyone who deliberately maltreats, neglects, or makes excessive demands on an animal, or fails to respect its dignity, shall be liable to a term of imprisonment or a fine."

In the view of the Committee, this would cover failure to perform an evaluation of interests or proceeding with an action or experiment despite an evaluation yielding a negative result.

Art. 25 Paragraph 1 TSchV (Animal breeding; principles) (www.admin.ch/ch/d/sr/455_1/a25.html)

Breeding should be aimed at obtaining healthy animals free of properties and characteristics which violate their dignity.

Comments: The Act repeatedly uses the term "violation" when it is essentially referring to stress or impairment of animals' welfare. The Committee recommends that the term "violation of dignity" be avoided altogether and that the term "stress" should always be used in the sense of the extended list included in the definition of dignity given in Art. 3 TSchG. This passage should read: "free of properties and characteristics which subject them to stress". The proposal to delete the term "dignity" in no way weakens this provision, since failure to respect the dignity of animals is always impermissible under Art. 3 TSchG.

Art. 105 Paragraph 1 Letter d TSchV (Requirements for licensing) (www.admin.ch/ch/d/sr/455_1/a105.html)

A licence under Article 13 TSchG may only be granted if:

In the case of promotional activities, it is assured that the animals do not undergo suffering or harm and their dignity is not otherwise violated, and that the conditions for transport are fulfilled.

Comments: Here, the same problem arises as in Art. 25 Paragraph 1 TSchV. The Committee recommends the following alternative: "and are not otherwise subjected to stress, and that the conditions for transport are fulfilled".