

Katharina Braun

# Law and Protest at the Periphery of Democracy

Evaluating Legal Responses to Animal Activism  
and Undercover Footage



Nomos

Beiträge zum  
ausländischen öffentlichen Recht und Völkerrecht

Edited by

the Max Planck Society  
for the Advancement of Science  
represented by Prof. Dr. Armin von Bogdandy  
and Prof. Dr. Anne Peters

Volume 337

Katharina Braun

# Law and Protest at the Periphery of Democracy

Evaluating Legal Responses to Animal Activism  
and Undercover Footage



**Nomos**

This publication was made possible by co-financing for open access monographs and collected volumes from Freie Universität Berlin, and a printing cost grant from the Commission for Women and Equality, Department of Law, at Freie Universität Berlin.

The **Deutsche Nationalbibliothek** lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

a.t.: Berlin, Freie Universität, Diss., 2023

ISBN 978-3-7560-1458-3 (Print)  
978-3-7489-1995-7 (ePDF)

1st Edition 2024

© Katharina Braun

Published by

Nomos Verlagsgesellschaft mbH & Co. KG  
Waldseestraße 3–5 | 76530 Baden-Baden  
[www.nomos.de](http://www.nomos.de)

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG  
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-1458-3 (Print)  
ISBN 978-3-7489-1995-7 (ePDF)

DOI <https://doi.org/10.5771/9783748919957>



Online Version  
Nomos eLibrary



This work is licensed under a Creative Commons Attribution 4.0 International License.

## Acknowledgments

This book is the output of my doctoral research at Freie Universität Berlin, submitted in summer 2022. First and foremost, I would like to express my gratitude to my primary supervisor, Anne Peters, for her guidance and feedback. I am also grateful to the further supervisors and examiners of this thesis, Heike Krieger and Alasdair Cochrane, for their comments and the time they spent on reviewing my work.

Further, I would like to thank the institutions where I spent time during this research project. I would like to thank the team of Anne Peters at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. For guidance in political theory while at the University of Sheffield Department of Politics and International Relations, I am deeply grateful to Alasdair Cochrane and Josh Milburn. For the research stay at the Cambridge Centre for Animal Rights Law, I would like to thank Raffael Fasel and Sean Butler. Equally, my gratitude extends to the fellow researchers at these institutions for the collaborative environment and inspiring discussions.

In addition to those already mentioned I would like to express my appreciation to everyone who provided feedback on parts of the thesis, in particular Bernd Ladwig, Martino Mona, Siobhan O'Sullivan and William Smith. My deepest thanks goes to Alain Zysset for reading the entire thesis and for providing most thoughtful comments. Further, I would like to thank Lillian Robb for her proofreading and advise on language questions.

My gratitude also extends to fellow researchers in the fields of animal law and politics. While it remains a small community, there still are too many to be named personally. From the initial idea to publication, the inspiring conversations and the supportive atmosphere were a source of motivation.

I would like to acknowledge the financial support provided by the Ernst Reuter Foundation, the Commission for Women and Equality at the Freie Universität Berlin, Department of Law, and the open access publication fund at Freie Universität Berlin. I am also thankful to the administrative staff at Freie Universität Berlin and at the Max Planck Institute for Comparative Public Law and International Law for their assistance in administrative matters, as well as the team at Nomos for their guidance in the publication process.

## *Acknowledgments*

Finally, I would like to express my gratitude to my parents and those who supported me throughout this project. I thank you deeply, for everything.

# Table of Contents

List of Abbreviations	17
Part I: Groundwork	19
1. Introduction	19
1.1 Placing the Dissertation in the Field of Animal Studies	22
1.2 Research Questions and Claims	25
1.3 Plan of the Dissertation	27
2. Methods and Theoretical Underpinnings	30
2.1 Definitions	31
2.2 Normative Jurisprudence	33
2.3 Discourse Theory and Discourse Analysis	35
2.4 Critical Legal Theory	37
2.5 Comparative Law	38
2.6 The Role of Political Philosophy: Normative Reconstruction	40
3. Deliberative Democracy as Key Concept	42
3.1 Defining Deliberative Democracy	44
3.2 Chances and Limits of Considering Deliberative Democracy in Animal Studies	49
3.3 Deliberative Democracy in the Context of Animal Activism and Undercover Footage	52
3.4 Deliberative Democracy and the Law	56
4. Animal Activism as a Key Concept	62
4.1 Why? The Theories Behind Animal Activism	63
4.2 How? The Strategies of Animal Activists	65
4.3 The Case of Undercover Footage	71
4.4 Why not Whistleblowing?	73
4.5 Gaps in the Existing Research	75

## Table of Contents

Part II: The Dissemination of Undercover Footage and the Deliberative Ideal	81
5. Animal Activism and the Rules of Deliberative Democracy: The <i>Tierbefreier</i> Case	81
5.1 Legal Analysis	84
5.1.1 Background and Facts	84
5.1.2 The Case Against <i>Tierbefreier</i> in the Context of Parallel Proceedings	85
5.1.3 Applicable Law	87
5.1.4 Münster District Court Decision	87
5.1.5 Hamm Regional Court Decision	88
5.1.6 ECtHR Decision	92
5.2 ‘The Rules of the Intellectual Battle of Ideas:’ A Normative Reconstruction	95
5.2.1 Defining the ‘Rules of the Intellectual Battle of Ideas’	97
5.2.2 The Intellectual Battle of Ideas	99
5.2.3 Animal Activists and Deliberative Democracy	104
5.2.4 Implications of the ‘Rules’ for Animal Activists’ Freedom of Expression	110
5.2.4.1 Disproportionate Effects on Political Minorities and Animal Activists	111
5.2.4.2 Furthering Deliberation Through Non-Deliberative Acts	112
5.2.4.3 Why resort to the ‘rules of the intellectual battle of ideas?’	117
5.3 Summary and Main Findings	118
5.4 Conclusion and Outlook	119
6. Animal Activists as Public Watchdog? The Organic Chicken Case	120
6.1 Legal Analysis	122
6.1.1 Background and Facts	122
6.1.2 Procedural History and Applicable Law	123
6.1.3 Arguments of the Parties	124
6.1.4 Hamburg District Court Decision and the Wallraff/Springer Test	124
6.1.5 Federal Court of Justice Decision	127

6.1.6	Implications for the Link Between Animal Welfare and Freedom of Expression	130
6.1.7	Links to Other Relevant Cases	131
6.2	The Media as ‘Public Watchdog’ in Legal Reasoning	133
6.2.1	The Public Watchdog in the Jurisprudence of German Courts	134
6.2.2	The Public Watchdog in the Jurisprudence of the ECtHR	137
6.2.3	Duties and Responsibilities of the ‘Public Watchdog’ in the Jurisprudence of the ECtHR	140
6.2.4	Tracing the Differences Between the Domestic and the ECtHR System	143
6.3	Normative Reconstruction	145
6.3.1	Democratic Journalism Theory	146
6.3.2	The Functions Ascribed to the Media in Different Models of Democracy	147
6.3.3	The Public Watchdog as a Functional Concept in the Jurisprudence of German Courts	150
6.3.3.1	The Revelation of Public Grievances: Accountability	150
6.3.3.2	Imparting Information	152
6.3.3.3	Contributing to the Public Formation of Opinion and the Intellectual Battle of Ideas	154
6.3.4	Deliberative vs. Participatory Democracy and Ethics of Journalism	155
6.4	Conclusion and Agenda for Further Research	158
Part III: The Creation of Undercover Footage as Democratic Civil Disobedience		161
7.	Beyond Deliberation? Trespass as Civil Disobedience	164
7.1	Why Civil Disobedience Matters	166
7.2	Considering Trespass as Civil Disobedience	168
7.3	Justifying Civil Disobedience for Animals Morally	177
7.3.1	Extending the Rawlsian-Liberal Approach	178
7.3.2	Democratic Approaches	180
7.3.2.1	Daniel Markovits: Democratic Disobedience	182
7.3.2.2	William Smith: The Deliberative Account	184

## Table of Contents

7.4	Summary and Conclusion	187
8.	Recent Trespass Cases: Civil Disobedience for Animals on Trial?	188
8.1	Heilbronn District Court: Civil Disobedience as a Threat to Democracy	190
8.1.1	Legal Analysis	190
8.1.1.1	Background and Facts	190
8.1.1.2	Procedural History	192
8.1.1.3	No Self Defense/ Defense of Others Justification	192
8.1.1.4	No Necessity Justification	194
8.1.1.5	The Court's Reasoning Comprised	196
8.1.2	Normative Reconstruction	196
8.1.2.1	The Epistemic Gap and Related Empirical Matters	197
8.1.2.2	The Democratic Legitimacy of Animal Welfare Law and its Enforcement	199
8.2	Magdeburg District Court and Naumburg Regional Court: Legally Justified Civil Disobedience?	202
8.2.1	Legal Analysis	203
8.2.1.1	Background and Facts	203
8.2.1.2	Applicable Law	204
8.2.1.3	Reasoning of the Courts	204
8.2.1.3.1	Defense of Others Justification	205
8.2.1.3.2	Necessity Justification	205
8.2.2	Normative Reconstruction	207
8.2.2.1	A Blueprint for Civil Disobedience?	207
8.2.2.2	Magdeburg District Court and the Extended Liberal Approach	209
8.2.2.3	Naumburg Regional Court and the Democratic Approaches	211
8.3	Conclusion	212
9.	Civil Disobedience and the Law	214
9.1	Civil Disobedience and German Courts	216
9.2	Legally Justified Civil Disobedience – A Contradiction?	218
9.3	Civil Disobedience and the Elements of a Crime	219
9.4	Legal Justifications for Civil Disobedience	220
9.4.1	Justifications from Constitutional Law	221

9.4.2	Justifications from Criminal Law	223
9.4.2.1	Necessity	223
9.4.2.2	Safeguarding Legitimate Interests	226
9.4.2.3	Summary: Legal Justifications for Civil Disobedience	228
9.5	Legal Excuses for Civil Disobedience	229
9.6	Legally Relevant Errors: Putative State of Necessity and Error of Law	230
9.7	Prosecutorial Discretion	233
9.8	Sentencing	234
9.9	Civil Disobedience and the Law in the United States	235
9.10	Conclusion	239
9.11	Outlook	240
Part IV: Deliberative Democracy vs. Agonistic Pluralism		243
10.	Ag-Gag Laws in the United States: Preempting the ‘Court of Public Opinion’	244
10.1	Introduction	244
10.2	Defining Ag-Gag	246
10.3	Categorizing Ag-Gag Laws	247
10.3.1	Prohibition of Recording	248
10.3.2	Employment Fraud	249
10.3.3	Rapid Reporting	250
10.4	Litigation	253
10.5	A Legal Analysis of Ag-Gag: The Idaho Case <i>ALDF v.</i> <i>Wasden</i>	255
10.5.1	Background and Facts	256
10.5.2	Procedural History and <i>ALDF v. Otter</i>	258
10.5.3	Applicable Law	259
10.5.4	Reasoning of the Court	261
10.5.4.1	Misrepresentation to Gain Entry	261
10.5.4.2	Obtaining Records by Misrepresentation	265
10.5.4.3	Obtaining Employment by Misrepresentation	266
10.5.4.4	Recordings Provision	266
10.5.4.5	Equal Protection Clause	269
10.5.4.6	Separate Opinion of Judge Bea, Dissenting in Part and Concurring in Part	271

## Table of Contents

10.6	The Idaho Case: A Normative Reconstruction of Ag-Gag	271
10.6.1	The Court of Public Opinion	272
10.6.1.1	Meaning of the Court of Public Opinion	273
10.6.1.2	The Rules of the Intellectual Battle of Ideas in the Court of Public Opinion	275
10.6.2	Democracy and the Court of Public Opinion in Ag-Gag Literature	276
10.6.2.1	Frye: From the Public Sphere to the Public Screen and the Politics of Preemption	277
10.6.2.2	Marceau and Chen: Translating First Amendment Theory into Legal Doctrine	278
10.6.2.3	Gelber and O’Sullivan: Democratic Arguments for Free Speech	280
10.6.2.4	Common Elements	281
10.6.3	Conclusion: Brushing over Democracy	282
10.7	From Antagonism to Agonism	283
10.7.1	Agonism, Activism, and Ag-Gag	284
10.7.2	Legal Implications	288
11.	Ag-Gag in Other Jurisdictions	289
11.1	Ag-Gag in Australia	289
11.1.1	Ag-Gag Legislation	289
11.1.2	Litigation	293
11.1.3	Public Interest and Journalism	296
11.2	Ag-Gag in Canada	300
11.3	Conclusion	302
12.	Comparison: Legal Responses to Undercover Footage in Germany and in the United States	303
12.1	Introduction	303
12.2	Relevant Differences between Legal Responses to Undercover Footage	304
12.2.1	Legislation Targeting Animal Activists	304
12.2.2	The Role of the Criminal Law	305
12.2.3	Animal Welfare as a Matter of Public Interest	308
12.2.4	Privileges Conferred to the Media and Journalism	312
12.2.5	Public Interest and Journalism in Australia and in the United States	313

12.2.6	Differentiating Between Legal and Illegal Conditions in Animal Facilities	314
12.2.7	Rights and Values Invoked in the Context of Undercover Footage	315
12.2.8	Connection to Animal and Environmental Terrorism	321
12.2.9	Deliberative Democracy vs. (Ant)agonistic Politics	322
12.3	Possible Explanations	324
12.3.1	Socio-Legal Explanations	324
12.3.1.1	Importance of Agriculture	324
12.3.1.2	Lobbyism and the American Legislative Exchange Council	325
12.3.1.3	Traditions of Animal Activism	328
12.3.1.4	Public Discourse on Animal Activism and Undercover Footage	331
12.3.2	Doctrinal Legal Explanations	332
12.3.2.1	The Legal Status of Animals and the Animal Welfare State Objective	332
12.3.2.2	Structure of the Criminal Code	335
12.3.2.3	Private/ Public Boundaries, Criminal Law, and the Public Interest	335
12.3.3	Explanations from Political Culture and Context	337
12.3.3.1	Varying Support for Deliberative Democracy	338
12.3.3.2	The Relationship Between Democracy and Fundamental Rights in Law	339
12.3.3.3	The Role of Courts	341
12.3.3.4	Animal Activism in Comparison to (Other) Non-Violent Political Extremism	343
12.4	Future Developments	345
12.4.1	Future Legal Responses to Undercover Footage in Germany	345
12.4.2	Future Legal Responses to Undercover Footage in the United States	348
12.4.3	Future Legal Responses to Undercover Footage in Australia and in Canada	349

*Table of Contents*

13. Conclusion	350
13.1 Main Findings	350
13.1.1 Interactions Between Freedom of Expression, Democracy, and Animal Law	350
13.1.1.1 Animal Activists' Enjoyment of Freedom of Expression	350
13.1.1.2 Criminal Sanctions	351
13.1.1.3 Democratic Engagement	352
13.1.2 Democratic Cultures and Practices in Cases Against Animal Activists	352
13.1.2.1 The Value of Employing Democratic Theory to Explain and Evaluate Legal Responses to Animal Activism	353
13.1.2.2 Insights from Deliberative Democracy	353
13.1.2.2.1 Going Beyond the Traditional Conception of Deliberative Democracy	354
13.1.2.2.2 Mitigating Distinctions Between Journalists and Activists	354
13.1.2.3 Insights from Democratic Approaches to Civil Disobedience	355
13.1.2.4 Recognizing Civil Disobedience in Cases Against Animal Activists	356
13.1.2.5 Addressing Tensions between Moral and Legal Evaluation through Civil Disobedience	356
13.1.3 Differences between Germany and the United States	357
13.1.3.1 Explaining the Relevant Differences	357
13.1.3.2 Agonism vs. Deliberative Democracy	358
13.2 Outlook	359
 Bibliography	 365
 Materials	 379
 International Treaties	 379
 National Laws	 379
Australia	379

*Table of Contents*

Canada	380
Germany	380
Switzerland	380
United States	380
Other Materials	381
Newspaper Articles and Other Media Sources	386
Table of Cases	389
International Courts	389
Court of Justice of the European Union	389
European Court of Human Rights	389
Domestic Courts	390
Australia	390
Austria	390
Germany	390
Switzerland	393
United States	393



## List of Abbreviations

ACLU	American Civil Liberties Union
AETA	Animal Enterprise Terrorism Act
Ag-gag	Agriculture-gag
ALDF	Animal Legal Defense Fund
ALEC	American Legislative Exchange Council
ALF	Animal Liberation Front
BGB	German Civil Code [Bürgerliches Gesetzbuch]
BGBL	Bundesgesetzblatt
BVerwG	Federal Administrative Court [Bundesverwaltungsgericht]
CJEU	Court of Justice of the European Union
dpa	Deutsche Presse-Agentur
e.V.	Registered association [eingetragener Verein]
ECtHR	European Court of Human Rights
EU	European Union
f./ff.	Following
FAO	Food and Agriculture Organization of the United Nations
FBI	Federal Bureau of Investigations
FCC [BVerfG]	German Federal Constitutional Court [Bundesverfassungsgericht]
FCJ [BGH]	German Federal Court of Justice [Bundesgerichtshof]
GA	Goltdammer's Archiv für Strafrecht
GG	German Basic Law [Grundgesetz]
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
JA	Juristische Arbeitsblätter

*List of Abbreviations*

JR	Juristische Rundschau
JuS	Juristische Schulung
LG	District Court [Landgericht]
MMR	Multimedia und Recht
NJW	Neue Juristische Wochenschrift
NStZ	Neue Zeitschrift für Strafrecht
NSW	New South Wales
NuR	Natur und Recht
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NZWiSt	Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht
OLG	Regional Court [Oberlandesgericht]
OVG	Regional Administrative Court [Oberverwaltungsgericht]
Para.	Paragraph
Qld	Queensland
SHAC	Stop Huntingdon Life Science Cruelty
StGB	German Criminal Code [Strafgesetzbuch]
StPO	German Criminal Procedure Code [Strafprozessordnung]
TE-SAT	EU Terrorism Situation & Trend Report
UN	United Nations
TierSchG	German Animal Protection Act [Tierschutzgesetz]
TierSchNutztV	Farm Animal Welfare Regulation [Tierschutz-Nutztierhaltungsverordnung]
VGH	Regional Administrative Court [Verwaltungsgerichtshof]
ZD	Zeitschrift für Datenschutz
ZPO	German Civil Procedure Code [Zivilprozessordnung]
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft
ZUR	Zeitschrift für Umweltrecht

