

# The impact of including animals in the constitution – Lessons learned from the German animal welfare state objective

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## 1 Introduction

**Scope-aim.** Animal welfare can be incorporated into a constitution in *grosso modo* four possible ways: as a state objective<sup>1</sup>, as a fundamental social and economic right<sup>2</sup>, as a classic fundamental right<sup>3</sup> and as a fundamental right for the animal<sup>4</sup> (i.e., animal rights).<sup>5</sup> A state objective reflects a general responsibility or state duty towards (the protection of) animals, but does not create an enforceable right as no rights are conferred upon individuals (human beings).<sup>6</sup> In contrast, socio-economic and classic fundamental rights are substantially different legal remedies, which also impose obligations on citizens and are indeed enforceable in court.<sup>7</sup> While classical fundamental rights are characterized by a negative obligation on the part of the government, in the form of an obligation to abstain exactly the opposite is expected in the case of socio-economic rights where the government must act in an active manner and has a positive duty to act.<sup>8</sup> The last option of animal rights conceptually differs from the first three options, as a right would be created for a nonhuman animal, whereas the others refer to human rights.<sup>9</sup> This article focuses

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<sup>1</sup> E.g., “The state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order”.

<sup>2</sup> E.g., “Every human being has the right to the protection of a healthy environment which entails the protection and welfare of animals as sentient beings”.

<sup>3</sup> E.g., “Every human being has the right that animals as sentient beings are treated with respect”.

<sup>4</sup> E.g., “Every animal (belonging to a wild species) has the right to live free in their natural environment, and have the right to reproduce”.

<sup>5</sup> ‘*Grosso modo*’ four possibilities, although other options are conceivable. With regard to the Belgian constitution Uyttendaele suggested for instance to include animal welfare in a preamble (See Preparatory Report of the Senate, 2018-2019, No. 6-339/3, 26-27, [www.senate.be/](http://www.senate.be/)). Note that the current Belgian constitution does not contain a preamble.

<sup>6</sup> BVerfG, 10.05.2001 - 1 BvR 481/01, ([bundesverfassungsgericht.de](http://bundesverfassungsgericht.de)) par. 18; Peter E. Quint, ‘The Constitutional Guarantees of Social Welfare in the Process of German Unification’ (1999) 47 AJCL 303, 315; Clemens Cristoph Hillmer, *Auswirkungen einer Staatszielbestimmung "Tierschutz" im Grundgesetz, insbesondere auf die Forschungsfreiheit* (Peter Lang 2000) 131&141; Eva Inés Oberfell, ‘Ethischer Tierschutz mit Verfassungsrang: Zur Ergänzung des Art. 20a GG um ‘drei magische Worte’ (2002) 55 NJW 2296, 2297; Johannes Caspar & Martin Geissen, ‘Das neue Staatsziel "Tierschutz" in Art. 20a’ (2002) 21 NVwZ 913, 914; Hans-Georg Kluge, ‘Staatsziel Tierschutz: Am Scheideweg zwischen verfassungspolitischer Deklamation und verfassungsrechtlichem Handlungsauftrag’ (2004) 37 ZRP 10, 10; Rico Faller, *Staatsziel "Tierschutz"* (Duncker & Humblot 2015) 135; Almuth Hirt, Christoph Maisack & Johanna Moritz, *Tierschutzgesetz* (2<sup>nd</sup> edn, Verlag Franz Vahlen München 2007) 59; Olivier Le Bot, ‘La protection de l’animal en droit constitutionnel. Etude de droit’ (2007) 12 Lex electronica 1, 10; Joris Larik, *Foreign policy objectives in European constitutional law* (OUP 2016) 33, 36 & 45-52; Olivier Le Bot, ‘Is It Useful to Have an Animal Protection in the Constitution’ (2018) 15 US-China Law Review 54, 56; Janneke Vink, *The Open Society and Its Animals* (Palgrave Macmillan 2020) 218.

<sup>7</sup> The difference between animal welfare as a fundamental social and economic right and animal welfare as a classic fundamental right is rather a distinction in concept than in content. Nevertheless, it can also affect content as the choice for a classic or social and economic right reflects a kind of hierarchical connotation. It is generally assumed that classic fundamental rights represent the absolutely core values of a state. In this view if a state anchors animal welfare in their constitution as a classic fundamental right it makes a considerable acknowledgement to animal welfare as one of the high-important constitutional values. An extensive discussion about this topic will be the subject of another research paper.

<sup>8</sup> Peter E. Quint, ‘What Is a Twentieth-Century Constitution?’ (2007) 67 Md. L. Rev. 238, 243; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 11; Claudia E. Haupt, ‘The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law’s Animal Protection Clause’ (2010) 16 Animal L. 213, 225 (2010); Johan Vande Lanotte, Geert Goedertier & Yves Haeck, *Belgisch publiekrecht* (Die Keure 2015) 676; Larik (n 6), at 36; Vink (n 6), at 219.

<sup>9</sup> In view of animal rights theory, one could wonder how *human* rights can affect *animal* welfare. As law tends to be pre-eminently anthropocentric in nature, it has proven difficult for example to recognize environmental or animal rights in the capacity of nature or animals as legal persons or right-holders. However, constitutions do accept for instance that ‘humans’ have the right to the protection of a healthy environment (i.e. Art 23., third paragraph, 4<sup>o</sup> Belgian Constitution). Although the

on the first possibility, a state objective, and aims to provide insight into whether a state objective significantly improves the position of animals. To examine animal welfare as a state objective in a constitution we will focus on Germany, which added an animal welfare state objective to its constitution, the Basic Law (*Grundgesetz*)<sup>10</sup>, in Article 20a.<sup>11</sup> The relevance of this research is highly topical as several European countries (such as Belgium<sup>12</sup> and the Netherlands<sup>13</sup>) are also considering the inclusion of animal welfare as a state objective in their constitutions.

**Methodology.** This research paper is the result of a thorough literature review and an in-depth analysis of the case law regarding Article 20a of the Basic Law. The German animal welfare state objective has been introduced almost twenty years ago and has been applied extensively in case law, which makes it an excellent subject for research.

To identify court decisions based on the constitutional animal welfare state objective embedded in Article 20a of the Basic Law, a twofold approach was taken to ensure the accuracy of the analysis. First case law itself as primary source was consulted, subsequently followed by an examination of related legal doctrine. To retrieve the relevant case law a search was conducted at the ‘dejure.org’-website (<https://dejure.org/>)<sup>14</sup>, which embodies a comprehensive repository of German jurisprudence.<sup>15</sup> This resulted in over 500 court decisions (both federal and state, civil, administrative, social, fiscal and criminal) which were then scrutinized.<sup>16</sup> Rulings from Germany’s higher courts (i.e., the Constitutional Court (*Bundesverfassungsgericht*) and the Federal Administrative Court (*Bundesverwaltungsgericht*)) were the primary focus because their decisions carry the greatest weight. However, lower-court decisions were far more numerous. In three months’ time all these decisions were examined in detail and converted into a structured and schematic overview. The analysis included false positive results (e.g., case law about species protection instead of animal welfare), as well as cases where the animal welfare state objective was invoked by the plaintiff or defendant, but was not relied upon by the court in reaching its decision

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environment is not directly addressed to, indirectly this provision advances the environment as this provision has been used to prohibit the deterioration of existing environmental legislation and therefore safeguarded a minimum level of environmental protection. A constitutional right which ensures for example that “every human being has the right that animals as sentient beings are treated with respect” could likewise positively impact animals and their welfare. According to Vink, a positive *human* right for *animal welfare*, concerns an improper fundamental right, whereby a duty of care for animals is disguised, for instance, as a socio-economic fundamental right. She argues that in the case of a state objective, it is clear that animals are the primary beneficiaries of the provision, while in the other case a legally laborious construction is set up in which people are supposedly beneficiaries of a constitutional animal welfare right (See Janneke Vink, *The Open Society and Its Animals* (Palgrave Macmillan 2020) 223). In my opinion, this is not so much problematic, since it can be argued that we as humans have the right to a government policy in relation to animal welfare, by analogy with environmental or cultural policy.

<sup>10</sup> Note that with regard to German legal texts official translations provided by ‘Bundesministerium der Justiz und für Verbraucherschutz’ were used at [www.gesetze-im-internet.de/Teilliste\\_translations.html](http://www.gesetze-im-internet.de/Teilliste_translations.html). With regard to case law a combination of official translations via ‘<https://animal.law.harvard.edu/projects/animals-comparative-constitutional-law/germany/>’ and unofficial translations via ‘[www.deepl.com/translator](http://www.deepl.com/translator)’ were used.

<sup>11</sup> Artikel 1 Gesetz zur Änderung des Grundgesetzes (Staatsziel Tierschutz), 26.07.2002 BGBl. I S. 2862, [www.bgbl.de/](http://www.bgbl.de/) (FRG).

<sup>12</sup> Proposal to revise Article 7bis of the Constitution, 25 April 2017, No. 6-339/1, [www.senate.be/](http://www.senate.be/); Amendment to the Proposal to revise Article 7bis of the Constitution, 14 June 2018, No. 6-339/2, [www.senate.be/](http://www.senate.be/); Proposal to revise Article 7bis of the Constitution, 3 October 2019, No. 7-47/1, [www.senate.be/](http://www.senate.be/).

<sup>13</sup> Proposal Halsema/Van Gent, No. 30900, [www.denederlandsegrondwet.nl](http://www.denederlandsegrondwet.nl); See Janneke Vink, ‘Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde’(2018) 26 Nederlands Juristenblad 1862 & Janneke Vink, ‘Dierenwelzijn moet in Grondwet’ (2019) Trouw 19.

<sup>14</sup> The dejure.org-website contains a search feature, which allows the specification of subject matter. Initially, the specific number of the constitutional provision (i.e., “Art. 20a GG”) that represents the animal welfare state objective was entered in the search tool. However, as Art. 20a GG is not limited to animal welfare, but also envisages environmental protection, the search was further narrowed down with the additional keyword “Tier” (animal).

<sup>15</sup> Note that the full texts of the decisions are not directly available on dejure.org, but are linked via other - official and non-official - sources. These decisions were subsequently accessed via the university’s library collection of foreign (e-)sources (e.g., Beck online, caselaw.de, Juris, ...).

<sup>16</sup> The timeframe of the reviewed case law includes court decisions up to and including October 2019.

(e.g., tax cases, liability cases). Finally, these systematic structured searches were supplemented by convenience sampling of secondary legal literature, which discussed and analyzed court decisions. The purpose of combining these multiple searches was to assure the most comprehensive coverage possible.

This work extends that of others in several ways. While the existing legal doctrine highlights the legal history, nature and effects of the state objective, the exact impact of the inclusion of animals in the Basic Law for animal welfare has been overlooked.<sup>17</sup> Few legal scholars reviewed to a limited extent what ramifications the change of the Basic Law has brought about.<sup>18</sup> However, those studies are limited in time and scope and frequently based on hypothetical assumptions. By verifying the actual impact via comprehensive empirical research (both quantitative and qualitative) this study fills this pending gap.

The paper is structured as follows. In order to set the context, a first part briefly discusses the reasons behind the new constitutional provision (Section 2.1.1) as well as its legal nature (Section 2.1.2). Part two of the research is dedicated to the central research question and thus analyses the impact of the animal welfare state objective. Section 2.2.1 identifies the lack of a federal standing provision for animal welfare organizations. Article 20a of the Basic Law as a basis for limiting fundamental rights is being explored in Section 2.2.2. Subsequently, on the one hand, Section 2.2.3 investigates if the incorporation of animals in the Basic Law can guarantee a minimum level of animal welfare. On the other hand, Section 2.2.4 examines if besides the *status quo* a positive impact of the constitutional amendment on animal welfare policy and legislation can be retrieved. The purpose of Section 2.2.5 is to shed light on the constitutional status of animal welfare and interpretation in accordance with the Basic Law. Finally, Section 2.2.6 charts the significance of Article 20a of the Basic Law for animal husbandry and hunting practices. The concluding part of this research paper reflects on these results and presents a general overview.

## 2 Animal Welfare in Germany's Basic Law

### 2.1 The introduction of animal welfare in the Basic Law

#### 2.1.1 The amendment process: influencing factors

In 2002, Germany was the first country in the European Union to introduce a constitutional article on animal welfare.<sup>19</sup> The words “and the animals” (*und die Tiere*) were added to Article 20a of the Basic Law. The constitutional amendment was intended to address the dissatisfaction that prevailed regarding the inadequate implementation of the Animal Welfare Act (*Tierschutzgesetz*).<sup>20</sup> The main obstacle was the confrontation between the provisions of the Animal Welfare Act and fundamental rights or ‘Basic Rights’ (*Grundrechte*) (e.g., freedom of religion, freedom of science and teaching, and freedom of artistic

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<sup>17</sup> Obergfell (n 6); Caspar & Geissen (n 6); Johannes Caspar & Michael W. Schröter, *Das Staatsziel Tierschutz in Art. 20a GG* (Kollen 2003); Kluge (n 6); Faller (n 6); Hirt, Maisack & Moritz (n 6), at 57-72; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6); Erin Evans, ‘Constitutional Inclusion of Animal Rights in Germany and Switzerland: How Did Animal Protection Become an Issue of National Importance?’ (2010) 18 *Society and Animals* 231; Olivier Le Bot, ‘Les Grandes Évolutions du Régime Juridique de l’Animal en Europe: Constitutionnalisation et Déréification’ (2011) 24 *Rev. Québécoise de Droit Int’l* 249; Jessica Eisen, ‘Animals in the Constitutional State’ (2017) 15 *ICON* 909, 917.

<sup>18</sup> Kate M. Natrass, “...Und Die Tiere” - Constitutional Protection for Germany’s Animals’ (2004) 10 *Animal L.* 283; Roman Kolar, ‘Three Years of Animal Welfare in the German Constitution – the Balance from an Animal Welfare Perspective’ (2005) 22 *Altex* 146; Haupt (n 8); Erin Evans, ‘A Socio-Legal Exploration of the Outcomes of Constitutional Animal Protection’ (American Sociological Association meeting, New York, 2019).

<sup>19</sup> Caspar & Geissen (n 6), at 913; Natrass (n 18); Claudia E. Haupt, ‘Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter’ (2007) 39 *Geo. Wash. Int’l L. Rev.* 839, 869; Carla M. Zoethout, ‘Animals as Sentient Beings: On Animal Welfare, Public Morality and Ritual Slaughter’ (2013) 7 *Vienna J. on Int’l Const. L.* 308, 313.

<sup>20</sup> Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Staatsziel Tierschutz), 23.04.2002 BT-Drs. 14/8860, 1&3 (FRG); Caspar & Geissen (n 6), at 913 & 917; Obergfell (n 6); Kluge (n 6), at 11; Natrass (n 18), at 290-294; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 30; Evans (n 17), at 235.

expression) enshrined in the Basic Law.<sup>21</sup> When restrictions regarding the use of animals set out in the Animal Welfare Act collide with the fundamental rights outlined in Section 1 of the Basic Law, these fundamental rights take precedence over lower norms, thereby rendering the Animal Welfare Act ineffective.<sup>22</sup> To give animal welfare greater weight in the balancing of interests, the only solution was to include animal welfare into the Basic Law.<sup>23</sup> The impetus that led to the final amendment was the so-called ritual slaughter decision.<sup>24</sup> In this case the German Constitutional Court (*Bundesverfassungsgericht*) ruled in favor of a Muslim butcher, who had been denied a permit to perform ritual slaughter.<sup>25</sup> Evans points out that animal rights movements exploited the Court decision as a spontaneous event to cause a public outcry through issue framing.<sup>26</sup> Subsequently, the political pressure became untenable, and so the Christian Democratic Union of Germany (*Christlich Demokratische Union Deutschlands*, abbreviated CDU), which had previously blocked legislative attempts, publicly supported the constitutional amendment and provided the required majority.<sup>27</sup> The new constitutional amendment to Article 20a put the Basic Law in line with the majority of state constitutions, as eleven of the sixteen German states<sup>28</sup> had already included animal welfare provisions in their respective state constitutions.<sup>29</sup> Furthermore, the introduction of animal welfare into the Basic Law followed a clear demand in legal literature<sup>30</sup> and of the German people, who supported the quest by addressing the constitutional committee with 170,000 requests to add a provision on this topic to the Basic Law<sup>31</sup>. A concurrence of legal, political and sociological factors led to the creation of a constitutional animal welfare provision.

### 2.1.2 The legal nature of Article 20a of the Basic Law

The positioning of animal welfare under Section II, “The Federation and the States” (*Der Bund und die Länder*), instead of under Section I, “Basic Rights” (*Die Grundrechte*), resulted in a state objective for animal

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<sup>21</sup> Obergfell (n 6); Caspar & Geissen (n 6), at 915; Kluge (n 6); Natrass (n 18), at 292-294; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6); Haupt (n 8), at 217-219; Jessica Eisen, ‘Liberating Animal Law: Breaking Free from Human-Use Typologies’ (2010) 17 *Animal L.* 59, 65.

<sup>22</sup> Obergfell (n 6); Kluge (n 6); Natrass (n 18), at 292; Haupt (n 8); Evans (n 17), at 235-236; Le Bot, ‘Les Grandes Évolutions du Régime Juridique de l’Animal en Europe’ (n 17), at 252; Eisen (n 17).

<sup>23</sup> Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Staatsziel Tierschutz), 23.04.2002 BT-Drs. 14/8860, 1&3 (FRG); Obergfell (n 6), at 2296; Eisen, ‘Liberating Animal Law’ (n 21), at 66; Joan E. Schaffner, *An introduction to animals and the law* (Palgrave Macmillan 2011) 159.

<sup>24</sup> Caspar & Geissen (n 6), at 916; Caspar & Schröter (n 17), at 68; Kluge (n 6), at 11; Natrass (n 18), at 301; Faller (n 6), at 23; Hans-Georg Kluge, ‘Das Schächten als Testfall des Staatszieles Tierschutz’ (2006) 25 *NVwZ* 650, 650; Hirt, Maisack & Moritz (n 6), at 57; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 10; Haupt, ‘Free Exercise of Religion and Animal Protection’ (n 19), at 857; Haupt (n 8), at 219; Schaffner (n 23); Eisen (n 17).

<sup>25</sup> BVerfG, 1 BvR 1783/99, 2002.

<sup>26</sup> Evans (n 17), at 246; Eisen (n 17), at 918.

<sup>27</sup> Obergfell (n 6), at 2296; Kluge (n 6); Natrass (n 18), at 302; Kluge, ‘Das Schächten als Testfall des Staatszieles Tierschutz’ (n 24); Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 9-10; Evans (n 17), at 236-238; Eisen (n 17), at 917-918.

<sup>28</sup> The following states incorporated an animal welfare provision into their state constitution: Brandenburg (1992), Saxony (1993), Thuringia (1993), Berlin (1995), Bremen (1997), Lower Saxony (1997), Bavaria (1998), Saarland (1999), Rhineland-Palatinate (2000), Baden-Württemberg (2001), North Rhine-Westphalia (2001).

<sup>29</sup> Obergfell (n 6), at 2296-2297; Natrass (n 18), at 297-298; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 9; Haupt (n 8), at 221.

<sup>30</sup> Stefan Huster, ‘Gehört der Tierschutz ins Grundgesetz?’ (1993) 26 *ZRP* 326; Eisenhart von Loeper, ‘Tierschutz ins Grundgesetz’ (1996) 29 *ZRP* 143; Johannes Caspar, ‘Tierschutz in die Verfassung?’ (1998) 31 *ZRP* 441; Michael Kloepfer & Matthias Rossi, ‘Tierschutz in das Grundgesetz?’ (1998) 53 *JZ* 369; Wolfgang Apel, ‘Staatsziel Tierschutz’ (1998) 4 *Du und das Tier* 10; Uwe Nickel, ‘Zur Notwendigkeit einer Staatszielbestimmung Tierschutz im Deutschen Grundgesetz’ in Harald Schöffel et al. (eds), *Forschung Ohne Tierversuche 2000* (Springer 2000), 89-94; Eva Inés Obergfell, ‘Wissenschaftsfreiheit und Tierschutz - Zur Wertigkeit des Tierschutzes im deutschen Verfassungsrechtssystem’ (2001) 34 *ZRP* 193, 196; Obergfell (n 6), at 2296; Haupt (n 8), at 221.

<sup>31</sup> Tade Matthias Spranger, ‘Auswirkungen einer Staatszielbestimmung "Tierschutz" auf die Forschungs- und Wissenschaftsfreiheit’ (2000) 33 *ZRP* 285, 285; Jana Glock, *Das deutsche Tierschutzrecht und das Staatsziel "Tierschutz" im Lichte des Völkerrechts und des Europarechts* (Nomos Verlagsgesellschaft 2004) 19; Haupt (n 8), at 219; Zoethout (n 19), at 313.

welfare rather than a directly enforceable right. A state objective implies a goal of constitutional magnitude, which the three branches of government are obligated to take into account and to promote as far as possible.<sup>32</sup> The wording of Article 20a of the Basic Law also clearly reflects the nature of animal welfare law as a state objective:

“Mindful also of its responsibility toward future generations, **the state shall protect** the natural foundations of life and **animals by legislation** and, in accordance with law and justice, **by executive and judicial action**, all within the framework of the constitutional order.”<sup>33</sup> [Emphasis added in bold]

Germany’s Basic Law has several state objectives (*Staatszielbestimmungen*), such as the social state principle (Article 20(1)), environmental protection (Article 20a), and European integration (Article 23(1)).<sup>34</sup> Animal welfare is the sixth constitutional state objective and differs from all other state objectives as it involves animal rather than human interests.<sup>35</sup>

Although structurally state objectives are considered constitutional provisions of a separate category<sup>36</sup>, they are of the same constitutional rank as other constitutional provisions, including fundamental rights<sup>37</sup>.

## 2.2 Impact of the constitutional amendment

In order to provide a clear overview of general implications and trends of including animal welfare in the (German) constitution a detailed analysis of all cases would lead us too far and falls therefore outside the scope of this contribution. Instead priority is given to the qualitative component of this research and several high-profile court cases from for example the Constitutional Court are discussed more elaborately. These are, however, complemented with numerous references to lower-court decisions.

### 2.2.1 Impetus for a federal standing provision for animal welfare organizations

As mentioned above, a state objective does not allow (federal) standing for animal welfare organizations. The case law affirmed that the animal welfare state objective does not provide a subjective right for individuals, but there is a duty for the government to protect animals.<sup>38</sup> However, a possible solution is the creation of an interest group standing provision (*Verbandsklagerecht*).<sup>39</sup> Instituting such a procedural instrument allows recognized groups to sue the government even if they did not suffer a violation of their own rights.<sup>40</sup> An interest group standing provision reflects an important social function and proactively helps to enforce animal welfare regulations. It endorses animal welfare organizations, for instance, when municipalities order unauthorized killing of animals (e.g., the killing of confiscated

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<sup>32</sup> Hillmer (n 6), at 141; Caspar & Geissen (n 6), at 914-917; Caspar & Schröter (n 17), at 19; Faller (n 6), at 151; Hirt, Maisack & Moritz (n 6), at 61; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 10-11; Gieri Bolliger, *Animal Welfare in Constitutions*, Conference ‘Constitutional and Legislative Aspects of Animal Welfare in Europe’ (Brussels, 1 February 2007), 2, [www.tierimrecht.org/](http://www.tierimrecht.org/); Haupt (n 8), at 215; Schaffner (n 23), at 160; Zoethout (n 19), at 314; Larik (n 6), at 7 & 32-33.

<sup>33</sup> Official translation of Article 20a of the Basic Law for the Federal Republic of Germany, [www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p01116](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p01116), accessed 22 September 2020.

<sup>34</sup> Haupt (n 8), at 221-222; Larik (n 6), at 31-40.

<sup>35</sup> Haupt (n 8), at 215.

<sup>36</sup> Faller (n 6), at 134.

<sup>37</sup> Caspar & Geissen (n 6), at 915; Hirt, Maisack & Moritz (n 6), at 60.

<sup>38</sup> BVerfG, 10.05.2001 - 1 BvR 481/01, ([bundesverfassungsgericht.de](http://bundesverfassungsgericht.de)) par. 18; VG Augsburg, 12.02.2010 - Au 4 E 10.78; OLG Stuttgart, 21.12.2016 - 4 Ws 284/16; OLG Naumburg, 22.02.2018 - 2 Rv 157/17; VGH Bayern, 13.02.2019 - 19 N 15.420.

<sup>39</sup> Johannes Caspar, ‘Verbandsklage im Tierschutzrecht durch Landesgesetz?’ (2008) 4 DÖV 145, 145-152.

<sup>40</sup> Obergfell (n 6), at 2298; Natrass (n 18), at 304; Lauren Magnotti, ‘Pawing Open the Courtroom Door: Why Animals’ Interests Should Matter when Courts Grant Standing’ (2006) 80 St. John’s L. Rev. 455, 492; Haupt (n 8), at 231.

animals) or when animal experiments are carried out illegally (despite animal-free alternatives having long been available).<sup>41</sup> Without such a legal instrument, only “too much” animal protection can be challenged (e.g., an animal experimenter can appeal to the courts against the denial of the authorities to authorize an experiment).<sup>42</sup> Therefore, an interest group standing provision redresses this imbalance by allowing recognized animal protection groups to sue on behalf of animals.<sup>43</sup>

Regarding Article 20a of the Basic Law, such a standing provision was passed in 2002 for environmental organizations.<sup>44</sup> For example, Articles 63 and 64 of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) grant standing to recognized nature conservation associations to file for a legal remedy. They can do this without their own rights being injured, insofar as their task area (as defined by their statutes) is affected.<sup>45</sup>

Currently a similar provision for animal welfare organizations is lacking.<sup>46</sup> Legislative initiatives to introduce such a right at a national level have been unsuccessful.<sup>47</sup> In response to this setback, several states instituted a group standing provision at the state level.<sup>48</sup> For example in the state of North Rhine-Westphalia an animal welfare organization used this group standing provision to try to put an end to the cultural tradition of goose pulling (*Gänssereiten*). The complaint was declared admissible, but unfounded because the court ruled that as long as the killed geese are consumed, a ban on the killing is out of the question.<sup>49</sup> Although North Rhine-Westphalia introduced the animal welfare interest group standing provision in 2013, the ruling CDU and FDP (Free Democratic Party, *Freie Demokratische Partei*) parties decided not to extend the trial period and therefore let it expire on December 31, 2018.<sup>50</sup> The State Government justified its decision by referring to the small number (seven) of court cases submitted. It was therefore concluded that the limited number of cases, firstly, did not allow a positive assessment of the effects of the standing provision and secondly, indicated that the initiative was not very successful due to underutilization. Finally, in the opinion of the State Government of North Rhine-Westphalia there was no need for any form of a standing provision because possible disagreements between enforcement authorities and animal welfare organizations could be settled amicably.<sup>51</sup> The statement by the Government of North Rhine-Westphalia is striking since not all of the court cases submitted have been settled<sup>52</sup> and it is therefore difficult to make an assessment. Secondly, the attitude of the State

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<sup>41</sup> <[www.tierschutzbund.de/information/hintergrund/recht/verbandsklage/](http://www.tierschutzbund.de/information/hintergrund/recht/verbandsklage/)> accessed 5 August 2020.

<sup>42</sup> Caspar & Geissen (n 6), at 913; Hirt, Maisack & Moritz (n 6), at 34 & 36; Caspar, ‘Verbandsklage im Tierschutzrecht durch Landesgesetz?’ (n 29), at 146.

<sup>43</sup> Natrass (n 18), at 304.

<sup>44</sup> Robert Seelig & Benjamin Gündling, ‘Die Verbandsklage im Umweltrecht - Aktuelle Entwicklungen und Zukunftsperspektiven im Hinblick auf die Novelle des Bundesnaturschutzgesetzes und supranationale und internationale rechtliche Vorgaben’ (2002) 21 NVwZ 1033; Natrass (n 18), at 304; Magnotti (n 40); Hans-Joachim Koch, ‘Die Verbandsklage im Umweltrecht’ (2007) 26 NVwZ 369; Haupt (n 8), at 332-334.

<sup>45</sup> § 63-64 Gesetz über Naturschutz und Landschaftspflege (Bundesnaturschutzgesetz), 29.07.2009 BGBl. I S. 2542, [www.bgbl.de/](http://www.bgbl.de/) (FRG).

<sup>46</sup> Obergfell (n 6), at 2298; Natrass (n 18), at 304; Magnotti (n 40); Haupt (n 8), at 234; Eisen (n 17), at 938.

<sup>47</sup> Haupt (n 8), at 234.

<sup>48</sup> Eight of the sixteen *Länder* have incorporated a *Verbandsklagerecht* into their state constitution: Bremen (2007), Hamburg (2013), North Rhine-Westphalia (2013, but this expired on 31 December 2018), Saarland (2013), Rhineland-Palatinate (2014), Baden-Württemberg (2015), Schleswig-Holstein (2015), Lower Saxony (2017).

<sup>49</sup> VG Gelsenkirchen, 04.02.2016 - 16 L 221/16.

<sup>50</sup> José Martínez, ‘Zur Abschaffung der Tierschutz-Verbandsklage in NRW’, <<https://agrardebatten.blog/2019/01/05/zur-abschaffung-der-tierschutz-verbandsklage-in-nrw/>> accessed 5 August 2020; See § 4 Gesetz über das Verbandsklagerecht und Mitwirkungsrechte für Tierschutzvereine (TierschutzVMG NRW), <[https://recht.nrw.de/lmi/owa/br\\_text?anw\\_nr=2&gld\\_nr=7&ugl\\_nr=7834&bes\\_id=24044&menu=1&sg=0&aufge\\_hoben=J&keyword=tierschutzvmg#det0/](https://recht.nrw.de/lmi/owa/br_text?anw_nr=2&gld_nr=7&ugl_nr=7834&bes_id=24044&menu=1&sg=0&aufge_hoben=J&keyword=tierschutzvmg#det0/)> accessed 5 August 2020.

<sup>51</sup> Martínez (n 50).

<sup>52</sup> VG Münster, 11.04.2019 - 2 K 486/16; OVG Nordrhein-Westfalen, 05.07.2019 - 20 A 1165/16.

Government is also ironic as the original opposition to the standing provision was offered out of fear of an avalanche of lawsuits.<sup>53</sup>

In summary, the mechanisms to mitigate a lack of direct effect are less strong in animal welfare than in environmental protection. This is remarkable since both interests are enshrined in Article 20a of the Basic Law and benefit from the same constitutional status. While environmental protection organizations can count on a federally anchored standing provision, animal welfare organizations have to rely on precarious sub-state initiatives. This difference might be explained by international law and more specifically by the Aarhus Convention.<sup>54</sup> Article 9 of the Aarhus Convention provides for obligations regarding access to justice for environmental associations. Germany signed the Aarhus Convention on December 21, 1998, but it has not yet been ratified. A similar convention on animal welfare is currently lacking in international law.

## 2.2.2 A basis for limiting fundamental rights

### 2.2.2.1 Fundamental rights and the animal welfare state objective

In the hierarchy of legal norms, the constitutional rights in the Basic Law prevail over lower norms such as the provisions of the Animal Welfare Act. The constitutional amendment has identified and alleviated this conflict by providing a constitutional rank to animal welfare. Whereas before animal welfare interests did not stand a chance in collision with constitutional rights, now the courts award much more weight to animal welfare in the balancing of interests and eventually decide in particular cases that fundamental rights can be limited on the grounds that they conflict with animal welfare. Hereinafter the impact of the animal welfare state objective on the following fundamental rights will be examined: human dignity (Article 1 of the Basic Law), personal development (Article 2), freedom of religion (Article 4), freedom of arts, teaching and science (Article 5) and freedom of profession (Article 12). Other fundamental rights that are only sporadically addressed in case law, such as freedom of association (Article 9) and the principle of equality (Article 3), will not be discussed.<sup>55</sup>

#### 2.2.2.1.1 *Freedom of artistic expression*

Article 5(3) of the Basic Law guarantees the freedom of artistic expression. This is a fundamental right not subjected to a textual limitation clause<sup>56</sup> with the consequence that it may only be limited by countervailing constitutional interests.<sup>57</sup> Prior to the constitutional amendment Article 3(6) of the Animal Welfare Act, which stipulates “It shall be prohibited to use an animal for filming, exhibition, advertising or similar events causing the animal pain, suffering or harm;”, could not limit Article 5 of the Basic Law due to the lack of constitutional value of animal interests.<sup>58</sup> This deficiency was illustrated by the canary case. In this case a performance artist placed a canary into an egg substance to honor the fortieth anniversary of the Federal Republic of Germany. Although the Kassel court recognized that the bird was in obvious distress because it was unable to fly and experienced pain, it ruled that the constitutionally protected freedom of artistic expression prevailed over the Animal Welfare Act.<sup>59</sup> Nevertheless, in a case

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<sup>53</sup> Martínez (n 50).

<sup>54</sup> Convention on Access to Information, Public Participation and in Decision-making and Access to justice in Environmental Matters, 1999 *ILM*, 515.

<sup>55</sup> BVerfG, 03.07.2007 - 1 BVR 2186/06; OLG Hamm, 06.11.2012 - I-27 W 83/12.

<sup>56</sup> A limitation clause is a provision in the text of a constitutional right that limits that particular right by allowing for regulation or prohibition. An example of a fundamental right that is subjected to a textual limitation clause is the freedom of occupation (Article 12 of the Basic Law).

<sup>57</sup> Haupt (n 8), at 218.

<sup>58</sup> Obergfell (n 6), at 2298; Caspar & Geissen (n 6), at 916; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 31; Haupt (n 8), at 253-256.

<sup>59</sup> AG Kassel, 05.10.1990 - 99 OWi 626 Js 159328/90. See Michael Selk, ‘Anmerkung’ (1991) 9 *NStZ* 443, 443-44.

concerning the decapitation of a chicken during an art performance the Regional District Court (*Landgericht*) of Cologne offered opposition to this animal abuse under the guise of artistic freedom. The artist argued that with the decapitation of the chicken he wanted to call attention to the violation of human rights. The court ruled that killing a defenseless animal in need of human protection was itself questioning humanity. To oppose the constitutional right of artistic freedom the court identified Article 2(1) of the Basic Law<sup>60</sup> as a countervailing constitutional interest. In the weighing of interests the moral order of humans and animals on one hand outweighed the individual artistic freedom on the other hand.<sup>61</sup> Haupt noticed that in light of the absence of an animal welfare state objective this decision was highly constitutionally questionable.<sup>62</sup> With the new constitutional amendment, it is no longer necessary to invoke the moral order argument and a reference to Article 20a of the Basic Law is sufficient for animal welfare to be considered as an independent factor. As far as freedom of artistic expression is concerned, Article 20a is thus an added value, since case law now consistently favors animal welfare over artistic freedom.<sup>63</sup>

### 2.2.2.1.2 *Freedom of teaching*

Freedom of teaching, like freedom of artistic expression, is constitutionally anchored in Article 5(3) of the Basic Law. Here we also see that the animal welfare state objective follows an identical trend.<sup>64</sup> In a case prior to the animal welfare state objective, the court accepted experiments on living rats carried out by a professor at the University of Giessen for educational purposes, even though an educational film existed as an alternative.<sup>65</sup> It was claimed that because animal welfare did not have a constitutional status, the university teacher's basic right to freedom of teaching could not be compromised. The decision to use alternative methods is left to the discretion of the teachers. Recent case law evolves in favor of animal interests. Since August 2018, the Administrative Court (*Verwaltungsgericht*) of Cologne no longer allows standard experiments on mice solely for educational purposes. It is unnecessary to carry out these tests, since films or videos about the tests can be shown to the students.<sup>66</sup> As a result, freedom of teaching is no longer a justification for using animal experiments for educational purposes.

### 2.2.2.1.3 *Freedom of research*

While for freedom of artistic expression and teaching the impact of Article 20a of the Basic Law is apparent, this is not the case with regard to constitutional freedom of research (Article 5(3)). The conflict between animal welfare and the freedom of research concerns the use of animals for scientific experiments. Prior to the constitutional amendment, the provisions of the Animal Welfare Act regarding animal experiments could not be effectively enforced because animal protection was not a constitutional interest.<sup>67</sup> As a result, scientists were given ample leeway in determining the “ethical justifiability” and “indispensability” of their own experiments on animals. For instance, in a case concerning the denial of a license to continue visual experiments on non-human primates (the experiment involved sewing up the

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<sup>60</sup> Article 2(1) of the Basic Law: “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law”.

<sup>61</sup> LG Köln, 02.02.1989 - 104 Qs 2/89. See Haupt (n 8), at 254-255.

<sup>62</sup> Haupt (n 8), at 254-255.

<sup>63</sup> LG Berlin, 24.02.2009 - 14 Js 1085/06; KG, 24.07.2009 - (4) 1 Ss 235/09 (150/09); VG Berlin, 24.04.2012 - 24 L 113.12; OVG Niedersachsen, 17.09.2014 - 11 ME 228/14.

<sup>64</sup> Obergfell (n 6), at 2298; Caspar & Geissen (n 6), at 915-916; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 31-32; Haupt (n 8), at 251-253.

<sup>65</sup> VGH Hessen, 29.12.1993 - 11 TH 2796/93; BVerwG, 18.06.1997 - 6 C 5.96.

<sup>66</sup> VG Köln, 22.08.2018 - 21 K 11572/17.

<sup>67</sup> Obergfell, ‘Wissenschaftsfreiheit und Tierschutz’ (n 30); Caspar & Geissen (n 6), at 915; Kluge (n 6), at 12; Nattrass (n 18), at 294; Kolar (n 18), at 146-147; Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 30-31; Eisen, ‘Liberating Animal Law’ (n 21); Haupt (n 8), at 248-251; Evans (n 17), at 235-236; Le Bot, ‘Les Grandes Évolutions du Régime Juridique de l’Animal en Europe’ (n 17).



eyes of newborn monkeys), the Constitutional Court ruled that the competent animal experiment licensing authority was not entitled to decide on the ethical justifiability and indispensability of animal experiments.<sup>68</sup> As long as no formal criteria were infringed, the ethical justifiability of animal experiments was left to the discretion of researchers. Due to the introduction of the animal welfare state objective, which constitutes a conflict between two competing constitutional interests, it was argued that decisions of competent licensing authorities should be subject to full review by the administrative courts instead of the former minimal examination.<sup>69</sup>

Nevertheless, conflicting judgments can be encountered in case law, which makes it difficult to predict the exact impact of the animal welfare state objective on scientific freedom. Two cases illustrate this ambiguity.

In the first case, the administrative court of the city of Giessen ruled with explicit reference to the insertion of animal welfare into the Basic Law that the competent authorities had the right and the duty to perform their own ethical evaluation.<sup>70</sup> The court therefore rejected the lawsuit of the University of Marburg against the local competent authority's decision not to grant licenses for experiments on rats. The Higher Administrative Court (*Verwaltungsgerichtshof*)<sup>71</sup> of Hessen had the same opinion.<sup>72</sup> This decision is in line with the new approach invoked by the animal welfare state object to no longer limit reviews on animal experiments solely to formal criteria.

However, in a second case concerning animal testing on rats and non-human primates (macaques), the Federal Administrative Court (*Bundesverwaltungsgericht*) reversed the decision of the licensing authority to deny the approval of the experiment.<sup>73</sup> The applicant had carried out research at the University of Bremen in the field of neuroscience and cognitive science since 1997. The basic configuration of their experimental set-up corresponded to what was used in cognitive research worldwide. The methodological core of the research project consisted of chronological experiments on macaques, which were fixed in a primate chair and only administered water if they responded to certain visual stimuli. The applicant was repeatedly granted a temporary permit until November 30, 2008. When the investigator applied for a new permit on June 19, 2008, this was refused on October 15, 2008 by an administrative decision of the competent local license authority.

The authority was of the opinion that the application did not substantiate the ethical justifiability of the experiments and lacked a convincing assessment of the burden on the laboratory animals. According to the authority, the burden on the laboratory animals was much higher than that indicated by the applicant. The University of Bremen challenged this decision before the Administrative Court of Bremen and requested the court to instruct the authority to issue a permit.<sup>74</sup> The Court of Bremen declared the appeal by the university admissible, but only partly founded. The court agreed that the refusal was invalid because of poor motivation by the authority, but it refused the claimant's request to instruct the administrative authority to issue a permit to the claimant. However, the court did instruct the authority to take a new decision (this time correctly motivated). In response to this decision, the licensing authority lodged an appeal with the *Oberverwaltungsgericht* (Higher Administrative Court) in Bremen.<sup>75</sup> Yet, the

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<sup>68</sup> VG Berlin, 20.04.1994 - 1 A 232.92; BVerfG, 20.06.1994 - 1 BvL 12/94; VG Berlin, 07.12.1994 - 1 A 232.92.

<sup>69</sup> Obergfell (n 6), at 2298; Le Bot, 'La protection de l'animal en droit constitutionnel' (n 6), at 42.

<sup>70</sup> VG Gießen, 13.08.2003, AZ 10 E 1409/03.

<sup>71</sup> Note that both '*Verwaltungsgerichtshof (VGH)*' and '*Oberverwaltungsgericht (OVG)*' are translated as 'Higher Administrative Court'. Both are synonyms but for historical reasons in three states (Baden-Württemberg, Bavaria and Hessen) the '*Oberverwaltungsgericht*' is called '*Verwaltungsgerichtshof*'.

<sup>72</sup> VGH Hessen, 16.06.2004, AZ 11 ZU 3040/03.

<sup>73</sup> BVerwG, 20.01.2014 - 3 B 29.13.

<sup>74</sup> VG Bremen, 28.05.2010 - 5 K 1274/09.

<sup>75</sup> OVG Bremen, 11.12.2012 - 1 A 180/10, 1 A 367/10.

Higher Administrative Court upheld the ruling of the Administrative Court of first instance. *A fortiori* it ruled that the authority had no discretionary power and must strictly apply Article 8 of the German Animal Welfare Act, which implies that if the factual requirements of this article are met, the authority must grant the license. As a last resort, the authority appealed in vain to the Federal Administrative Court, which concurred with the previous decisions.<sup>76</sup>

These latter decisions are reminiscent of the situation prior to the animal welfare state objective. In both situations the review was limited to formal criteria.

In brief, the impact of Article 20a of the Basic Law on the freedom of research is ambiguous. Results are variable and dependent on the case and therefore no clear trend can be identified.

However, there are a number of findings worth noting. Firstly, the judicial branch sometimes reverses progressive statements by the executive branch. Secondly, it appears from a pilot study investigating the licensing of animal experiments that local competent authorities have not taken any substantial measures in reaction to the constitutional amendment.<sup>77</sup> In a substantial number of cases, the task to evaluate whether an experiment is at all justifiable for the proposed research goal is not performed.<sup>78</sup>

#### 2.2.2.1.4 *Freedom of profession*

*Berufsfreiheit* or occupational freedom is constitutionally protected by Article 12 of the Basic Law. Contrary to previous fundamental rights, a limitation clause does exist with regard to the freedom of profession (Article 12 (1)). Unlike scientific freedom, a conflict between professional freedom and animal welfare might seem less obvious. Nothing is further from the truth, during the case law study it became abundantly clear that this fundamental right was being invoked pre-eminently in the area of animal welfare issues. With respect to intensive animal husbandry, this is the argument par excellence. It is also a popular argument with animal breeders<sup>79</sup> and even in the ritual slaughter case professional freedom was called upon. In particular, a conflict arises when certain animal welfare standards have an economic impact on the professional activity. Note that the courts pronounce limitations to occupational freedom based on violations of the Animal Welfare Act, with Article 20a of the Basic Law only being cited as a subsidiary argument.

The argument of freedom of profession has been used in vain to justify egregious animal welfare violations. For example, a pig breeder was sentenced to three years in prison because more than 1,600 pigs died in his stables due to the appalling conditions in which they were held.<sup>80</sup> The court explicitly took the animal welfare state objective into account in its motivation citing that:

“Since 2002 Article 20a of the Basic Law grants constitutional status to animal protection. The protection of animals thus acquires an outstandingly important significance in a constitutional state, especially since it is located next to the state objective provisions of Article 20 of the Basic Law and thus at an outstanding position in the Basic Law. According to this, animal protection is constitutionally on the same level as the Basic

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<sup>76</sup> BVerwG, 20.01.2014 - 3 B 29.13.

<sup>77</sup> Kolar (n 18), at 148-149.

<sup>78</sup> Kolar (n 18), at 148.

<sup>79</sup> **Pro animal welfare:** VGH Hessen, 26.06.2003 - 11 TG 1262/03; BVerwG, 09.12.2004 - 3 C 7.04; VG Düsseldorf, 26.01.2012 - 23 L 1939/11; OVG Schleswig-Holstein, 04.12.2014 - 4 LB 24/12; VG Hamburg, 04.04.2018 - 11 E 1067/18.

**Pro occupational freedom:** VG Aachen, 22.05.2003 - 6 L 92/03; BVerwG, 17.12.2009 - 7 C 4.09; OVG Nordrhein-Westfalen, 28.02.2013 - 20 B 90/13.

<sup>80</sup> AG Ulm, 15.03.2019 - 1 Ls 12 Js 19998/16.

Rights, so it does not have to recede in any way from the freedom of occupation and ownership of mass animal husbandry enterprises.”<sup>81</sup>

In addition, a case-by-case approach is very common, which makes it difficult to determine the impact of Article 20a of the Basic Law. This is demonstrated by two lawsuits, one concerning training dogs with electric collars<sup>82</sup>, another concerning new horseshoeing regulations<sup>83</sup>. In both cases a ‘higher’ court (i.e., Federal Administrative Court, *casu quo* the Constitutional Court) has ruled and both judgments date from the same period (i.e., 2006, 2007).

However, opposite judgments were made. The Federal Administrative Court decided that the ban on the use of electric collars to train dogs was justified by a proportional violation of Article 12 of the Basic Law and thereby explicitly referred to Article 20a. In particular, the court explained in recital 17 that:

“The general freedom of action protected by Article 2 (1) of the Basic Law [and] the fundamental right to freely exercise an occupation pursuant to Article 12 (1) can be restricted on the basis of a law that is justified by reasons of the common good and complies with the principle of proportionality, which follows in particular from the principle of the rule of law (Article 20 (3) of the Basic Law). This means that the statutory intervention must be suitable and necessary to achieve the objective pursued and that the limit of reasonableness must still be respected in the overall weighing of the severity of the intervention and the weight of the reasons justifying it [...]. These prerequisites are present here. The prohibition of Article 3 (11) of the Animal Welfare Act is in line with the purpose of the provision in Article 1 of the Animal Welfare Act, which is to protect the life and well-being of the animal as a fellow creature out of man's responsibility for it. It thus serves recognized public welfare interests, which are now constitutionally guaranteed, especially since Article 20a of the Basic Law has expressly placed animals under the protection of the state since the Act amending the Basic Law of 26 July 2002 (Federal Law Gazette I p. 2862). [...]”<sup>84</sup>

However, in the new horseshoeing regulation case the German Constitutional Court considered that the requirements of hoof technicians prescribed by the new legislation did not constitute a proportional restriction on occupational freedom, despite the fact that it was pursuing a legitimate objective of animal welfare.<sup>85</sup> The new horseshoeing regulation required all hoof technicians to have a shoeing forge certificate. Prior to the new regulation, only conventional hoof technicians needed such a certificate, other hoof technicians using alternative methods of hoof care were exempted. In response, the hoof technicians who used alternative methods claimed an infringement of their professional freedom. The

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<sup>81</sup> **German text:** *Seit 2002 räumt Art. 20a des Grundgesetzes dem Tierschutz Verfassungsrang ein. Der Tierschutz erhält damit eine überragend wichtige Bedeutung im Rechtsstaat, zumal er neben den Staatszielbestimmungen des Art. 20 des Grundgesetzes und damit an einer herausragenden Stelle im Grundgesetz verortet ist. Tierschutz steht demnach verfassungsrechtlich auf gleicher Ebene wie die Grundrechte, muss also keineswegs vor der Berufs- und Eigentumsfreiheit der Massentierhaltungsbetriebe zurückweichen.*

<sup>82</sup> BVerwG, 23.02.2006 - 3 C 14.05.

<sup>83</sup> BVerfG, 03.07.2007 - 1 BvR 2186/06.

<sup>84</sup> **German text:** *Art. 2 Abs. 1 GG geschützte allgemeine Handlungsfreiheit [und] das Grundrecht auf freie Berufsausübung gemäß Art. 12 Abs. 1 können auf Grund eines Gesetzes eingeschränkt werden, das durch Gründe des Gemeinwohls gerechtfertigt ist und dem insbesondere aus dem Rechtsstaatsprinzip (Art. 20 Abs. 3 GG) folgenden Grundsatz der Verhältnismäßigkeit entspricht. Dies bedeutet, dass der gesetzliche Eingriff zur Erreichung des verfolgten Zwecks geeignet und erforderlich sein sowie bei der Gesamtabwägung zwischen der Schwere des Eingriffs und dem Gewicht der ihn rechtfertigenden Gründe die Grenze der Zumutbarkeit noch gewahrt sein muss [...]. Diese Voraussetzungen liegen hier vor. Das Verbot des § 3 Nr. 11 TierSchG fügt sich ein in den in § 1 TierSchG benannten Zweck des Gesetzes, aus der Verantwortung des Menschen für das Tier als Mitgeschöpf dessen Leben und Wohlbefinden zu schützen. Sie dient damit anerkannten Gemeinwohlbelangen, die nunmehr, insbesondere da Art. 20a GG seit dem Gesetz zur Änderung des Grundgesetzes vom 26. Juli 2002 (BGBl I S. 2862) auch Tiere ausdrücklich unter den Schutz des Staates stellt, verfassungsrechtlich verbürgt sind.*

<sup>85</sup> BVerfG, 03.07.2007 - 1 BvR 2186/06, (bundesverfassungsgericht.de) par. 92-94.

Constitutional Court ruled that by insisting upon additional requirements in the education of all hoof technicians, the regulation responded to a legitimate public interest, i.e., animal welfare. However, the subjective requirements resulting from the unification of occupational profiles did inappropriately burden the hoof technicians who used alternative methods.

Divergent judgments are also abundant in the lower courts. On the one hand, the requirement of a license to operate a dog school is regarded as a justified subjective restriction of occupational freedom (access to the profession) (in contrast to the new horseshoeing regulation case).<sup>86</sup> The obligation to obtain a license was introduced for reasons of animal welfare and has a constitutional status by virtue of Article 20a of the Basic Law.<sup>87</sup> Carrying out the principle of proportionality the burden for the dog schools is low in comparison with the advantage for animal welfare, which is a high public interest.<sup>88</sup> The same reasoning was applied to an equestrian facility.<sup>89</sup> The ban on the use of red garra (*Kangalfish*) in beauty salons, on the other hand, does constitute an infringement of professional freedom.<sup>90</sup> Although animal welfare has acquired high priority through constitutional anchoring, the suffering of the fish during beauty treatment is so low that a restriction of the freedom of profession is not justified.<sup>91</sup> Contrary, a ban on the establishment of an animal tattoo service is not seen as an infringement of professional freedom (e.g., tattooing a pony with a "Rolling-Stones-Tongue").<sup>92</sup> Nor does the obligation to dismantle tension nets at fishing beacons constitute an infringement of professional freedom.<sup>93</sup>

The argument of professional freedom is cited in a wide variety of cases. The cited examples show that a case-by-case approach is characteristic.

A weak trend can be observed in the area of keeping animals (in a professional setting). In almost all cases (e.g., circus elephants<sup>94</sup>, livestock animals<sup>95</sup>, poultry<sup>96</sup>, pigs<sup>97</sup>, ...), the courts upheld a prohibition on the keeping of animals. This was pronounced by administrations as the ultimate sanction following an animal welfare violation. The economic importance and the restriction of occupational freedom do not outweigh the protection of animals (a state objective in the Basic Law). As pointed out earlier, one must keep in mind that in the aforementioned cases the primary basis to justify a limitation to the occupational freedom remains the Animal Welfare Act and not the animal welfare state objective. Otherwise these rulings may give a distorted picture and a superficial interpretation could overestimate the impact of the state objective. Overall, the findings suggest that the direct impact of Article 20a of the Basic Law should be nuanced since the same result would probably have been achieved without reference to Article 20a.<sup>98</sup>

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<sup>86</sup> VG Stade, 19.10.2015 - 6 A 1882/14; OVG Niedersachsen, 01.12.2015 - 11 OA 254/15; VG Berlin, 06.04.2016 - 24 K 238.15; VG Würzburg, 17.09.2018 - W 8 K 18.469; VG Würzburg, 11.02.2019 - W 8 K 18.1005; VG Berlin, 30.04.2019 - 24 K 1182.17.

<sup>87</sup> VG Würzburg, 17.09.2018 - W 8 K 18.469; VG Würzburg, 11.02.2019 - W 8 K 18.1005.

<sup>88</sup> VG Berlin, 06.04.2016 - 24 K 238.15.

<sup>89</sup> VG Lüneburg, 19.03.2009 - 6 A 157/07; OVG Niedersachsen, 30.03.2010 - 11 LA 246/09.

<sup>90</sup> VG Gelsenkirchen, 15.05.2014 - 16 K 5116/12; VG Meiningen, 30.06.2015 - 2 K 143/15 Me; VG Köln, 16.07.2015 - 13 K 1281/14; VG Freiburg, 01.02.2017 - 4 K 1758/16.

<sup>91</sup> VG Freiburg, 01.02.2017 - 4 K 1758/16.

<sup>92</sup> VG Münster, 04.10.2010 - 1 L 481/10; VG Münster, 10.05.2011 - 1 K 1823/10; OVG Nordrhein-Westfalen, 10.08.2012 - 20 A 1240/1.

<sup>93</sup> VG Neustadt, 24.03.2009 - 1 L 136/09.NW.

<sup>94</sup> VG Arnsberg, 02.07.2007 - 14 L 518/07.

<sup>95</sup> VG Augsburg, 09.06.2008 - Au 4 S 08.743; VG Gelsenkirchen, 31.03.2010 - 7 K 2168/09; VG Oldenburg, 12.03.2014 - 11 A 4706/12; OVG Niedersachsen, 20.04.2016 - 11 LB 29/15; BVerwG, 09.12.2016 - 3 B 34.16; VG Köln, 28.08.2018 - 21 L 1543/18.

<sup>96</sup> VG Arnsberg, 21.07.2015 - 8 L 850/15.

<sup>97</sup> VG Magdeburg, 15.12.2014 - 1 B 1197/14; OVG Sachsen-Anhalt, 18.12.2014 - 3 M 517/14; OVG Sachsen-Anhalt, 16.04.2015 - 3 M 517/14; VG Magdeburg, 04.07.2016 - 1 A 1198/14; OVG Sachsen-Anhalt, 04.11.2016 - 3 L 162/16.

<sup>98</sup> Caspar & Geissen (n 6), at 917.

This does not detract from the fact that Article 20a does have a supportive effect and thus gives animal welfare more weight in considerations of interests.

#### 2.2.2.1.5 Freedom of religion

Of all the fundamental rights in relation to animal welfare religious freedom (Article 4(1) and (2) of the Basic Law) is the most controversial. The difficult relationship between animal welfare and religious freedom has been the subject of considerable debate, in particular with regard to ritual slaughter.<sup>99</sup> The unsatisfactory outcome in the ritual slaughter case mentioned above was a trigger to constitutionally anchor animal welfare. It is therefore interesting to examine whether the case law has changed under the influence of the new state objective. At first sight this seems to be the case and requests for unstunned slaughter are refused by the administration and confirmed by the courts.<sup>100</sup> However, the Federal Administrative Court's ruling of November 23, 2006 was overturned.<sup>101</sup> This is a crucial statement and reverses the initial positive trend of Article 20a. The Federal Administrative Court held that the introduction of animal protection as an objective of the state does not prohibit granting exemptions from the stunning requirement.<sup>102</sup> The court asserted that the religious exemption provision of the Animal Welfare Act was not affected by the introduction of the animal welfare state objective. Despite the constitutional amendment, it is primarily up to the legislature to reconcile countervailing interests. Thus, given that the religious exemption in the Animal Welfare Act had not been amended, this exemption has continuing effect. In the legal doctrine this judgement has been criticized because the Federal Administrative Court continues to declare that animal welfare is an important "public interest" and denies its constitutional status and capacity to limit other constitutional rights.<sup>103</sup>

Despite this decision, the administration continues to refuse requests for unstunned slaughter, but now the courts blow the whistle on those denials and give consent after all.<sup>104</sup>

Two remarkable observations can be made from the above. The most notable and paradoxical finding is that the state objective exerts the least effect in the area of religious slaughter. Ironically, the animal welfare state objective was introduced specifically in response to the Constitutional Court's ritual slaughter decision, but the outcome of new procedures stayed the same. Thus, the amendment to Article 20a of the Basic Law had no direct impact on the fundamental right of religious freedom. A second conclusion that emerges from the turbulent course of the lawsuits following the constitutional amendment is the discrepancy between the executive and the judicial branch. Unlike the judiciary, the

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<sup>99</sup> Katharina Pabel, 'Der Grundrechtsschutz für das Schächten' (2002) 29 EuGRZ 220; Obergfell (n 6), at 2298; Caspar & Geissen (n 6), at 916-917; Kyrill-Alexander Schwarz, *Das Spannungsverhältnis von Religionsfreiheit und Tierschutz am Beispiel des "rituellen Schächten"* (Nomos Verlagsgesellschaft 2003); Kluge (n 6), at 12-13; Kluge, 'Das Schächten als Testfall des Staatszieles Tierschutz' (n 24); Le Bot, 'La protection de l'animal en droit constitutionnel' (n 6), at 32 & 47-48; Haupt, 'Free Exercise of Religion and Animal Protection' (n 19); Haupt (n 8), at 237-246; Joel Silver, 'Understanding Freedom of Religion in a Religious Industry: Kosher Slaughter (Shechita) and Animal Welfare' (2011) 42 Vict. U. Wellington L. Rev. 671; Zoethout (n 19); Aleksandra Lis & Tomasz Pietrzykowski, 'Animals as Objects of Ritual Slaughter-Polish Law after the Battle over Exceptionless Mandatory Stunning' (2015) 2 GJAL 1; Robert J. Delahunty, 'Does Animal Welfare Trump Religious Liberty - The Danish Ban on Kosher and Halal Butchering' (2015) 16 San Diego Int'l L.J. 341; Aleksandra Gliszczynska-Grabias & Wojciech Sadurski, 'The Law of Ritual Slaughter and the Principle of Religious Equality' (2016) 4 J.L. Religion & St. 233; Olivier Le Bot, 'The Limitation of Animal Protection for Religious or Cultural Reasons' (2016) 13 US-China L. Rev. 1.

<sup>100</sup> VG Minden, 28.11.2002 - 2 K 548/02; VG Gelsenkirchen, 10.02.2003 - 7 L 131/03; OVG Nordrhein-Westfalen, 11.02.2003 - 20 B 320/03; VG Frankfurt/Main, 11.02.2003 - 2 G 588/03; OVG Nordrhein-Westfalen, 16.07.2003 - 20 A 1108/03.

<sup>101</sup> BVerwG, 23.11.2006 - 3 C 30.05.

<sup>102</sup> Press release No. 64/2006 of the Federal Administrative Court, 23 November 2006, <[www.bverwg.de/de/pm/2006/64/](http://www.bverwg.de/de/pm/2006/64/)> accessed 5 August 2020.

<sup>103</sup> Haupt (n 8), at 243.

<sup>104</sup> VGH Bayern, 29.12.2006 - 25 CE 06.3458; VG Stuttgart, 19.12.2007 - 4 K 6315/07; VGH Bayern, 05.12.2008 - 9 CE 08.3225; VGH Bayern, 22.07.2011 - 9 BV 09.2892.

administrations do take the constitutional amendment into account and take animal welfare into consideration in their decision as to whether or not an exception should be granted to stunned slaughter. As a result it can be deduced that the attitude of the executive power with regard to ritual slaughter is more progressive and Article 20a of the Basic Law thus has an indirect impact via permit process by the administrative agencies.<sup>105</sup> However, this indirect impact needs to be nuanced, precisely because the judiciary can reverse the decisions of the administration.

An interesting remark in this matter is that Evans noticed that socio-legal exploration suggests that the ineffectiveness of the animal welfare constitutional provision with regard to ritual slaughter can be explained by the peculiar historical context of Germany.<sup>106</sup> The collective memory of the Holocaust and Germany's continued reconciling of its past with the Jewish community is a cultural barrier which renders any equating of animal and human interests problematic.<sup>107</sup> This conclusion is important because it may have implications for the functioning of a constitutional animal welfare provision in other European countries. Unlike in Germany, an animal welfare constitutional provision in the "allied" countries may have an impact on ritual slaughter because these countries do not feel the need to compensate for the past.

#### 2.2.2.1.6 *Freedom of personal development and human dignity*

Article 2 of the Basic Law is dedicated to personal freedoms and ensures that "every person shall have the right to free development of his personality"<sup>108</sup> (Article 2 (1)). Like the fundamental right to freedom of profession, this fundamental right also contains a limitation clause: "insofar as he does not violate the rights of others or offend against the constitutional order or the moral law"<sup>109</sup>. This article is often used to undermine animal welfare.<sup>110</sup> An important case concerned the prohibition of zoophilia in Article 3 (13) of the Animal Welfare Act. In this case, two people, the applicants, who felt sexually attracted to animals, lodged a complaint with the Constitutional Court because the ban would violate their constitutional right to sexual self-determination (Article 2 of the Basic Law).<sup>111</sup> The court considered that the ban on the use of animals for sexual purposes constitutes an infringement of the two persons' right to sexual self-determination, but that this infringement is proportionate. The court stated that animal welfare is a legitimate aim within the meaning of the Animal Welfare Act and that the aim is confirmed by Article 20a of the Basic Law.<sup>112</sup>

A case in which Article 2 of the Basic Law was successfully invoked concerns the advertising campaign of People for the Ethical Treatment of Animals (abbreviated PETA) "Holocaust on your plate".<sup>113</sup> The argument of freedom of personal development was invoked as a subsidiary argument in conjunction with the primary argument of human dignity (Article 1 of the Basic Law). While the lower courts considered human dignity to be the primary argument<sup>114</sup>, the Constitutional Court considered this approach problematic and focused on the personality rights of the plaintiffs (Article 2 (1) in conjunction with Article 1 (1) of the Basic Law)<sup>115</sup>. PETA took the case to the European Court of Human Rights

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<sup>105</sup> Haupt, 'Free Exercise of Religion and Animal Protection' (n 19), at 872.

<sup>106</sup> Evans, 'A Socio-Legal Exploration of the Outcomes of Constitutional Animal Protection' (n 7), at 25.

<sup>107</sup> Ibid.

<sup>108</sup> **German text:** *Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit*

<sup>109</sup> **German text:** *soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.*

<sup>110</sup> BVerfG, 18.11.2004 - 1 BvR 2252/04; EGMR, 16.01.2014 - 45192/09; VG Arnsberg, 03.05.2018 - 8 L 489/18.

<sup>111</sup> BVerfG, 08.12.2015 - 1 BvR 1864/14.

<sup>112</sup> BVerfG, 08.12.2015 - 1 BvR 1864/14, (bundesverfassungsgericht.de) par. 11-12.

<sup>113</sup> BVerfG, 20.02.2009 - 1 BvR 2266/04, 1 BvR 2620/05.

<sup>114</sup> LG Berlin, 18.03.2004 - 27 O 207/04; LG Berlin, 22.04.2004 - 27 O 207/04; KG, 30.07.2004 - 9 U 118/04; KG, 27.08.2004 - 9 U 118/04; LG Berlin, 02.12.2004 - 27 O 676/04; KG, 25.11.2005 - 9 U 15/05.

<sup>115</sup> BVerfG, 20.02.2009 - 1 BvR 2266/04, 1 BvR 2620/05, (bundesverfassungsgericht.de) par. 24.

(abbreviated ECHR), but the ECHR confirmed that it was acceptable for Germany to ban these billboards given the history of the Holocaust and the extremely sensitive nature of the survivors' collective conscience.<sup>116</sup> The PETA case confirms what has already been explained above, namely that the historical context specific to Germany affects the potential impact that an animal welfare constitutional provision may have. Socio-legal research indicates that Germany's history with the Holocaust atrocities "prevents inclusion of animals in any concept of constitutional dignity or inherent worth on par with humans".<sup>117</sup> This thesis implies that in other countries who do not encounter this obstacle an animal welfare state objective could have a more profound impact. For example, a similar case to the German PETA case was brought before the Austrian Supreme Court, who in contrast to the German Constitutional Court accepted the PETA billboards.<sup>118</sup>

Case law has revealed that, just as in the case of freedom of profession, a case-by-case approach prevails, in which Article 20a and Article 2 of the Basic Law alternately gain the upper hand.

### 2.2.2.2 Balancing of interests

When discussing the restriction of fundamental rights, it becomes clear that the constitutional amendment has an impact on the weighing of different constitutional interests. The role of the animal welfare state objective in the balancing of interests is in particular decisive with regard to fundamental rights without a textual limitation clause.<sup>119</sup> Such fundamental rights may only be limited by countervailing constitutional interests.<sup>120</sup> In a scenario where constitutional provisions of the same constitutional rank come into conflict with each other, both interests will be weighed against each other.<sup>121</sup> However, the intended goal of the new Article 20a of the Basic Law was not to award one-sided preference to animal welfare.<sup>122</sup> The application of the proportionality principle must always be carried out to determine which of the constitutional provisions will prevail in each individual case.<sup>123</sup> As demonstrated above superb applications of this test can be found in case law concerning the appraisal of animal welfare and occupational freedom (e.g., red garra cases, dog trainer cases). Also in a variety of other cases in both higher and lower courts, the reference to Article 20a of the Basic Law and the specific balance of interests that goes with it can be retrieved in the argumentation of each case.<sup>124</sup> For example, following the

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<sup>116</sup> *PETA Deutschland v Germany* no. 43481/09 (ECHR, 8 November 2012), <https://hudoc.echr.coe.int/>.

<sup>117</sup> Evans, 'A Socio-Legal Exploration of the Outcomes of Constitutional Animal Protection' (n 7), at 24.

<sup>118</sup> Oberster Gerichtshof [Supreme Court] No. 4 Ob 71/06d, 20 June 2006, [www.ogh.gv.at/entscheidungen/entscheidungen-ogh/](http://www.ogh.gv.at/entscheidungen/entscheidungen-ogh/).

<sup>119</sup> Pabel (n 99), at 231; Caspar & Geissen (n 6), at 917; Natrass (n 18), at 303; Haupt (n 8), at 213; Gieri Bolliger, 'Legal Protection of Animal Dignity in Switzerland: Status Quo and Future Perspectives' (2016) 22 *Animal L.* 311, 344; Vink, 'Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde' (n 13), at 1864; Vink (n 6), at 216.

<sup>120</sup> Haupt (n 8), at 218.

<sup>121</sup> Caspar & Geissen (n 6), at 914.

<sup>122</sup> Caspar & Geissen (n 6), at 914; Faller (n 6), at 114; Hirt, Maisack & Moritz (n 6), at 60; BVerwG, 23.11.2006 - 3 C 30.05; VG Gelsenkirchen, 30.11.2006 - 16 K 3159/05; BVerfG, 12.10.2010 - 2 BvF 1/07; VG Münster, 05.06.2014 - 5 K 1303/13; VGH Bayern, 04.08.2014 - 10 ZB 11.1920; OVG Schleswig-Holstein, 04.12.2014 - 4 LB 24/12; VGH Bayern, 13.02.2019 - 19 N 15.420; BVerwG, 13.06.2019 3 C 28.16; OVG Nordrhein-Westfalen, 05.07.2019 - 20 A 1165/16.

<sup>123</sup> Le Bot, 'La protection de l'animal en droit constitutionnel' (n 6), at 37; Haupt (n 8), at 230; Bolliger, 'Legal Protection of Animal Dignity in Switzerland' (n 119), at 346.

<sup>124</sup> VGH Baden-Württemberg, 28.04.2004 - 1 S 756/04; BVerfG, 18.11.2004 - 1 BvR 2252/04; VGH Baden-Württemberg, 17.03.2005 - 1 S 381/05; VG Arnberg, 18.01.2006 - 3 L 1105/05; VG Arnberg, 04.06.2007 - 14 K 2581/06; VG Augsburg, 09.06.2008 - Au 4 S 08.743; VG Bayreuth, 21.01.2009 - B 1 S 08.990; VG Gelsenkirchen, 08.02.2010 - 7 L 57/10; OVG Sachsen, 18.01.2011 - 3 C 15/09; OLG Koblenz, 02.11.2012 - 1 SsBs 105/12; OVG Bremen, 11.12.2012 - 1 A 180/10, 1 A 367/10; OVG Berlin-Brandenburg, 04.06.2013 - 5 S 3.13; VG Münster, 05.06.2014 - 5 K 1303/13; BVerfG, 08.12.2015 - 1 BvR 1864/14; VG Magdeburg, 04.07.2016 - 1 A 1198/14; VG Cottbus, 06.09.2017 - 3 L 509/17; LG Magdeburg, 11.10.2017 - 28 Ns 182 Js 32201/14; OVG Berlin-Brandenburg, 14.03.2018 - 5 S 16.17; VGH Bayern, 13.02.2019 - 19 N 15.420.

application of the principle of proportionality, public health takes precedence over animal welfare in the context of the muzzle obligation for dogs<sup>125</sup> and the ban on feeding pigeons<sup>126</sup> or other wild animals<sup>127</sup>.

The need for balancing of interests and application of the proportionality principle is not limited to the judicial branch. Administrative agencies must also balance the competing constitutional interests on a case-by-case basis and attempt to maximize each while limited by the countervailing provision.<sup>128</sup> This is particularly noticeable in the licensing of animal experiments and religious slaughter. In both areas, the administration takes animal welfare into account in its decision-making. In 1994, the administrative Court of Berlin advised the local competent authority to restrict its examination of applications for animal experiments to formal criteria.<sup>129</sup> In contrast, the constitutional amendment now provides a legal basis to extend its examination to a substantive review. Nevertheless, it is clear that this time the administration is overruled by the courts. For example, the Higher Administrative Court of Bremen declared that the executive branch has no discretionary power and must grant a license if the factual conditions are met.<sup>130</sup> A similar movement can be detected in the licensing of ritual slaughter. In addition to examining the application in the light of criteria set out in the derogation for stunned slaughter, the agency checks at each step whether the exemption is necessary to meet the demands of the religious community. This requires the balancing of religious freedom with animal protection.<sup>131</sup> Here too, the decisions of the executive branch can be reversed.<sup>132</sup>

A discrepancy can therefore be observed between the attitude of the executive branch and the judicial branch. The executive, on the one hand, applies the principle of proportionality less restrictively and decides more promptly in favor of animal welfare. The judicial branch, on the other hand, is more inclined to fall back on old case law from before the constitutional amendment, adopting a more conservative attitude towards animal welfare.

### 2.2.3 Standstill effect

A vital function of a state objective is a standstill effect.<sup>133</sup> Although the level of animal welfare legislation has not improved dramatically, a state objective based on the standstill effect should at least ensure that the existing protection is maintained.<sup>134</sup> A standstill effect means that the existing level of protection must not be altered in a negative direction. The existing protection is thus the absolute minimum, preventing further deterioration of the existing standards and ensuring that protection can only become stricter.<sup>135</sup> The standstill effect guarantees an inherently progressive effect.<sup>136</sup> Therefore an animal welfare state

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<sup>125</sup> VG Gelsenkirchen, 30.11.2006 - 16 K 3159/05; VGH Baden-Württemberg, 15.11.2007 - 1 S 2720/06; OVG Sachsen, 18.01.2011 - 3 C 15/09; OVG Berlin-Brandenburg, 14.11.2018 - 5 N 4.16.

<sup>126</sup> VGH Baden-Württemberg, 27.09.2005 - 1 S 261/05; OLG Hamm, 22.02.2007 - 2 Ss OWi 836/06; VGH Hessen, 30.04.2008 - 8 UZ 3006/06; VG Düsseldorf, 04.05.2011 - 18 K 1622/11; OLG Koblenz, 02.05.2012 - 2 SsBs 114/11; VG Stuttgart, 27.05.2014 - 5 K 433/12; VGH Bayern, 04.08.2014 - 10 ZB 11.1920; VG Düsseldorf, 16.12.2015 - 18 K 218/15.

<sup>127</sup> VGH Baden-Württemberg, 09.02.2005 - 1 S 2673/04; VG Koblenz, 14.02.2006 - 4 L 174/06.KO; VG Augsburg, 12.02.2010 - Au 4 E 10.78.

<sup>128</sup> Caspar & Geissen (n 6), at 914; Hirt, Maisack & Moritz (n 6), at 60; Le Bot, 'La protection de l'animal en droit constitutionnel' (n 6), at 37; Haupt (n 8), at 230; Schaffner (n 23), at 160.

<sup>129</sup> VG Berlin, 07.12.1994 - 1 A 232.92.

<sup>130</sup> OVG Bremen, 11.12.2012 - 1 A 180/10, 1 A 367/10.

<sup>131</sup> Haupt (n 8), at 245.

<sup>132</sup> See n 94.

<sup>133</sup> Natrass (n 18), at 303; Bolliger (n 32); Haupt (n 8), at 228-229; Eisen, 'Liberating Animal Law' (n 21), at 67; Vink, 'Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde' (n 13), at 1865; Preparatory Report of the Senate, 2018-2019, No. 6-339/3, 64, [www.senate.be/](http://www.senate.be/); Vink (n 6), at 217-218.

<sup>134</sup> Hirt, Maisack & Moritz (n 6), at 62.

<sup>135</sup> Natrass (n 18), at 303; Vink, 'Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde' (n 13), at 1865; Preparatory Report of the Senate (n 133); Vink (n 6), at 217.

<sup>136</sup> Vink, 'Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde' (n 13), at 1865; Vink (n 6), at 217.



objective should prevent animal welfare legislation from degenerating and secure that existing animal welfare standards are safeguarded by the Basic Law.<sup>137</sup> The government needs to monitor the quality of legal protection for animals and adapt legislation according to advancing scientific insight.<sup>138</sup> Whenever regulations that would have a negative impact on animal welfare are considered, alternatives should be explored.<sup>139</sup>

In recent case law, the standstill effect of the animal welfare state objective has been confirmed.<sup>140</sup> An application can be found in the Laying Hens Regulation case.<sup>141</sup> This case concerned an amendment of the Ordinance on protection of animals kept for farming purposes (*Tierschutz-Nutztierhaltungsverordnung*) by the BMEL.<sup>142</sup> The standards set in the amendment regarding egg-laying hens and enriched cages, in particular the transitional period until 2020 that allowed housing standards below those enumerated in the Animal Welfare Act, violated Article 20a of the Basic Law.<sup>143</sup> The amendment constituted a decrease in the level of animal welfare and thus repudiated the standstill effect of the animal welfare state objective. In the same case the Constitutional Court also points out that the legislator has a duty to investigate animal welfare in the light of the most recent scientific knowledge.<sup>144</sup> Subsequent case law also refers to the legislator's duty of investigation.<sup>145</sup> Such an obligation to investigate pertains to the judicial branch.<sup>146</sup> The requirement to keep abreast of the latest scientific knowledge on animal welfare is an additional guarantee that reflects the standstill effect.

#### 2.2.4 Animal welfare policy and legislation

Another key function of a state objective is to facilitate and integrate an objective (*in casu* animal welfare) into other policies.<sup>147</sup> An example of a typical integration clause is Article 13 of the Treaty on the Functioning of the European Union that advocates taking animal welfare into account in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies. A state objective has a similar effect and carries much weight with regard to adopting legislation and implementing policy choices that affect animal welfare.<sup>148</sup> This should ensure that the impact of a policy action on animal welfare is also considered in other policy sectors, where one policy sector cannot take precedence over another. A striking example of the latter is the strict separation between environmental protection and animal welfare, often with the precedence of nature conservation over animal welfare. In the Netherlands, there was a controversial decision not to feed emaciated grazing animals in a nature reserve.<sup>149</sup> Nevertheless, there are also examples where animal welfare is already being integrated. In Wallonia, for example, it was decided to include animal welfare as a basis for assessing

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<sup>137</sup> Caspar & Geissen (n 6), at 914.

<sup>138</sup> Caspar & Geissen (n 6), at 914; Haupt (n 8), at 229.

<sup>139</sup> Haupt (n 8), at 229.

<sup>140</sup> OVG Nordrhein-Westfalen, 05.07.2019 - 20 A 1165/16.

<sup>141</sup> BVerfG, 12.10.2010 - 2 BvF 1/07.

<sup>142</sup> Artikel 13b, § 33 (3 & 4) der Verordnung zum Schutz landwirtschaftlicher Nutztiere und anderer zur Erzeugung tierischer Produkte gehaltener Tiere bei ihrer Haltung in der Fassung vom 22. August 2006 (22.08.2006 BGBl. I S. 2043), zuletzt geändert durch die Dritte Verordnung zur Änderung der Tierschutz-Nutztierhaltungsverordnung vom 30. November 2006 (30.11.2006 BGBl. I S. 2759), [www.bgbl.de/](http://www.bgbl.de/) (FRG).

<sup>143</sup> BVerfG, 12.10.2010 - 2 BvF 1/07, (bundesverfassungsgericht.de) par. 68-72 & 121-122.

<sup>144</sup> Ibid par. 122-23.

<sup>145</sup> VGH Bayern, 04.08.2014 - 10 ZB 11.1920.

<sup>146</sup> BVerwG, 17.12.2009 - 7 C 4.09.

<sup>147</sup> Haupt (n 8), at 229; Vanessa Gerritsen, 'Animal Welfare in Switzerland – constitutional aim, social commitment, and a major challenge' (2013) 1 GJAL 1, 3; Larik (n 6), at 64-65; Vink, 'Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde' (n 13), at 1865; Preparatory Report of the Senate (n 133); Vink (n 6), at 216-217.

<sup>148</sup> Natrass (n 18), at 299; Bolliger (n 32); Haupt (n 8), at 226-229; Gerritsen (n 147); Vink, 'Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde' (n 13), at 1865; Vink (n 6), at 217.

<sup>149</sup> <[www.theguardian.com/environment/2018/apr/27/dutch-rewilding-experiment-backfires-as-thousands-of-animals-starve](http://www.theguardian.com/environment/2018/apr/27/dutch-rewilding-experiment-backfires-as-thousands-of-animals-starve)> accessed 5 August 2020.

whether or not an environmental permit should be granted for the exploitation of, for instance a livestock facility.<sup>150</sup>

The results of this research suggest that the animal welfare state objective performs this integration function only to a minimal extent. The increase in the status of animal welfare has hardly led to concrete legislative initiatives aimed at an actual increase in animal welfare standards. In its analysis of the German Animal Welfare Act of 2013, Buhl noted that the amendments lay behind what might be expected under Article 20a of the Basic Law.<sup>151</sup> An example of the inadequate implementation by the legislator is the fact that while there is a federal interest group standing provision for environmental protection, this is lacking for animal welfare. In addition, initiatives that were taken by the legislator were, in the majority of the cases, reversed. For example, the act banning dangerous dog breeds was annulled by the Constitutional Court.<sup>152</sup> The Court ruled that animal welfare as a basis for the act was used as a cover and that the real motive of the act was based on the protection of public health. The Horseshoeing Regulation<sup>153</sup> and the Regulation Regarding Battery Cages for Laying Hens<sup>154</sup> were also annulled by the Constitutional Court.

In addition to the inadequate implementation of the legislation, the integration of animal welfare into the policy is also extremely poor. For instance, regarding the German hunting policy no changes occurred. In response to Article 20a of the Basic Law, attempts were made to include animal welfare in the argumentation in which ethical objections were raised to put a stop to hunting.<sup>155</sup> The Federal Administrative Court pointed out that Article 20a can only lead to conclusions regarding the way in how hunting is carried out, but not regarding whether animals may or should be hunted.<sup>156</sup> A similar approach is also adopted by the Constitutional Court, which stated that the anchoring of animal protection in the Basic Law has an influence on how hunting is carried out, but not on its legitimacy.<sup>157</sup> Article 20a of the Basic Law is similarly unsuccessful when it comes to blocking certain cultural traditions or events that have a negative impact on animal welfare. For example, an application for revocation of a license for a rodeo event was not accepted in 2014<sup>158</sup> and an attempt to ban the cultural tradition of goose pulling in 2016 by way of summary proceedings failed<sup>159</sup>.

The same trend is followed with regard to Germany's agricultural policy. Article 20a of the Basic Law has not been able to cause spectacular changes in this area. The German agricultural sector, when adopting the policy objective in 2002, expressed its fear of stricter regulations and the associated negative impact on agriculture. However, statistical evidence has contradicted these fears as the number of animals in the German livestock industry has not decreased since the adoption of the state objective on animal welfare.<sup>160</sup> In addition a recent judgment asserted that the killing of animals (*in casu* pigs) for the production of food is not prohibited by Article 20a of the Basic Law and is considered a "sound reason"

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<sup>150</sup> Artikel 9 Decr.W. 4 oktober 2018 betreffende het Waalse Dierenwelzijnwetboek, *BS* 31 december 2018, 106.818, [www.ejustice.just.fgov.be/eli/decreet/2018/10/04/2018015578/justel](http://www.ejustice.just.fgov.be/eli/decreet/2018/10/04/2018015578/justel) (BE).

<sup>151</sup> Amelie Buhl, 'Animal Welfare Law in Motion? – Comment on the Latest Amendments to the Animal Welfare Act in Germany (2013) 1 GJAL 1, 6.

<sup>152</sup> BVerfG, 16.03.2004 - 1 BvR 1778/01.

<sup>153</sup> BVerfG, 03.07.2007 - 1 BvR 2186/06.

<sup>154</sup> BVerfG, 12.10.2010 - 2 BvF 1/07.

<sup>155</sup> VG Trier, 14.01.2004 - 2 K 1182/03 ; OVG Rheinland-Pfalz, 13.07.2004 - 8 A 10216/04; BVerwG, 14.04.2005 - 3 C 31.04; BGH, 15.12.2005 - III ZR 10/05; BVerfG, 13.12.2006 - 1 BvR 2084/05; VG Würzburg, 13.11.2008 - W 5 K 07.1084; VGH Bayern, 09.09.2009 - 19 BV 07.97; VG Düsseldorf, 10.05.2017 - 15 K 5140/15.

<sup>156</sup> BVerwG, 14.04.2005 - 3 C 31.04, (lexetius.com) par. 27.

<sup>157</sup> BVerfG, 13.12.2006 - 1 BvR 2084/05, (bundesverfassungsgericht.de) par. 16.

<sup>158</sup> VG Köln, 28.07.2010 - 13 L 1064/10.

<sup>159</sup> VG Gelsenkirchen, 04.02.2016 - 16 L 221/16.

<sup>160</sup> Philipp Henrich, 'Bestandsentwicklung an Nutztieren in Deutschland im Verlauf der Jahre 1900 bis 2018' <<https://de.statista.com/statistik/daten/studie/659045/umfrage/nutztierbestand-in-deutschland/>> accessed 5 August 2020.

within the meaning of Article 1 of the Animal Welfare Act.<sup>161</sup> Despite more weight given to animal welfare in balancing different interests, the animal welfare state objective does not constitute a radical shift against eating animals or even animal husbandry.

Yet, one should recall that as a member state of the European Union, Germany is to some extent limited in its possibilities to act. Germany's national policies may not be implemented in a way that interferes with the European Single Market. This is particularly problematic in relation to intensive livestock farming where stringent animal welfare standards that change common agricultural practice may cause German farmers to lose their ability to compete in the international market. Nevertheless, it is not conducive to animal welfare that "animal health" and "agriculture" have both been transferred to the Federal Ministry of Food and Agriculture (*Bundesministerium für Ernährung und Landwirtschaft*, abbreviated BMEL). As a result of this, the ministry is forced to walk a fine line between fulfilling its obligations to enforce animal welfare legislation without compromising the economic stability of Germany's agriculture. In practice, we see that BMEL's policy is mainly based on voluntary initiatives. For example, a compulsory self-monitoring of animal welfare for livestock farmers has been introduced.<sup>162</sup> Another example is that BMEL in July 2016 announced that it did not want a ban on permanent tethering because it relies on the farmer's voluntary commitment to animal welfare.<sup>163</sup>

In the past, BMEL undertook action to combat intensive livestock farming, in particular against battery cages for laying hens. Notwithstanding BMEL's amendment to the Ordinance on protection of animals kept for farming purposes was initiated to comply with EU legislation and promote animal welfare<sup>164</sup>, it gave rise to a number of lawsuits<sup>165</sup>. The Constitutional Court eventually found the regulation regarding battery cages for laying hens (i.e., Article 13b and Article 33(3) and (4) of the Ordinance on protection of animals kept for farming purposes) in violation with Article 16b(1) of the Animal Welfare Act and Article 20a of the Basic Law.<sup>166</sup> the State Government of Rhineland-Palatinate (plaintiff in this case) noticed that the amendment ironically enough caused a setback given the fact that the transitional provisions did not meet the minimum housing standards for laying hens provided by the Animal Welfare Act.<sup>167</sup> Both procedural and substantive issues were discussed.<sup>168</sup> The procedural issue concerned the disregard of a proper consultation of the Animal Protection Committee as requested by Article 16b of the Animal Welfare Act.<sup>169</sup> The substantive issue concerned a violation of species-appropriate animal husbandry guidelines set out in Article 2 of the Animal Welfare Act.<sup>170</sup> The Constitutional Court ruled that enacting a regulation in violation of the consultation requirement of Article 16b of the Animal Welfare Act equally violates Article 20a of the Basic Law.<sup>171</sup> As a constitutional level interest the protection of animals is to be respected within decision-making frameworks.<sup>172</sup> Procedural requirements are inherent to Article 20a of the Basic Law as they are intended to encourage the creation of substantive animal protection standards and thereby serve the national objective of animal welfare.<sup>173</sup> In light of the

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<sup>161</sup> VG Karlsruhe, 14.03.2019 - 12 K 3450/16, (landesrecht-bw.de) par. 25.

<sup>162</sup> Artikel 1, 19., § 11, (8) Drittes Gesetz zur Änderung des Tierschutzgesetzes, 04.07.2013 BGBl. I S. 2182, [www.bgbl.de/FRG](http://www.bgbl.de/FRG).

<sup>163</sup> TASSO e.V., 'Anbindehaltung von Rindern. Etwa 25 Prozent der Milchkühe in Deutschland werden noch immer im Stall angebunden', <[www.tasso.net/Tierschutz/Tierschutzthemen/Nutztiere/Rinder/Anbindehaltung/](http://www.tasso.net/Tierschutz/Tierschutzthemen/Nutztiere/Rinder/Anbindehaltung/)> accessed 5 August 2020.

<sup>164</sup> BVerfG, 12.10.2010 - 2 BvF 1/07, (bundesverfassungsgericht.de) par. 44.

<sup>165</sup> VG Gießen, 07.09.2007 - 8 E 453/06; VGH Baden-Württemberg, 19.03.2007 - 1 S 1041/05; BVerwG, 23.10.2008 - 7 C 48.07; BVerwG, 30.04.2009 - 7 C 14.08; BVerfG, 12.10.2010 - 2 BvF 1/07.

<sup>166</sup> BVerfG, 12.10.2010 - 2 BvF 1/07, (bundesverfassungsgericht.de) par. 101.

<sup>167</sup> Ibid par. 72.

<sup>168</sup> Ibid par. 60.

<sup>169</sup> Ibid par. 61-67.

<sup>170</sup> Ibid par. 68-75.

<sup>171</sup> Ibid par. 120-123.

<sup>172</sup> Ibid par. 121.

<sup>173</sup> Ibid par. 122.

procedural violation the Constitutional Court concluded that it was unnecessary to investigate the substantive issues in detail.<sup>174</sup> Note that in 1999, the Constitutional Court also declared a Hen Keeping ordinance unconstitutional.<sup>175</sup> However, in the 1999 case, the claimants were farmers who saw the requirement of an increased cage size for laying hens as a violation of their constitutional rights to practice their profession. Although in both cases the legislation was found to be unlawful, the situations cannot be equated with each other. In the 1999 case, professional freedom prevailed over animal welfare because it could not provide a constitutional counterweight due to the absence of a constitutional provision at the time. In the second case, the regulations were declared incompatible precisely in order to meet a minimum level of animal welfare, with explicit reference being made to Article 20a of the Basic Law. Yet, it is arguable whether Article 20a was the major catalyst for this ruling. Presumably, the more influential impetus was the EU mandate to ban the practice of intense confinement of hens.<sup>176</sup> The 1999 Council Directive set down minimal standards for the protection of laying hens and obligated Germany to ban these practices in 2012. The 2010 decision may be seen as abiding with the EU directive and instituting necessary compliance even though Article 20a was invoked in this ruling.<sup>177</sup>

Another initiative to improve the intensive animal husbandry concerned the problem of day-old chicks, in which male chicks were killed shortly after birth, due to their unsuitability for egg and meat production. The practice of killing so-called day-old chicks had been tolerated for many years but by decree of 26 September 2013, the Ministry for Climate Protection, Environment, Agriculture, Nature and Consumer Protection (*Ministerium für Klimaschutz, Umwelt, Landwirtschaft, Natur- und Verbraucherschutz*) of the State of North Rhine-Westphalia requested the State Office for Nature, Environment and Consumer Protection (*Landesamt für Natur, Umwelt und Verbraucherschutz*) to instruct the regional authorities of the State to prohibit by way of an administrative order the hatcheries within their jurisdiction in which male day-old chicks have been killed for reasons of *de facto* economic non-usability.<sup>178</sup> This gave rise to a number of lawsuits.<sup>179</sup> The ban on killing day-old chicks was eventually declared unlawful by the Administrative Court of Minden.<sup>180</sup> Despite the administration's argument that the ban was justified because it met the changed social perception of animal welfare as constitutionally enshrined in Article 20a of the Basic Law<sup>181</sup>, the Administrative Court of Minden ruled that even if this reflected public opinion and the public wanted a ban, it was still the responsibility of the parliamentary legislator to impose such a ban. The ban was therefore dismissed in the absence of a specific legal basis.<sup>182</sup> The overturning of the ban also remained in place on appeal.<sup>183</sup> The Higher Administrative Court in North Rhine-Westphalia pointed out that the risk of animal welfare being eroded does not justify a light-hearted approach to economic considerations. Animal welfare must not deprive the animal-based food industry of basic structural economic conditions.<sup>184</sup> In the end, the case reached the Federal Administrative Court, which adopted a more nuanced attitude and explicitly took animal welfare into account in its argumentation and balance

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<sup>174</sup> Ibid par. 125.

<sup>175</sup> BVerfG, 06.07.1999 - 2 BvF 3/90.

<sup>176</sup> Evans, 'A Socio-Legal Exploration of the Outcomes of Constitutional Animal Protection' (n 7), at 21-22.

<sup>177</sup> Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens [1999] OJ L 203/53; amended by Council Regulation (EC) 806/2003 of 14 April 2003 OJ L 122/1, by Council Directive 2013/64/EU of 17 December 2013 OJ L 353/8 and by the European Parliament and the Council Regulation of 15 March 2017 OJ L 95/1.

<sup>178</sup> VG Minden, 30.01.2015 - 2 K 83/14, (openjur.de) par. 7.

<sup>179</sup> VG Minden, 30.01.2015 - 2 K 83/14; LG Münster, 07.03.2016 - 2 K Ls 7/15; OLG Hamm, 10.05.2016 - 4 Ws 113/16; OVG Nordrhein-Westfalen, 20.05.2016 - 20 A 488/15; VG Münster, 17.08.2016 - 1 K 81/14; BVerwG, 20.12.2016 - 3 B 38.16; BVerwG, 13.06.2019 - 3 C 28.16.

<sup>180</sup> VG Minden, 30.01.2015 - 2 K 83/14, (openjur.de) par. 97-104.

<sup>181</sup> Ibid par. 8.

<sup>182</sup> Ibid par. 70.

<sup>183</sup> OVG Nordrhein-Westfalen, 20.05.2016 - 20 A 488/15.

<sup>184</sup> OVG Nordrhein-Westfalen, 20.05.2016 - 20 A 488/15, (nrwe.de) par. 92.

of interests.<sup>185</sup> Unlike the Higher Administrative Court, the Federal Administrative Court is stricter with regard to economic interests and states that in view of the national objective of animal welfare, the economic importance of chickens bred specifically for high laying quality is not in itself a reasonable reason to kill male chicks from these breeding lines.<sup>186</sup> Nevertheless, the Court invalidates the ban because it is the legislator's prerogative to draw up such a ban and to provide for an appropriate transitional period.<sup>187</sup>

The aforementioned cases highlight the fact that intensive livestock farming is hardly affected by the constitutional amendment. Animal use is central to market-economies in industrialized countries such as Germany. Article 20a of the Basic Law could not declare that an entire segment of the economy was to be regarded as unlawful. Change is more likely to happen through a gradual development with public support and ethological data. Some authors suggest that for dismantling the structural economic impediment, a solution could be to establish a legal distinction between animals as property and animals as sentient beings through some type of personhood status.<sup>188</sup> This suggestion goes far beyond the animal welfare state objective and implies subjective rights for animals.

In order to maximize animal welfare, legislative support is necessary.<sup>189</sup> Yet, it can be concluded that the constitutional amendment has not ensured that animal welfare legislation has improved significantly, nor that animal welfare occupies a prominent place in the (hunting or agricultural) policy.

### 2.2.5 Constitutional status and interpretation in accordance with the Basic Law

The embedding of animal welfare into the Basic Law has strengthened the position of animal welfare. A constitution reflects the overall values of a nation.<sup>190</sup> By subsequently including animal welfare into the constitution it becomes an interest protected by law with constitutional standing. Case law explicitly confirms the constitutional status of animal welfare<sup>191</sup>, the fact that animal welfare is of extraordinary general interest<sup>192</sup> and that the position of animal welfare has been enhanced by its inclusion in the Basic Law<sup>193</sup>. Just by referring to it, the judicial branch respects the animal welfare provision and recalls repeatedly that a change has taken place with regard to the legal situation. However, the exact impact of the reference to Article 20a of the Basic Law is not always clearly visible. Sometimes Article 20a is used as a sort of "passe-partout", where this argument is abused by claimants or defendants in support of matters, which are detrimental to animal welfare or in cases that have nothing to do with animal welfare at all, e.g., tax cases.<sup>194</sup> In order to determine the real impact of these cases, it is possible to evaluate the number of effective prosecutions that are pronounced and focus on the case law of higher courts. Case

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<sup>185</sup> BVerwG, 13.06.2019 - 3 C 28.16.

<sup>186</sup> BVerwG, 13.06.2019 - 3 C 28.16, (bverwg.de) par. 10.

<sup>187</sup> Ibid par. 30&32.

<sup>188</sup> Eisen, 'Liberating Animal Law' (n 21); Le Bot, 'Les Grandes Évolutions du Régime Juridique de l'Animal en Europe' (n 17), at 253 & 257; Evans, 'A Socio-Legal Exploration of the Outcomes of Constitutional Animal Protection' (n 7), at 26.

<sup>189</sup> Kluge (n 6), at 14.

<sup>190</sup> Bolliger (n 32); Eisen, 'Liberating Animal Law' (n 21), at 62.

<sup>191</sup> VGH Baden-Württemberg, 19.03.2007 - 1 S 1041/05; OVG Nordrhein-Westfalen, 24.03.2011 - 14 A 2394/10; OVG Bremen, 11.12.2012 - 1 A 180/10, 1 A 367/10; OVG Schleswig-Holstein, 04.12.2014 - 4 LB 24/12; OVG Sachsen-Anhalt, 14.05.2018 - 3 M 141/18; VGH Bayern, 13.02.2019 - 19 N 15.420; AG Ulm, 15.03.2019 - 1 Ls 12 Js 19998/16; BVerwG, 13.06.2019 - 3 C 28.16.

<sup>192</sup> LG Münster, 03.11.2004 - 12 O 85/04; OVG Sachsen-Anhalt, 14.05.2018 - 3 M 141/18.

<sup>193</sup> VGH Bayern, 04.08.2014 - 10 ZB 11.1920; VGH Bayern, 13.02.2019 - 19 N 15.420; BVerwG, 13.06.2019 3 C 28.16.

<sup>194</sup> FG München, 03.09.2003 - 4 K 1027/03; VG Stuttgart, 07.11.2005 - 11 K 3740/04; OVG Niedersachsen, 03.12.2007 - 9 KN 10/07; BVerwG, 29.01.2009 - 9 BN 2.08; VG Gießen, 27.11.2009 - 8 K 281/09.GI; OVG Sachsen-Anhalt, 22.06.2010 - 4 K 252/08; OVG Nordrhein-Westfalen, 24.03.2011 - 14 A 2394/10; VG Karlsruhe, 15.11.2011 - 4 K 1090/10; VG Gelsenkirchen, 18.06.2013 - 18 K 1261/13; VGH Hessen, 08.12.2014 - 5 C 2008/13.N; OVG Niedersachsen, 27.06.2017 - 9 LA 35/16; OVG Saarland, 10.07.2019 - 1 A 29/18.

law illustrates the actual impact of Article 20a of the Basic Law. Many permits concerning the operation of animal establishments (dog breeding, animal shelter, riding school, etc.) have been revoked.<sup>195</sup> Prohibitions on keeping an animal are abundantly pronounced<sup>196</sup> and many animal welfare violations are also (criminally) prosecuted<sup>197</sup>. A correlation between the constitutional anchoring of animal welfare and the stricter enforcement with regard to animal welfare violations can thus be postulated.<sup>198</sup> From case law studies, it can be seen that animal welfare is not only a subject that is discussed in lower courts, but also appears in the case law of the Constitutional Court<sup>199</sup> and the Federal Administrative Court<sup>200</sup>. The fact that animal welfare is also discussed at a higher level reflects the impact of the constitutional amendment and at the same time reinforces the influence of Article 20a of the Basic Law. The animal welfare state objective has thus ensured that animal welfare is reflected in all layers of case law.

The constitutional status of animal welfare plays an important role in the interpretation of undefined legal concepts.<sup>201</sup> An example of an undefined legal concept can be encountered in Article 1 of the Animal Welfare Act, which states that no one may cause an animal any pain, suffering or harm without a sound reason. It is up to the judge to assess “a sound reason (*vernünftigen Grund*)” in accordance with the Basic Law taking into account the new constitutional amendment.<sup>202</sup> The function of the animal welfare state objective to interpret undefined legal concepts in accordance with the Basic Law is confirmed in case law.<sup>203</sup>

### 3 Concluding remarks: Is Article 20a of the Basic Law a lost opportunity?

This research focused on the impact of article 20a of the Basic Law through a case law analysis. The research results revealed two major conclusions: a significant paradigm shift has not occurred and the impact is limited to rather minor marginal changes instead of large-scale transformations. Structural animal welfare problems (e.g., intensive animal husbandry, hunting, animal-unfriendly cultural traditions, ritual slaughter) have not been affected.

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<sup>195</sup> VGH Bayern, 14.07.2008 - 9 CS 08.536; VG Freiburg, 09.12.2008 - 2 K 1500/08; VG Potsdam, 06.09.2010 - 3 L 159/10; VG Würzburg, 25.10.2012 - W 5 K 11.590.

<sup>196</sup> VGH Baden-Württemberg, 28.04.2004 - 1 S 756/04; VG Freiburg, 14.02.2005 - 2 K 91/05; VG Arnberg, 01.06.2006 - 3 L 337/06; VG Arnberg, 04.06.2007 - 14 K 2581/06; VG Augsburg, 09.06.2008 - Au 4 S 08.743; VG Bayreuth, 21.01.2009 - B 1 S 08.990; VG Gelsenkirchen, 01.09.2010 - 7 K 1994/10; VG Göttingen, 09.02.2011 - 1 A 184/09; VG Saarlouis, 08.02.2012 - 5 L 48/12; VG Potsdam, 15.05.2013 - 3 L 148/13; VG München, 10.09.2014 - M 18 K 14.2089; VG Oldenburg, 16.11.2015 - 11 A 2142/15; VG Mainz, 13.06.2016 - 1 L 187/16.MZ; OVG Sachsen-Anhalt, 27.10.2017 - 3 M 240/17; OVG Berlin-Brandenburg, 14.03.2018 - 5 S 16.17; VGH Bayern, 30.04.2019 - 23 CS 19.662.

<sup>197</sup> VG Oldenburg, 25.03.2004 - 2 A 1624/00; VG Saarlouis, 24.02.2010 - 5 K 531/09; OVG Sachsen-Anhalt, 13.05.2013 - 3 M 161/13; VG Bayreuth, 17.02.2014 - B 1 S 14.19; LG Karlsruhe, 29.10.2015 - 3 Ss 433/15, 3 Ss 433/15 - AK 170/15; VG Schleswig, 07.07.2017 - 1 B 83/17; VG Schleswig, 04.08.2017 - 1 B 104/17; AG Ulm, 15.03.2019 - 1 Ls 12 Js 19998/16.

<sup>198</sup> Le Bot, ‘La protection de l’animal en droit constitutionnel’ (n 6), at 43-45.

<sup>199</sup> BVerfG, 16.03.2004 - 1 BvR 1778/01; BVerfG, 18.11.2004 - 1 BvR 2252/04; BVerfG, 21.06.2006 - 1 BvR 1319/04; BVerfG, 05.12.2006 - 1 BvR 2186/06; BVerfG, 03.07.2007 - 1 BvR 2186/06; BVerfG, 12.10.2010 - 2 BvF 1/07; BVerfG, 08.12.2015 - 1 BvR 1864/14.

<sup>200</sup> BVerwG, 09.12.2004 - 3 C 7.04; BVerwG, 14.04.2005 - 3 C 31.04; BVerwG, 23.02.2006 - 3 C 14.05; BVerwG, 23.11.2006 - 3 C 30.05; BVerwG, 23.10.2008 - 7 C 48.07; BVerwG, 30.04.2009 - 7 C 14.08; BVerwG, 17.12.2009 - 7 C 4.09; BVerwG, 20.01.2014 - 3 B 29.13; BVerwG, 13.06.2019 - 3 C 28.16.

<sup>201</sup> Caspar & Geissen (n 6), at 914; Natrass (n 18), at 303; Larik (n 6), at 17; Le Bot, ‘Is It Useful to Have an Animal Protection in the Constitution’ (n 6), at 57; Vink, ‘Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde’ (n 13), at 1864; Preparatory Report of the Senate (n 133); Vink (n 6), at 214.

<sup>202</sup> Natrass (n 18), at 303; Vink, ‘Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde’ (n 13), at 1864; Vink (n 6), at 214.

<sup>203</sup> OVG Nordrhein-Westfalen, 08.07.2004 - 21 A 1349/03; VG Münster, 10.05.2011 - 1 K 1823/10; VG Saarlouis, 05.12.2012 - 5 K 640/12; OLG Naumburg, 22.02.2018 - 2 Rv 157/17; BVerwG, 13.06.2019 - 3 C 28.16.

Seven fundamental rights were examined above. Two of them contain a limitation clause (Articles 2 and 12 of the Basic Law). With regard to these fundamental rights, the exact scope of Article 20a is hard to measure because legal restraints have already been accepted in the period prior to the constitutional amendment of Article 20a. Nevertheless, the new Article 20a also continues to influence case law. However, the impact is less explicit than in the case of the other fundamental rights. Moreover, the application of Article 20a usually results in a case-by-case approach. With regard to “unlimited” fundamental rights, the constitutional amendment has had varying degrees of success. It seems that while the human dignity provision, the freedom of research and the freedom of religion are virtually unaffected by the new constitutional provision, animal welfare does have an impact on the freedom of artistic expression and the freedom of teaching. The fact that the state objective ensures that fundamental rights can now be limited in certain cases in favor of animal welfare is a positive development. Previously, animal welfare only had the connotation of “important public interest” and, due to a lack of constitutional value, the provisions of the Animal Welfare Act could not outweigh the fundamental rights (without a limitation clause) of the Basic Law.<sup>204</sup>

This research also demonstrates that the constitutional amendment has changed the constitutional analysis by including it in the balancing of interests. The added value of the constitutional provision is that animal welfare must now be taken into account as a constitutional interest. Even if the balance of interests does not always result in a ruling in favor of animal welfare, the obligation provides for a certain awareness whereby the constitutional status of the importance of animal welfare is recalled each time. This is also explicitly included in the legal argumentation. The correlation between the legal effects of the state objective in terms of balancing of interests and the basis for limiting fundamental rights indicates that the inclusion of animal welfare in the balancing of interests may result in a restriction on certain fundamental rights. However, the potential for restricting fundamental rights is limited. It has been stressed several times that the exact scope of the limiting effect differs and therefore does not have the same effect with respect to all fundamental rights. Nor is it the case that animal welfare is given priority as a matter of course. As such, human interests retain their dominance and the state objective only operates on the periphery of fundamental rights and not at their core.<sup>205</sup>

The difference in the degree of implementation of the state objective by the different branches of government is also striking. The legislative power in particular, scores poorly; the broad discretionary power of the legislator does not translate into concrete policy or progressive legislative initiatives. The legislator should respect the Basic Law as the highest standard in the hierarchy of legal norms, but fails to take concrete measures. Moreover, there are not enough opportunities for sanctions against this unconstitutional behavior. As a citizen, it is practically impossible to take action against this because of the lack of direct effect of the animal welfare state objective. The judicial branch also puts its finger on the sore spot by referring in its case law to the dearth of legislative initiatives, as a result of which progressive developments inevitably fail. In contrast to the legislative power, the administration does try to play a pioneering role, but in turn is often been blew the whistle on. Case law indicates that the judicial branch also implements the state objective, for example, in the interpretation of indefinite legal concepts and in the balancing of interests. However, taking animal welfare into account does not simply mean that this *a priori* results in a ruling in favor of animal welfare.

A final remark about this analysis concerns the limited representativeness. Not all countries have the same constitutional system. The obtained results relate specifically to the German context and cannot be

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<sup>204</sup> Caspar (n 30), at 442.

<sup>205</sup> Natrass (n 18), at 307; Larik (n 6), at 37&43; Vink, ‘Dierenwelzijn: van Onderhandelbare naar Grondwettelijke Waarde’ (n 13), at 1864; Preparatory Report of the Senate (n 133); Vink (n 6), at 209.

extended blindly to other countries. The exact influence that an animal welfare state objective will have depends on the peculiarities of that country's legal system.

While on the one hand one could claim that in reality not much has evolved, on the other hand one should keep in mind the adage that “it does not hurt to try”. The constitutional amendment was not entirely without significance and the current achievements should not be simply forgotten. For example, it was demonstrated that animal welfare was more intentionally and explicitly included in decision-making and the balancing of interests. In addition, the animal welfare state objective strengthens the position of animal welfare, which results in stricter enforcement, and limitation of other fundamental rights such as personal development, freedom of artistic expression, freedom of teaching and freedom of occupation. It also prevents deterioration of the existing level of animal welfare and stimulates animal welfare initiatives at all levels, such as the interest group standing provision that has been introduced by some of the states. Nevertheless, a state objective should not be accepted as the only option and further legal research into alternative approaches to implement animal welfare in a constitution (e.g., economic, social and cultural rights, classical fundamental rights, animal rights) should also be carried out.