

## IGN-Research Award 2022

Johanna Hahn / Ariane Désirée Kari

*Do farm animals suffer from their housing conditions? – Establishing “suffering” in animal cruelty criminal proceedings*

published in *Natur und Recht* 2021, pp. 599-607

### Summary

Anyone who keeps his dog in a kennel without an exercise area or leaves it in the car for hours in strong sunlight must expect to be prosecuted for animal cruelty. However, anyone who keeps cattle tethered in one place for the rest of their lives or has them transported from Germany to Turkey for days at a time in hot temperatures will not be prosecuted. This practice is not compatible with current animal cruelty law: According to Section 17 No. 2 b of the German Animal Protection Act (TierSchG), anyone who inflicts prolonged serious pain or suffering on a vertebrate animal - whether a pet or a farmed animal - is liable to prosecution. The reason for this unequal treatment of pets and farmed animals in practice lies in the fact that in the case of farmed animals, the "suffering" variant of the offense is regularly misjudged by law enforcement, prosecutors, and courts. Using the example of permanent tethering of cattle, this article examines from a legal and veterinary perspective how the infliction of suffering on farmed animals can be established in criminal proceedings using suitable expert witnesses.

Permanent tethering of cattle has been criticized for years: the cattle are fixed at the neck with chains and stand in a row close to each other in a confined space. They cannot move around, cannot turn around, cannot even scratch properly, and cannot perform their social behavior. Their lives are reduced to "standing, lying, eating and defecating." The German Veterinary Association is therefore calling for a complete phase-out of this type of housing; administrative courts have already deemed it inappropriate from an animal behavior perspective. But criminal convictions and even investigations of the public prosecutor's offices in these cases were missing so far. However, it seems very likely that this husbandry system also inflicts longer lasting serious (“substantial”) sufferings in the sense of § 17 No. 2 b TierSchG.

Suffering in the sense of the § 17 TierSchG is an independent term of the Animal Protection Act. According to case law, this includes all impairments in well-being not already covered by the concept of pain, which go beyond a simple discomfort and continue for a not entirely insignificant period of time. The key question in the assessment of suffering is whether the animal is impaired in its well-being. Well-being is understood as a state of physical and psychological harmony of the animal within itself and with the environment; a prerequisite for well-being is physical health and normal behavior in every respect. In order to determine whether well-being is impaired, experts can refer in particular to Tschanz's concept of well-being. According to this concept, animals are impaired in their well-being if their normal behavior is repressed or completely suppressed.

According to § 17 No. 2 b TierSchG, in addition to suffering, its seriousness must also be determined. Like suffering, seriousness is a legal term. Since the requirement of seriousness (“substantial”) in § 17 No. 2 TierSchG is intended to exclude minor cases, so that only "considerable" impacts are covered, expert explanations of the intensity of the impairments are also regularly required here. In particular, physical indicators or behavioral disturbances can be used for this purpose. In the case of permanently tethered cattle, ascertainable physical indicators that may lead to the conclusion that they are suffering from ailments include diseases of the udder, the musculoskeletal system and the digestive system. The

## IGN-Research Award 2022

advantage of demonstrating the seriousness of suffering on the basis of physical indicators on the animal is that - in contrast to the assessment of behavioral disorders - any official veterinarian is able to make this assessment, at least for the common animal species. In addition, externally visible disorders of physical health, such as severe emaciation, can usually be assessed on the basis of images and video footage; the expert does not necessarily have to have examined the animal on site.

However, a good state of health and nutrition does not mean that an animal is not suffering. Behavioral disturbances (a significant and persistent deviation from normal behavior in terms of modality, intensity, or frequency) are also indicative of impairments in the well-being and thus suffering of the animal. This includes, on the one hand, outwardly clearly recognizable abnormal behavior and, on the other hand, enforced non-behavior. Outwardly clearly recognizable abnormal behaviors are, for example, stereotypies, externally or self-harming behavior, actions on non-adequate objects, altered abnormal movement patterns, or apathy. These classic behavioral disorders are recognized in the practice of courts and prosecutors as evidence of serious suffering.

In addition to the more familiar externally recognizable behavioral disorders, however, forced non-behavior is also a behavioral disorder and therefore a clear indication of serious suffering. A behavioral disorder due to forced non-behavior is present if the housing conditions lead to the animal being able to perform species-typical behaviors only in a strongly limited way or not at all. It is not important whether the behavior is made physically impossible for the animal or whether the animal stops or greatly reduces the behavior as a result of a lack of environmental stimuli. For some animal species, the determination of serious suffering based on enforced non-behavior has special significance: sheep and cattle are "silent sufferers"; they suffer silently and acquiesce silently. Neither in pain nor in suffering do they make any vocalizations, and even in the case of massive impairment of well-being in housing that is contrary to animal welfare, they do not show behavioral disturbances that are visible at first glance. With these animal species, it would therefore be wrong to conclude from the lack of obvious external signs - such as the absence of vocalizations - that the animals are not suffering. Here, an in-depth ethological examination is simply required to determine the extent to which the species-typical behavior of the animals is restricted.

However, some courts and public prosecutors - and also experts - regularly fail to recognize this and assume that "empirically-objectifiable signs of suffering (abnormalities, behavioral disturbances and other specific indicators in the behavior of the animals)" are necessary for the determination of suffering, claiming that forced non-behavior is not sufficient. This view seems to be based in part on a misunderstanding of a 1987 Federal Supreme Court ruling and is not convincing from the perspective of animal behavior research. It is overlooked that according to the scientific findings of animal behavior research, forced non-behavior *is* a behavioral disorder and that it can also be empirically-objectively determined, since it can be objectively determined by observing the affected animal and comparing it with normal behavior or by assessing the husbandry system. Ethological experts are able to objectively determine enforced non-behavior as a form of behavioral disorder. This involves determining the degree and extent to which the housing system suppresses the animal's normal behavior. In the case of permanent tethering of cattle, the housing system severely restricts or completely prevents numerous basic needs. An ethological examination by experts would show that the normal behavior of cattle is almost completely suppressed. This forced non-behavior leads to suffering of the animals. The seriousness becomes clearly visible by the multitude of affected functional circles and the sum of deprivations. It can be assumed that cattle in tethered conditions are regularly subjected to prolonged and serious suffering. With the

## **IGN-Research Award 2022**

knowledge of ethology and suitable experts, these sufferings can be determined and those who inflict them can be convicted in animal cruelty criminal proceedings.