ANIMAL CONSTITUTIONALISM: PAVING THE WAY FOR ANIMAL INCLUSION IN THE BELGIAN CONSTITUTION

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An increasing number of countries decide to include animals in their Constitution. This animal constitutionalism movement is not unimportant since the Constitution is the pinnacle of the law, as a result of which the mere inclusion of a particular value in the Constitution indicates that society attaches considerable importance to this value. Belgian legislators have also considered the inclusion of animals in the Constitution for quite some time, and proposals were introduced in the previous (2014-2019) and in the current (2019-2024) parliamentary term. This contribution will examine whether and how the inclusion of a provision on animal welfare in the Constitution would actually improve the position of animal welfare in Belgium. To this end, research was conducted into the animal welfare provision in the German Constitution (Article 20a) on the one hand and into the current legal framework governing animal welfare in Belgium on the other hand, with a particular emphasis on the case law from the Belgian Constitutional Court regarding animal welfare. Not only are the existing proposals (i.e. a Belgian animal welfare state objective and a socio-economic animal welfare right) to revise the Belgian Constitution examined, but two new avenues (i.e. a classic animal welfare right and fundamental animal rights) are also explored. All these results will be taken into account to make concrete recommendations for Belgian legislators.

1 INTRODUCTION

Environmental constitutionalism is increasingly gaining acceptance.[1] More and more countries are embedding the right to environmental protection in their Constitutions, and some even include the rights of nature.[2] In tandem with the environmental constitutionalism movement, animal constitutionalism is brought into prominence, albeit on a much smaller scale.[3] For instance, Russia introduced Article 114, 1, e[5]) in 2020 which states that "the Government of the Russian Federation shall undertake measures aimed to creating favourable conditions for […] forming responsible

[1] Alicja Sikora, *Constitutionalisation of environmental protection in EU law* (Europa law publishing 2020); Erin Daly and James R May, *Implementing Environmental Constitutionalism: Current Global Challenges* (Cambridge University Press 2018); David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012); Luc Lavrysen, *The right to the protection of a healthy environment : international and comparative perspective* (Lambert 2012).

[2] Susana Borràs, 'New transitions from human rights to the environment to the rights of nature' (2016) 5 Transnational Environmental Law 113.

[3] Kristen Stilt, 'Rights of Nature, Rights of Animals' (2021) 134 Harvard Law Review Forum 276, 277; Olivier Le Bot, 'Is It Useful to Have an Animal Protection in the Constitution' (2018) 15 US-China Law Review 54; Jessica Eisen, 'Animals in the constitutional state' (2017) 15 International Journal of Constitutional Law 909.

attitude in society toward animals"[4] and recently (February 2022) the Italian Parliament also successfully voted to include the protection of animals in the nation's Constitution[5].[6] This brings the total of constitutional duties owed to animals to 11 constitutional provisions: Austria (§2 Preamble), Brazil (Article 225, §1, VII), Ecuador (Article 71), Egypt (Article 45, §2), Germany (Article 20a), India (Article 51A, (g)), Italy (Article 9), Luxembourg (Article 11*bis*), Russia (Article 114, 1, e[5]), Slovenia (Article 72, §4) and Switzerland (Article 120, §2).[7] The constitutionalisation of animal welfare is highly topical in Belgium. Both in the previous (2014-2019) and in the current (2019-2024) parliamentary term, proposals were introduced to embed animal welfare in the Belgian Constitution.[8] The renown Belgian animal welfare organisation GAIA has strongly supported these initiatives[9] and to date it still continuously strives for incorporating animals into the Constitution.[10]

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[4] Translation retrieved from *World Constitutions Illustrated*, HeinOnline, updated 2020, <https://heinonline.org/HOL/Page?collection=cow&handle=hein.cow/zzru0027&id=44&men_tab=srchresults> accessed 24 May 2022.

[5] Gianluca Felicetti, 'A historic achievement: animals and environment finally recognised by the Italian Constitution!' (*LAV*, 8 February 2022) <www.lav.it/en/news/animals-environment-constitution> accessed 25 May 2022; X, 'Italy enshrines protection of animals and environment in constitution' (*Eurogroup for Animals*, 11 February 2022) <www.eurogroupforanimals.org/news/italy-enshrines-protection-animals-and-environment-constitution> accessed 25 May 2022.

[6] In this regard, it should also be noted that on 13 February 2022, following a citizens' initiative launched in 2016 by Sentience Politics, the Swiss Canton of Basel-Stadt voted in favour of amending the Cantonal Constitution in order to grant nonhuman primates the fundamental right to life and to bodily and mental integrity. See Section 5.2.

[7] Only national (e.g. Article 13 TFEU is exempted) constitutional animal welfare provisions which cover animals' individual inherent interests (i.e. no competence rules, references to animal species or animal husbandry, etc.) were taken into account. Regarding Austria, Brazil, Egypt, Germany, India, Luxembourg and Switzerland, see Charlotte E Blattner, *Protecting Animals Within and Across Borders: Extraterritorial Jurisdiction and the Challenges of Globalization* (Oxford University Press 2019) 322-334 and Le Bot (n 3) 55. Regarding Ecuador, see Joan Schaffner, *An introduction to animals and the law* (Palgrave Macmillan 2011) 157, however, one should remark that this provision is foremost a 'Rights for Nature provision' rather than an animal constitutional provision. Regarding Italy, see Damiano Fuschi, 'Environmental Protection in the Italian Constitution: Lights and Shadows of the New Constitutional Reform' (*Int'l J. Const. L. Blog*, 13 February 2022) <www.iconnectblog.com/2022/02/environmental-protection-in-the-italian-constitution-lights-and-shadows-of-the-new-constitutional-reform%EF%BF%BC/#_ftn1> accessed 25 May 2022. Regarding Slovenia and Russia, see Stilt (n 3) 277 and Jessica Eisen and Kristen Stilt, *Protection and Status of Animals* (Oxford University Press 2016).

[8] Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2016-17, n° 6-339/1; Amendment to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2017-18, n° 6-339/2; Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2019, n° 7-47/1.

[9] GAIA even launched a national campaign including a promotional video that was broadcast on Flemish and Walloon television channels for some time, see X, '"Beste politici, geef dieren een plaats in de Grondwet"' (*GAIA*, 17 March 2019) <www.gaia.be/nl/nieuws/beste-politici-geef-dieren-plaats-grondwet> accessed 20 May 2022.

[10] See e.g. X, 'Dieren in de Grondwet' (2021) 4 Magazine voor de leden van GAIA vzw 15.

What is the added value of such embedment with a view to improving animal welfare? In this contribution, we will focus on the question of whether and how the inclusion of a provision on animal welfare in the Constitution would actually improve the position of animal welfare in Belgium. To this end, research was conducted into the animal welfare provision in the German Constitution (*Section 2*) on the one hand and into the current legal framework of animal welfare in Belgium on the other hand, with a particular focus on case law regarding animal welfare from the Belgian Constitutional Court (*Section 4*) and the proposed constitutional revisions for animal welfare (*Section 3*). In the latter case, parallels are drawn with the environmental provisions in the Belgian Constitution. Finally, we consider two alternative approaches related to the recent proposal to amend the Cantonal Basel-Stad Constitution (*Section 5*) and formulate a few practical recommendations for the Belgian legislators (*Section 6*).

2 THE IMPACT OF INCLUDING ANIMALS IN THE CONSTITUTION

To enshrine animals in a country's Constitution is to say that animal rights belong to that country's specific set of most central and core values which demand an unequivocal commitment to their protection by the legislative, judiciary and executive branch.[11] A Constitution is the pinnacle of the law and due to a country's sovereignty, each country decides autonomously on the standards and key concerns to which they wish to attribute the highest possible level of legal protection. Legal scholar Vink highlights four political and legal effects of a constitutional (animal welfare) state objective: (i) a basis for limiting fundamental legal rights, (ii) a fuller review in light of conflicting interests and interpretation of open norms, (iii) presence in legislative and executive considerations and (iv) a safeguarding mechanism against incremental degeneration.[12] In addition, although the effects of a Constitution and its provisions are typically limited in their territorial scope to a specific country, a national animal welfare constitutional provision can serve as a legal basis for extraterritorial jurisdiction and thus not only protect animals within, but also across borders.[13] Notwithstanding the ambiguous connotation of animal welfare when included in a Constitution, in

[11] Blattner (n 7) 363.
[12] Janneke Vink, *The Open Society and Its animals* (Palgrave Macmillan 2020) 207-218.
[13] Blattner (n 7).

particular in relation to other constitutionally embedded values[14], it is safe to say that constitutional animal provisions reflect the idea that "animal interests are, at the least, important and, at best, as important as human interests" [15]. The principal legal justification for the inclusion of animals in the Constitution is based on the liberal democratic system with constitutional support being provided to minorities, all the more so if they are unable to make their voices heard, as is already the case for future (human) generations.[16]

In what follows, I will first examine to what extent the intended theoretical effects of a constitutional state objective correspond to the actual functioning of an animal welfare state objective in practice. The German animal welfare state objective proves to be an adequate case study for answering this question, as Germany was the first EU country to incorporate an animal welfare state objective into its Constitution in 2002 and thus already has sufficient case law for a useful analysis. The second part will then explore the possible inclusion of animals in the Belgian Constitution.

2.1 LESSONS LEARNED FROM THE GERMAN ANIMAL WELFARE STATE OBJECTIVE

In a previous study, I thoroughly investigated the German animal welfare state objective.[17] As a result, I will confine myself to setting out the main lines of the topic, with a particular focus on the scrutiny of the four above-mentioned effects.

The first effect we investigate relates to 'presence in legislative and executive considerations'. In other words, besides the scrutiny of Article 20a of the Basic Law by the judiciary, which will be discussed in detail later on, we will first examine to what extent Article 20a is also taken into consideration by the legislative and executive powers when developing legislation and policy.[18] For the legislative branch, this means creating or improving the applicable laws in view of Article

[14] See Eva Bernet Kempers, 'De rechten van mensen en andere dieren: waarom dierenrechten al bestaan' (2021) 1 Tijdschrift voor Milieurecht 4, 15.
[15] Blattner (n 7) 363.
[16] Vink (n 12) 65-123.
[17] Elien Verniers, 'The impact of including animals in the constitution – Lessons learned from the German animal welfare state objective' (2020) 8 Global Journal of Animal Law 1.
[18] See ibid "2.2.4 Animal welfare policy and legislation", 17-21.

20a by, for example, adapting legislation according to advancing scientific insights.[19] Another concrete example of the legislature giving meaning to the effective implementation of Article 20a is the installation of a standing provision for animal protection groups (*Verbandsklagerecht*).[20] However, we see that Article 20a has not convinced the legislature to introduce such a *Verbandsklagerecht* at the federal level.[21] In addition, administrative agencies play a key role in specifying state objectives. The executive must reflect this by implementing the corresponding administrative rules and regulations.[22] While it is acknowledged that the legislature has a wide margin of discretion as to the implementation of Article 20a[23], the opposite is true for the executive [24]. However, the legislature has not done much with this wide margin of discretion[25], while the executive has to some extent tried to change the policy, for instance by not authorising ritual slaughter without stunning, but this attempt was thwarted by the judiciary[26]. In short, it is safe to say that the aim of a state objective to find response not just with the judiciary, but also with the legislature and the executive has only been achieved to a limited extent as far as the German animal welfare state objective is concerned.

In view of the conclusion that Article 20a has not resulted in a significant improvement or rise in the level of animal welfare legislation, it is important to check whether the animal welfare state objective has at least ensured that deteriorations were prevented. Such a standstill effect of Article 20a has been explicitly recognised in case law.[27] For instance, in the Laying Hens Regulation case the Constitutional Court referred to this specific effect to render an amendment inapplicable since it implied a deterioration compared to the previous housing standards for laying hens.[28] Although

[19] Claudia Haupt, 'The nature and effects of constitutional state objectives: assessing the German Basic Law's animal protection clause'' (2010) Animal Law 226 and 229; Roman Kolar, 'Three Years of Animal Welfare in the German Constitution – the Balance from an Animal Welfare Perspective' (2005) 22 ALTEX 147; Kate M. Nattrass, '"...und die Tiere" Constitutional Protection for Germany's Animals' (2004) 10 Animal Law 283, 293 and 299.
[20] Haupt (n 19) 231 and 235-237.
[21] Verniers (n 17) 6-7.
[22] Haupt (n 19) 229; Nattrass (n 19) 299.
[23] E.g. OVG Nordrhein-Westfalen, 24.03.2011 - 14 A 2394/10, para 7; VGH Bayern, 04.08.2014 - 10 ZB 11.1920, para 29; VG München, 07.09.2017 – M 10 K 16.5436, para 20; VGH Bayern, 13.02.2019 - 19 N 15.420, para 134.
[24] E.g. OVG Bremen, 11.12.2012 - 1 A 180/10 & 1 A 367/10, at 16-17.
[25] Verniers (n 17) 18.
[26] ibid 16.
[27] ibid 16-17.
[28] BVerfG, 12.10.2010 - 2 BvF 1/07, paras 68-72 and 121-122.

effective progress is not yet noticeable in animal welfare legislation, Article 20a does open the door for progressive development and prevents degeneration.

Does Article 20a also lead to a fuller review of conflicting interests and the interpretation of open norms? Case law explicitly confirms the function of Article 20a as the reference standard for interpretation.[29] As for the interpretation of 'a sound reason' (*vernünftigen Grund*) mentioned in Article 1 of *Tierschutzgesetz*, Article 20a of the Constitution must be taken into consideration.[30] It is clear that the inclusion of animal welfare in the Constitution will enhance the status of animal welfare to the level of a constitutional value.[31] This upgrade of animal welfare from a legal to a constitutional value was necessary because in Germany, human rights can only be weighed against other constitutionally protected rights, and until then, animal interests could not be taken into account.[32] The fact that animal welfare was included merely as a state objective does not matter, since fundamental rights and state objectives have the same constitutional rank.[33] Conversely, it is also clear from case law that the constitutional embedment of animal welfare does not mean that animal interests have automatic priority over other constitutional interests.[34] Instead courts must balance the competing constitutional interests on a case-by-case basis and resolve conflicts by applying the proportionality principle to determine which provision prevails in a specific case.[35]

This brings us to the final effect: to what extent does the German animal welfare state objective constitute a basis for limiting fundamental legal rights? Constitutional value may have been allocated to animal welfare, but if it is consistently given lower priority in the balance of constitutional interests, the function of limiting fundamental legal rights is not fulfilled. Consequently, previous studies examined case law where the animal welfare state objective was weighed against various other values incorporated in the Basic Law, namely human dignity (Article

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[29] E.g. 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.
[30] E.g. BVerwG, 13.06.2019 - 3 C 28.16, para 20.
[31] Verniers (n 17) 21-22.
[32] Nattrass (n 19) 292.
[33] Yet, structurally state objectives are considered constitutional provisions of a separate category. See Verniers (n 17) 5.
[34] E.g. 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.
[35] Verniers (n 17) 15-16.

1), personal development (Article 2), freedom of religion (Article 4), freedom of arts, teaching and science (Article 5) and freedom of profession (Article 12).[36] In short, the application of Article 20a usually results in a case-by-case approach and provides varying degrees of success. For example, although the Constitutional Court acknowledged that the restriction on the freedom of profession was pursuing a legitimate objective of animal welfare, the Court ruled in the new horseshoeing regulation case that the new subjective requirements for hoof technicians did inappropriately burden the hoof technicians who used alternative methods.[37] The Federal Administrative Court, on the other hand, decided that the ban on the use of electric collars to train dogs was justified by a proportionate violation of Article 12 of the Basic Law with explicit reference to Article 20a.[38] The German animal welfare state objective seems to have impacted the freedom of artistic expression and the freedom of teaching the most and the freedom of science and religion the least.[39] However, the fact that the animal welfare state objective ensures that, at least in some cases, fundamental rights are limited in favour of animal welfare leads us to the conclusion that the final function has been fulfilled, albeit partially.

A last remark which so far has not been discussed in detail relates to the nature of Germany's constitutional animal welfare provision: a state objective. Contrary to socio-economic and classic constitutional rights, state objectives do not create any enforceable rights as no rights are conferred upon individuals, but only a general responsibility or state duty towards (the protection of) animals is generated.[40] This distinction is important and we will return to it later on.

For Germany, we may thus conclude that the animal welfare state objective was especially required to gain initial access to the judicial decision-making process and in the balance of interests, since animal welfare was *a priori* subordinate to constitutionally embedded values due to its lack of constitutional weight. However, if we take a closer look at Article 20a, we notice that not all four

[36] ibid 7-15.
[37] BVerfG, 03.07.2007 - 1 BVR 2186/06, paras 92-94.
[38] BVerwG, 23.02.2006 - 3 C 14.05, para 17.
[39] It should be noted that paradoxically, this is at odds with the direct reason for including animals in the constitution. Verniers (n 17) 4, 13-14.
[40] ibid 1.

functions of a fully-fledged state objective have been fulfilled to the same extent, as a result of which the eventual impact on animal welfare in Germany has remained relatively limited in comparison with the potential impact. In what follows, we will examine whether this thesis can be generalised and would also remain valid if animals were included in the Belgian Constitution.

2.2 $1 + 1 \neq 2$: BLACK, YELLOW AND RED IS NOT THE SAME AS BLACK, RED AND GOLD

In 2014, black, red and gold defeated Brazil in the semi-finals of the FIFA World Cup with a whopping score of 7-1, while 4 years later, black, yellow and red knocked out Brazil in the quarter finals with a score of 1-2. When watching a world championship football game abroad, it is easy to confuse the Belgian flag with the German one. Indeed, both flags look very similar at first sight, but taking a closer look they actually differ greatly (in terms of the direction of the stripes and the sequence of the colours as well as the historical background).

The same reasoning should be applied to the constitutional framework of both countries; numerous superficial similarities may exist, such as a federal state structure and the presence of a Constitutional Court, but in reality, there are significant differences as well.

While in Germany animal welfare is a competitive competence between the Federal State and the *Länder*, in Belgium animal welfare has been an exclusive competence of the regions since 2014.[41] Before the constitutional amendment to Article 20a was incorporated into the Basic Law, eleven of the sixteen German states had already included animal welfare provisions in their respective state constitutions.[42] Yet, in Belgium such state constitutions do not exist. In the Walloon Region we do have a Walloon Animal Welfare Code that came to the fore on the fourth of October, 2018.[43]

[41] Special Act 6 January 2014 on the Sixth State Reform, *Belgian Official Gazette* 31 January 2014, art 6, §1, XI, see Jennifer Dubrulle, 'De impact van de regionalisering van de bevoegdheid dierenwelzijn op de dierenwelzijnswet van 1986' (2020) 1 Tijdschrift voor Omgevingsrecht en Omgevingsbeleid 6; Jeroen Van Nieuwenhove, 'Dierenwelzijn' in Bruno Seutin and Geert Van Haegendoren (eds), *De bevoegdheden van de gewesten* (die Keure 2016).
[42] Verniers (n 17) 4.
[43] Decree 4 October 2018 on the Walloon Animal Welfare Code, *Belgian Official Gazette* 31 December 2018.

However, this code does not have any constitutional status and should be considered nothing more than standard animal welfare legislation.[44]

Zooming in on the structure of the constitutions of both countries, we notice that the German Constitution includes Title "I. Basic Rights" (*Die Grundrechte*) [art 1-19] and Title "II. The Federation and the States" (*Der Bund und die Länder*) [art 20-37]. The Belgian Constitution, on the other hand, includes Title "I*bis* General political objectives of federal Belgium, the Communities and the Regions" (*Algemene beleidsdoelstellingen van het federale België, de Gemeenschappen en de Gewesten*) [art 7*bis*] and Title "II Belgians and their rights" (*de Belgen en hun rechten*) [art 8-32]. Although Title I*bis* of the Belgian Constitution seems to be the equivalent of Title II of the German Constitution, as in both cases constitutional state objectives are included under these specific titles, it will become apparent that, despite the formal equality, other consequences are linked to these state objectives.

The structure of the Constitution is also important, in particular with regard to judicial review by the Belgian Constitutional Court. According to Article 142 of the Belgian Constitution, the Constitutional Court has the authority to review legislative acts for compliance only with the Articles of Title II 'The Belgians and their rights' of the Constitution and not with Article 7*bis*, which belongs to Title I*bis*.[45] Nevertheless, it may be possible to circumvent this restricted power of scrutiny by adding a fundamental right to the review so that the Constitutional Court can perform an indirect review to state objectives enshrined in Title I*bis* of the Constitution after all.[46] However, it will only be possible to indirectly review a law against a state objective, i.e. in combination with an article which can be reviewed, since a state objective does not constitute an independent ground for review. The importance of this limitation for judicial review will become clearer when the legislative proposals to include animal welfare in the Belgian Constitution are discussed.

[44] See Elien Verniers, 'Le code wallon du bien-être animal: révolution ou réformation?' (2018) 2 Revue Semestrielle De Droit Animalier 151.
[45] See also Section 3.1.
[46] E.g. Constitutional Court 18 May 2011, n° 75/2011; Constitutional Court 31 July 2013, n° 114/2013.

It is clear that what applies to the German animal welfare state objective does not necessarily apply to other animal welfare state objectives, since the characteristics of a constitutional framework determine its operation.[47] Consequently, it is important to first concentrate on how animal welfare would be integrated into the Belgian Constitution in accordance with the current legislative proposals, before identifying any parallels with the German animal welfare state objective. After all, the impact of a constitutional article on animal welfare can differ significantly for Belgium and for Germany.

3 LEGISLATIVE PROPOSALS REGARDING THE INCLUSION OF ANIMALS IN THE BELGIAN CONSTITUTION

The second section of this article focused on the impact of the animal welfare state objective in Germany. This was the prelude to the main part of the contribution, which analyses the implications of the inclusion of animal welfare in the Belgian Constitution. To examine whether the inclusion of a provision on animal welfare in the Constitution would actually improve the position of animal welfare in Belgium, we will first present an overview of the existing legislative proposals to revise the Constitution in order to incorporate animal welfare.

In 2016, well-known Belgian animal welfare organisation GAIA launched an awareness raising campaign with a corresponding survey for a Belgian constitutional provision on animal welfare.[48] The campaign paid off as a legislative proposal to address animal welfare in the Belgian Constitution was submitted to the federal parliament soon afterwards.[49]

These legislative proposals were mainly based on legally technical reasons in addition to ethical and philosophical considerations. Similar to the underlying German motive, the main reason is indeed the alignment of animal welfare with other fundamental rights, which allows animal welfare to counterbalance animal-unfriendly practices based on a particular fundamental right. The embedding of animal welfare in the Constitution should then enhance the effectiveness of the

[47] Verniers (n 17) 23-24.
[48] Dries Verhaeghe and Linda De Wandel, *Dieren in de Grondwet* (Peiling, IPSOS, 2017).
[49] Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2016-17, n° 6-339/1.

current provisions of the Animal Welfare Act and encourage the integration of animal welfare into other policy sectors. Moreover, constitutional anchoring can facilitate a better balance between human fundamental rights and animal interests.

If we scrutinise the legislative proposals, we can distinguish two ways of incorporating animals into the Belgian constitution: an animal welfare state objective (Article 7*bis*) and animal welfare as a fundamental social and economic right (Article 23).

3.1 ROUTE 7BIS: ANIMAL WELFARE AS A STATE OBJECTIVE IN THE BELGIAN CONSTITUTION

Under this option, the legislative proposal of 25 April 2017 on the revision of Article 7*bis* of the Belgian Constitution will be canvassed.[50] The formulation, positioning and scope of the Article are explained in turn.

The proposal to revise Article 7*bis* of the Belgian Constitution stipulates: "*In the exercise of their respective competences, the Federal State, the Communities and the Regions shall strive to care for animals as sentient beings*". Originally, the initiator De Bethune preferred the wording: "animals as sentient and intelligent beings", but in order to find a broad political majority as well as social and scientific support, the broader definition of "animals as sentient beings" was retained.[51] The formulation of Article 20a of the German state objective was considered to be outdated, therefore the initiators preferred to align its proposal with Article 13 of the Treaty of the Functioning of the European Union (TFEU)[52].[53] Although the wording is different from that of Germany, here too the intention is to introduce a state objective for animal welfare considering the

[50] ibid.
[51] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 4.
[52] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
[53] Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2016-17, n° 6-339/1, 4; Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 4.

disposition of the proposal which explicitly addresses the 'Federal State, the Communities and Regions' and their duty of care.

The intention to introduce a state objective is also demonstrated by the choice of the petitioners to add an additional paragraph to the current Article 7*bis*[54] of the Belgian Constitution. Article 7*bis* was introduced into the Belgian Constitution in 2007 and contains the anchoring of sustainable development.[55] The provision on sustainable development has been lodged under a new Title I*bis* 'General political objectives of federal Belgium, the Communities and the Regions'.[56] In the Explanatory Memorandum, the legislator clarified that Title I*bis* was intended to "create a new category of constitutional provisions, which should not be confused with the current Title II".[57] Even though no source of a subjective right is established, Article 7*bis* does reflect a course of action imposed on public authorities.[58] Although it is obvious that the government is the primary responsible authority addressed by Title I*bis*, a collective obligation of the Belgian population towards future generations can be deduced indirectly from Article 7*bis*, whereas Title II sets out the rights and obligations of all Belgians.[59] In addition, the parliamentary proceedings confirmed that although sustainable development was the only general state objective that was then included in the Constitution under Title I*bis*, it was possible to include other state objectives under the new category in the future.[60] Hence, an animal welfare state objective entailing the government's concern for animals as sentient beings is indeed another state objective which could perfectly fit within the new category.

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[54] Article 7*bis* of the Constitution of Belgium: "*In the exercise of their respective competences, the Federal State, the Communities and the Regions pursue the objectives of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations*".
[55] Revision of the Constitution of 25 April 2007, *Belgian Official Gazette* 26 April 2007.
[56] Maarten Vidal, 'Duurzame ontwikkeling in de Grondwet' (2007) 149 Juristenkrant 5.
[57] Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2016-17, n° 6-339/1, 2.
[58] Peter De Smedt, Hendrik Schoukens and Tania Van Laer, 'Greening the constitution: the principle of sustainable development in the Belgian Constitution' (2012) European Law Network International Review 74, 76; Peter De Smedt, 'Duurzame ontwikkeling als beleidsdoelstelling verankerd in de Grondwet. Op zoek naar de maakbare samenleving?' in Ingrid Boone (ed), *Liber amicorum Hubert Bocken* (die Keure 2009) 314; Jean Francois Neuray and Marc Pallemaerts, 'L'environnement et le développement durable dans la Constitution belge' (2008) Amén 139; Charles-Hubert Born, 'Le développement durable: un objectif de politique générale à valeur constitutionnelle' (2007) 193 Revue belge de droit constitutionnel 215.
[59] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 23.
[60] De Smedt, Schoukens and Van Laer (n 58) 75.

If animal welfare were to be included in the very same Article as sustainable development (albeit in an additional paragraph), this would imply that the duty of care must be exercised by the government in the context of sustainable development.[61] This would resemble the existing animal welfare constitutional provisions of Brazil[62], Germany[63], Italy[64] and Luxembourg[65] which also link sustainable development and future generations to animal welfare[66] and is line with recent international developments which increasingly acknowledge the inextricable link between animal welfare and sustainable development.[67]

According to the initiators, the adoption of their proposal implies a negative and a positive obligation for the government.[68] The negative obligation means that the government may not make

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[61] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 5.

[62] Article 225, §1, VII Constitution of Brazil: "Everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations. §1°. To assure the effectiveness of this right, it is the responsibility of the Government to: VII. protect the fauna and the flora, with prohibition, in the manner prescribed by law, of all practices which represent a risk to their ecological function, cause the extinction of species or subject animals to cruelty.". Translation retrieved from *World Constitutions Illustrated*, HeinOnline, updated 2008, <https://heinonline.org/HOL/Page?handle=hein.cow/zzbr0101&id=178&collection=cow&index=> accessed 24 May 2022.

[63] Article 20a Constitution of Germany: "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.". Translation retrieved from *World Constitutions Illustrated*, HeinOnline, updated 2021, <https://heinonline.org/HOL/Page?collection=cow&handle=hein.cow/zzde0254&id=27&men_tab=srchresults> accessed 24 May 2022.

[64] Article 9 Constitution of Italy: "The Republic shall promote the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation. It protects the environment, biodiversity and ecosystems, also in the interests of future generations. The law of the state regulates the ways and forms of animal protection.". Translation retrieved from Fuschi (n 7).

[65] Article 11*bis* Constitution of Luxembourg: "The State guarantees the protection of the human and natural environment, and works for the establishment of a durable equilibrium between the conservation of nature, in particular its capacity for renewal, and the satisfaction of the needs of present and future generations. It promotes the protection and the well-being of animals.". Translation retrieved from *World Constitutions Illustrated*, HeinOnline, updated 2020, <https://heinonline.org/HOL/Page?collection=cow&handle=hein.cow/zzlu0078&id=6&men_tab=srchresults> accessed 24 May 2022.

[66] Elien Verniers, 'Bringing animal welfare under the umbrella of sustainable development: A legal analysis' (2021) 30 Review of European, Comparative & International Environmental Law 349, 356-357.

[67] E.g. UN Environment Programme, 'Resolution on the animal welfare-environment-sustainable development nexus' (2 March 2022) UNEP/EA5/L10/REV.1; Independent Group of Scientists, *Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development* (UN 2019) 117.

[68] For an overview on the negative and positive obligation regarding the Belgian sustainable development state objective, see De Smedt, Schoukens and Van Laer (n 58) 76-78 and Born (n 58) 225.

any decisions counter to the constitutional objective.[69] This means, for example, that public authorities should refrain from taking measures that would result in a deterioration of the existing level of animal welfare protection. The positive obligation implies active intervention by the government, whereby the various authorities, within their area of competence, take the necessary measures to achieve the (animal welfare) objective.[70] Henceforth, a practical exemplification of the latter could entail that in its procedure for granting a permit (e.g. a permit for a livestock farm), the government lays down an obligation whereby animal welfare becomes an obligatory assessment criterion which must be taken into account for a permit to be granted. Note that the Walloon Region already introduced such "Animal Impact Assessment (AIA)" as part of the environmental permit procedure when it adopted the Walloon Animal Welfare Code.[71] Such integration should definitely not be underestimated as in the past, the Council of State explicitly annulled environmental permit denials because they were based on animal welfare considerations, and only environmental effects were allowed to be taken into account in the evaluation process to receive a permit.[72] However, as indeed illustrated by the Walloon Region, such an AIA can also be accomplished by adjusting current legislation and thus without establishing an animal welfare state objective. Unlike the negative obligation, the positive obligation is not legally enforceable.

Furthermore, the submitters want their proposal to be an adequate tool enabling the judicial branch to support legal arguments in favour of animal welfare by making it possible to refer to the constitutional foundations of animal welfare in Article 7*bis*. For the Constitutional Court, the animal welfare state objective should provide a real benchmark and an instrument which the Court can fall back on.[73] The standing of animal welfare as a rule of law with constitutional value promotes animal welfare from a legal to a constitutional interest, giving it the highest rank in the

[69] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 5.
[70] ibid.
[71] Decree 4 October 2018 on the Walloon Animal Welfare Code, *Belgian Official Gazette* 31 December 2018, art 2-13.
[72] E.g. Council of State 23 March 2017, n° 237.752, NV Moerwegel Mink; Council of State 11 May 2017, n° 238.153, Schellekens; Council of State 29 June 2017, n° 238.704, BVBA Nertskwekerij Truyman.
[73] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 6.

hierarchy of legal norms.[74] This is important in the assessment of subordinate legislation and in the balancing of interests.[75]

Next, we will investigate whether the animal welfare state objective as envisaged by the petitioners in their proposal actually corresponds to the reality and actual potential of Article 7*bis*. As mentioned before, positioning animal welfare under Title I*bis* which is specifically designated as "General political objectives of federal Belgium, the Communities and the Regions" reflects the idea of implementing a German-like animal welfare state objective in the Belgian Constitution. The initiators of the proposal have deliberately chosen to follow Article 13 of the TFEU and the German animal welfare state objective in order for animal welfare to be incorporated as a general (state) objective.[76] So, similar to the German provision, we will thus verify to what extent the theoretical expectations of the envisaged proposal correspond to the four legal effects Vink identified as inherent to a constitutional state objective. Whereas in Germany, this was analysed by reviewing the case law that referred to Article 20a of the German Constitution, a different approach is applied here as this is a proposal that has not yet been adopted. Nevertheless, also in this case it is possible to assess the potential impact by investigating the scope of the existing Article 7*bis* of the Belgian Constitution regarding sustainable development. The animal welfare state objective would, after all, have similar consequences as a result of its particular positioning and formulation.

Probably the most important feature that a state objective could provide is a basis for limiting fundamental rights. In order to have this effect, it is necessary that Article 7*bis* belongs to the regulations constituting the yardstick for review by the Constitutional Court. However, as already mentioned above, this is not the case. The jurisdiction of the Constitutional Court is limited to passing judgment on any violation by legislative acts of the rules that determine the respective competences of the federal State, the Communities and the Regions, which are set forth in the Constitution and in laws (usually passed by a special majority vote) that are enacted with a view to

[74] Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2016-17, n° 6-339/1, 2.
[75] ibid.
[76] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 32-33.

institutional reform in federal Belgium, as well as of the fundamental rights and liberties guaranteed in Title II of the Constitution (Articles 8 to 32) and of Articles 143, §1 (the principle of federal loyalty), 170 (the legality principle in tax matters), 172 (the equality principle in tax matters) and 191 (the protection of foreign nationals) of the Constitution.[77] When analyzing the case law of the Constitutional Court in relation to the sustainable development state objective inserted in the existing Article 7*bis* of the Belgian Constitution, we indeed encounter multiple judgements in which the Court explicitly confirms that "it has no jurisdiction to rule directly on the violation of that constitutional provision".[78] However, an indirect review, in which the Constitutional Court attaches its jurisdiction to a fundamental right that is included in Title II, such as Articles 10 and 11[79] or Article 23[80] of the Belgian Constitution, is accepted. Yet, it is important to point out that while it is accepted that for the state objective on sustainable development (Article 7*bis* - Title I*bis*), the protection of a healthy environment (Article 23, third paragraph, 4° - Title II) can provide such an anchor point that enables an indirect review, Belgian legal scholars Uyttendaele and Chapaux claim that there exist absolutely no such equivalent steppingstone for an animal welfare state objective.[81] Consequently, they opine that the Constitutional Court will never be able to review animal welfare – not even indirectly – as long as it pertains to the configuration of the particular 7*bis* incorporation proposal.[82] I contend that this assumption can be countered in at least two ways. First, it can be argued that the steppingstone of Article 23 used for the sustainable development state objective can equally buttress the animal welfare state objective. Both at the national[83], European[84] and international[85] level, the nexus between the environment and animal welfare is increasingly endorsed. Secondly, even when one should oppose the former view, there

[77] This jurisdiction of the Constitutional Court is enshrined in Article 142 of the Belgian Constitution.
[78] E.g. Constitutional Court 29 March 2018, n° 38/2018, para B.11.2; Constitutional Court 25 February 2021, n° 30/2021, para B.33.1; Constitutional Court 14 October 2021, n° 142/2021, para B.30.1.
[79] E.g. Constitutional Court 19 July 2018, n° 95/2018, paras B.4, B.7 & B.12.
[80] E.g. Constitutional Court 10 October 2019, n° 129/2019, paras B.5.1 & B.6.2; Constitutional Court 10 October 2019, n° 131/2019, paras B.5.1 & B.6.2; Constitutional Court 23 January 2020, n° 11/2020, para B.11.2; Constitutional Court 25 February 2021, n° 30/2021, para B.6; Constitutional Court 14 October 2021, n° 142/2021, para B.30.1.
[81] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 126.
[82] ibid.
[83] E.g. The aforementioned AIA with regard to receiving an environmental permit in the Walloon Animal Welfare Code, see n 71.
[84] E.g. Case C–900/19 *One Voice and Ligue pour la protection des oiseaux v Ministre de la Transition écologique et solidaire* [2021] ECLI:EU:C:2021:211.
[85] UN Environment Programme, 'Resolution on the animal welfare-environment-sustainable development nexus' (2 March 2022) UNEP/EA5/L10/REV.1.

still remains the catch-all mechanism of the principle of equality and non-discrimination (Articles 10 and 11 – Title II) which could be invoked in combination with the animal welfare state objective in Article 7*bis* and thus trigger an indirect review by the Constitutional Court. In a nutshell, regardless one's viewpoint concerning the indirect judicial review, we can postulate that the proposal to revise Article 7*bis* of the Belgian Constitution in order to incorporate an animal welfare state objective would barely fulfil the objective of providing a basis for limiting other fundamental rights. In particular, the lack of a primary possibility of review by the Constitutional Court prevents the intended and potential impact of the envisaged animal welfare state objective.

The insufficient possibility for the Constitutional Court to review Article 7*bis* of the Belgian Constitution also has consequences in the context of the judicial interpretation of indefinite legal concepts and the balancing of interests. It will prevent Article 7*bis* from exerting any influence, because here too its effect is limited to objective disputes and in this regard, the competence of the Constitutional Court is again limited by the inclusion of the animal welfare state objective under Title I*bis.* Even in the event that the Constitutional Court could still include animal welfare in the balancing of interests through indirect judicial review, Bonbled complains that, when comparing constitutional values, general policy objectives will always be subordinate to a fundamental right.[86] When actually taking a closer look at the current sustainable development state objective in Article 7*bis*, we are confronted with a lack of further clarification of the concept of 'sustainable development'.[87] However, this function of interpreting open norms in accordance with the Constitution may not only be carried out by the (constitutional) legislator itself, but also by the executive branch, for example in the process of granting permits as is currently the case with regard to the sustainable development state objective.[88] In addition, an animal welfare state objective with a constitutional rank may result in a fuller review in light of the balancing of interests by the Belgian Council of State (competent to review acts of the executive[89]). Although the Council of State does recognise the normative power of general policy objectives, this has not yet led to annulment in

[86] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 41.
[87] Report of the Commission to the Proposal to insert a Title I*bis* and an Article 7*bis* in order to establish sustainable development as a general objective for the Federal State, Communities and Regions in the Constitution, *Parl.St.* Senaat 2005-06, n° 3-1778/2, 64.
[88] De Smedt, Schoukens and Van Laer (n 58) 75.
[89] Belgian Federal coordinated laws concerning the Council of State, art 14.

concrete cases.[90] In order to be eligible for annulment, there must be a manifest breach of the general policy objective, in a manner which has a more than temporary or local impact.[91]

A penultimate function to be checked encompasses the integrative ability of a state objective to bear on considerations of the legislative and executive branch. This effect is situated in the positive obligation which makes its enforcement problematic. There are no legal instruments to fill a lacuna in policy or legislation; legislative bodies can, for instance, not be forced to adopt specific legislation and judicial review can only relate to the negative obligation imposed upon the authorities.[92]. Nonetheless, it is expected that a state objective is ideally equipped with such influence. It is doubtful that, in the current disposition of Article 7*bis*, the animal welfare state objective will induce a promotion of animal welfare through legislative initiative. By analogy with the existing sustainable development state objective which has not resulted in a particular increase in the adoption of specific legislation explicitly restricting other fundamental rights in favour of sustainable development, the same will probably apply to animal welfare. With regard to integration into the policy decision-making process of the executive branch, we recall that AIAs are currently in place in the Walloon Region, which somehow downplays the additional value of an animal welfare state objective in this regard. An additional overall remark in line with this train of thought concerning the actual need of this legal effect of a state objective on animal welfare relates to Article 13 of the TFEU, which indeed already envisages the legislative and executive branch of Member States by proclaiming that "*In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.*" This may put the potential lack of bearing in perspective.

A final legal effect that characterises a state objective is that it prevents the current level of protection from deteriorating. It is apparent that the present constitutional reform will not be able

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[90] E.g. Council of State 24 February 2005, n° 141.217, Keymolen; Council of State 19 April 2007, n° 170.173, Aktiekomitee voor milieubescherming te Merelbeke. See also De Smedt, Schoukens and Van Laer (n 58) 81.
[91] E.g. Council of State 19 April 2007, n° 170.173, Aktiekomitee voor milieubescherming te Merelbeke, para 3.3.6.2.
[92] Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2016-17, n° 6-339/1, 3.

to achieve this effect. In a judgment in which Article 23 of the Belgian Constitution was examined in combination with Article 7*bis*, the Constitutional Court only recognised the standstill effect with regard to Article 23.[93] The absence of such a basic principle can only be considered as a profound hiatus. In order to increase the impact of animal welfare, the existing protection should be maintained at the very least. Yet, Article 7*bis* clearly does not comply with this requirement, so that the legislative proposal does not offer sufficient guarantees to provide even a minimum level of protection of animal welfare.

The above assessment reveals a poor result with two striking observations: the animal welfare state objective in Germany differs from its possible counterpart in Belgium and the intentions of the legislative proposal do not correspond to the effective scope of the prevailing Article 7*bis* of the Belgian Constitution. A major difference with the German provision is that the Belgian proposal does not constitute an adequate basis for limiting other fundamental rights and therefore is not taken into account in the weighing of interests. The only option via an implicit judicial review is extremely precarious and offers insufficient guarantees. Although the intentions of the authors of the Belgian proposal were in line with the German constitutional provision, the assessment with regard to the general functions of a state objective and in comparison with the German animal welfare state objective underscored that one state objective is not the same as the other. The submitters' aim was that animal welfare would be taken into account by public authorities. A state objective seemed to be the instrument par excellence. The decision to position the state objective under the title of state objectives (Title I*bis*) in the Constitution is a systematic and formally logical choice. However, the consequences in terms of content stemming from an intuitively logical choice resulted in an unsatisfactory outcome. While the potential impact of the positive obligation, despite the unenforceability, can be given the benefit of the doubt, it is certain that the negative obligation is not realized by Article 7*bis*. The inadequate impact can always be traced back to the lack of judicial review. The negative obligation can only be guaranteed by this judicial review and precisely this essential component is missing. In addition, the absence of a standstill effect from Article 7*bis* also demonstrates that a constitutional provision of Title I*bis* does not have the same

[93] E.g. Constitutional Court 18 May 2011, n° 75/2011, paras B.2, B.3.1 & B.3.2.

legal force as a fundamental right from Title II of the Constitution. It is abundantly clear that the inclusion of animal welfare in Article 7*bis* of the Belgian Constitution will only have a very marginal impact. The legal doctrine also shares this view and mentions a relative importance, or even more so, a purely symbolic addition.[94] A different approach is required if the proposers want animal welfare to really count and weigh on the policy or if they only want to come near achieving the same result as the German animal welfare state objective.

3.2 ROUTE 23: ANIMAL WELFARE AS A FUNDAMENTAL SOCIAL AND ECONOMIC RIGHT IN THE BELGIAN CONSTITUTION

This option is elaborated on the basis of amendments of Lacroix, Thibaut and De Sutter. In general, the same methodology is used here as for the proposal regarding the revision of Article 7*bis* of the Belgian Constitution.

On 15 January 2018, the discussion of the constitutional proposal to revise Article 7*bis* of the Belgian Constitution was initiated in the Commission for Institutional Affairs, and in March 2018, hearings were held with constitutional law experts, philosophers, scientists and representatives from both the agricultural sector and animal welfare organisations.[95] Within the framework of this discussion and in particular in order to respond to the above-mentioned loopholes, members of parliament Lacroix, Thibaut and De Sutter submitted an amendment to include animal welfare in Article 23, third paragraph, 4° of the Belgian Constitution instead of in Article 7*bis*.

The current Article 23, third paragraph, 4° of the Belgian Constitution contains the constitutional embedding of environmental protection.[96] The Article would be expanded with the words "what

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[94] Amendment to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2017-18, n° 6-339/2, 2; Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 41.
[95] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 2.
[96] Article 23 Constitution of Belgium: "Everyone has the right to lead a life in keeping with human dignity. To this end, the laws, federate laws and rules referred to in Article 134 guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them. These rights include among others : 4° the right to the proection of a healthy environment;". Translation retrieved from *World Constitutions Illustrated*, HeinOnline, updated 2021,

entails the protection and welfare of animals as sentient beings", resulting in "4° the right to the protection of a healthy environment what entails the protection and welfare of animals as sentient beings;". This amendment is highly reminiscent of the German example where '*und die Tiere'* was also added to the very same Article as the protection of the environment, '*die natürlichen Lebensgrundlagen'*. Nevertheless, the two formulations differ in the fact that the German version explicitly mentions the State and the Belgian amendment does not contain such a reference. The emphasis on the description as a state objective, which was present in the initial proposal to revise Article 7*bis* of the Belgian Constitution, has been omitted here. This does not mean that this provision is not addressed to the government as is elucidated by the second paragraph of Article 23 of the Belgian Constitution; the government must indeed determine the conditions for implementation.[97]

Apart from the exact formulation, another difference pertains to the positioning of both provisions. In Germany, Article 20a of the German Constitution is included under the Title 'the Federation and the *Länder'* and not under the Title 'Basic Rights'. In the Belgian amendment proposal, however, animal welfare is positioned under the Belgian equivalent of 'Basic Rights', i.e. 'The Belgians and their Rights'. The supporters of the original proposal to revise Article 7*bis* of the Belgian Constitution explain that they deliberately chose not to include animal welfare under the title of fundamental human rights, because this would lead to an instrumentalisation of animals and thus strengthen an anthropocentric view of the world.[98]

However, the initiators of the amendment proposal oppose that the specific choice to include animal welfare in the constitutional environmental provision is in fact rather logical, because Article 23, third paragraph, 4° of the Belgian Constitution relates precisely to 'the world in a metaphysical sense'.[99] Consequently, like the other fundamental rights of Article 23 of the Belgian Constitution, animal welfare classified in this option would result in a socio-economic fundamental right to animal welfare. Positioning animal welfare under Title II, instead of Title I*bis* would also

<https://heinonline.org/HOL/Page?collection=cow&handle=hein.cow/zzbe0116&id=11&men_tab=srchresults> accessed 24 May 2022.

[97] Luc Lavrysen, *Handboek milieurecht* (Wolters Kluwer 2020) 91-92.

[98] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 34.

[99] ibid 44.

match the proposal in the Netherlands, which considers to implement the care for animals in Article 21 of the Dutch Constitution, under the title 'fundamental rights' (*De Grondrechten*).[100]

Yet, according to Vink, it is not really a fundamental right, with a duty of care for animals being disguised as a socio-economic fundamental right, calling it a "circuitous, legally ugly and inconsistent construction in which the beneficiaries of a constitutional right are not the same entities as the rights holders".[101] A socio-economic fundamental right is a legal remedy which is substantially different from a state objective and just like the constitutional environmental provision, it also implies obligations for citizens. 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.[102] In my opinion, this is not necessarily 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 policies.[103]

To reiterate, the rationale behind this amendment is to eliminate the shortcomings of the proposed animal welfare state objective of Article 7*bis* of the Belgian Constitution by means of a socio-economic fundamental right in the form of Article 23, third paragraph, 4° of the Belgian Constitution. The authors of this amendment believe that the latter is a much more appropriate fit. Whether this constitutional amendment can indeed fill the gaps of Article 7bis will be verified next. To this end, the existing case law, legal doctrine and parliamentary proceedings concerning the constitutional environmental provision were analysed.[104] In particular, the possibility of judicial

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[100] ibid 31.
[101] Vink (n 12) 223; Janneke Vink, 'Dierenwelzijn: Van onderhandelbare naar grondwettelijke waarde' (2018) 26 Nederlands Juristenblad 1862, 1863.
[102] Vink (n 101) 1863.
[103] See for a concurring view: Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 31.
[104] Although animal welfare is incorporated in exactly the same constitutional provision as the right to the protection of a healthy environment, it remains a mere hypothetical assessment in which, in theory, it is not possible to state with 100% certainty that similar consequences will also occur with regard to animal welfare. By analogy with Germany, one could refer to the national *Verbandsklagerecht*, which exists for environmental protection organisations but not for animal welfare organisations. Nevertheless, in order to make a comparison possible, the adopted research

review and the standstill effect with regard to Article 23, third paragraph, 4° of the Belgian Constitution were evaluated.

Judicial review is linked to the potential opportunity of animal welfare to serve as a legal basis, following the German example, to limit other fundamental rights. This also influences the impact of animal welfare on the balancing of interests.

In the parliamentary proceedings, the fact that the rights enumerated in Article 23 of the Belgian Constitution do not have any direct effect and therefore do not establish any subjective rights was emphasized.[105] The majority of the legal doctrine also supports this view.[106] As a result, individuals cannot seek redress before the ordinary courts because the absence of interest prevents them from invoking a violation of a subjective right. Nevertheless, judicial review is still possible in the context of objective litigation. Both the Council of State and the Constitutional Court accepted a (collective) environmental interest.[107] In this respect, Article 23, third paragraph, 4° of the Belgian Constitution is in line with what is in fact expected from a state objective; there is no direct effect[108], but a review by the Constitutional Court and the Council of State remains possible.

The Belgian Constitutional Court is competent to review formal acts. If the Constitutional Court finds a conflict, it can annul the regulation in question or declare it illegal. It also has the power to submit a preliminary question to the European Court of Justice, and the Constitutional Court has the monopoly to answer preliminary questions from other Belgian Courts. The special Act of 9 March 2003 extended the power of review of the Belgian Constitutional Court[109], so that the

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hypothesis is that the current Article 23, paragraph 3, 4° Belgian Constitution would simultaneously apply to animal welfare. In the review of Article 7*bis* Belgian Constitution, the same premise and starting point was also applied.

[105] Proposal to revise Title II of the Constitution in order to insert an Article 24*bis* on economic and social rights, *Parl.St.* Senaat 1991-92, n° 100-2/3°, 9 & 13; Report of the Commission to the Proposal to revise Title II of the Constitution in order to insert an Article 24*bis* on economic and social rights, *Parl.St.* Senaat 1993-94, n° 100-2/4°, 5 & 90-91.

[106] Lavrysen (n 97) 93; Geert Goedertier, Johan Vande Lanotte and Yves Haeck, *Belgisch Publiekrecht* (Die Keure 2015) 679; Luc Lavrysen and Jan Theunis, 'Het recht op de bescherming van een gezond leefmilieu: een blik over de grenzen en een blik achterom' in *Liber Amicorum Paul Martens: L'humanisme dans la résolution des conflits: utopie ou réalité?* (Larcier 2007) 370; Jan Theunis and Bernard Hubeau, 'Het grondwettelijk recht op de bescherming van een gezond leefmilieu' (1997) 8 TROS 329, 334.

[107] Theunis and Hubeau (n 106) 342.

[108] Maxime Stroobant, 'Artikel 23 van de Grondwet: sociale grondrechten twee decennia ter discussie' (2009) 1 Tijdschrift voor Mensenrechten 7; Ann Carette, 'Een subjectief recht op een volwaardig leefmilieu?' (1998) Tijdschrijft voor Privaatrecht 821, 860-861.

[109] The name of the Constitutional Court at that time was the Court of Arbitration.

Constitutional Court could from then on also directly assess Article 23 of the Belgian Constitution.[110] Previously, a detour was used via Article 10-11 of the Constitution, whereby the Constitutional Court refrained from pronouncing the exact scope of Article 23, third paragraph, 4° of the Belgian Constitution, because only the review against Article 10-11 of the Belgian Constitution was touched upon.[111]

The case law shows that the Constitutional Court has frequently used the new article to review acts.[112] Implementing orders, on the other hand, can be reviewed by the Council of State against Article 23, third paragraph, 4° of the Belgian Constitution.[113] In its case law, the Council of State confirms that a lack of direct effect does not affect its power to review administrative acts against the constitutional environmental provision.[114]

The judicial review by both the Constitutional Court and the Council of State is always marginal in view of the wide discretion left to the legislature or executive in the field of environmental policy.[115] The case law analysis reveals a number of concrete effects that the constitutional environmental provision brings about.

The case law of both the Constitutional Court and the Council of State demonstrates that the constitutional environmental provision is considered in the balancing of interests. Environmental policy cannot simply be subordinated to other interests[116] and is mainly weighed against the 'general interest'[117]. Another effect caused by the constitutional environmental provision, which has already been applied in case law, relates to interpretation in accordance with the Constitution.

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[110] Lavrysen and Theunis (n 106) 373.
[111] E.g. Constitutional Court 7 June 2001, n° 78/2001.
[112] E.g. Constitutional Court 15 September 2004, n° 150/2004; Constitutional Court 16 March 2005, n° 59/2005; Constitutional Court 14 September 2006, n° 137 /2006; Constitutional Court 20 June 2007, n° 67/2007; Constitutional Court 31 July 2008, n° 114/2008; Constitutional Court 9 July 2009, n° 114/2009; Constitutional Court 29 July 2010, n° 90/2010; Constitutional Court 27 January 2011, n° 8/2011; Constitutional Court 3 May 2012, n° 58/2012; Constitutional Court 31 July 2013, n° 114/2013; Constitutional Court 19 December 2013,, n° 171/2013; Constitutional Court 21 January 2016, n° 7/2016; Constitutional Court 28 July 2016, n° 57/2016; Constitutional Court 27 June 2019, n° 103/2019.
[113] E.g. Council of State 13 June 2005, n° 145.837, De Becker. See also Lavrysen (n 97) 93.
[114] E.g. Council of State 17 November 2008, n° 187.998, Coomans.
[115] Goedertier, Vande Lanotte and Haeck (n 106) 684; Theunis and Hubeau (n 106) 344.
[116] E.g. Council of State 5 October 1994, n° 49.440, Gregoire; Council of State 19 December 2003, n° 126.669, de gemeente Sint-Pieters-Woluwe.
[117] E.g. Constitutional Court 28 July 2016, n° 57/2016, para B.14.1; Constitutional Court 23 May 2019, n° 80/2019, para B.3.1; Constitutional Court 27 June 2019, n° 103/2019, para B.5.

According to settled Belgian case law, if regulations are open to different interpretations, the Court is obliged to follow that interpretation which is compatible with the Constitution.[118] Not only judges but also administrative authorities have to adopt such an interpretation when granting permits.[119] This has triggered the so-called '*in dubio pro natura'* principle: in case of doubt, an environmentally friendly interpretation is recommended.[120] The constitutional embedding of animal welfare in the same Article as the constitutional environmental provision could, by analogy, include the creation of a principle '*in dubio pro animali'*. Finally, the most common effect that has been identified relates to the standstill effect.

The standstill effect of the constitutional environmental provision is the subject of widespread consensus in legal doctrine, case law and parliamentary proceedings. A standstill effect is regarded as intrinsic to economic, social and cultural rights.[121] It guarantees that the existing level of protection is maintained and, if it is adversely affected, the judge can sanction this. The legislator retains a high degree of scope for policymaking, but because of the standstill effect, this implies that the legislator can only use it in favour of environmental policy. Although the Council of State was the first to recognise the standstill obligation with regard to the constitutional environmental provision in 1999[122], it is mainly the Constitutional Court[123] that applies this obligation. The used reference standard concerns a proportionate and not an absolute standstill obligation. This means that a fair balance is pursued in which a violation of the standstill can only be decided if it entails significant reductions in the level of protection and if there are no reasons of public interest. An insidious deterioration is therefore possible since both the Council of State and the Constitutional

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[118] Supreme Court 8 February 1952, *Pas.*, 1952, I, 334 (Waleffe case). See also Lavrysen (n 97) 93; Theunis and Hubeau (n 106) 337.
[119] François Ost, 'Un environnement de qualité: droit individuel ou responsabilité collective?' in X (ed), *L'actualité du droit de l'environnement* (Bruylant 1995) 40.
[120] Council of State 20 August 1999, n° 82.130, Venter. See Benoît Jadot, 'Le droit à l'environnement' in Rusen Ergec (ed), *Les droits économiques, sociaux et culturels dans la Constitution* (Bruylant 1995) 263; Theunis and Hubeau (n 106) 337; Lavrysen and Theunis (n 106) 372; Lavrysen (n 97) 93.
[121] Lavrysen and Theunis (n 106) 371.
[122] Council of State 29 April 1999, n° 80.018, Jacobs.
[123] E.g. Constitutional Court 14 September 2006, n° 135/2006 & n° 137/2006; Constitutional Court 28 September 2006, n° 145/2006; Constitutional Court 20 June 2007, n° 67/2007; Constitutional Court 31 July 2008, n° 114/2008; Constitutional Court 1 September 2008, n° 121/2008; Constitutional Court 9 July 2009, n° 114/2009; Constitutional Court 29 July 2010, n° 90/2010; Constitutional Court 27 January 2011, n° 8/2011; Constitutional Court 3 May 2012, n° 58/2012; Constitutional Court 8 July 2013, n° 108/2013; Constitutional Court 19 December 2013, n° 171/2013; Constitutional Court 19 December 2013, n° 177/2013; Constitutional Court 27 January 2016, n° 12/2016; Constitutional Court 23 May 2019, n° 80/2019.

Court do not take every reduction into account. Nevertheless, the standstill effect associated with the constitutional environmental provision has already had an impact. In a recent case, this even resulted in a judgment that was beneficial to animal welfare.[124] A reduction in the distance rules for large-scale factory farming sheds was considered unlawful by the Council of State because the compulsory review of the standstill in accordance with Article 23, third paragraph, 4° of the Belgian Constitution had not been carried out at the time of the reduction.[125]

While with regard to Article 7*bis* of the Belgian Constitution hardly any case law can be retrieved, Article 23, third paragraph, 4° of the Belgian Constitution is abundantly discussed in the case law. This is also in line with the findings in which economic, social and cultural fundamental rights can weigh much more on policy than constitutional state objectives. The amendment improves on the original proposal by opting for an Article that can have a more substantial impact. This is illustrated by the fact that, in relation to the constitutional environmental provision, a standstill effect and the existence of judicial review are recognised. Nevertheless, the real impact of the constitutional environmental provision should not be exaggerated and remains relatively limited. For example, the Constitutional Court has only accepted a violation of Article 23, third paragraph, 4° of the Belgian Constitution in three legal cases.[126] In the part concerning an animal welfare state objective in Germany, a similar finding has already been reported, namely that the incorporation of a certain constitutional value into the decision-making process does not necessarily mean that a ruling in favour of that constitutional value arises.[127] Although this indicates that the actual impact might be minimal, it is clear that Article 23 constitutes a sound basis for limiting fundamental rights and in doing so, it has more potential than Article 7*bis* of the Belgian Constitution. Ancillary, it also seems that the socio-economic provision of Article 23 ironically resembles the German animal welfare state objective more than the proposal of the Belgian animal welfare state objective itself.

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[124] Council of State 2 May 2019, n° 244.351, vzw Aktiegroep Leefmilieu Kempen. See Nina Baeten, 'Het 'standstill'-beginsel: ruilt de Raad van State zijn wandeling op het gekende pad in voor een tocht doorheen de wilde natuur?' (2020) 1 Milieu- en Energierecht 29.
[125] Council of State 2 May 2019, n° 244.351, vzw Aktiegroep Leefmilieu Kempen, paras 27 & 32.
[126] Constitutional Court 14 September 2006, n° 137/2006; Constitutional Court 28 July 2016, n° 57/2016; Constitutional Court 23 May 2019, n° 80/2019.
[127] See n 34.

Now that we analysed and compared the two proposals and before we gauge the ultimate added value of constitutional animal welfare incorporation for Belgium, it is imperative to take a step back and answer an intermediate question we have neglected so far. To what extent is animal welfare currently taken into account in the Belgian legal order, especially by the Belgian Constitutional Court?

4 WHAT IF…? ABOUT THE CREATIVITY OF THE BELGIAN CONSTITUTIONAL COURT

The discussion of the proposals to incorporate animal welfare into the Belgian Constitution make it clear that a recurring motive relates to the possibility of judicial review, for instance by the Constitutional Court. However, what if a constitutional provision, either as a state objective or as socio-economic fundamental right, turns out not to be necessary for review?

In this chapter we will delve deeper into all the case law of the Belgian Constitutional Court regarding animal welfare[128], in particular with regard to the Act of 14 August 1986 on the protection and welfare of animals.[129]

This revolutionary law caused a real paradigm shift through the introduction of the concept of animal welfare. Previously, Belgian legislation focused on 'animal protection', a passive concept which revolved around the defence of animals against human cruelty.[130] With the Animal Welfare Act, the legislator had the following objective: "*within the scope of ethical reflection on the changed living conditions of animals in modern society, actively pursue the general welfare of animals by meeting their needs*".[131] Contrary to the animal protection laws of 1929[132] and 1975,[133] this rationale is taken a step further by not just combating the maltreatment and suffering of

[128] The timeframe of the reviewed case law includes Court decisions from 1 December 1987 (when the Animal Welfare Act entered into force) unto May 2022.
[129] Act of 14 August 1986 on the protection and welfare of animals, *Belgian Official Gazette* 3 December 1986.
[130] Explanatory memorandum to the Draft Act on the protection and welfare of animals, *Parl.St.* Senaat 1982-1983, n° 469/1, 1.
[131] ibid.
[132] Act of 22 March 1929 on animal protection, *Belgian Official Gazette* 29 March 1929.
[133] Act of 2 July 1975 on animal protection, *Belgian Official Gazette* 18 July 1975.

animals, but also by promoting animal welfare and focusing on the integration of animal welfare into economic life.[134] The addition of this extra dimension was based on a new economic and social reality characterised by the industrialisation of agriculture, the exponential increase in the number of pets, the trade in and keeping of wild animals, the significant increase in animal testing and the growing European concern for animal welfare.[135]

4.1 THE PRE-LISBON PERIOD: A PUBLIC TRADE BAN AND INVESTIGATIONS OF ANIMAL SHOPS BY INSPECTOR-VETS

Before the Lisbon Treaty entered into force on 1 December 2009, the Belgian Constitutional Court only ruled in three cases related to animal welfare. Note that the relevance of this demarcating date will be elucidated in the next subsection.

The first case the Constitutional Court had to examine was based on an amendment to Article 12 of the Animal Welfare Act which banned the trade in dogs and cats on public roads, markets, fairs, shows, exhibitions and similar events as well as at the buyer's home.[136] The measure was aimed at addressing the overpopulation of dogs and cats as well as the specific conditions in which they were publicly traded.[137] In addition, the legislator wished to put an end to abuses that occurred because some laboratories purchased animals intended for experiments on markets.[138] The amendment was primarily aimed at discouraging impulsive purchases of certain animals and extended the existing trade ban on markets to any kind of trade outside shops, farms or private homes.[139]

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[134] Geert Van Hoorick, 'Dieren in het recht in historisch perspectief' in Geertrui Cazaux (ed), *Mensen en andere dieren – Hun onderlinge relaties meervoudig bekeken* (Garant 2001) 104-105.
[135] Explanatory memorandum to the Draft Act on the protection and welfare of animals, *Parl.St.* Senaat 1982-1983, n° 469/1, 1-3. Guy Adant, 'De wetgeving op de bescherming en het welzijn van dieren' in Geertrui Cazaux (ed), *Mensen en andere dieren – Hun onderlinge relaties meervoudig bekeken* (Garant 2001) 134-136.
[136] Act of 4 May 1995 on the modification of the 1986 Animal Welfare Act, *Belgian Official Gazette* 28 July 1995, art 11.
[137] Explanatory memorandum to the Draft Act on the modification of the 1986 Animal Welfare Act, *Parl.St.* Senaat 1993-1994, n° 972-1, 4.
[138] Report of the Commission to the Draft Act on the modification of the 1986 Animal Welfare Act, *Parl.St.* Senaat 1993-1994, n° 972-2, 75.
[139] ibid 73 & 75.

The same concern underlay the amendment of 11 May 2007 which extended the public trade ban to the keeping or exhibiting of dogs and cats with a view to their marketing in a shop or business facility.[140] As in the case of the public trade ban, the rationale behind this ban was to prevent impulsive purchases and aid the socialisation of dogs and cats.[141]

In both cases, the Constitutional Court rules against the plaintiffs and upheld the progressive amendments to the Animal Welfare Act.[142]

We have already briefly mentioned that the Constitutional Court has the exclusive authority to answer preliminary questions from other courts on the compatibility of laws, decrees and ordinances with the rules governing the division of competences between the federal state, the communities and the regions or with Articles 8 to 32, 143, §1, 170, 172 or 191 of the Constitution. In the 'investigations by inspector-vets' case, the Constitutional Court was tasked with answering a prejudicial question from the criminal Court of Brussels about the compatibility of Article 34 of the Animal Welfare Act with Articles 10, 11 and 15 of the Constitution. The subject of the underlying case was a search by the police and an inspector-vet of the laboratory of the Faculty of Medicine of *Université Libre de Bruxelles* (ULB). Following this search, several defendants were directly summoned by the Public Prosecutor on account of infringements of the animal welfare legislation. The Constitutional Court had to shed light on the derogation from the general principles of criminal procedure which the Animal Welfare Act provides for, whereby the defendants in a case in which investigations have been conducted without the intervention of an examining magistrate can be summoned directly. The Constitutional Court ruled that Article 34 of the Animal Welfare Act is compatible with the common criminal procedure legislation. This was also justified by the specific objective of the Animal Welfare Act, namely actively pursue the general welfare of

[140] Act of 11 May 2007 on the modification of the 1986 Animal Welfare Act, *Belgian Official Gazette* 4 October 2007, art 4.
[141] Amendment to the Draft Proposal to revise the 1986 Animal Welfare Act, *Parl.St.* Kamer 2006-07, n° 51-2771/008, 3-4.
[142] Constitutional Court 5 March 1996, n° 16/96 & Constitutional Court 18 December 1996, n° 78/96 (public trade ban); Constitutional Court 19 March 2009, n° 53/2009 (animal shops). See for a more comprehensive overview: Elien Verniers, 'Dierenwelzijn in de rechtspraak van het Grondwettelijk Hof' (2021) 18 Rechtskundig Weekblad 683.

animals[143], as well as by the special guarantee built in by the legislator, whereby only inspector-vets may identify offences relating to animal welfare[144].[145]

4.2 CIRCUS ANIMALS: A FIRST RECOGNITION OF EU ANIMAL WELFARE LAW

A core provision of the Belgian animal welfare legislation is Article 4, which stipulates that an animal must be kept in conditions appropriate to its nature, its physiological and ethological needs, its state of health and its level of development.[146] It concerns a positive obligation with the owner of an animal having to care for the animal with respect for its characteristics. The Explanatory Memorandum explains that Article 4 is mainly to be situated "in light of the particular living conditions of animals in modern intensive livestock farms".[147] The article is based on the European Farm Animal Convention adopted in Strasbourg in 1976 regarding the protection of animals kept for farming purposes[148]. [149] This is demonstrated by the implementing decisions that concretise Article 4 and thus primarily focus on farm animals.[150]

This gives cause to the question as to the extent to which Article 4 should be interpreted teleologically and consequently can be read as an implicit ban on the keeping of all wild animals, outside a specific agricultural context. In 1986, the legislator already recognised that it is very difficult to "provide wild animals in zoos and animal parks with the same amount of space and

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[143] Constitutional Court 16 December 1998, n° 140/98, para B.5.
[144] ibid para B.10.
[145] See for a more comprehensive overview: Verniers (n 142) 684-685.
[146] Article 4, §1 of the 1986 Animal Welfare Act: "Any person who keeps, looks after or has charge of an animal must take the necessary measures to provide the animal with food, care and accommodation appropriate to its nature, physiological and ethological needs, state of health and level of development, adaptation or domestication".
[147] Explanatory memorandum to the Draft Act on the protection and welfare of animals, *Parl.St.* Senaat 1982-1983, n° 469/1, 5.
[148] European Convention of 10 March 1976 on the protection of animals kept for farming purposes, *Belgian Official Gazette* 5 October 1979, 11.199.
[149] Explanatory memorandum to the Draft Act on the protection and welfare of animals, *Parl.St.* Senaat 1982-1983, n° 469/1, 5.
[150] E.g. Royal Decree of 23 January 1998 on the protection of calves kept for farming purposes, *Belgian Official Gazette* 3 April 1998; Royal Decree of 15 May 2003 on the protection of pigs kept for farming purposes; *Belgian Official Gazette* 24 June 2003; Royal Decree of 4 March 2005 on the welfare of ratites kept for farming purposes, *Belgian Official Gazette* 13 May 2005; Royal Decree of 17 October 2005 laying down minimum standards for the protection of laying hens, *Belgian Official Gazette* 20 October 2005; Royal Decree of 13 June 2010 laying down minimum rules for the protection of chickens kept for meat production, *Belgian Official Gazette*, 18 June 2010.

freedom of movement which they have in their natural habitat".[151] In the spirit of that time, however, the choice was made to provide for a derogation from the general principle, whereby wild animals may still be kept in specific conditions, although strictly speaking, this is contrary to the principle of Article 4.[152] In particular, the Explanatory Memorandum explains: "*The phrase 'appropriate to its physiological and ethological needs' applies to those animals taking into consideration the conditions in which they were born or are forced to live. This phrase should make it possible to impose appropriate measures on these facilities*." Consequently, some room was left for professional actors keeping wild animals.[153] Private individuals, on the other hand, are fully subject to Article 4, complemented by Article 3*bis* which builds upon Article 4 and provides for a principle ban on the keeping of animals not included in a positive list.[154] It should be noted that the initial positive list for mammals was contested by animal breeders and fanciers, and eventually led to a prejudicial question from the Belgian Council of State to the European Court of Justice.[155] It was argued that the Belgian positive list for mammals would disproportionately hinder intra-Community trade. The Court of Justice primarily accepts the existence of a positive list inspired by animal welfare[156], to the extent that it complies with various requirement listed in the ruling[157]. As a result of the Andibel case, the Belgian positive list was brought in line with the criteria listed by the Court.

However, the positive list is not exhaustive. As has been alluded to before, an exception was made for certain professionals such as zoos and laboratories, as a result of which they keep animals other than those included in the positive list.[158] Initially, the exception regime also applied to circuses and travelling exhibitions.[159] In 2014, however, the legislator decided to add Article 6*bis* to the

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[151] Explanatory memorandum to the Draft Act on the protection and welfare of animals, *Parl.St.* Senaat 1982-1983, n° 469/1, 5.
[152] According to Article 2, §2 of the original 1986 Animal Welfare Act, a 'wild animal' was defined as an animal not belonging to one of the two previous categories (i.e. farm animals and pets), which was taken from its natural habitat or born in captivity and kept in an artificial environment. The Explanatory Memorandum clarifies that the term 'wild animal' only includes animals that are kept by humans and live under their care, for example in a zoo.
[153] E.g. 1986 Animal Welfare Act, art 3*bis*, §2; Royal Decree of 2 September 2005 on the welfare of animals used in circuses and travelling exhibitions, *Belgian Official Gazette* 12 September 2005.
[154] 1986 Animal Welfare Act, art 3*bis*, §1.
[155] Case C–219/07 *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat* [2008] ECLI:EU:C:2008:353.
[156] ibid para 24.
[157] ibid para 33-36.
[158] 1986 Animal Welfare Act, art 3*bis*, §2.
[159] 1986 Animal Welfare Act, art 3*bis*, §2, 7°.

Animal Welfare Act which also banned circuses and travelling exhibitions from keeping and exploiting (undomesticated) animals.[160] This decision was opposed by various actors from the circus sector who subsequently brought the case before the Constitutional Court.[161]

One of the principal arguments advanced by the applicants concerned the difference in treatment between zoos and animal parks, which continued to fall under the exception regime, and circuses, which did not as a result of the amendment.[162] Although the Constitutional Court accepted the applicants' argument that zoos and circuses are sufficiently comparable in terms of the keeping of animals, the Court clarified that Articles 10 and 11 of the Constitution were nevertheless not infringed,[163] since the difference in treatment was based on objective and relevant criteria. On the one hand, the government-imposed housing conditions for wild animals are better complied with in zoos, and an additional guarantee applies since zoos require a specific permit issued by the competent minister, and on the other hand, inspections are easier in zoos than in circuses, which frequently relocate and have more limited housing space at their disposal.[164]

Although the Constitutional Court ruled that the difference in treatment is justified, the applicants who denounced the discrepancy between circuses and zoos went to the heart of the problem. In its ruling, the Court stated that "in view of the changing social views, with society placing ever higher demands on animal welfare, and the educational aspects with regard to wildlife being taken over by zoos, nature documentaries and the Internet, [it was not reasonably to be expected that] wild animals would always be allowed to be displayed in a circus or travelling exhibition".[165] In addition, the Court concluded that circuses and travelling exhibitions no longer provide sufficient added value in terms of education.[166] In line with this, the question arises as to the extent to which it still makes sense for zoos to keep wild animals in captivity. In this context, a balance of interests

[160] Act of 7 February 2014 on various provisions on animal welfare, international trade in endangered species of wild fauna and flora and animal health, *Belgian Official Gazette* 28 February 2014, art 4.
[161] Constitutional Court 30 July 2014, n° 119/2014, see Anthony Godfroid, 'Verbod op wilde dieren in het circus' (2014) 296 Juristenkrant 16;Constitutional Court 21 May 2015, n° 66/2015.
[162] Constitutional Court 21 May 2015, n° 66/2015, para B.17.
[163] ibid paras B.18.2-B.20.
[164] ibid para B.19.1.
[165] ibid para B.15.2.
[166] ibid.

will have to be made between animal welfare and the educational function of zoos. This involves a delicate balancing act, which also touches upon the field of tension with nature conservation and species protection. After all, zoos not only fulfil an educational function, but also play an important role in the preservation of species by means of breeding programmes. Nevertheless, scientific studies have shown that the mortality rate among animals released into the wild that had been born in captivity is very high.[167] However, Broom discovered that a lot depends on the methods used to allow captive animals to adapt to life in the wild.[168] For instance, it is of paramount importance that human contact is minimised or even avoided altogether, but in most breeding programmes in zoos this is hardly ever the case.[169] Consequently, scientific research has demonstrated that the current conditions in zoos have a significantly negative impact on the welfare of wild animal species.[170] Broom therefore proposes to integrate scientific research on animal welfare into the current captive breeding policy for threatened wild animal species so as to enhance its potential in this respect.[171] It is perfectly possible for some wild animal species such as the European bison to be bred in zoos, while other species such as rhinoceroses thrive better in semi-wild yet protected environments.[172] This proposed integration of animal welfare into species protection could thus result in a win-win situation, with zoos continuing to play a role in society.

In addition to the difference in treatment between circuses and zoos, the Court also had to consider whether the legal provisions banning circuses and travelling exhibitions from keeping undomesticated animals were to hinder intra-Community trade, at least indirectly, in an unjustified manner.[173] In its analysis, the Court refers to the above-mentioned Andibel case and confirms that the legislative amendment should indeed be considered as a measure having an effect equivalent to a quantitative restriction on importation, which is in principle forbidden pursuant to Article 34

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[167] Andrew E Bowkett, 'Recent captive-breeding proposals and the return of the ark concept to global species conservation' (2009) 23 Conservation Biology 773; Andrew Balmford, Georgina M Mace and N Leader-Williams, 'Designing the ark: setting priorities for captive breeding' (1996) 10 Conservation Biology 719.
[168] Donald M Broom, 'Animal welfare complementing or conflicting with other sustainability issues' (2019) 219 Applied Animal Behaviour Science 4.
[169] ibid.
[170] Donald M Broom, 'Welfare in wildlife management and zoos' (2002) 37 Advances in Ethology 4.
[171] Broom (n 168).
[172] ibid.
[173] Constitutional Court 21 May 2015, n° 66/2015, para B.6.

of the TFEU.[174] The amendment does in fact prohibit circus organisers from other EU Member States from putting on shows with wild animals in Belgium. The Court then considered whether the principal ban could be justified on the basis of Article 36 of the TFEU or on the basis of other overriding requirements, taking account of the case law of the European Court of Justice .[175] In this respect, the Constitutional Court stated as follows: "*The protection of animal welfare is a legitimate aim in the public interest, the importance of which appears, in particular, from the adoption by the EU Member States of the Protocol (n° 33) on protection and welfare of animals annexed to the Treaty establishing the European Community, most of the substance of which was incorporated into article 13 TFEU.*".[176] Consequently, the Constitutional Court rejected the applicants' claim as unfounded.[177]

Interestingly, the Constitutional Court referred for the first time to Article 13 of the TFEU and highlights the protection of animal welfare as a legitimate aim in the public interest. At EU level, animal welfare has been systematically developed, culminating in the introduction of Article 13 of the TFEU by the Lisbon Treaty.[178] In 1992, the Maastricht Treaty laid the initial foundations with the addition of a non-binding declaration on animal welfare annexed to the Treaty.[179] The declaration called for paying full regard to the welfare of animals when drawing up and implementing the legislation. In 1997, Protocol n° 33 annexed to the Treaty of Amsterdam provided for a binding legal provision at European level on animal welfare with the high point being the recognition of animals as 'sentient beings'.[180] Finally, the literal wording of Protocol n° 33 was

[174] ibid para B.7.
[175] ibid.
[176] ibid para B.8.
[177] ibid para B.9.6.
[178] Anne Peters, *Animals in International Law* (BRILL 2021) 197-203; Jessica Vapnek, 'Using Article 13 of the Treaty on the Functioning of the EU to Challenge Action or Inaction on Animal Welfare' (2021) 1818 Academia Letters 1; Denis Simonin and Andrea Gavinelli, 'The European Union legislation on animal welfare: state of play, enforcement and future activities' in Sophie Hild and Louis Schweitzer (eds), *Animal Welfare: From Science to Law* (La Fondation Droit Animal Éthique & Sciences 2019) 60; Diane Ryland, 'Animal welfare in the reformed Common Agricultural Policy: Wherefore art thou?' (2015) 17 Environmental Law Review 22, 26; Angus Nurse and Diane Ryland, 'Mainstreaming after Lisbon: advancing animal welfare in the EU internal market' (2013) 22 European Energy and Environmental Law Review 101; Rasso Ludwig and Roderic O'Gorman, 'A Cock and Bull Story?—Problems with the Protection of Animal Welfare in EU Law and Some Proposed Solutions' (2008) 20 Journal of Environmental Law 363.
[179] Declaration n° 24 on the protection of animals, annexed to the Treaty on European Union [1992] OJ C191/01.
[180] Protocol n° 33 on protection and welfare of animals (1997), annexed to the Treaty establishing the European Community [2006] OJ C321E/314.

adopted by Article 13 of the TFEU.[181] In essence, it is an integration provision whereby animal welfare must be taken into consideration in the formulation of policy. Article 13 of the TFEU specifies the legal areas where both the EU Member States and the European Union must take full account of animal welfare. Contrary to environmental protection, for instance, animal welfare as such is not a European harmonised competence and is left in the first instance to the Member States. Because Article 13 of the TFEU implicitly refers to the shared competencies in Article 4 of the TFEU (cf. internal market, transport, agriculture …), indirect harmonising actions from an animal welfare perspective are nevertheless possible. For the sake of completeness, it should be noted that Article 13 of the TFEU is not the only Article which implicitly attempts to harmonise animal welfare. Originally, animal welfare was approached from the perspective of internal market optimisation (Article 36 of the TFEU).[182] The principle of shared competences implies that both the European Union and the Member States can take legislative and legally binding action (Article 2, paragraph 2 of the TFEU). The subsidiarity principle (Article 5 of the Treaty on European Union[183]) determines whether action should be taken at European or national level. This means that the Union may only draw up animal welfare regulations if it is best placed to do so and only indirectly, for instance on the basis of the shared competence in respect of fisheries policy. A practical example is Regulation (EC) n° 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (see recital 48 on subsidiarity).[184] When reading the final sentence of Article 13 of the TFEU[185], we notice that the general principle of integration of animal welfare into the policy is mitigated by the requirement of compatibility with 'religious rites, cultural traditions and regional heritage'. This exception is often used as a loophole to justify certain existing animal-unfriendly practices such as cockfighting, bullfighting, the production of foie gras and ritual slaughter without stunning (which

[181] It should be noted that the scope of Article 13 of the TFEU has been extended compared to the old provision of Protocol n° 33 to include 'fisheries', 'technological development' and 'space'.
[182] It goes without saying that this provision cannot be compared to Article 13 of the TFEU, which constitutes a more self-standing provision with animal welfare being central.
[183] Consolidated version of the Treaty on European Union [2012] OJ C326/13.
[184] EP/Council Regulation (EC) 882/2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules [2004] OJ L165/1.
[185] Article 13 TFEU: "In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.".

will be discussed in detail later on). Article 13 of the TFEU differs from Protocol n° 33 in that it is considered as a kind of European constitutional provision concerning animal welfare.[186] *Sensu stricto*, the European Union does not have a constitution, but the consolidated version of the Treaties on European Union and on the Functioning of the European Union serve as the functional equivalent to a European constitutional text. In terms of positioning, Article 13 of the TFEU has been included in the first part of the Treaty on the Functioning of the European Union, under Title II, which deals with the general principles.

It is exactly this European constitutional provision that the Constitutional Court refers to for the first time in its ruling on circuses and wild animals. These arguments have been consistently used by the Court in its other animal welfare-related rulings.[187]

4.3 BOOMING BUSINESS: REGIONALISATION GIVES A BOOST TO ANIMAL WELFARE

As a result of the sixth Belgian state reform, animal welfare became the exclusive competence of the regions in 2014.[188] Related matters such as animal health and food safety with regard to animal products continue to fall under the competence of the Belgian federal government.[189] Previously, the animal welfare policy was uniformly regulated in the three Belgian regions, but the regionalisation has resulted in the three regions each having a separate version of the Animal Welfare Act. This have given an unprecedented boost to animal welfare as the regions try to outdo each other with innovative legislative initiatives. These numerous legislative amendments have in turn given risen to a multitude of decisions by the Constitutional Court. We will now discuss the rulings of the Court concerning fur farming[190], the docking of horses' tails[191] and electric dog

[186] J. E. Schaffner, *An introduction to animals and the law* (Palgrave Macmillan 2011) 158; Jessica Vapnek and Megan S Chapman, 'Legislative and regulatory options for animal welfare' (2010) FAO legislative study 22.
[187] See Section 4.6, in particular n 270.
[188] See n 41.
[189] Special Act 6 January 2014 on the Sixth State Reform, art 6, §1, V, 2°.
[190] Constitutional Court 20 October 2016, n° 134/2016. See Anna Vanhellemont and Geert Van Hoorick, 'Dierenwelzijn, een luis in de pels van de bescherming van eigendom?' (2017) 364 Nieuw Juridisch Weekblad 426.
[191] Constitutional Court 24 October 2019, n° 154/2019. See Elien Verniers, 'Blokstaarten van paarden' (2020) 416 Nieuw Juridisch Weekblad 116.

collars[192]. The appeals filed against the Flemish fireworks ban and the Walloon Animal Welfare Code as well as the case concerning slaughter without stunning will be discussed in a separate subsection.[193]

In 2015, the Walloon Region was the first Belgian region to introduce a ban on fur farming.[194] Since then, this example has also been followed in the Brussels-Capital Region[195] and the Flemish Region.[196] However, the Walloon ban on fur farming was not without controversy and various stakeholders filed an appeal with the Constitutional Court.[197] As in the case of circus animals, the applicants invoked a difference in treatment of professional actors[198] and an infringement of 34 of the TFEU[199]. The ban is aimed at specific persons who keep fur animals exclusively or principally for fur production, and does not apply to persons who keep fur animals for other purposes such as the production of meat for consumption. The Constitutional Court held that the difference in treatment was based on a relevant and objective criterion, given the ethical consideration of animal welfare underlying the ban.[200] The Court recalled, on the one hand, that animal welfare is a legitimate aim in the public interest[201] and, on the other hand, that the legislator has broad discretion when it comes to socio-economic matters[202]. In the assessment of a potential infringement of Article 34 of the TFEU, the Court used the same ethical consideration of animal welfare as justification and explicitly reiterated the consideration that animal welfare is a legitimate aim in

[192] Constitutional Court 24 September 2020, n° 119/2020. See Elien Verniers, 'Verbod op het gebruik van elektrische halsbanden bij honden houdt stand' (2020) 418 Juristenkrant 5.
[193] See Section 4.4 (slaughter without stunning) & 4.5 (Flemish fireworks ban and the Walloon Animal Welfare Code).
[194] Decree of 22 January 2015 on the modification of the 1986 Animal Welfare Act in order to prohibit the possession of animals solely or primarily intended for the production of fur, *Belgian Official Gazette* 30 January 2015.
[195] Ordinance of 11 May 2017 on the modification of the 1986 Animal Welfare Act, *Belgian Official Gazette* 30 May 2017, art 7.
[196] Decree of 22 March 2019 on the modification of the 1986 Animal Welfare Act concerning the establishment of a ban on the keeping of fur animals and on the keeping of animals for the production of foie gras by force feeding, *Belgian Official Gazette* 25 April 2019. See Elien Verniers, "Ik hou nie van madammen met nen bontjas': het kersverse Pelsdieren-en foie gras-decreet' (2019) 9 Tijdschrift voor Stedenbouw, Omgeving, Ruimtelijke Ordening en Milieu 1.
[197] Constitutional Court 20 October 2016, n° 134/2016.
[198] ibid para B.4.
[199] ibid para B.18.1.
[200] ibid para B.7.2.
[201] ibid para B.6.
[202] ibid para B.8.

the public interest.[203] The exact wording used by the Constitutional Court in the ruling on circus animals is mentioned twice in this case. The Court thus confirms a beginning of standing case law.

This standing case law is continued in the ruling on the docking of horses' tails. Article 17*bis*, §1 of the Animal Welfare Act provides for a fundamental ban on the removal of sensitive body parts of animals. To reinforce this ban, Article 19 explicitly states that it is prohibited to participate in exhibitions, shows or competitions with animals that have undergone illegal interventions. Despite these stipulations, the number of animals displayed at exhibitions, shows or competitions that had undergone illegal interventions remained very high, which strengthened the suspicion that the Animal welfare Act was circumvented.[204] It was in fact true that Article 17, §2 still allowed illegal interventions in the event of a veterinary necessity, or of a legal obligation with regard to animal disease control as well as interventions in view of the use of the animal and the restriction of reproduction of the species. In order to avoid abuse, the Flemish Region decided to tighten the ban on participation by introducing a total ban on the participation in exhibitions, shows or competitions of animals that have undergone illegal interventions, even if the intervention was motivated by a veterinary necessity.[205] The ban met with protest from a breeder of Belgian draft horses, who lodged an appeal with the Constitutional Court. The applicant claimed an infringement of Articles 10 and 11 of the Constitution, because the owners of animals that had undergone legal interventions were treated in the same way as the owners of animals that had undergone illegal interventions, without any objective and reasonable justification.[206] Both cases are treated equally by the legislator, because they cannot be clearly distinguished from each other in practice.[207] Once the intervention has been performed, it is extremely difficult or even impossible to demonstrated the existence or absence of a veterinary necessity.[208] Previously, the Constitutional Court decided

[203] ibid para B.21.
[204] Explanatory memorandum to the Draft Decree on the modification of Article 3 and Article 19 of the 1986 Animal Welfare Act, *Parl.St.* Vl.Parl. 2017-18, n° 1482/1, 3.
[205] Decree of 23 March 2018 on the modification of Article 3 and Article 19 of the 1986 Animal Welfare Act, *Belgian Official Gazette* 5 April 2018.
[206] Constitutional Court 24 October 2019, n° 154/2019, para B.4.
[207] ibid para B.7.
[208] Explanatory memorandum to the Draft Decree on the modification of Article 3 and Article 19 of the 1986 Animal Welfare Act, *Parl.St.* Vl.Parl. 2017-18, n° 1482/1, 3.

that a suspicion of fraud is an acceptable justification for the legislator to take countermeasures.[209] In the ruling in question, the Court accepted the legislative measures and furthermore emphasised that the protection of animal welfare is a legitimate aim in the public interest.[210] This view has recently been confirmed by the Constitutional Court in its ruling regarding the equivalent Walloon ban on the docking of horses' tails (Articles D.36, D.37, §2 and D.38 of the Walloon Animal Welfare Code) and in this case as well, the Court has reiterated that animal welfare is a legitimate aim in the public interest, referring to Article 13 of the TFEU.[211]

The same wording was mentioned twice in the ruling by the Constitutional Court on electric dog collars.[212] The Flemish legislator placed a ban on the use of collars that deliver electric shocks to dogs.[213] Following the example of various other European countries (Denmark, Germany, Luxembourg and Romania), the legislator considered it expedient to introduce such a ban in the Flemish Region to promote animal welfare.[214] Hubertusvereniging Vlaanderen, the association that represents the interests of hunters in Flanders, and two private individuals who had a hunting licence appealed against the electric collar ban, which also applies to hunting dogs, while an exception regime applied to dogs in training or behavioural therapy.[215] The Constitutional Court elucidated on the one hand that owners of hunting dogs could make use of the exemption for the purpose of dog training or behavioural therapy[216] and on the other hand that the legislator had made an informed choice based on the expertise of the person operating the remote control of an electric collar, so that a reasonable justification was available[217].

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[209] Constitutional Court 21 December 2017, n° 150/2017.
[210] Constitutional Court 24 October 2019, n° 154/2019, para B.6.
[211] Constitutional Court 30 September 2021, n° 119/2021, para B.6.
[212] Constitutional Court 24 September 2020, n° 119/2020, paras B.10.2 & B.20.4.
[213] Decree of 13 July 2018 on the modification of the 1986 Animal Welfare Act in the context of the sixth State reform, *Belgian Official Gazette* 10 August 2018.
[214] Explanatory memorandum to the Draft Decree on the modification of the 1986 Animal Welfare Act in the context of the sixth State reform, *Parl.St.* Vl.Parl. 2017-18, n° 1555/1, 5.
[215] Constitutional Court 24 September 2020, n° 119/2020, para A.11.
[216] ibid para B.17.2.
[217] ibid para B.18.

It should be noted that the Flemish legislator has recently made some amendments on the occasion of an advice formulated by the Flemish Council for Animal Welfare on 22 April 2021.[218] An amended ban will come into effect on 1 January 2027 and stipulates: "No one may have a dog or cat wear a collar that delivers electric impulses or trade such collars. Electric collars connected to an invisible fence constitute an exception from this ban."[219] It is not inconceivable that this ban will also be scrutinised by the Constitutional Court in the near future. In this case, it is likely that an appeal will be lodged not by the opponents but by the proponents of the original ban, since the new ban appears, at first glance, to be a weakened version of the original ban.[220] By reviewing the standstill principle of Article 23 of the Constitution, it can be argued that the new regulation results in a significant weakening of the current level of animal welfare. In addition, the new regulation raises some questions about the legal certainty, since another amendment has been introduced in a relatively short period of time. It is positive that the state of scientific progress is taken into account, but this innovativeness is largely offset by the provision of a five-year lead-in period. This poses a risk of lagging behind and being overtaken by potential new scientific developments and evolving insights.

4.4 A MILESTONE DECISION WITH EU IMPACT: THE BELGIAN RITUAL SLAUGHTER CASE

On 28 June 2017, the Decree proposal to modify the authorised slaughter methods was adopted unanimously by the Flemish parliament.[221] The Decree stipulates that from 1 January 2019 onwards, it would no longer be allowed to kill any vertebrate without prior stunning, except in case of force majeure, hunting or fishing and within the scope of the eradication of harmful organisms.[222] Prior to the introduction of the Decree, there was also an exception to the basic principle of stunning before slaughter for ritual slaughter, but this exception was deleted. As a result, ritual slaughter

[218] Explanatory memorandum to the Draft Decree on the modification of the 1986 Animal Welfare Act and the Decree of 13 July 2018 on the modification of the 1986 Animal Welfare Act in the context of the sixth State reform, *Parl.St.* Vl.Parl. 2021-22, n° 1124/1, 3-4.
[219] Decree of 22 April 2022 on the modification of the 1986 Animal Welfare Act and the Decree of 13 July 2018 on the modification of the 1986 Animal Welfare Act in the context of the sixth State reform, *Belgian Official Gazette* 12 May 2022, art 3.
[220] See Elien Verniers, 'Aanpassing van het verbod op elektrische (hond)halsbanden' (2022) Juristenkrant *forthcoming*.
[221] Decree of 7 July 2017 on the modification of 1986 Animal Welfare Act, concerning permitted methods of slaughtering animals, *Belgian Official Gazette* 18 July 2017.
[222] ibid art 3 & 6.

may only take place if the stunning procedure is reversible and does not lead to the death of the animal. The Flemish Decree thus introduced a ban on ritual slaughter without stunning, but not on ritual slaughter as such.[223] Following the example of the Flemish Decree, the Walloon Region adopted a similar amendment.[224] In the Brussels-Capital Region, by contrast, the exception to the ban on slaughter without stunning continues to apply to religious rites.[225]

Jewish and Muslim advocacy organisations tried to keep the original arrangement in place in the Flemish and Walloon Regions by lodging various appeals with the Constitutional Court.[226] The main arguments invoked were the violation of religious freedom and the infringement of EU Regulation n° 1099/2009 on the protection of animals at the time of killing[227].[228] Before ruling on the substance of the case, the Belgian Constitutional Court decided to seek further clarification from the European Court of Justice via a reference for a preliminary ruling.[229]

Advocate General Hogan was the first to consider the question.[230] In his opinion of 10 September 2020 he stated that the (Flemish) ban on slaughter without stunning was contrary to European Union law.[231] The exemption under Article 4 (4) of Regulation n° 1099/2009, which specifically allows unstunned slaughter for religious rites, may not simply be circumvented by the Member States by adopting stricter rules on the basis of Article 26 (2), first paragraph, c) and thus completely banning ritual slaughter without prior stunning.[232] In his analysis, he stated that animal welfare "must yield in certain circumstances to the even more fundamental objective of securing religious freedoms and beliefs".[233]

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[223] See Verniers (n 142) 691-692.
[224] See Article 57 of the Walloon Animal Welfare Code.
[225] See Elien Verniers and Geert Van Hoorick, 'Godsdienstvrijheid versus dierenwelzijn: Over het mijlpaalarrest van het Hof van Justitie aangaande het ritueel slachten' (2021) 444 Nieuw Juridisch Weekblad 470, 470-471.
[226] Constitutional Court 4 April 2019, n° 52/2019 & n° 53/2019.
[227] Council Regulation (EC) n° 1099/2009 of 24 September 2009 on the protection of animals at the time of killing [2009] OJ L 303/1.
[228] Constitutional Court 4 April 2019, n° 52/2019, para B.15.
[229] ibid para B.27.
[230] See Elien Verniers, 'Opinion of Advocate General Hogan in Case C-336/19 Centraal Israëlitisch Consistorie van België and Others, ECLI:EU:C:2020:695' (2020) 8 Global Journal of Animal Law 1.
[231] Opinion of Advocate General Hogan in Case C-336/19 Centraal Israëlitisch Consistorie van België and Others, ECLI:EU:C:2020:695, para 88.
[232] ibid paras 70, 72 & 75.
[233] ibid para 62.

The Court subsequently weighed up animal welfare against religious freedom, and came to a surprising verdict at odds with that of Hogan. Although the Court agrees with the Advocate General's opinion in that the Flemish Decree restricts the right of Jews and Muslims to freely manifest their religion (Article 10, section 1 of the Charter)[234], the Court is of the opinion that it is a proportionate restriction in view of the wide margin of discretion which Member States have.[235] According to the Court, the lack of consensus between Member States regarding ritual slaughter constitutes an additional argument to justify a wide margin of discretion for the Member States.[236] In its ruling, the Court also takes into consideration the fact that the Flemish legislator has based its regulation on scientific research, with an alternative stunning procedure being specifically provided for ritual slaughter, in particular reversible stunning.[237] On this basis, the Court decides that Member States may indeed impose conditions on ritual slaughter provided that they remain limited to one aspect of the specific ritual act of slaughter and that ritual slaughter is not prohibited as such.[238] An example of the latter would be a ban on the import of meat coming from animals that were slaughtered without prior stunning.[239] In addition to imposing technical conditions on ritual slaughter[240], the Court also allows substantive conditions in this ruling, in this case in the form of reversible stunning which may not lead to the animal's death. Instead of giving precedence to religious freedom over animal welfare, as did Advocate General Hogan with his assessment of a 'more fundamental objective', the Court of Justice opted for a more nuanced approach, specifically assessed against the conditions of the proportionality principle.[241]

Taking into consideration this clarification by the Court of Justice, the Constitutional Court finally ruled, on 30 September 2021, on the appeals lodged against the Flemish[242] and Walloon[243] ban on unstunned slaughter. The Belgian Constitutional Court followed the ruling of the Court of Justice

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[234] Case C–336/19 *Centraal Israëlitisch Consistorie van België e.a* [2020] ECLI:EU:C:2020:1031, para 55.
[235] ibid para 79.
[236] ibid paras 68-69.
[237] ibid para 75.
[238] ibid para 61.
[239] ibid paras 28 & 46.
[240] Case C–426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen e.a.* [2018] ECLI: EU:C:2018:335, paras 60-65.
[241] See Elien Verniers, 'Dierenwelzijn prevaleert op godsdienstvrijheid' (2021) 2 Tijdschrift voor Milieurecht 97, 98-99.
[242] Constitutional Court 30 September 2021, n° 117/2021.
[243] Constitutional Court 30 September 2021, n° 118/2021.

and resolutely rejected the appeals, subject to the interpretations mentioned in B.31.3. and B.31.4.[244] The Court referred to its settled case law and emphasised three times that animal welfare is a legitimate aim in the public interest which can consequently justify a legal and proportionate restriction of religious freedom[245], cultural development[246] as well as the free choice of an occupation and the freedom of enterprise[247] as a pressing social need. Interestingly, it should be noted that the applicants have appealed against this final decision of the Constitutional Court before the European Court of Human Rights.[248] The case is thus becoming a never ending story. To be continued…

4.5 A DAMPER ON THE PARTY: THE FLEMISH BAN ON FIREWORKS AND THE WALLOON ANIMAL WELFARE CODE

While the previously discussed rulings have all been in favour of animal welfare, this is not the case for the Flemish ban on fireworks[249] and the Walloon Animal Welfare Code[250].

At the end of last year, the Constitutional Court annulled the Decree[251] of the Flemish Region of 26 April 2019 on the regulation of the use of fireworks, firecrackers, carbide guns and sky lanterns.[252] The Court ruled that the Flemish ban violates the rules on the allocation of powers, as it is the exclusive competence of the federal government to regulate matters related to fireworks,

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[244] Recitals B.31.3. and B.31.4. relate to the interpretation of the principle of separation of religion and state. The Court clarified that the neutrality and impartiality of the legislator implies that the proposed alternative stunning method cannot be construed as a definition of what the special slaughter methods should be that are required for religious rites.
[245] Constitutional Court 30 September 2021, n° 117/2021 & n° 118/2021, para B.19.2.
[246] ibid para B.27.2.
[247] ibid para B.38.1.
[248] Tom Guillaume, 'Le Consistoire israélite ira en appel dans le dossier de l'abattage rituel' *La Libre Belgique* (Brussels, 12 October 2021) 11; X, 'Moslimexecutief vecht verbod op onverdoofd slachten aan bij Europees Hof voor Mensenrechten' (*KNACK online*, 17 december 2021) <www.knack.be/nieuws/moslimexecutief-vecht-verbod-op-onverdoofd-slachten-aan-bij-europees-hof-voor-mensenrechten/> accessed 24 May 2022.
[249] See Elien Verniers, 'Het Grondwettelijk Hof steekt de lont aan het Vlaams vuurwerkverbod' (2021) 6 Tijdschrift voor Bestuurswetenschappen en Publiekrecht 339.
[250] See Elien Verniers, 'Het Waalse Dierenwelzijnwetboek doorstaat de beoordeling door het Grondwettelijk Hof' (2021) 6 Tijdschrift voor Bestuurswetenschappen en Publiekrecht 345.
[251] Decree of 26 April 2019 on the regulation of the use of fireworks, firecrackers, carbide guns and sky lanterns, *Belgian Official Gazette* 17 May 2019.
[252] Constitutional Court 17 December 2020, n° 165/2020.

irrespective of the underlying animal welfare objective.[253] Even though the *ratio legis* of the Decree was indeed to promote animal welfare[254], this does not entitle the Flemish Region to circumvent the rules on the allocation of powers. Any other decision would go against the rules on the allocation of powers, since it would mean that any government level could take any measure as long as the underlying objective of this measures could be linked to an existing jurisdictional basis. The Court elucidated: "*The competences allocated to the communities and the regions are in principle defined in terms of matters and not in terms of objectives. The objective pursued by adopting a rule can thus in principle not determine by itself whether this rule falls within the sphere of competence of the legislator imposing the rule.*"[255]

As already stated above, the ruling in this case differs from the Court's previous rulings, since a regulation aimed at increasing animal welfare was annulled by the Constitutional Court. Simply put, it seems as if the Constitutional Court gave precedence to the pyrotechnical sector and the accompanying economic considerations over animal welfare. However, this is not the case at all. In this specific ruling, the Decree was annulled on the grounds of a formal technicality, namely the rules on the allocation of powers, rather than on the basis of substance. Competence issues are a very delicate point in federal Belgium and allow a narrow margin of discretion to the Constitutional Court.

As already stated above, the sixth Belgian state reform and the accompanying regionalisation of powers relating to animal welfare gave a considerable boost to the animal welfare policy. The Walloon Parliament was the first legislature in Belgium to adopt an animal welfare Code on 3 October 2018 – not coincidentally the eve of World Animal Day.[256] Following the example of the Walloon Region, the Flemish Region[257] and the Brussels-Capital Region[258] have also planned the

[253] ibid para B.13.
[254] Explanatory memorandum to the Proposal Decree on the regulation of the use of fireworks, firecrackers, carbide guns and sky lanterns, *Parl.St.* Vl.Parl. 2018-19, n° 1924/1, 2.
[255] Constitutional Court 17 December 2020, n° 165/2020, para B.11.2.
[256] See n 43.
[257] Policy note Animal Welfare 2019-2024, *Parl.St.* Vl.Parl. 2019-20, n° 131/1, 9.
[258] X, 'Binnenkort ook een Brusselse codex voor het Dierenwelzijn' (*GAIA* 2 July 2021) <www.gaia.be/nl/nieuws/binnenkort-ook-brusselse-codex-voor-dierenwelzijn> accessed 24 May 2022.

issuance of an animal welfare Code. Although the Walloon Code is largely a codification and reorganisation of the 1986 Animal Welfare Act, it does contain a few novelties, including the requirement of a permit for keeping an animal (Article D.6).[259] This provision, together with Articles D.8, D.19, D.34, D.48, D.49, D.50, D.51, D.57, D.59 and D.90 of the Walloon Animal Welfare Code, was challenged by the Walloon Agricultural Federation (*Fédération Wallonne de l'Agriculture* – FWA) before the Constitutional Court.[260] In summary, the contested provisions relate to the keeping, accommodating, breeding and marketing of animals, on advertising in order to trade or donate animals and on the killing of animals. In view of the scope of the ruling, we will limit ourselves to a few specific topics dealt with in the ruling. Essentially, the applicants invoked five infringements, namely the misuse of powers of the federal government by the regions on the one hand and of powers of the legislature by the executive on the other hand as well as a breach of the non-discrimination principle and of the principle of freedom of enterprise and of expression. Only the last objection was accepted by the Court and led to the annulment of Article D.49, §1, fifth section of the Walloon Animal Welfare Code.[261] According to the Court, the implicitly mandatory prior registration for advertising by sellers and breeders of animals entailed a restriction of their commercial freedom of expression. This prior registration for participation in an advertising group constitutes a preventive measure of which the content, nature and scope have not been determined, and thus infringes Article 19 of the Constitution read in conjunction with Article 10 of the ECHR.[262] As in the case of the fireworks ruling, the argument of misuse of powers of the federal government by the Flemish Region is invoked. The applicants contended that Articles D.8, D.19, D.34 and D.59 regulate animal health, which falls under the competence of the federal government. Contrary to the fireworks ruling, the argument had no success in this case.[263] However, the Constitutional Court did decide to interpret Article D.19 in conformity with the Constitution.[264] The commentary on this article suggested that the Walloon government could take measures to limit the reproduction of certain animals to prevent overpopulation as well as the spread of diseases or infections, although animal health indeed falls within the powers of the federal government. The

[259] Verniers (n 44), 159-161.
[260] Constitutional Court 21 January 2021, n° 10/2021.
[261] ibid para B.53.
[262] ibid para B.52.2.
[263] ibid para B.18.
[264] ibid.

Court therefore clarified that Article D.19 should be interpreted in such a way as to exclusively allocate to the Walloon government the competence to take measures to limit the reproduction of animals, without regulating the issue of animal health.[265] As for the (immaterial)[266] permit for keeping an animal (D.6), the Walloon Agricultural Federation claimed that it introduced an unjustified equality of treatment between persons keeping animals for production purposes in agriculture and persons keeping pets. The Constitutional Court rejected this argument and emphasised that, since the pursued objective consists in giving greater responsibility to the owners of animals and in ensuring the welfare of pets as well as farm animals, it is not disproportionate to provide that the right to keep an animal can be withdrawn for pet owners as well as the owners of farm animals.[267]

Except for Article D.49, §1, fifth section of the Walloon Animal Welfare Code, it can be concluded that the Walloon initiative has been successfully maintained. In addition, we see that the Constitutional Court indirectly supports and boosts the Walloon animal welfare policy by opting for a constitutional interpretation of Article D.19 instead of resolutely opting for annulment of the ruling.

4.6 THE CONSTITUTIONAL COURT AS AN UNEXPECTED CATALYST

This analysis of the Belgian Constitutional Court's animal welfare case law provides us with some remarkable insights which are helpful in the assessment of the central research question as to whether and how animal welfare should be included in the Belgian Constitution and how the Belgian situation compares to the situation in Germany.

The first conclusion is the positive attitude of the Belgian Constitutional Court towards animal welfare. The intervention of the Belgian Constitutional Court is exceptional; in almost all court

[265] ibid para B.13.
[266] Originally, it concerned an immaterial permit made available to every adult, but from 1 July 2022 onwards, it concerns a material permit for which anyone who wishes to buy or adopt an animal in the Walloon Region shall have to submit an extract from the central register.
[267] Constitutional Court 21 January 2021, n° 10/2021, paras B.30 & B.31.2.

cases where animal welfare legislation was challenged, the Court consistently decided that there was no violation or illegality, and the improvement of animal welfare remained intact.[268] The aforementioned Flemish fireworks ban and the Walloon Animal Welfare Code are indeed the only two exceptions, but their impact is dwarfed by that of the ritual slaughter case. In its ruling on circus animals, the Court acknowledged for the first time that animal welfare is a "legitimate aim in the public interest"[269], which has been consistently and repeatedly highlighted thereafter by the Constitutional Court.[270]. Each time, the Constitutional Court has used the same wording: "*The protection of animal welfare is a legitimate aim in the public interest, the importance of which has already been reflected, in particular, in the adoption by the European Member States of Protocol n° 33 on protection and welfare of animals annexed to the Treaty establishing the European Community (OJ 1997 C 340, p. 110), the content of which has been largely adopted by Article 13 of the Treaty on the Functioning of the European Union (TFEU))*." Although there is currently no explicit constitutional provision on animal welfare against which this can be reviewed, this has not stopped the Constitutional Court from inventively taking animal welfare into consideration, in particular by relying on primary Union law and especially Article 13 of the TFEU and Protocol n° 33, discussed in detail above. Hence, to come back to the motivation of the submitters of the legislative proposal to revise Article 7*bis* of the Belgian Constitution in order to provide the Constitutional Court with a 'benchmark' to rule in animal matters[271], we can simply conclude that the Constitutional Court has already created such a benchmark by relying on Article 13 of the TFEU. In addition, as a side remark, the Court could also rely on international case law. For example, in the EC Seals case the WTO Appellate Body has ruled that animal welfare is part of the

[268] Constitutional Court 5 March 1996, n° 16/96 & Constitutional Court 18 December 1996, n° 78/96 (public trade ban); Constitutional Court 16 December 1998, n° 140/98 (investigations of inspectors-vets); Constitutional Court 19 March 2009, n° 53/2009 (animal shops); Constitutional Court 30 July 2014, n° 119/2014 & Constitutional Court 21 May 2015, n° 66/2015 (circus animals); Constitutional Court 20 October 2016, n° 134/2016 (fur farming); Constitutional Court 4 April 2019, n° 52/2019 & n° 53/2019 & Constitutional Court 18 July 2019, n° 115/2019 & Constitutional Court 30 September 2021, n° 117/2021 & n° 118/2021 (unstunned slaughter); Constitutional Court 24 September 2019, n° 119/2020 (electric (dog) collars); Constitutional Court 24 October 2019, n° 154/2019 & Constitutional Court 30 September 2021, n° 119/2021 (horse tail docking). See Verniers (n 142) 696.
[269] Constitutional Court 21 May 2015, n° 66/2015, para B.8.
[270] Constitutional Court 20 October 2016, n° 134/2016, para B.6; Constitutional Court 24 October 2019, n° 154/2019, para B.6; Constitutional Court 24 September 2020, n° 119/2020, paras B.10.2 & B.20.4; Constitutional Court 30 September 2021, n° 117/2021 & n° 118/2021, paras B.19.2, 19.3 & B.27.2 & n° 119/2021, para B.6.
[271] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 6.

public morality that can justify trade restrictions imposed by Member States.[272] Similarly, the Constitutional Court acknowledged in the ritual slaughter case that "the protection of and respect for the welfare of animals as sentient beings can be regarded as a moral value shared by numerous people in the Flemish Region".[273]

The progressive approach of the Constitutional Court should be nuanced to some extent, as it is strongly limited in one respect: the impossibility of striving for 'more' animal welfare.[274] All current lawsuits brought before the Constitutional Court were filed by opponents who wanted less animal welfare and never by animal welfare organisations striving for more animal welfare. This is not the case for environmental matters, for instance, with lawsuits being filed by both proponents and opponents. A textbook example is the Belgian climate case in which the non-profit organisation vzw Klimaatzaak and over 50,000 natural persons were involved as claimants or interveners before the Court of First Instance of Brussels.[275] It remains to be seen how the Constitutional Court would rule in a case, in which, for instance, the well-known Belgian animal welfare organisation GAIA sought the annulment of animal-unfriendly legislation which would weaken the current level of animal welfare. As indicated above, the recent amendment to the Decree on electric collars for dogs and cats could constitute the ideal case. Such a ruling could shed light on the Court's attitude towards 'more' animal welfare, since the Court has so far only ruled on 'less' animal welfare. In addition, the decision of the Court would also provide insight into the question as to whether the standstill principle inherent to Article 23, third section, 4° of the Constitution also explicitly applies to animal welfare. As already mentioned above, the case law of the Council of State has already made it clear that the standstill principle can indeed have an implicit impact on animal welfare.[276] Finally, the decision of the Court could reveal the extent to which a constitutional article can still

[272] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (Appellate Body Report) WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014). The case concerned an import ban by the European Union of seal products from Canada and Norway, motivated by animal welfare considerations. The European Union did not want to accept that products resulting from cruel hunting parties should be made available on the European market. The WTO, which generally safeguards free trade as much as possible, accepted the animal welfare argument. The ruling was a milestone in international law for animal welfare.
[273] Constitutional Court 30 September 2021, n° 117/2021 & n° 118/2021, para B.19.2.
[274] Eisen (n 3) 938.
[275] Court of First Instance of Brussels (FR), 17 June 2021, n° 2015/4585/A, https://www.klimaatzaak.eu/nl.
[276] See n 124 & 125.

be relevant to (pro)actively promoting animal welfare, or whether the Court would again rely on Article 13 of the TFEU in such situations.

A second point of interest relates to the contradistinction between Germany and Belgium.

If we compare the topics of both Constitutional Courts' case law we notice that in terms of content there are some overlapping themes, for example, freedom of profession[277], misuse of powers[278] and most importantly ritual slaughter[279].

In Germany, the so-called '*Schacht-Urteil*' resulted in a constitutional amendment which embedded animal welfare in Article 20a of the German Constitution.[280] In this case, the *Bundesverfassungsgericht* (Federal Constitutional Court) ruled in favour of religious freedom by authorising a Muslim butcher, who had been denied a permit for ritual slaughter, to perform ritual slaughter. As a result, a wave of indignation swept the country, making the political pressure untenable, and so the Christian Democratic Union of Germany (CDU), which had previously blocked the legislative proposals, publicly supported the constitutional amendment to incorporate animal welfare into the Constitution.[281] In the Belgian ritual slaughter case, the Constitutional Court had to rule on the amendment of the Animal Welfare Act with the introduction of a total ban on unstunned slaughter, including for ritual slaughter. By analogy with Germany, a decision in favour of religious freedom could also have served as a catalyst for the incorporation of animal welfare in the Belgian Constitution. But contrary to the German case, the Belgian Constitutional Court, via a preliminary ruling from the European Court of Justice, reached a verdict giving

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[277] **Belgian Constitutional Court**, e.g. Constitutional Court 5 March 1996, n° 16/96 & Constitutional Court 18 December 1996, n° 78/96 (public trade ban); Constitutional Court 19 March 2009, n° 53/2009 (animal shops); Constitutional Court 30 July 2014, n° 119/2014 & Constitutional Court 21 May 2015, n° 66/2015 (circus animals); Constitutional Court 20 October 2016, n° 134/2016 (fur farming). **German Constitutional Court**, e.g. BVerfG, 06.07.1999 - 2 BvF 3/90 & BVerfG, 12.10.2010 - 2 BvF 1/07 (laying hens); BVerfG, 19.07.1999 - 1 BvR 875/99 (tail docking); BVerfG, 05.12.2006 - 1 BvR 2186/06 & BVerfG, 03.07.2007 - 1 BVR 2186/06 (horseshoeing).

[278] **Belgian Constitutional Court**, e.g. Constitutional Court 17 December 2020, n° 165/2020 (fireworks ban). **German Constitutional Court**, e.g. BVerfG, 16.03.2004 - 1 BvR 1778/01 (breeding ban dangerous dogs).

[279] **Belgian Constitutional Court**, e.g. Constitutional Court 4 April 2019, n° 52/2019 & n° 53/2019 & Constitutional Court 18 July 2019, n° 115/2019 & Constitutional Court 30 September 2021, n° 117/2021 & n° 118/2021. **German Constitutional Court**, e.g. BVerfG, 15.01.2002 - 1 BvR 1783/99; BVerfG, 18.01.2002 - 1 BvR 2284/95.

[280] BVerfG, 15.02.2002 - 1 BvR 1783/99.

[281] Verniers (n 17) 4.

preference to animal welfare over religious freedom.[282] Consequently, although such a specific impetus seems to be lacking for Belgium, we have already pointed out that this is not really required in the case of Belgium since the Belgian Constitutional Court strongly relies on European law. This European context is absent from the rulings by the German Constitutional Court.

Although Article 13 of the TFEU was not yet in force at the time of the German ritual slaughter case, it has not been referred to since 2009.[283] However, the ambit of EU law in the field of animal welfare should not be underestimated and has evolved significantly, especially over the last few years, partly driven by the European Court of Justice.[284] Above, we briefly referred to the exception regime of Article 13 of the TFEU, which mitigates the general principle of integration of animal welfare to the extent that it contravenes religious rites, cultural traditions and regional heritage. Over the past few years, these restrictions have been considerably watered down by the Court of Justice. On the one hand, the Court of Justice has interpreted the exception of religious rites very strictly in favour of animal welfare in the biolabel ruling[285] and the ruling with regard to unstunned slaughter[286]. On the other hand, the exceptions for 'cultural traditions and regional heritage' have been reconsidered in light of the recent French case of hunting with birdlime.[287] In this case, the European Court has specifically opted to include animal welfare in the interpretation of the Birds Directive, although the environment as such is not incorporated as a policy area into Article 13 of the TFEU.[288] On the basis of case law, Luxembourg has ensured the extension of the material scope. In addition, the Court of Justice clarified in the same ruling that 'tradition' is not just a passe-partout exception, and that alternatives must be evaluated, in which Article 13 of the TFEU plays an essential role.[289] Also striking is the fact that in the Court's three most recent rulings related to

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[282] See Section 4.4.
[283] E.g. BVerfG, 12.10.2010 - 2 BvF 1/07; BVerfG, 08.12.2015 – 1 BvR 1864/14.
[284] Elien Verniers, 'Dierenwelzijn. Kroniek 2019-2021' (2021) 453 Nieuw Juridisch Weekblad 894, 900-903.
[285] Case C–497/17 *Oeuvre d'assistance aux bêtes d'abattoirs* [2019] ECLI:EU:C:2019:137. See Elien Verniers, 'Dierenwelzijn in de Europese Unie: geen Europees biologisch logo voor ritueel geslacht vlees' (2019) 407 Nieuw Juridisch Weekblad 590.
[286] Case C–336/19 *Centraal Israëlitisch Consistorie van België e.a* [2020] ECLI:EU:C:2020:1031.
[287] Case C–900/19 *One Voice and Ligue pour la protection des oiseaux v Ministre de la Transition écologique et solidaire* [2021] ECLI:EU:C:2021:211. See Elien Verniers and Hendrik Schoukens, 'Natuurbescherming en dierenwelzijn, twee zijden van dezelfde medaille: de rechtspraak inzake de Franse lijmjacht als keerpunt?' (2022) Rechtskundig Weekblad 931.
[288] Case C–900/19 *One Voice and Ligue pour la protection des oiseaux v Ministre de la Transition écologique et solidaire* [2021] ECLI:EU:C:2021:211, paras 39 & 65.
[289] ibid para 36.

animal welfare, the Court has consistently ignored the opinion of the Advocate General and thus explicitly appears to have adopted a more favourable approach towards animal welfare. Finally, it should be noted that not only the European Court of Justice but also the citizens of the EU attach great importance to animal welfare, as has recently been demonstrated by the successful European citizens' initiative (ECI) 'End the Cage Age' which achieved 1.4 million validated signatures.[290] In response, the European Commission proposed on 30 June 2021 to phase out cage systems by 2027.[291] On 16 March 2022, another ECI was registered: 'Fur Free Europe'.[292]

A final conclusion which is closely related to the first one is that, even without a constitutional provision, the prevailing Flemish & Walloon animal welfare policies should be considered as some of the more progressive in the world.[293] The cases giving rise to the judgments of the Constitutional Court were in fact the numerous legislative amendments aimed at enhancing animal welfare. Just like a constitutional article is not required for judicial review by the Constitutional Court, we have seen that the legislature does not necessarily need such an article now that the regionalisation has given animal welfare a general additional boost through the positive competition between the Regions. As far as the executive is concerned, we have already pointed out the existence of AIAs in the Walloon Region which were simply introduced by decree, as well as the similar yet more general integration function of Article 13 of the TFEU. From this perspective as well, a Belgian constitutional article seems to have lost relevance.

However, a constitutional provision has a number of advantages which an ordinary legislative provision cannot provide. In the hierarchy of legal norms, animal welfare legislation remains subordinate to the Constitution. In addition, regular animal welfare laws are precarious and volatile, because the scope and subsistence of this protection depends on the changing views of a political

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[290] European Commission, *Commission's response to the European Citizens' Initiative on "End the Cage Age"* (Q&A, Brussels, 30 June 2021) para 1. See Elien Verniers, 'Europees burgerinitiatief 'End the Cage Age' krijgt steun van Europese Commissie' (2021) 434 Juristenkrant 6.

[291] European Commission, *Commission's response to the European Citizens' Initiative on "End the Cage Age"* (Q&A, Brussels, 30 June 2021) para 2.

[292] European Citizens' Initiative, *Fur Free Europe* (Commission registration number: ECI(2022)000002, 16 March 2022).

[293] Belonging to level 5 according to the GAL database on animal legislations in the world at national level, <www.globalanimallaw.org/database/national/index.html> accessed 24 May 2022.

majority.[294] Animal welfare legislation is therefore sensitive to economic gain and political opportunism. Although the Constitutional Court already takes animal welfare into account, a constitutional provision not only addresses the judicial power, but also the executive and legislative powers. An anchoring in the Constitution implies the recognition of animal welfare as a primary state concern from which government consideration emerges. This governmental consideration, which targets all branches of government, is almost non-existent in a mere legislative provision. So in the Belgian context, a constitutional article can bring added value to the promotion of animal welfare, although much will depend on how this right is formulated and where it is positioned.

5 MANY ROADS LEAD TO BRUSSELS

In a nutshell, we have so far discovered that the German context cannot be compared to the Belgian one and that the current proposals to enshrine animals in the Belgian Constitution might have less impact than expected as the Belgian Constitutional Court already integrates animal welfare (Article 13 of the TFEU) in its judicial review. However, a major shortcoming which has not yet been mitigated is the inability to endeavour a stronger animal welfare policy. For this purpose, we may explore other options than the ones currently in place.

5.1 ROUTE 66: ANIMAL WELFARE AS A CLASSIC FUNDAMENTAL RIGHT IN THE BELGIAN CONSTITUTION

A penultimate approach that is being discussed is the constitutional anchoring of animal welfare as a classic fundamental right. It is important to note that this option also differs from the introduction of subjective animal rights. After all, this option maintains an anthropocentric assumption with humans as right-holders that is more in line with the animal welfare theory than the animal rights theory.[295]

[294] Vink (n 101) 1867.
[295] Gary L Francione, 'Animal rights and animal welfare' (1995) 48 Rutgers Law Review 397.

At the 1993 World Conference on Human Rights in Vienna, it was explained that "all human rights are universal, indivisible and interdependent and interrelated".[296] This was an attempt to propose an integrated approach to human rights without any hierarchy.[297] Although the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, this should not prevent States from promoting and protecting all human rights and fundamental freedoms.[298] Traditionally, we can distinguish three generations of fundamental rights: civil and political rights (first generation), economic, social and cultural rights (second generation) and collective rights (third generation).[299] Originally, the Belgian Constitution only comprehended first-generation rights.[300] They are called 'first generation' or 'classic fundamental rights' as these civil and political rights were the first to emerge in response to the absolute monarchies from before the French Revolution.[301] The rights under Title II 'The Belgians and their Rights' of the Belgian Constitution are indeed defined by the ideals of the French Revolution.[302] The principal *ratio legis* was the protection of the freedom of the individual against abuse of power by the government.[303]

By its nature, a classic fundamental right is thus characterised by a negative obligation on the part of the government, in the form of an obligation to abstain.[304] Consequently, in order not to violate a classic fundamental right, the government should adopt a passive attitude and must refrain from taking any action. Exactly the opposite is expected in case of economic, social and cultural rights. Here, the government must act in an active manner and has a positive duty to act.[305] It is up to the government to create certain conditions so that citizens can live in dignity. These 'second-generation' rights were mostly introduced in the 20th century under the impetus of the October

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[296] 'Vienna Declaration and Programme of Action' (25 June 1993) UN Doc A/CONF.157/23, ch 1, para 5.
[297] Martin Scheinin, 'Economic and social rights as legal rights' in Asbjørn Eide (ed), *Economic, social and cultural rights: A Textbook* (Brill Nijhoff 2001) 32.
[298] See n 296.
[299] Fausto Pocar, 'Some thoughts on the universal declaration of human rights and the generations of human rights' (2015) 10 Intercultural Human Rights Law Review 43.
[300] Goedertier, Vande Lanotte and Haeck (n 106) 264.
[301] ibid 263.
[302] ibid 261.
[303] Paul Errera, *Traité de droit public belge*, vol 1 (M. Giard & É. Brière 1918) 43.
[304] Goedertier, Vande Lanotte and Haeck (n 106) 676.
[305] ibid 676; Vink (n 12) 219-220, referring to socio-economic rights as positive rights and classical civil and political rights as negative rights.

Revolution (1917) and the decolonisation wave in the 1960s.[306] In Belgium, the constitutional reform of 1994 resulted in the inclusion of several economic, social and cultural fundamental rights in Article 23 of the Constitution, for instance the right to social security (2°) and the right to adequate housing (3°).[307]

Although reference has already been made to the fact that in the hierarchy of legal norms, one generation of fundamental rights does basically not take precedence over the other generation, but that the generations are complementary to each other, we notice in reality that second-generation fundamental rights usually enjoys weaker juridical protection than classic fundamental rights.[308] This is logical in view of the different nature of the government's obligations arising from the generations of fundamental rights, since an infringement of a prohibition can be legally verified more easily than the obligation to implement a fundamental right.[309] This has already been alluded to by the fact that the Belgian constitutional environmental provision can only be reviewed in respect of objective litigation.[310] As aforementioned, the parliamentary preparations for Article 23 of the Constitution repeatedly emphasised that the incorporated rights do not constitute any subjective rights.[311] The aim was to avoid that the government would be confronted with the same liability claims before Court as was the case for classic fundamental rights.[312] Although in principle, (Belgian) socio-economic fundamental rights have no vertical (i.e. in the relationship between citizen and government) or horizontal (i.e. in the relationship between citizens) direct[313] effect, they may have other legal and extra-legal consequences such as an ideological aspect and civic education value, as well as a constitutional interpretation, a standstill obligation and the possibility of review in objective litigation by the Constitutional Court among others.[314] The added

[306] Goedertier, Vande Lanotte and Haeck (n 106) 262.
[307] Revision of the Constitution of 31 January 1994, *Belgian Official Gazette* 12 February 1994.
[308] Goedertier, Vande Lanotte and Haeck (n 106) 676; Boyd (n 1) 65-66.
[309] Goedertier, Vande Lanotte and Haeck (n 106) 676.
[310] Catherine Van de Heyning and Jurgen Vanpraet, 'Hoe fundamentele rechten het leefmilieu beschermen: overzicht van het instrumentarium' (2010) 227 Nieuw Juridisch Weekbklad 562, 566.
[311] See n 105.
[312] Goedertier, Vande Lanotte and Haeck (n 106) 678.
[313] The absence of direct effect means that the rights cannot be immediately claimed before the court solely on the grounds of the constitutional provision. On the other hand, there is an indirect effect, which means that the fundamental rights are given practical form by the competent legislators. See ibid 678-680 & 684-685.
[314] ibid 680-685.

value of a classic fundamental animal welfare right would consequently be its enforceability in subjective litigation.

Such a right could be formulated as follows: "Every human being has the right that animals as sentient beings are treated with respect".[315] In terms of positioning, it is difficult to make an organic choice. Article 12 of the Constitution, which guarantees the freedom of the individual, may be considered in this respect. It is accepted that this provision also implies the prohibition of slavery.[316] Contrary to the ECHR, which generally embeds personal freedom in Article 5.1 and provides for a concrete prohibition of slavery in Article 4, both rights are covered by the same provision. Their scope is not equal, however, as the prohibition of slavery is regarded as an absolute fundamental right, while the freedom of the individual is in principle not an absolute freedom, but can be restricted.

If the choice was made to position a classic fundamental animal welfare right under this provision, it would be possible to construe this as a fundamental animal right rather than a classic human fundamental right to animal welfare. Yet, as mentioned above, this option does not involve the installation of animal rights, but the insertion of a right owned by humans and thus not by the animal itself. In order to better understand and frame the pursuit of animal welfare as inherent to the human condition, reference can be made to the final decision of the Constitutional Court regarding slaughter without stunning. In this decision, the Court stated that "the objective of limiting the avoidable suffering of […] animals, can be broken down into the protection of morality on the one hand, and the protection of the rights and freedoms of individuals who, in their outlook on life, are committed to animal welfare on the other hand".[317] In this sense, a classic human right to promote animal welfare can be justified from an anthropocentric perspective with animal welfare having to be pursued because it would be inextricably linked to general human morality and

[315] Verniers (n 17) 1.
[316] Goedertier, Vande Lanotte and Haeck (n 106) 392.
[317] Constitutional Court 30 September 2021, n° 117/2021 & n° 118/2021, para B.19.3.

specifically to the protection of the fundamental rights of people with a pro-animal welfare attitude.[318]

A justification may be available, yet the question nonetheless arises as to whether the artificial construction of a classic fundamental animal welfare right, in particular when positioned in Article 12, rightly or wrongly gives the impression that it is in fact a hidden fundamental animal right or that it at least comes very close. This ambiguity is both a blessing and a curse. The association of a (human) classic fundamental animal welfare right with a fundamental animal right can indeed close the gap with actual fundamental animal rights in the long run, while the possibility of a potential opening will also give rise to additional opposition, which could prevent the introduction of a classic fundamental animal welfare right in the first place.

Apart from the somewhat unnatural positioning, questions may be asked about the choice of a classic fundamental animal welfare right in view of the nature of such a provision. In order to enhance animal welfare, the government is expected to take active action, so that the classic fundamental right does not seem suitable for this purpose. This is one of the reasons why this option has been explicitly excluded from the discussion of the Belgian animal welfare constitutional proposals.[319] It does seem somewhat contradictory, when an active (animal welfare) policy is envisaged, to make use of a tool revolving around a passive attitude, i.e. an obligation to abstain. In this respect, it is useful to put this subject in the correct perspective. Firstly, the theoretical assumption of a duty of abstention on the part of the government should be nuanced. In practice, it can be observed that classic fundamental rights are also further specified by the legislator. The right to respect for private life (Article 22 of the Belgian Constitution), for example, is in reality further shaped by numerous privacy regulations (e.g. GDPR). Consequently, even classic fundamental rights still require the intervention of the legislator in certain cases. Secondly, we point out the integrated approach mentioned at the 1993 Vienna Conference, as a result of which the various

[318] See also Elien Verniers, 'Straatsburgs vervolg aan eindarrest Grondwettelijk Hof inzake onverdoofd slachten' (2021) 451 Nieuw Juridisch Weekblad 830.
[319] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 32.

generations of fundamental rights should not be interpreted too dogmatically. It is possible that certain socio-economic rights nevertheless entail an obligation to abstain on the part of the government (e.g. the right of ownership – Article 16) and conversely, that some civil and political rights also entail a positive duty to act for the government (e.g. the right to respect for family life – Article 22).[320]

Not only the positioning and nature are controversial, it can also be argued that a classic fundamental right for animal welfare can have negative consequences for the individual fundamental rights. This is the case when it is assumed that there is competition between fundamental rights and the constitutional values they represent. From a political and ethical point of view, priorities must be set in relation to interests, and then choosing to establish animal welfare as a classic fundamental right may give rise to the perception that more importance is being attached to animal welfare than to, for example, the socio-economic right to work. However, the purpose of the animal welfare fundamental right is not to compete with other fundamental rights, but is embedded in the research on how to give animal welfare a more decisive status in constitutional law. The hypothesis that animal welfare as a classic fundamental right is intended to deprive other fundamental rights of their value must therefore be dismissed. Although there is a difference in the area of enforcement, this third option is by no means designed to allow animal welfare, as a constitutional value, to take precedence over other constitutional values. This option is instead aimed at giving animal welfare a standing in the Constitution that goes beyond a purely symbolic dimension and can also ensure legal added value. Research has revealed that in the specific case of animal welfare, the other options do not always yield the desired outcomes. In order to be able to improve animal welfare, there must be a possibility of enforceability that is provided for in a classic fundamental right. For the specific case of animal welfare, a classic fundamental right is therefore more appropriate. Whether other fundamental rights would also benefit from a transformation or whether they already exert sufficient influence in their present form is not covered by this research. It should be noted, however, that in the field of environmental law, for example, all kinds of international standards are available, while this is missing in the field

[320] Goedertier, Vande Lanotte and Haeck (n 106) 676-677.

of animal welfare. In order to fill this lacuna, this is an additional argument in favour of a classic fundamental right for animal welfare. In this regard, a strongly enforceable national constitutional right might thus overcome the neglect of animal welfare at the international level.

For persistent critics who do see a prioritisation of animal welfare in a classic animal welfare fundamental right, this does not have to be problematic in itself. After all, a Constitution is a reflection of what is going on in society and it is only normal that the Constitution is brought in line with the social reality.[321] Reference has already been made to the ruling of the Constitutional Court that linked the protection of animal welfare to human morality and in which the Court noted that "the protection of and respect for the welfare of animals as sentient beings can be regarded as a moral value shared by numerous people in the Flemish and Walloon Regions".[322] Previously, the European Court of Justice declared in the same sense that animal welfare is a value which democratic societies have increasingly regarded as important in recent years and which is increasingly taken into consideration in the context of societal developments.[323] Finally, reference can be made to an Ipsos survey that was conducted in 2017 and that showed that 83-86% of Belgians were prepared to include the protection of animal welfare in the Belgian Constitution.[324] Therefore, the decision to include animal welfare as a classic fundamental right can be an expression of public support. It is indeed possible that people, on account of their own well-being, consider it significant and are satisfied that animals are treated with respect and that they want a constitutional instrument to be able to enforce this conviction. However, it is up to them to decide how profoundly they want the animal welfare fundamental right to operate, depending on whether or not they decide to invoke the direct effect of a classic fundamental right.

Alternatively, inspiration can also be drawn from the Portuguese environmental provision in Article 66 of the Portuguese Constitution.[325] Although in the Portuguese Constitution, Article 66

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[321] Report of the Commission to the Proposal to revise Title II of the Constitution in order to insert an Article 24*bis* on economic and social rights, *Parl.St.* Senaat 1993-94, n° 100-2/4°, 58.
[322] See n 273.
[323] Case C–336/19 *Centraal Israëlitisch Consistorie van België e.a* [2020] ECLI:EU:C:2020:1031, para 77.
[324] Verhaeghe & De Wandel (n 48) 11-16.
[325] Article 66 of the Constitution of Portugal: "1. Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it. 2. In order to ensure enjoyment of the right to the environment within an overall framework of sustainable development, acting via appropriate bodies and with the involvement and participation of citizens, the state shall be charged with: a) Preventing and controlling pollution and its effects and the harmful forms of erosion; b) Conducting and promoting town and country planning with a view to a correct location

is categorized under Title III 'Economic, social and cultural rights and duties', the Portuguese legal doctrine assumes that Article 66 is a basic fundamental right that is characterized by a double structure.[326] The layered structure consists, on the one hand, of a classic fundamental right that imposes an obligation of abstinence on the government and is subjectively enforceable and, on the other hand, of a fundamental social right that requires active intervention by the government.[327] By opting for a construction based on this Portuguese model, in which animal welfare would be positioned among the socio-economic rights, yet complemented with substantive guarantees of a classic fundamental right, the best of both worlds would be combined. On the one hand, the major stumbling block of a lack of direct effect would be remedied and on the other hand, the nature of the generations of fundamental rights would be respected since the pursuance of an active animal welfare policy indeed fits in better with a socio-economic fundamental right than an inherently passive classic fundamental right.

Finally, another option can be taken into consideration as well. Above, it has been briefly mentioned that a classic fundamental animal welfare right can constitute the link with fundamental animal rights. Constitutional embedment is combined with attributing fundamental rights to (some) animals, as was the case with the Basel referendum.

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of activities, balanced social and economic development and the enhancement of the landscape; c) Creating and developing natural and recreational reserves and parks and classifying and protecting landscapes and places, in such a way as to guarantee the conservation of nature and the preservation of cultural values and assets that are of historic or artistic interest; d) Promoting the rational use of natural resources, while safeguarding their ability to renew themselves and maintain ecological stability, with respect for the principle of inter-generational solidarity; e) Acting in cooperation with local authorities, promoting the environmental quality of rural settlements and urban life, particularly on the architectural level and as regards the protection of historic zones; f) Promoting the integration of environmental objectives into the various policies of a sectoral nature; g) Promoting environmental education and respect for environmental values; h) Ensuring that fiscal policy renders development compatible with the protection of the environment and the quality of life.". Translation retrieved from *World Constitutions Illustrated*, HeinOnline, updated 2010,
<https://heinonline.org/HOL/Page?collection=cow&handle=hein.cow/zzpt0001&id=40&men_tab=srchresults> accessed 24 May 2022.

[326] Branca Martins Da Cruz, 'The constitutional right to an ecologically balanced environment in Portugal' in Isabelle Larmuseau (ed), *Constitutional rights to an ecologically balanced environment* (VVOR vzw 2007) 47.

[327] Diogo Freitas do Amaral and Pedro Garcia Marques, 'Environmental Law in Portugal' in Niels Koeman (ed), *Environmental Law in Europe* (Kluwer Law International 1999) 464-465.

5.2 BASEL OPTION: ANIMAL RIGHTS IN THE BELGIAN CONSTITUTION

Finally, we consider the option of introducing animal fundamental rights. Although the basis of this contribution is focused on the question of whether and how the inclusion of a provision on animal welfare in the Constitution would actually improve the position of animal welfare in Belgium, it nevertheless also seems useful to briefly shed light on the option of animal fundamental rights. In each of the three options examined above (i.e. animal welfare as a state objective (*Section 3.1*), as a fundamental social and economic right (*Section 3.2*) and as a classic fundamental right (*Section 5.1*)), animals are approached as legal objects whose welfare is protected to a greater or lesser extent. Although the promotion of animal welfare is at the centre, the concept still concerns human rights, with humans being the direct beneficiary and animals being the indirect beneficiary. Activating such a right therefore always requires a link with humans, be it artificial or not, and the interests of the animal cannot be taken into consideration autonomously. Humans act as the legal subject. Animal rights, on the other hand, are created with the animal as the legal subject and do not apply to humans.[328] In this option, the interests of the animal are taken into consideration on account of the animal's intrinsic value and no longer on account of the animal's value for humans. There is a disconnection between the interests of the animal and the human interests in the animal. The result is that human and animal interests can be put on the same footing and can be balanced on an equal basis. This ecocentric movement has been in the ascendant for some time, especially in the Rights of Nature discourse, with 'Pacha Mama' in Article 71 of the Ecuadorian Constitution as the best-known example.[329] In the same vein, a case has been made for 'Rights of Animals'.[330]

During the discussion of the Belgian proposals to embed animal welfare in the Constitution, the suggestion was made to grant fundamental rights to animals.[331] According to Vink, this option would have much greater consequences than the policy objective set out, since animals themselves

[328] Verniers (n 17) 1-2.
[329] See Andreas Gutmann, 'Pachamama as a Legal Person? Rights of Nature and Indigenous Thought in Ecuador' in Daniel P Corrigan and Markku Oksanen (eds), *Rights of Nature: A Re-examination* (Routledge 2021).
[330] Saskia Stucki, *Grundrechte für Tiere* (Nomos Verlagsgesellschaft mbH & Co. KG 2016).
[331] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 70. See also Vink (n 101) 1868-69.

would be granted subjective rights.[332] This choice can certainly be justified on the basis of political and philosophical grounds.[333] The pressure on the government to improve the current and real situation of animals would increase exponentially, since animal rights by their very nature indeed include enforceable rights.[334] The downside is that animal rights could significantly undermine the credibility of the Belgian Constitution in view of the discrepancy that would arise between the newly introduced norm and the existing reality.[335] After all, subjective rights create expectations that seem to be very unrealistic in the current Belgian society where animals are instrumentalised en masse.[336] Legal scholar Larik, however, also points out the positive function of the discrepancy between norm and reality: the necessity of bringing reality in line with the constitutional norm so as to maintain the credibility of the Constitution.[337] It can therefore provide an additional incentive to actively intervene in terms of policy. Despite this potential, the option has been rejected as inappropriate in the current Belgian social context. In Switzerland, by contrast, the necessary attention has been paid to this option, culminating in the referendum held in February 2022 in Basel-Stadt.

In 2014, Sentience Politics[338] was founded as a project of the Effective Altruism Foundation[339]. Its aim is to raise awareness in (Swiss) society about the interests of non-human animals. As Switzerland's political system is one of direct democracy, it offers excellent conditions for effective activism through the possibility of initiating a referendum, which can ultimately amend the constitution. In April 2016, Sentience Politics published its position paper on fundamental rights for primates (*Grundrechte für Primaten*) in which it proposed to amend the Cantonal Constitution

[332] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 70.
[333] Vink (n 12); Vink (n 101) 1869.
[334] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 77. See also Vink (n 101) 1869.
[335] ibid.
[336] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 70.
[337] Joris Larik, *Foreign policy objectives in European constitutional law* (Oxford University Press 2016) 24-25.
[338] See <https://sentience.ch/en/> accessed 24 May 2022.
[339] See on effective altruism e.g. Peter Singer, *The Most Good You Can Do - How Effective Altruism Is Changing Ideas About Living Ethically* (Yale University Press 2015); Stijn Bruers, *Beter worden in goed doen: vergroot je impact met effectief altruïsme* (Academia Press 2018).

of the Swiss Canton of Basel-Stadt in order to grant non-human primates the fundamental right to life and to bodily and mental integrity.[340] After an ongoing legal dispute the Swiss Federal Supreme Court[341] upheld the decision of the Cantonal Constitutional Court[342] and thus affirmed on 16 September 2020 that the popular initiative launched by Sentience Politics was valid and that the citizens of the canton of Basel-Stadt were allowed to vote on it.[343]

In specific terms, the citizen's initiative text entails "*c. das Recht von nicht-menschlichen Primaten auf Leben und auf körperliche und geistige Unversehrtheit* (the right of non-human primates to life and to physical and mental integrity)" which should be entered in §11^2 of the Cantonal Constitution of Basel-Stadt.[344] In addition to the Swiss Federal Constitution, cantonal constitutions may provide and include constitutional rights which are not covered by the Federal Constitution and thus extend the scope of protection of existing fundamental rights.[345] The Canton of Basel-Stadt has already used this cantonal fundamental right competence (*kantonale Grundrechtskompetenz*) to list special cantonal fundamental rights which go beyond the existing protection of the Federal Constitution under §11 'Guarantees of fundamental rights'.[346] Based on this competence, the Sentience Politics initiative has also requested the extension of the cantonal fundamental right which, contrary to the federal fundamental right to life and integrity, is not limited to human primates, but would also extend to non-human primates.[347] Applied to the Belgian context, an identical formulation – the right of non-human primates to life and to physical and mental integrity – could be used, but other formulations are possible as well.[348] Depending on the formulation as well as the material and personal scope, an animal fundamental right can be introduced at various locations in the Belgian Constitution. For example, Article 11 of the Belgian Constitution already emphasises the rights

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[340] Raffael Fasel, Charlotte E Blattner, Adriano Mannino and Tobias Baumann, 'Grundrechte für Primaten' (*Sentience Politics*, April 2016) <www.primaten-initiative.ch/wp-content/uploads/grundrechte-fuer-primaten-positionspapier.pdf> accessed 24 May 2022.
[341] Swiss Federal Supreme Court, Judgment, 16 Sept. 2020, 1C_105/2019.
[342] Constitutional Court of Basel-Stadt, 15 Jan. 2019, VG.2018.1.
[343] See Charlotte E Blattner and Raffael Fasel, 'The Swiss primate case: How courts have paved the way for the first direct democratic vote on animal rights' (2022) 11 Transnational Environmental Law 201.
[344] Fasel, Blattner, Mannino and Baumann (n 340) 19.
[345] ibid 20. See Rainer Schweizer, 'Vorbemerkungen zu Art. 7-36' in Bernard Ehrenzeller and others (eds), *Die schweizerische Bundesverfassung* (Dike 2014).
[346] Fasel, Blattner, Mannino and Baumann (n 340) 20.
[347] ibid.
[348] 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", see Verniers (n 17) 1.

and freedoms of ideological and philosophical minorities. By analogy with the systematic extension and concretisation of the right to privacy (Article 22), with an Article 22*bis* for children and an Article 22*ter* for persons with disabilities, the inclusion of an Article 22*quater* for primates would be another viable option.

When zooming in on the material scope of the current Swiss proposal, §11[2], c. does not only cover the right to life, but also the right to physical and mental integrity. However, if this right were to be granted to non-human primates, this would not mean that non-human primates would have the same rights as human primates. Instead, Singer's principle of equal consideration of interests[349], which applies irrespective of the species to which an individual belongs, is to be taken into account.[350] The proposed fundamental right is in fact modelled on the corresponding human rights since the grounds for obtaining these rights are identical. The human rights category, however, includes rights other than the right to life and to physical and mental integrity, such as the right to freedom of speech and the right to religious freedom. The latter two are not of interest to non-human primates.[351] In addition, it should be noted that, as is true for human rights, the fundamental rights of non-human primates are subject to certain recognised and proportionate restrictions insofar as they do not violate the core content.[352] It is also worth noting that in fact, according to the Swiss Federal Supreme Court[353], the initiative does not aim to transpose human rights to animals, but instead seeks to create special fundamental rights for non-human primates, an important distinction which also follows legal scholar Peters' view[354] on animal rights. Furthermore, in terms of practical consequences, the submitters also explicitly clarify that the acceptance of this initiative will not lead to the abolishment of zoos, nor will it make biomedical research impossible.[355] International pharmaceutical companies such as Novartis and Roche that are based in Basel would be exempt from this cantonal fundamental right as it only applies to public

[349] Peter Singer, 'All Animals Are Equal' in Tom Regan and Peter Singer (eds), *Animal rights and human obligations* (Prentince-Hall 1976) 150.
[350] Fasel, Blattner, Mannino and Baumann (n 340) 20.
[351] ibid 16.
[352] See <www.primaten-initiative.ch/en/arguments/> accessed 24 May 2022.
[353] Swiss Federal Supreme Court, Judgment, 16 Sept. 2020, 1C_105/2019, 11, para 8.2. See Blattner and Fasel (n 343) 211-212.
[354] Peters (n 178) 469.
[355] Fasel, Blattner, Mannino and Baumann (n 340) 16 & 20.

institutions (e.g. universities, hospitals, etc.) and thus not to private companies. [356] Even though they will not be directly affected, it is possible that this fundamental right will have an indirect effect on the way private companies use animals in their research to develop drugs and on the development of good practices.[357]

With regard to the personal scope, the submitters deliberately opted for non-human primates, not because of anthropocentrism or reasons of morality, but purely in light of the practical implications, as their demand is linked to a certain order, that of Primates, because they seem to possess the relevant qualities and interests which are necessary for these basic rights.[358] For instance, non-human primates have a high degree of social intelligence[359], including empathy[360], self-awareness[361], the ability to recall the past and to plan ahead into the future[362], as well as a high sensitivity to (physical[363] and mental[364]) pain.[365] Even though the current initiative does not preclude the inclusion of other animals with the same characteristics in the future, the submitters refute that this will result in a slippery slope with rights ultimately being granted to even insects. Firstly, as is particularly the case with non-human primates, ample scientific evidence is required to back up the claim that certain species are indeed capable, for example, of suffering, empathy, remembering past events and anticipating the future. Secondly, as mentioned above, individuals who are granted fundamental rights may be subject to certain limitations.[366] Another counterargument the submitters debunk is that giving primates fundamental rights will undermine human rights. Today's concept of human rights is poorly grounded in theory, because they are either based on the membership of the human species (i.e. speciesism) or on supposedly specifically

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[356] Carla Bleiker, 'Do chimpanzees have the right to life?' (14 February 2022), <https://p.dw.com/p/46q2W> accessed 12 April 2022; Blattner and Fasel (n 343) 207, 209.
[357] Swiss Federal Supreme Court, Judgment, 16 Sept. 2020, 1C_105/2019, 12 & 14, para 8.3 & 9.2. See ibid 212.
[358] Fasel, Blattner, Mannino and Baumann (n 340) 17.
[359] John Rafferty, *Primates* (Brittanica Educational Pub 2011) xii.
[360] Frans BM De Waal, 'Putting the altruism back into altruism: the evolution of empathy' (2008) 59 Annual Review of Psychology 279.
[361] James R Anderson and Gordon G Gallup, 'Mirror self-recognition: a review and critique of attempts to promote and engineer self-recognition in primates' (2015) 56 Primates 317; James R Anderson and Gordon G Gallup, 'Which primates recognize themselves in mirrors?' (2011) 9 PLOS Biology 1.
[362] William A Roberts, 'Mental time travel: animals anticipate the future' (2007) 17 Current Biology 418.
[363] Helen Proctor, 'Animal sentience: Where are we and where are we heading?' (2012) 2 Animals 628, 632.
[364] William S Gilmer and William T McKinney, 'Early experience and depressive disorders: human and non-human primate studies' (2003) 75 Journal of affective disorders 97, 103.
[365] See for a more comprehensive overview: Fasel, Blattner, Mannino and Baumann (n 340) 7.
[366] ibid 17.

human characteristics such as autonomy and rationality. The latter dangerously puts the basic rights of people with mental disabilities, advanced dementia or infants on the line. Therefore, this proposal truly strengthens human rights by creating a secure foundation based on interests which is able to protect those who are most vulnerable.[367] In the history of fundamental rights, the circle of rights has always gradually evolved and has been shaped by changing concepts of justice. It is time to expand legal protection to all primates, as human and non-human primates share a basic need to live and to remain physically and mentally unharmed.[368]

In line with the previous argument, Sentience Politics also disproves the objection of 'no rights without duties' in their position paper, by again referring to other bearers of fundamental rights which do not have any corresponding duties, such as infants.[369] As far as the practicability is concerned, Sentience Politics points out that in comparison with the 200,000 human primates in the Canton of Basel-Stadt, the number of 300 non-human primates is manageable.[370] Moreover, the fact that non-human primates cannot enforce their fundamental rights themselves can be solved by appointing a special commissioner within the current Child and Adult Protection Authority (*Kindes- und Erwachsenenschutzbehörde*). Other proposed options are an Ombudsperson or an independent Primate Counsellor who would need to ensure the right to life and integrity of non-human primates.[371]

The decisions of both the Cantonal Constitutional Court and the Swiss Federal Supreme Court constitute watershed moments in the global wave of recent judicial decisions on fundamental animal rights. The Swiss courts accept that it is possible to 'expand the circle of rights holders beyond the anthropological barrier'[372] in that it can encompass the larger category of primates.[373] On 13 February 2022, the citizens of the Canton of Basel-Stadt were able to write history and turn Basel into a flagship canton for animal welfare policy in Switzerland and around the world. However, with only a quarter (25,26%) of the Basel residents voting in favour of the

[367] ibid.
[368] See n 352.
[369] Fasel, Blattner, Mannino and Baumann (n 340) 17.
[370] ibid 16.
[371] ibid.
[372] Constitutional Court of Basel-Stadt, 15 Jan. 2019, VG.2018.1, para. 3.7.3.
[373] Blattner and Fasel (n 343) 213-214.

aforementioned proposal, the plan to grant non-human primates the right to life and physical and mental integrity was rejected.[374] It seems that society is just not ready to give animals legal protection beyond mere animal welfare legislation. Similarly to Switzerland, attempts to introduce such rights in Belgium would probably also be faced with insufficient societal support. The aforementioned Ipsos survey revealed that 42% of 3000 Belgian participants between the age of 18 and 75 agreed with the statement that the Belgian Constitution should attribute the right to life to animals.[375] This number decreased to 27% when the same participants were asked whether or not the Constitution should give animals legal personhood.[376] However, if certain propositions about animal welfare and animal rights are put forward, without any link to a constitutional anchoring, positive results have been achieved ranging between 82% and 94%.[377] This demonstrates that 'moral schizophrenia' exists and that moral consideration currently does not translate into stronger legal and constitutional protection.[378]

To end on a positive note, we provide an inspiring quote from Blattner, one of the supporters of the initiative and co-author of Sentience Politics' position paper: "*Would I have wanted primate rights to be introduced in Basel? Sure. Do I think a 25% approval is a loss? Certainly not. It took over 50 years' time and 72 votes before voting rights for women were fully introduced in Switzerland. I'm not saying the two struggles are identical, but progress takes time. This is part of a journey. This is success*."[379]

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[374] Bleiker (n 356).
[375] Verhaeghe & De Wandel (n 48) 18. See Elien Verniers, 'Titel II van de Belgische Grondwet: "De Belgen en hun (dieren)rechten"' (2022) Tijd voor Mensenrechten <www.tijd.mensenrechten.be> *forthcoming August 2022*.
[376] ibid.
[377] ibid 22-23.
[378] Gary L Francione, 'Animals - Property or Persons?' in Cass Sunstein and Martha Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2004) 121 & 123; Evelyne Langenaken, 'L'animal entre l'être et l'avoir, une schizophrénie humaine et juridique' in Florence Dossche (ed), *Le Droit Des Animaux: Perspectives d'avenir* (Larcier 2019).
[379] See <www.linkedin.com/posts/charlotte-e-blattner-dr-iur-ll-m-harvard-986299b1_primate-justice-activity-6899765210492522497-ABHM?utm_source=linkedin_share&utm_medium=member_desktop_web.> accessed 24 May 2022.The quote is slightly adapted because it has been shortened, the full quote entails: "*Would I have wanted #primate rights to be introduced in Basel? Sure. Do I think a 25% approval is a loss? Certainly not. Look at the below chart indicating the many "unsuccessful" votes to introduce voting rights for women in Switzerland - including on the cantonal level: It took over 50 years' time and 72 votes for them to be fully introduced (first federal vote with a 33% approval). I'm not saying the two struggles are identical, but progress takes time. Lots of people seriously thought about what we owe other animals on grounds of #justice and many have shown their support for animal rights, including major green and left parties. This is part of a journey. This is success.*".

5.3 SETTING THE GPS FOR THE OPTIMAL ROUTE: A MATTER OF ALIGNING WITH THE MORAL COMPASS

The Ipsos survey has revealed that broad public support exists for the inclusion of animal welfare in the Belgian Constitution.[380] Animal welfare can be given shape in the Constitution in various ways. We have discussed four options in particular, but the list is not exhaustive and can also include intermediate forms, for example, the inclusion of animal welfare in a constitutional preamble[381] or the hybrid Portuguese model explained above.

The first option that has been examined was that of a Belgian animal welfare state objective ("Route 7*bis*") and corresponds to the initial proposal to revise the Constitution that members of the Belgian federal parliament have submitted in order to give political and legal expression to the public support for animal welfare. We have discovered that the German animal welfare state objective should by no means be compared to a Belgian animal welfare state objective, as the latter is a state objective in name only, but not in reality if we consider the content. The principal downside is the impossibility of judicial review.

Subsequently, we looked into the option of a socio-economic fundamental right to animal welfare ("Route 23"). It quickly became clear that this option is much more in line with what can be labelled as a state objective in Germany. It is also much more in line with what the submitters envisaged with Article 7*bis*, namely provide guidance to the Constitutional Court so that animal welfare could be included in the judicial review. The disadvantage of this approach is that it is very difficult to enforce the active policy expected from the government in practice within the scope of a socio-economic right, due to the absence of a (vertical) direct effect. To resolve this problem, a classic fundamental right to animal welfare has been investigated.

A classic fundamental right ("Route 66") does in face have the advantage of a direct effect. However, regarding its nature, it is indeed atypical to choose for a classic fundamental animal welfare right, since a duty for the government to abstain is inherent to this right, which is not

[380] In contrast to indeed fundamental animal rights.
[381] Report of the Commission to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2018-19, n° 6-339/3, 26-27.

conducive to the active promotion of animal welfare in policy. To meet this concern, one could follow the Portuguese example in which a two-pronged approach is applied. On the one hand, because of the socio-economic aspect, it is possible to provide an enumeration of what is expected from the government as a minimum. On the other hand, the classic connotation can guarantee an actual impact as it allows for direct enforceability. This outlook expresses the most comprehensive scope for animal welfare, with respect to the freedom of judgement of citizens who decide for themselves what importance they attach to animal welfare and whether or not they use the possibility to enforce it. Yet, as has been mentioned, it is a human who will decide whether they will intervene or not. In case of fundamental animal rights an artificial link to a human right is no longer required; instead, the animal itself could defend its rights and interests as a legal subject.

The final avenue that has been explored, namely fundamental animal rights ("Basel Route"), differs radically from the three previous ones. The "Basel Route" is based on a more ecocentric vision and creates a new category of legal subjects: non-human primates. The monopoly of humans on legal protection is thus broken and the scope has been extended. This extension should not be regarded as a threat to human rights, but should instead be considered as a logically substantiated reinforcement. In our current society where massive instrumentalisation of animals takes centre stage (e.g. food, research, sports), the granting of rights to animals continues to be met with reluctance, as has recently been shown by the Basel referendum. In this respect, consumers play a crucial role, as they alone hold the key to change. This will probably depend on overcoming the moral schizophrenia.

6 CONCLUSION: TO INCLUDE OR NOT TO INCLUDE?

Animal welfare is highly topical in today's society. The Special Eurobarometer 442 has shed light on the attitudes of Europeans towards Animal Welfare and has uncovered that an absolute majority of Europeans (94%) are convinced it is important to protect the welfare of (farmed) animals.[382] A high proportion of the respondents (83%) believe that this should be regulated by public

[382] European Commission Directorate-General for Health and Food Safety, *Attitudes of Europeans towards Animal Welfare* (Special Eurobarometer 442, Report, March 2016) 9.

authorities.[383] In the United States, a 2015 Gallup poll identified that about one in three Americans are of the opinion that animals should be given the same rights as people.[384]

Accordingly, a general conclusion is that a constitutional provision on animal welfare would advance the status of animal welfare. The level of animal welfare enhancement varies according to the option chosen. While the case law of Article 20a of the German Constitution demonstrates that the state objective as formulated in the German Constitution does indeed have an impact[385], even though the impact is rather marginal, a Belgian state objective in the form of Article 7*bis* of the Belgian Constitution could in reality be reduced to a symbolic gesture without any legal added value. The second option, to tie in with the current Article 23 of the Belgian Constitution, in which animal welfare is represented as a socio-economic fundamental right, is a more favourable starting point in that it guarantees judicial review as well as a standstill effect. However, the question arises as to the extent to which Article 23 is in fact what we need to strive for, knowing that the case law of the Constitutional Court already reviews against animal welfare by referring to primary Union law (Article 13 TFEU). Opting for "Route 23" may present a risk of lagging behind, as a result of which codification on the basis of the decisions of the Court is wrongly regarded as an innovation. In addition, both the research into the Belgian constitutional environmental provision and the research into the German animal welfare state objective have indicated that the pioneering proposal to include animal welfare as a classic fundamental right reflects the ultimate answer to the existing problems, in particular with regard to direct effect. If the constitutional legislator wishes to achieve real change in animal welfare, the potential of "Route 66" should certainly be take into consideration and the revolutionary "Basel Route" should not be simply rejected. An important reservation is that, by analogy with the chicken or the egg paradox, fundamental changes in terms of animal welfare should not be expected without animal rights and vice versa, as both are conceptually connected.

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[383] ibid 44.
[384] Jeff Jones and Lydia Saad, *Gallup Poll Social Series: Values and Beliefs* (Gallup News Service, 2015) 2.
[385] Bernet Kempers, for instance, states that merely mentioning animals in the German Constitution improves the weight of the abstract and individual animal interest, see Bernet Kempers (n 14) 23.

Due to the end of the 2014-2019 parliamentary term, the above-mentioned legislative proposals (*Section 3*) have so far not resulted in a revision of the Constitution.[386] Amending the Belgian Constitution requires a constitutional majority, i.e. at least 2/3 of the members of the federal parliament must be present and 2/3 of the votes cast must be in favour, but a concrete vote to incorporate animals into the Constitution has not yet been achieved.[387] If Belgian politics still want to express its support for the inclusion of animal welfare in the Constitution in the future parliamentary term, this must be accompanied by a number of guarantees. Moreover, Belgium should not be fixated on the German provision and preference must be given to a provision that fits best within the Belgian Constitution. The option of a mere state objective, which has been continued in the current parliamentary term (2019-2024), lacks ambition and substance.[388] A constitutional provision for animal welfare must go a step further and be able to influence policy adequately in order to ensure any impact. Belgium has the opportunity to take animal constitutionalism to a higher level, a choice between to be or not to be.

[386] Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2016-17, n° 6-339/1; Amendment to the Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2017-18, n° 6-339/2.
[387] Goedertier, Vande Lanotte and Haeck (n 106) 79.
[388] Proposal to revise Article 7*bis* of the Constitution, *Parl.St.* Senaat 2019, n° 7-47/1.