

The Status of Animal Protection in Denmark

Søren Stig Andersen*

1	Introduction	164
2	The Danish Animal Welfare Act	165
	2.1 Structure, Overall Purpose, and Time of Entry into Force of the Animal Welfare Act	165
	2.2 Fundamental Principles	166
	2.3 Concrete Substantive Issues Debated During the Legislative Process	169
3	Issues not Addressed	171
	3.1 The Protection Offered in Practice to Different Types of Animals	171
	3.2 Legal Representation of Animal Interests	174
4	Concluding Remarks: In Which Direction are We Moving?	176

1 Introduction

In February 2020, Denmark got a new ‘basic law’ for animals: The Animal Welfare Act.¹ When it enters into force, it will replace the Animal Protection Act from 1991.

During the latter years, the legal protection of animals in Denmark has been improved a number of times. In 2016, for instance, the Parliament promulgated a law that heightened the length of prison sentences substantially,² and in 2019, the police established some special animal protection units that deal with trade, import and neglect of animals in order to prevent abuses and to monitor the animal welfare area.³ Still, these improvements have taken place within the established legal framework, which fundamentally has remained the same since the Animal Protection Act from 1950.

Those who may have hoped that the new act would tread new paths will have been disappointed. As was made clear when the bill was introduced in Parliament, the purpose of the new act primarily was to achieve a more desirable legislative set-up and not to introduce new substantive rules or to change existing ones. However, the new law does offer an appropriate occasion for assessing the status of animal protection in Denmark and for identifying some major frontlines.

Section two of this article gives an overview of the content of the Animal Welfare Act with a special focus on the topics that were most intensely debated during the legislative process. This includes questions relating to the delegation of legislative competencies to the administrative bodies, the use of the wording ‘sentient beings’, and whether or not to make reference to the ‘intrinsic value’ of animals. The review also encompasses two more substantive issues where the new law will have an impact. The first issue concerns the extent to which the responsible minister will be able to issue rules on training requirements for staff that handle animals, and the second issue concerns the abolition of a point demerit system with regard to transportation of animals.

This contribution does not aspire to describe all aspects of the new Animal Welfare Act, and it will only sparsely touch upon the bulk of its substantive rules, which are more or less identical to the provisions of the preceding Animal Protection Act. Section two does, however, include an outline of the main principles that underlie the Act, and which have formed the backbone of Danish animal protection since 1950.

In section three, I turn my attention towards a couple of important issues, which could have been, but hardly were discussed during the legislative process. Firstly, taken at face value, the general protection of animals does not distinguish between animals according to the way they interact with human beings. If

* Søren Stig Andersen, Ph.D., Assistant Professor, Department of Food and Resource Economics, University of Copenhagen. Email: ssa@ifro.ku.dk. All internet references were operational on 31 August 2020. All translations are mine.

¹ Act no. 133 of 25 February 2020 (<https://www.retsinformation.dk/eli/ft/201913L00080>).

² Act no. 648 of 8 June 2016.

³ See, in Danish, the press release of 1 July 2019 from the Danish Police (<https://politi.dk/rigspolitiet/nyhedsliste/politiets-nye-dyreværnsenheder-er-klar/2019/07/01>).

anything, it is considered aggravating if an offence has been committed as part of an industrial activity. The question is, however, whether the rules are in fact applied accordingly. A closer look at the case law does in fact indicate that ill-treatment of animals in the farming and transportation industries is not always sanctioned as severely as when companion animals are involved. Another question that may have deserved more attention concerns the legal representation of animal interests in different legal contexts such as criminal and civil litigation, administrative processes, vis-à-vis the Ombudsman, etc. Some animal welfare organizations did in fact raise this question but the legislator appears not to have addressed the matter in earnest.

Finally, section four contains some concluding remarks on the status of animal protection in Denmark as well as predictions about future developments.

2 The Danish Animal Welfare Act

2.1 Structure, Overall Purpose, and Time of Entry into Force of the Animal Welfare Act

The Animal Welfare Act consists of 21 chapters. The first 11 chapters, which concern various aspects of animal welfare, contain either substantive rules, which prohibit or prescribe certain actions, or delegatory provisions that authorize the Minister to issue such rules.⁴ The last 10 chapters contain mainly administrative and institutional provisions as well as provisions on sanctions.

According to the legislative proposal of the new Animal Welfare Act,⁵ the purpose is to make the legislation more transparent and user-friendly in practice by simplifying the legislative structure. This is achieved, inter alia, by repealing a range of species-specific acts and instead either incorporate or expand the scope of existing delegatory provisions into the Animal Welfare Act.

Furthermore, such broader use of delegation, which authorizes the Minister to regulate a wide range of subject areas, enables the rules to be adapted more quickly to new knowledge and other new developments.

In line with this new legislative strategy, the new act does not contain the former provision in § 4(2) of the Animal Protection Act, which has prevented the Minister from issuing rules on living areas, living spaces, and equipment for farming animals unless the rule in question is either derived from an international obligation or has minor impact. The purpose of that provision has been to ensure that the interests of interested parties, in particular those of the agricultural industry, have been considered as part of a parliamentary process. In the legislative proposal for the new act it is argued that the opinions of the industry as well as animal welfare organizations will be taken duly into account as stipulated in § 57 of the new act.

⁴ I will refer to ‘the Minister’ without qualifying which Minister I am referring to. With the current distribution of competencies, it is the Minister for Food, Fisheries, Equal Opportunities and Nordic Cooperation.

⁵ Legislative Proposal L 80 of 28 November 2019 for an Animal Welfare Act (https://www.ft.dk/samling/20191/lovforslag/L80/som_fremsat.htm).

The diagram below illustrates the structural change concerning the rules on animal protection/welfare going from the preceding set-up under the Animal Protection Act to the set-up under the Animal Welfare Act:

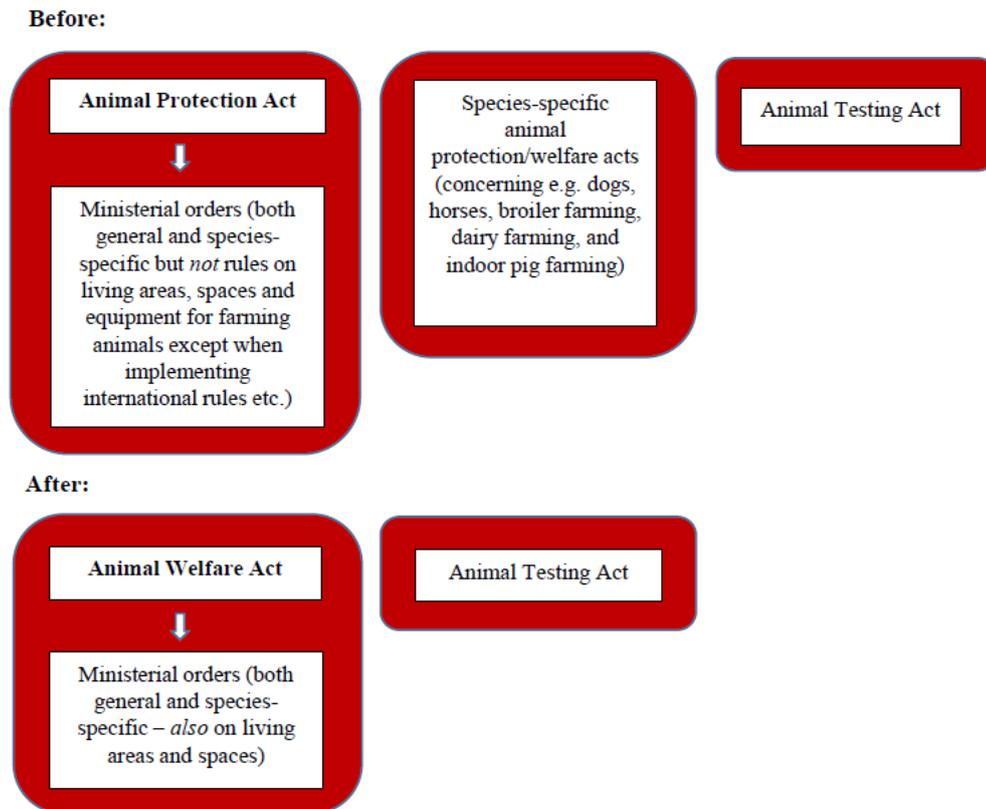


Diagram: Animal welfare rules in Denmark under the Animal Protection Act resp. the Animal Welfare Act

The act will not enter into force immediately. Instead, the Minister can decide when the Act, or parts thereof, shall enter into force. This will ensure that the current legislation in the Animal Protection Act as well as in species-specific acts will remain in force until the new ministerial orders are issued.

2.2 *Fundamental Principles*

Whereas the new act encompasses only a few substantive changes, there are some more symbolic innovations. One such change is the use of the word ‘Welfare’ instead of ‘Protection’ in the title of the act. According to the legislative proposal, this reflects an increased focus on the behavioral needs of animals.

Another change, which may be perceived as more symbolic than substantive, is the inclusion of an object clause in § 1. While this is a novelty compared to the preceding Animal Protection Act, it does concur with a general trend in Danish legislation. According to the provision, the act ‘aims to promote good animal welfare, including the protection of animals, and respect for animals as living and sentient beings’. Furthermore, the act ‘aims to protect ethical considerations with regard to animals’.

The inclusion of the word ‘sentient’ in the phrase ‘respect for animals as living and sentient beings’ was one of the most intensely debated questions during the parliamentary process.⁶ Whereas the Government initially had been opposed to the notion that all animals are sentient beings arguing that there is no scientific evidence, which supports that all animals are able to perceive and feel pain and suffering,⁷ it finally was agreed to include the word ‘sentient’. Animal welfare circles perceived this as a big victory. The largest Danish animal welfare organization, Animal Protection Denmark, called it a milestone and proclaimed that Denmark is now a pioneering country in this regard.⁸

The *travaux préparatoires*, however, give a less sensational impression:

The word sentient is understood to mean that all animals are capable of sensing and interacting with their environment to some extent. In addition to situations where animals are able to perceive and feel pain and suffering, this broader meaning also covers situations where animals, for instance, reflexively responds to sensory impressions such as light, sound, pressure, temperature and physical and chemical influences.⁹

Against this background, it appears unlikely that the wording ‘sentient beings’ will have any real impact on how the act is applied. On the other hand, it cannot be ruled out that it will have some symbolic value with regard to the perception of animals in general.

The issue of the use of the phrase ‘sentient beings’ seems to have somewhat overshadowed another, perhaps more significant issue raised by the animal welfare organizations. During the consultation phase, several organizations advocated for the inclusion of a declaration that animals possess an intrinsic value independent of the human benefit value. This was turned down by the Ministry, which argued that it was apparent from the legislative proposal that animals do in fact possess an intrinsic value, which should be respected as much as possible. The Ministry further stated that there will be ‘cases where it nevertheless will be impossible to accommodate this intrinsic value, e.g. in relation to pest control or eradication of infectious diseases, where the need to prevent the spread of infection (and to protect the economy) outweighs the

⁶ Animal Protection Denmark was one of the consultation partners that advocated for the inclusion of the word ‘sentient’ pointing to the similar wording in Article 13 of the Treaty of the Functioning of the European Union. In the legislative proposal, the Ministry of Environment and Food had argued that whereas the EU legislation concerns vertebrate, which indeed are sentient beings, the Danish act concerns all animals, i.e. also invertebrates, cf. the consultation report of 27 November 2019 (<https://www.ft.dk/samling/20191/lovforslag/L80/bilag/1/2114561/index.htm>).

⁷ The Environment and Food Committee 2019-20, L 80 final answer of 6 January 2020 to question 12 (<https://www.ft.dk/samling/20191/lovforslag/L80/spm/12/svar/1622824/2131868/index.htm>).

⁸ Accessible at <https://www.dyrenesbeskyttelse.dk/artikler/danmark-bliver-foregangsland-med-ny-dyrevelfaerdslov>.

⁹ The Parliamentary Report of 22 January 2020, L 80 Forslag til lov om dyrevelfærd, by the Environment and Food Committee (https://www.ft.dk/samling/20191/lovforslag/180/20191_180_betaenkning.htm).

interests of the animal'.¹⁰ It is not clear how and why the notion of animals' intrinsic value would conflict decisively with such considerations.

Even though the phrase 'intrinsic value' does not appear in the act, the wording of the object clause together with the *travaux préparatoires* should leave no doubt that animals are, after all, perceived as having an intrinsic value. However, it remains an unanswered question what this implies when it comes to balancing such an intrinsic value against the human benefit in different contexts. This question will be discussed further below in section three with a critical analysis of the actual level of protection for animals that are used for economic purposes (especially production animals) compared to the protection level of other animals, e.g. companion animals.

Whereas the real significance of the object clause is not clear, § 2 and § 3 of the act set up the fundamental principles for the handling and protection of animals. These provisions, which are identical to § 1 and § 2 of the preceding Animal Protection Act, have the following wording:

§ 2. Animals are living beings and must be treated properly and protected best possibly from pain, suffering, distress, lasting injury and substantial nuisance.

§ 3. Everyone, who keeps animals, must ensure that they are treated with consideration, including housing, feeding, watering and care with regard for their physiological, behavioral and health needs in agreement with established practical and scientific experience.

These provisions serve two purposes: Firstly, they define the limits and purposes of the regulations that the Minister is authorized to issue (it would for instance contravene § 3 to allow so-called battery calves),¹¹ secondly, they define criminal offences, which are sanctioned in chapter 20 of the act. Even though the provisions may appear somewhat vague, they thus constitute the core protection of animals in Denmark.

Despite the unchanged wording, the provisions gave rise to some debate. The Danish Animal Ethics Council, among others, argued that a comment in the legislative proposal regarding a ranking of animals according to their 'evolutionary stage'¹² was unclear as well as unnecessary and undesirable.¹³ The issue does not appear to have been further addressed in the *travaux préparatoires*.

The only enduring political division over the wording of § 2 and § 3 concerned whether or not the word 'natural' should be inserted after 'physiological' in § 3. The Ministry argued that it is not always possible to fully accommodate animals' natural behavior in production conditions, e.g. when animals are kept in a shed or a restricted outdoor area.¹⁴ At the end of the

¹⁰ The consultation report of 27 November 2019, op.cit., p. 3-5.

¹¹ See the comments to § 3 in the Legislative Proposal, op.cit.

¹² Op.cit.

¹³ The consultation report of 27 November 2019, op.cit.

¹⁴ The Environment and Food Committee 2019-20, L 80 final answer of 6 January 2020 to question 28 (<https://www.ft.dk/samling/20191/lovforslag/L80/spm/28/svar/1622882/2131986/index.htm>).

parliamentary process, a minority of the Environment and Food Committee, representing 37% of the seats in Parliament, was in favour of including a reference to an animals' natural behavior, whereas the rest of the committee were against.¹⁵

2.3 *Concrete Substantive Issues Debated During the Legislative Process*

Apart from the issues mentioned above, the legislative proposal only raised a limited number of substantive questions. In most cases, the Ministry responded by reiterating that the relevant provisions in substance are a continuation of the preceding rules in the Animal Protection Act and that the purpose of the new act is to introduce a new rule structure, and not to introduce substantive changes. Nevertheless, the legislative proposal gave rise to some few substantive discussions.

According to § 21(3) of the new act, the Minister may issue administrative orders concerning training requirements for people who handle animals or advise on how to keep animals. Such administrative orders may concern people, who are responsible for the management of enterprises that engage in such activities, as well as people who are otherwise engaged in the work without being responsible for the management. This authorization to the Minister encompasses commercial trade and breeding of animals, the operation of kennels and catteries, animal shelters, etc. However, concerning farming, the Minister is only authorized to issue rules on training requirements concerning those who are in charge of the enterprise. According to the legislative proposal as well as an answer given by the Minister during the parliamentary process, the reason is that the person, who is responsible for the management, will have the task of ensuring that other personnel have, or are provided with, the relevant professional skills so that the animals are looked after properly.¹⁶ The *travaux préparatoires* does not specify why this is considered sufficient with regard to farming but not with regard to the other industries.¹⁷

Another issue raised by some animal welfare organizations concerned whether or not animal welfare organizations should be entitled to submit complaints on behalf of animals. Such a right could be relevant with regard to, inter alia, situations where an animal welfare organization files a notification with the police concerning a violation of the Animal Welfare Act and the prosecution service decides not to press charges.

¹⁵ Parliamentary Report of 22 January 2020, op.cit.

¹⁶ See the comments to § 21 in the Legislative Proposal L 80 of 28 November 2019, op.cit., as well as the Environment and Food Committee 2019-20, L 80 final answer of 22 January 2020 to question 43 (<https://www.ft.dk/samling/20191/lovforslag/L80/spm/43/svar/1627150/2138920/index.htm>).

¹⁷ In the Environment and Food Committee, a minority representing 27% of Parliament seats voted in favour of extending the authorization to issue administrative orders on training requirements to cover non-management staff in farming. This would have ensured that – at least on the level of authorization – there would be no differentiation between people employed in the farming industry and people in other industries. Cf. the Parliamentary Report of 22 January 2020, op.cit.

This debate is part of a broader discussion concerning the legal standing and legal representation of animals and touches upon principled questions on legal subjectivity and the organization of legal representation of animals. Unsurprisingly, the Ministry therefore responded in the following manner:

The introduction of a general appeal procedure for animal welfare organizations will constitute a comprehensive and significant change to the existing animal welfare complaint system. This is not a purpose of this bill, which is to change the rule structure. Likewise, the issue of an animal ombudsman institution is beyond the scope of this Bill.¹⁸

During the parliamentary process, the Ministry more specifically noted the following with regard to complaints about decisions made by the prosecution service:

It is true that the aggrieved party (the animal) cannot complain in animal welfare cases. However, this does not differ from the general principle in criminal proceedings according to which the issue of punishment is a matter between the State on the one hand and the accused on the other. Even in cases where the wronged party is a person, the wronged party does not obtain party status.¹⁹

Below in section three, I will elaborate further on the issue of legal representation of animal interests.

The last, more specific issue that should be mentioned here concerns the non-continuation of a point demerit system (*'klippeurtsordning'*), which was incorporated into the Animal Protection Act in 2007. The system supplements rules according to which qualified contraventions of the animal transportation rules are sanctioned with disqualification from commercial involvement with transportation of animals. Such a disqualification may be either unconditional or conditional depending on the seriousness of the offence. According to the point demerit system, a person, who operates an animal transportation company, or a person, who, as a driver or companion, partakes in the transportation of animals, is automatically disqualified after three contraventions regardless of whether the individual offences would have led to disqualification in themselves.

In the legislative proposal for the Animal Welfare Act, it is alleged that the system entails an undesirable discrimination of Danish carriers and drivers. Whereas the disqualification of a carrier or driver, who has obtained his or her authorization in Denmark, will entail that he or she loses the right to transport animals in the rest of the EU as well as in Denmark, the disqualification of a person, who has obtained the authorization outside Denmark, only will have legal effect within Denmark. Based on this consideration alone, and with no deliberations on the consequences, the point demerit system was abolished without any discussion during the parliamentary process.²⁰

¹⁸ The consultation report of 27 November 2019, op.cit.

¹⁹ The Environment and Food Committee 2019-20, L 80 final answer of 6 January 2020 to question 27 (<https://www.ft.dk/samling/20191/lovforslag/L80/spm/27/svar/1622880/2131981/index.htm>).

²⁰ In the legislative proposal, reference is made to a couple of evaluations of the point demerit system on 15 December 2015 and 22 March 2017, cf. the Danish Veterinary and Food

3 Issues not Addressed

Due to the explicit decision not to address substantive issues, the issues that could have been, but were not addressed during the legislative process are legion. Here, I want to focus on two general and principled topics that go beyond the individual concrete rules: Firstly, whether the application of the law offers all animals equal protection, or whether there are inconsistencies contingent on the role that animals play with regard to human needs, and secondly, the question of legal standing of animals.

3.1 *The Protection Offered in Practice to Different Types of Animals*

In general, the basic provisions of the Danish Animal Welfare Act in § 2 and § 3 (corresponding to the § 1 and § 2 in the preceding Animal Protection Act) apply to all animals irrespective of the nature of the relationship between human beings and the animal. It is, for instance, of no relevance whether an animal is raised for production, e.g. farm animals, or as a companion animal.

There are, however, a number of modifications. One significant exception consists of the separate Act on Animal Testing, where animal testing is defined as ‘any use of animals for scientific or educational purposes which may be associated with pain, suffering, anxiety or lasting injury for the animal equivalent or stronger than what is caused by the insertion of a needle in accordance with good veterinary practice causes’.²¹ The apparent inconsistency between the § 2 of the Animal Welfare Act and the regime of the Act on Animal Testing is possible because the latter is considered *lex specialis* and thus applicable despite the apparent lack of conformity with the Animal Welfare Act.

Furthermore, the Animal Welfare Act carries inconsistencies within itself. For instance, so-called pests such as rats may be exempted from the obligation to apply the fastest and most painless killing method, cf. § 25.²²

Another example revolves around § 27 of the act, which regulates surgery and similar interventions that can inflict suffering on an animal, other than negligible pain of a transient nature. Unless such interventions are urgent they must be performed by a veterinarian, and suffering and pain must be limited to the greatest extent possible. The provision further authorizes the Minister to lay down rules on surgery and similar interventions, including rules on castration,

Administration, case no. 2014-14-39-00039. These evaluations contain information on the number of known incidents where a carrier or driver have been subjected to the point demerit system. According to the Danish Veterinary and Food Administration there is no information on the nationality of the carriers and drivers in question. It transpires from the evaluations that there has been only one single incident, where a carrier or a driver has been disqualified pursuant to the point demerit system (judgment of 5 October 2011 of the Eastern Division of the High Court (S-3998-10)). In that case, according to the Danish Veterinary and Food Administration it was a driver of Danish nationality, who was disqualified from the commercial transportation of animals. Overall, the evaluations contain no new data, which substantiates that there should in fact have been a discrimination of Danish carriers and drivers. Likewise, the arguments forwarded by the industry as part of the evaluations all refer to conditions that were also known in 2007 when the point demerit system was introduced.

²¹ Consolidated law no. 474 of 15 May 2014 on Animal Testing, § 1(2).

²² See Legislative Proposal L 80 of 28 November 2019, *op.cit.*

tail-docking, removal of claws, teeth and other body parts, and beak pruning. Furthermore, the provision authorizes the Minister to lay down rules on whether or not the interventions should necessarily be performed by a veterinarian or other specially trained staff. Consequently, despite the best possible protection from pain, suffering, distress, lasting injury and substantial nuisance guaranteed by § 2, the Minister may issue rules that allow surgery and similar interventions without offering the ‘best possible protection’.

Based on § 14 in the Animal Protection Act, which has preceded the authorization in § 27 of the Animal Welfare Act, the Minister has issued rules that, inter alia, permit tail-docking and castration of piglets, tail-docking of lambs (which may be performed by the ‘producer’, i.e. not necessarily a veterinarian or other specially trained staff) without anaesthetization²³ as well as beak pruning and amputation of e.g. toes of chicken.²⁴

The issue of tail-docking of piglets has been the subject of much controversy in Denmark, possibly due to the large production of pork. The permission to perform tail-docking is conditioned on, inter alia, that the farmer has ‘tried measures to prevent tail biting, taking into account the environment and occupancy of the pigsty’.²⁵ In practice, this means that if tail biting cannot be avoided under the overall set-up of the pigsty, tail-docking will in general be allowed. In other words, tail-docking appears to be *de facto* allowed because it is considered too economically burdensome for the pig farmers if they are required to ensure conditions and necessary stimulation for the pigs to prevent tail biting.²⁶ Economic considerations thus exempt the farming industry from fully respecting the protection enshrined in the fundamental principles of the Animal Welfare Act.

A third example of differentiated protection concerns the use of sanctions. In principle, the penal provisions in § 58 are evenly applicable regardless of the kind of species that have been maltreated or abused, though it is considered aggravating if an offence has been committed as part of an industrial activity including transportation of animals, cf. § 58(12).²⁷ However, it may be difficult to ensure such a consistent use of penal sanctions because the nature of offences often differs according to whether the offence is committed in one or the other context. On the one hand, most criminal cases that involve farm animals concern inadequate living conditions or lack of supervision by veterinary personnel. Similarly, with regard to transportation of animals most cases concern either transportation of animals who are not fit for such transportation, or transport conditions that do not fulfill the legal requirements. This type of offence often

²³ § 4 and § 8 of Administrative order no. 1402 of 27 November 2018.

²⁴ § 20 and § 21 of Administrative order no. 1047 of 13 August 2018.

²⁵ § 4 and § 5 of Administrative order no. 1402 of 27 November 2018.

²⁶ Tail-docking of piglets is an issue of interest also on EU level. See D’Eath, R. B., Niemi, J. K., Vosough Ahmadi, B., Rutherford, K. M. D., Ison, S. H., Turner, S. P., Anker, H. T., Jensen, T., Busch, M. E., Jensen, K. K., Lawrence, A. B., Sandøe, P. (2016). ‘Why are most EU pigs tail docked? Economic and ethical analysis of four pig housing and management scenarios in the light of EU legislation and animal welfare outcomes’, *Animal*, 10(4), p. 687-699 (<https://doi.org/10.1017/S1751731115002098>).

²⁷ See similarly § 28(9) of the preceding Animal Protection Act.

involves a large number of animals that have been subjected to pain, suffering, or anxiety over a long time interval, or lasting injury.

On the other hand, reported criminal cases committed against companion animals are characterized by violent actions against an individual animal that has been subjected to intense pain or suffering over a relatively short time-span, often ending with the death of the animal.

Bearing these differences in mind, a review of publicized judgments²⁸ does indicate that offences committed against farming animals often are penalized with only a fine whereas offences committed against companion animals more often are sanctioned with imprisonment.

The following case from 2017 concerned a farm animal: The High Court, Western Division, found a farm manager guilty of gross negligence in the performance of his duties by failing to treat a sow properly and carefully. The sow's abdomen dilated violently, its mobility was impaired, and it was subdued due to a boil in its abdomen that grew to a weight of 90 kg. The farm manager, however, did not have the sow put down. Furthermore, the sow was loaded and transported to the slaughterhouse, which exposed the sow to a high degree of unnecessary pain, suffering, anxiety and substantial nuisance. The farm manager was sentenced a fine of 10.000 DKK.²⁹

It is difficult to find comparable publicized decisions involving companion animals. It is worth noting, however, that in all publicized decisions from the last ten years concerning violation of § 1 or § 2 of the Animal Protection Act with regard to companion animals,³⁰ the offender has been sentenced with imprisonment, possibly suspended. A case from 2015 may serve as an example:³¹

The High Court, Western Division, found a person guilty of abuse through grossly irresponsible treatment of another person's dog. He had hit the dog several times on its head and body with his fists and had kicked it several times on the body as well as tightened the dog's leash hard and with such force that the dog lost consciousness. According to the court, this had exposed the dog to the highest degree of pain, suffering, anxiety, permanent injury and substantial nuisance. The offender was sentenced with 20 days of suspended imprisonment.³²

With regard to both the legal derogations from the main protection principles and the possible discriminatory use of penal sanctions, the preparation of the

²⁸ In Denmark, there is no general access to all court judgments. The review is based mainly on publicized judgments from 1991 to the present concerning contravention of § 1 - § 3 of the Animal Protection Act, in total 37 judgments.

²⁹ Tidsskrift for Kriminalret, 2017, p. 711.

³⁰ There have been four such publicized cases: Tfk2012.989/2V (20 days imprisonment, suspended), Tfk2014.670V (20 days imprisonment, suspended), Tfk2015.493V (20 days imprisonment, suspended), Tfk2018.234Ø (60 days imprisonment). Only the last decision dates from after the promulgation in 2016 of a law which sought to significantly increase the level of punishment in cases of mistreatment of animals.

³¹ For a further analysis of the underlying reasons why there may be such discriminatory practices, see Søren Stig Andersen, 'Proximity: A Levinasian Approach to Justice for Animals', *Global Journal of Animal Law*, no. 1, January 2016.

³² Tidsskrift for Kriminalret, 2015, p. 493.

legislative proposal for the new Animal Welfare Act would have been an adequate occasion for further investigating whether there is in fact a lack of consistency that ought to be addressed. Such an investigation could have encompassed the significance of the concrete relation between animal and human being, which touches upon the other topic that I would like to highlight: Legal representation of animal interests.

3.2 Legal Representation of Animal Interests

Before entering into the question of legal representation of animal interests, one must differentiate between two different, however related, issues: legal personhood and legal representation of interests. Legal personhood implies the ability to have legal rights and duties on one's own behalf. Natural persons are the most obvious example, but companies, agencies, NGO's, legal subjects according to international law (e.g. national states), etc. may also constitute legal persons. Whether animals should also be considered legal persons is an important question that has been and still is a major point of discussion within animal ethics and animal law.³³

The question of legal representation of interests is of a more concrete and practical nature and does not give rise to the same fundamental ethical considerations. The starting point of the discussion is the observation that irrespective of whether the protection of animals is construed as a matter of rights or not, for the protection of animals to be efficient, there must be a way for someone to safeguard their interests. There must be some person – natural or legal – who is empowered to report contraventions to the authorities and, if needed, to bring the matter before the courts. That is undisputed. Now, instead of arguing that animals have legal personhood and that humans in this regard are acting on behalf of the animals, one may construe the situation such that the humans are acting on their own behalf but with the purpose of representing the interests of the animals.³⁴ The question then is whether someone – and if yes, who – should be legally empowered to represent and safeguard the interests of animals in such contexts.

In Denmark, there are no administrative, nor procedural rules that deal specifically with this issue. According to normal procedures, anyone can report offences to the relevant authorities, e.g. the police, but usually, neither the person that has reported the contravention nor anyone else (e.g. an animal welfare organization) has a legal capacity to represent the animal. Thus, usually, only the transgressor will be party to the case.

During the consultation phase over the drafting of the legislative proposal for the Animal Welfare Act, several animal rights organizations advocated for the inclusion of provisions that would give such organizations the right to complain on behalf of animals; a request possibly inspired by the legal set-up within the

³³ One notable example is the academic and procedural accomplishments under the Legal Personhood and the Nonhuman Rights Project, e.g. Steven M. Wise, 'The Legal Personhood and the Nonhuman Rights Project', *Animal Law*, Vol. 17:1, 2010.

³⁴ See with regard to the Austrian Animal Welfare Ombudsperson the doctoral thesis of Elke Ottensamer, *Ausgewählte Aspekte des österreichischen Tierschutzgesetzes*, Wien, April 2006, p. 191 (<https://www.tieranwalt.at/fxdata/tieranwalt/prod/media/files/ottensamer.pdf>).

realm of environmental protection where NGOs under certain conditions are entitled to complain about administrative decisions. In its response to the request, the Ministry of Environment and Food firstly remarked that it was not the purpose of the bill to introduce significant changes to the existing complaint system. The Ministry further pointed to the fact that in criminal cases it is the prosecution service, not the aggrieved party, which takes the offender to court. Therefore, an animal welfare organization should not have the right to complain about the prosecution service's decisions concerning whether to press charges or not.

The fact that the Ministry focused on representation in the context of criminal procedure may appear understandable at first sight. Whereas cases concerning environmental protection almost exclusively appear in the context of administrative procedures – or in the last instance are subject to civil litigation – animal protection cases are often associated with criminal cases. However, many administrative procedures and decisions made by state agencies and local authorities do have significant implications for animals, e.g. concrete veterinary decisions made by public personnel on the treatment of production animals or the design of barn systems. As a rule, in such contexts, nobody is entitled to stand up for the animals in a legal sense and complain about the decisions.

With regard to criminal cases, it is not clear why the fact that the aggrieved party is not considered a party to the criminal case should preempt the possibility of a right for an NGO to complain about a decision made by the police or the prosecution service about whether or not to press charges, e.g. in situations where the NGO in question has notified the police about a contravention.

During the legislative process, Animal Protection Denmark also addressed the possibility of establishing an Ombudsperson for animals. The suggestion did not point to any well-defined model for such an Animal Ombudsperson but Animal Protection Denmark may have had something akin to the legal set-up for the Austrian Animal Protection Ombudsperson³⁵ in mind. In Austria, each state appoints an animal protection ombudsperson who is responsible for taking care of the interests of animals. This encompasses, inter alia, taking care of the following tasks:

- The Animal Protection Ombudsperson has party status in administrative procedures, including administrative criminal cases. This includes the right of access to all information. The authorities must support the Animal Protection Ombudsperson, cf. section 41(4).
- The Animal Protection Ombudsperson can appeal decisions made under the Animal Welfare Act, cf. section 41(5).
- When there is a reasonable suspicion of a violation of the Animal Protection Act, the Animal Protection Ombudsperson shall notify the police and prosecution service and forward relevant material, cf. section § 41(6).

The provision further states that the Animal Protection Ombudsperson is not subject to any instructional authority, and that the Animal Protection Ombudsperson must report to the State Government.

³⁵ See section 41 of the Austrian Animal Protection Act (*Tierschutzgesetz*).

From a Danish perspective, inspiration could also come from the office of the Parliamentary Ombudsman, e.g. with regard to a competence to take up a case on their own accord and to carry out general investigations into an authority's handling of cases. Likewise, parallel to the competencies of the Parliamentary Ombudsman, an Animal Ombudsperson could be empowered to investigate institutions or companies and any place of employment, which falls within the ambit of the Animal Ombudsperson.

4 Concluding Remarks: In Which Direction are We Moving?

In its motivation for the new Animal Welfare Act, the Danish Government noted that it wanted to simplify the legislative structure. The purpose of the new act thus was a matter of legislative set-up, not a desire to enhance the protection of animals. However, after the promulgation of the new Animal Welfare Act it is fair to assume that in the near future, the legislator will be reluctant to invest political capital in major reforms with regard to animal protection. Whereas the new Animal Welfare Act could have been an occasion for addressing some core issues, it now is likely to be a while before any conducive occasion again presents itself.

In this article, I have pointed to two general and principled topics – equal protection and representation – that are intrinsic to the Animal Welfare Act, and which in my opinion could very well have been addressed as part of the work with the new act. Whether or not the time is ripe for legal reforms with regard to these topics, they deserve academic attention. This certainly will also help laying out a foundation for future discussions on how to effectively ensure the welfare of animals.

These years' animal welfare is also subject to a range of new and changing perspectives as we gain new insights and as the world is changing. Our understanding of the physiological and mental capacities of animals is constantly increasing, *inter alia* with regard to their capacity to experience pain, suffering and distress, and globalization raises new challenges to their welfare. Furthermore, animal welfare is increasingly being linked to issues such as climate change, biodiversity, the environment, and health issues such as the spread of zoonoses, e.g. (presumably) Covid-19. One must expect, or at least hope, that next time the basic principles of animal protection are addressed, such issues will be included in the deliberations.

Philosophical and Empirical Approaches

