

# ARTICLES

## THE NATURE AND EFFECTS OF CONSTITUTIONAL STATE OBJECTIVES: ASSESSING THE GERMAN BASIC LAW'S ANIMAL PROTECTION CLAUSE

By  
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*In 2002, an animal protection clause was added to Article 20a of the German Constitution. Designed as a state objective, the nature of the animal protection clause decidedly influences its application. As a state objective, it is directed at all three branches of government, and each branch must ensure within its sphere of competence the realization of the stated goal. The Federal Constitutional Court has yet to address the precise scope of the provision.*

*This Article examines the likely future effects of the animal protection clause. With respect to the legislative branch, this Article addresses the question of whether the state objective demands that a standing provision be created for animal protection groups. With respect to the judicial and executive branches, this Article focuses on three fundamental rights that are most likely to come into conflict with animal protection: freedom of religion; freedom of teaching, science, and research; and freedom of artistic expression.*

*Seismic shifts in constitutional adjudication are not likely to be expected. The provision does not give rights to animals. However, at a minimum, it prohibits circumventing the Animal Protection Act by construing that statute in light of the Constitution. The animal protection clause removed the disproportionality between certain fundamental rights and the interest in animal protection. It mandates a balancing of constitutional interests and eliminates doubts regarding the constitutionality of the Animal Protection Act, especially with respect to the fundamental rights discussed.*

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I. INTRODUCTION

Germany’s constitution, the Basic Law (*Grundgesetz*) of 1949, contains several provisions designed as state objectives (*Staatszielbestimmungen*) covering a broad range of topic areas: environmental protection,<sup>1</sup> the social state principle,<sup>2</sup> European integration,<sup>3</sup> maintenance of peace,<sup>4</sup> and fiscal responsibility.<sup>5</sup> Animal protection, a sixth constitutional state objective, was added in the summer of 2002.<sup>6</sup> By introducing the words “and the animals” into Article 20a, the provision now reads:

The state, aware of its responsibility for present and future generations, shall protect the natural resources of life and the animals within the frame-

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1 Grundgesetz [GG] [Constitution] art. 20a (F.R.G.).  
2 Grundgesetz [GG] [Constitution] art. 20(1) (F.R.G.).  
3 Grundgesetz [GG] [Constitution] art. 23(1) (F.R.G.).  
4 Grundgesetz [GG] [Constitution] art. 24(2) (F.R.G.).  
5 Grundgesetz [GG] [Constitution] art. 109(2) (F.R.G.).  
6 Gesetz zur Änderung des Grundgesetzes (Staatsziel Tierschutz) [Animal Protection State Objective], July 26, 2002 BGBl. I at 2862 art. 1 (F.R.G.).

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work of the constitutional order through the legislature and, in accordance with the law and principles of justice, the executive and judiciary.<sup>7</sup>

The new provision has attracted some interest in the United States, as evidenced by several references within American legal scholarship.<sup>8</sup> It raises questions on several levels. Structurally, the nature of the provision sets it apart from rights and liberties and from organizational elements of constitutional design because state objectives are considered constitutional provisions of a separate category.<sup>9</sup> Scholars have debated the normative value of including state objectives in constitutions, particularly in connection with the constitution-writing efforts of the 1990s.<sup>10</sup> Assessing the latest state objective added to the German Basic Law provides a case study in the role of such constitutional provisions more generally.

The aim of this Article is to examine the future effects of the animal protection clause in relation to all three branches of German government. This Article argues that seismic shifts in constitutional adjudication are not expected. However, since the clause involves the protection of animal interests rather than human interests, it differs from all other state objectives.<sup>11</sup> The state objective is directed at all branches of government, and this Article examines how each branch must ensure within its sphere of competence the realization of the stated goal. On the larger issue of constitutional state objectives, this Article demonstrates that such provisions do have practical impact. The animal protection state objective at a minimum eliminates the practice of effectively circumventing the Animal Protection Act by construing the statute in light of the constitution.

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<sup>7</sup> Grundgesetz [GG] [Constitution] art. 20a (F.R.G.).

<sup>8</sup> See e.g. Cass R. Sunstein, *The Rights of Animals*, 70 U. Chi. L. Rev. 387, 388 (2003) (noting that Germany was “the first European nation to vote to guarantee animal rights in its constitution”); Lauren Magnotti, *Pawing Open the Courtroom Door: Why Animals’ Interests Should Matter when Courts Grant Standing*, 80 St. John’s L. Rev. 455, 490 (2006) (citing Germany as one example of a European country that amended its constitution to provide greater protection to animals); Kara Gerwin, *There’s (Almost) No Place Like Home: Kansas Remains in the Minority on Protecting Animals from Cruelty*, 15 Kan. J.L. & Pub. Policy 125, 137–38 (2005) (citing Germany’s constitutional amendment as an example of how the United States is “falling behind the rest of the world” in stopping animal abuse); Kate M. Natrass, “. . . und die Tiere”: *Constitutional Protection for Germany’s Animals*, 10 Animal L. 283, 297 (2004) (describing the initial failure and subsequent addition of the words “and the animals” to Article 20a).

<sup>9</sup> Rico Faller, *Staatsziel, Tierschutz: Vom parlamentarischen Gesetzgebungsstaat zum verfassungsgerichtlichen Jurisdiktionsstaat?* 134 (Duncker & Humblot 2005). For discussion on the nature of state objectives, see *infra* Part III.

<sup>10</sup> *Infra* nn. 70–74 and accompanying text.

<sup>11</sup> One might argue, of course, that the interest in animal protection is a primarily human interest. However, the legally significant difference between the other state objectives, including environmental protection, and the animal protection state objective is that non-implementation of the others can result in individualized harm to human beings, whereas non-implementation of the animal protection state amendment cannot. See *infra* Part IV for a detailed discussion.

Part II outlines the conflict between the Animal Protection Act (*Tierschutzgesetz*) and fundamental rights under the Basic Law. Prior to the amendment, fundamental rights not subject to a textual limitation clause—a provision in the text of a constitutional right that limits that right by allowing for regulation or prohibition—generally prevailed over animal protection. After the inclusion of animal protection in the constitution, constitutionally protected human interests must be reconciled with animal interests in the event of a conflict. Part III addresses the theoretical considerations for including state objectives into the Basic Law before turning to the specific structural implications of state objectives. As this Article will show, state objectives place obligations on all three branches of government. Thus, Part IV first turns to the legislative branch, asking whether the state objective demands that a standing provision be created for animal protection groups. Part V investigates the effects of the amendment on the judicial and executive branch. The focus will be on three fundamental rights that are not subject to textual limitation clauses and that are most likely to come into conflict with animal protection: freedom of religion;<sup>12</sup> freedom of teaching, science, and research;<sup>13</sup> and freedom of artistic expression.<sup>14</sup> To date, the German Federal Constitutional Court has not offered its interpretation of the animal protection provision. However, some clues as to the scope of the clause might be found in a recent decision of the Federal Administrative Court and lower court decisions, as well as by evaluating assessments offered in German legal literature.<sup>15</sup> Moreover, the original version of Article 20a containing only the environmental protection state objective serves as a reference point throughout this Article. In assessing the future effects of the animal protection clause, this Article examines whether decisions concerning the environmental protection clause can be translated to apply to animal protection and, if applicable, whether this translation provides any guidance.

## II. CREATION OF THE STATE OBJECTIVE

Animal welfare and protection have historically been issues of high public interest, and they continue to be firmly rooted in contemporary public discourse.<sup>16</sup> The Federal Constitutional Court acknowledged in its 2002 ritual slaughter (*Schächten*) decision that the German public places special importance on animal protection.<sup>17</sup> Fur-

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<sup>12</sup> Grundgesetz [GG] [Constitution] art. 4 (F.R.G.).

<sup>13</sup> Grundgesetz [GG] [Constitution] art. 5(3) (F.R.G.).

<sup>14</sup> *Id.*

<sup>15</sup> For discussion, see *infra* Parts II and III.

<sup>16</sup> See Natrass, *supra* n. 8, at 285–88 (providing a historical perspective on animal welfare in Germany).

<sup>17</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 15, 2002, 104 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 337, 347 (F.R.G.) [hereinafter Ritual Slaughter Decision]; see also Claudia E. Haupt, *Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter*, 39 Geo.

thermore, some scholars assert that Germany has the strongest animal-protecting legislation of all Western societies.<sup>18</sup> This Part first illustrates the legal situation prior to the constitutional amendment, focusing on the potential conflict between the Animal Protection Act and fundamental rights, and then turns to the amendment process that resulted in the addition of the animal protection clause to Article 20a.

A. *The Conflict between the Animal Protection Act and Fundamental Rights*

The Animal Protection Act of 1972 is the key statute governing animal protection in Germany.<sup>19</sup> Section 1 of the Animal Protection Act states the purpose of the law: “The aim of this Act is to protect the lives and well-being of animals, based on the responsibility of human beings for their fellow creatures. No one may cause an animal pain, suffering or harm without good reason.”<sup>20</sup> The provision requires animal friendly interpretation when multiple interpretations of the law itself or any regulation based upon it are possible.<sup>21</sup> It also serves as a guideline in administrative exercises of discretion.<sup>22</sup>

There was a clear discrepancy between the fundamental rights protected in the Basic Law, especially those without a textual limitation clause, and the interest in animal protection.<sup>23</sup> While animal protection was an important public interest, it was not a constitutional value prior to the amendment.<sup>24</sup> The sub-constitutional provisions of the Animal Protection Act imposed significant limits upon constitu-

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Wash. Intl. L. Rev. 839, 856–72 (2007) (discussing the German ritual slaughter decision).

<sup>18</sup> Christina G. Skibinsky, *Changes in Store for the Livestock Industry? Canada’s Recurring Proposed Animal Cruelty Amendments*, 68 Sask. L. Rev. 173, 200 (2005).

<sup>19</sup> Tierschutzgesetz [Animal Protection Act], July 24, 1972, BGBl. I at 1277, last amended May 18, 2006, BGBl. I at 1206, 1313 (F.R.G.); see generally Jana Glock, *Das deutsche Tierschutzrecht und das Staatsziel “Tierschutz” im Lichte des Völkerrechts und des Europarechts* 24–25 (Nomos Verlagsgesellschaft 2004); Almuth Hirt, Christoph Maisack & Johanna Moritz, *Tierschutzgesetz Kommentar* 3–4 (2d ed., Verlag Franz Vahlen München 2007) (discussing the 1972 Animal Protection Act).

<sup>20</sup> English translation of Animal Protection Act of 1998, available at MICHIGAN STATE UNIVERSITY COLLEGE OF LAW: ANIMAL LEGAL & HISTORICAL WEB CENTER, <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (last accessed Feb. 11, 2010) (translating the 1998 amended version) [hereinafter 1998 English Translation].

<sup>21</sup> Hirt et al., *supra* n. 19, at 74.

<sup>22</sup> *Id.*

<sup>23</sup> See e.g. Eva Inés Obergefell, *Ethischer Tierschutz mit Verfassungsrang: Zur Ergänzung des Art. 20a GG um drei magische Worte*, 55 Neue Juristische Wochenschrift [NJW] 2296, 2297 (2002) (describing the major dilemma resolved by insertion of animal protection in the Basic Law).

<sup>24</sup> Katharina Pabel, *Der Grundrechtsschutz für das Schächten*, 29 Europäische Grundrechtezeitschrift [EuGRZ] 220, 231 (2002); Kyrill-A. Schwarz, *Das Spannungsverhältnis von Religionsfreiheit und Tierschutz am Beispiel des “rituellen Schächten”* 28–30 (Nomos Verlagsgesellschaft 2003); Hans-Georg Kluge, *Staatsziel Tierschutz: Am Scheideweg zwischen verfassungspolitischer Deklamation und verfassungsrechtlichem Handlungsauftrag*, 37 Zeitschrift für Rechtspolitik [ZRP] 10, 11 (2004); Johannes Cas-

tionally protected fundamental rights, such as freedom of religion,<sup>25</sup> freedom of science and research,<sup>26</sup> and freedom of artistic expression.<sup>27</sup> The original 1972 version of the Animal Protection Act, for instance, generally allowed animal experimentation but placed it under a notification requirement or, if it involved vertebrates, a permission requirement; permission was only to be granted if the experiment was necessary.<sup>28</sup> Animal slaughter was also introduced in the regulatory framework.<sup>29</sup>

The first change to the Animal Protection Act in August 1986<sup>30</sup> introduced further provisions regarding animal experimentation, such as requirements for appointing animal protection officers and commissions.<sup>31</sup> None of the aforementioned fundamental rights, however, is subject to a textual limitation clause; thus, they may only be limited by countervailing constitutional interests.<sup>32</sup> It is therefore logically impossible to limit them in sub-constitutional legislation that is not based on a limitation clause or constitutional interest. Because the Animal Protection Act's protections were sub-constitutional, animal protection could not constitutionally limit freedom of religion; teaching, science, and research; or artistic expression.<sup>33</sup>

Consequently, there was some debate as to whether, prior to the inclusion of animal protection in Article 20a, all provisions of the Animal Protection Act that limited constitutional rights not subject to a limitation clause were unconstitutional.<sup>34</sup> While some scholars answered this question in the affirmative, the courts appeared to avoid the issue.<sup>35</sup> A clear answer could only be arrived at in two ways: either by declaring that all animal protection provisions limiting constitutional rights not subject to a limitation clause are unconstitutional and

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par, *Tierschutz in die Verfassung?*, 31 *Zeitschrift für Rechtspolitik* [ZRP] 441, 442 (1998) [hereinafter Caspar, *Tierschutz*].

<sup>25</sup> *Tierschutzgesetz* [Animal Protection Act], May 25, 1998, BGBl. I at 1107 § 4a, last amended May 18, 2006, BGBl. I at 1206, 1313 (F.R.G.).

<sup>26</sup> *Id.* at § 9.

<sup>27</sup> *Id.* at § 3(6).

<sup>28</sup> Glock, *supra* n. 19, at 24.

<sup>29</sup> *Id.*

<sup>30</sup> *Tierschutzgesetz* [Animal Protection Act], Aug. 18, 1986, BGBl. I at 1319, last amended May 18, 2006, BGBl. I at 1206, 1313 (F.R.G.).

<sup>31</sup> Glock, *supra* n. 19, at 25; Hirt et al., *supra* n. 19, at 3–4.

<sup>32</sup> See e.g. Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] May 28, 1970, 28 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 243, 261 (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 27, 1990, 83 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 130, 139 (F.R.G.).

<sup>33</sup> Obergfell, *supra* n. 23, at 2296; Caspar, *supra* n. 24, at 441–42. This problem also arose in the context of supranational legislation. See Obergfell, *supra* n. 23, at 2297.

<sup>34</sup> Obergfell, *supra* n. 23, at 2297; see also Faller, *supra* n. 9, at 74–104 (discussing the conflicts arising in the areas of freedom of science and research, artistic freedom, and religious freedom prior to the adoption of the animal protection clause).

<sup>35</sup> Obergfell, *supra* n. 23, at 2297; Johannes Caspar & Martin Geissen, *Das neue Staatsziel "Tierschutz" in Art. 20a GG*, 21 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 913, 915 (2002); Kluge, *supra* n. 24, at 11; Faller, *supra* n. 9, at 103–04.

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thus void; or by amending the Basic Law to include animal protection as a constitutional value.<sup>36</sup> Unlike environmental protection legislation, which already had a constitutional basis prior to the inclusion of Article 20a, via the fundamental rights to life, bodily integrity, and property,<sup>37</sup> animal protection as a constitutional value depended on a separate provision.<sup>38</sup>

### B. The Amendment to Article 20a

After German unification in 1990, changes to the Basic Law were discussed, and a committee that also gathered input from the German public was established for this purpose.<sup>39</sup> The committee received 170,000 requests from citizens concerning animal protection and the preservation of fellow creatures.<sup>40</sup> This amounted to the second-highest number of requests on a single issue.<sup>41</sup> Although only a few changes were made beyond “structural changes necessary to reflect the actual mechanics of unification,”<sup>42</sup> one new addition was the original version of Article 20a.<sup>43</sup> The provision initially contained no reference to animals but focused solely on environmental protection. Notably, animals were protected under the original version as a matter of species protection. However, the clause did not provide for the protection of individual animals.<sup>44</sup> The later constitutional amendment, adding the words “and the animals” to Article 20a, was a response to the ritual slaughter decision of the Federal Constitutional Court.<sup>45</sup> Despite prior

<sup>36</sup> Obergfell, *supra* n. 23, at 2297; Caspar, *supra* n. 24, at 443–44; *see also generally* Karl-Peter Sommermann, *Staatsziele und Staatszielbestimmungen* 423–25 (Mohr Siebeck 1997) (discussing the conflict between state objectives and unlimited constitutional rights).

<sup>37</sup> Caspar, *supra* n. 24, at 444; Heinz-Joachim Peters, *Art. 20a GG—Die neue Staatszielbestimmung des Grundgesetzes*, 14 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 555, 556 (1995); Pabel, *supra* n. 24, at 231; Schwarz, *supra* n. 24; Kluge, *supra* n. 24, at 11; Caspar, *supra* n. 24, at 442.

<sup>38</sup> Caspar, *supra* n. 24, at 444–45.

<sup>39</sup> Peter E. Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 *Am. J. Comp. L.* 303, 313 (1999) [hereinafter Quint, *Constitutional Guarantees of Social Welfare*].

<sup>40</sup> Glock, *supra* n. 19, at 19; Tade Matthias Spranger, *Auswirkungen einer Staatszielbestimmung “Tierschutz” auf die Forschungs- und Wissenschaftsfreiheit*, 33 *Zeitschrift für Rechtspolitik* [ZRP] 285 (2000).

<sup>41</sup> Glock, *supra* n. 19, at 19.

<sup>42</sup> Peter E. Quint, *What Is a Twentieth-Century Constitution?*, 67 *Md. L. Rev.* 238, 244 (2007) [hereinafter Quint, *Twentieth-Century Constitution*]. *See also* Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, at 313 (pointing out that under the Unification Treaty few constitutional amendments were necessary).

<sup>43</sup> Quint, *Twentieth-Century Constitution*, *supra* n. 42, at 244; *see also* Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, at 316 (describing Article 20a as a “highly qualified environmental provision”).

<sup>44</sup> Hans D. Jarass & Bodo Pieroth, *Grundgesetz für die Bundesrepublik Deutschland* 513, Art. 20a no. 3 (9th ed., Verlag C. H. Beck 2007).

<sup>45</sup> *See* Faller, *supra* n. 9, at 23; Johannes Caspar & Michael W. Schröter, *Das Staatsziel Tierschutz in Art. 20a GG* 68 (Köllen 2003); Hirt et al., *supra* n. 19, at 57; Kluge, *supra* n. 24, at 11.

unsuccessful attempts to include animal protection in the Basic Law,<sup>46</sup> the political parties in the federal legislature (*Bundestag*) did not reach a consensus until after that decision, and public dissatisfaction with the outcome in that case may have been the driving political force.<sup>47</sup> In May 2002, the *Bundestag* voted in favor of the joint proposal of the Social Democrats (SPD) and the Green Party—who formed the government coalition at the time—as well as the opposition parties Christian Democrats (CDU/CSU) and Free Democrats (FDP).<sup>48</sup> The state chamber (*Bundesrat*) approved the amendment.<sup>49</sup>

The constitutional history yields some insight into the motivation for passing the amendment as well as its intended effect. The explanatory remarks—part of the joint bill of SPD, Green Party, CDU/CSU, and FDP—express the moral obligation of humankind to animals.<sup>50</sup> Due to their sentience and capacity to suffer, animals deserve respect and must be spared unnecessary suffering.<sup>51</sup> This duty is codified in the Animal Protection Act and encompasses three specific protections for animals: (1) protection from not being kept in a species-appropriate environment, (2) protection from avoidable suffering, and (3) protection from destruction of their habitat.<sup>52</sup> Anchoring animal protection in the constitution was intended to increase the effectiveness of the Animal Protection Act.<sup>53</sup> The explanatory note states that animal protection is of high importance, and decisions of several courts tended to respect changing sensitivity in this area when interpreting the constitution.<sup>54</sup> The judiciary, however, can only appropriately do this if the legislature explicitly includes animal protection into the framework of the Basic Law.<sup>55</sup> Doing so, according to the explanatory note, enhances legal certainty.<sup>56</sup> By adding the words “and the animals” to Article 20a, animal protection is given constitutional status, and the duty to protect is extended to the individual animal as well as to the species.<sup>57</sup>

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<sup>46</sup> See Natrass, *supra* n. 8, at 301 (describing the animal protection amendment as politically stagnant until 2002, when the Supreme Court ruled in favor of a Muslim butcher who had been denied a permit to perform ritual slaughter).

<sup>47</sup> See *id.*, at 301–02 (noting that the ruling in favor of the Muslim butcher “initiated a tide of public outcry”).

<sup>48</sup> *Id.* at 302.

<sup>49</sup> Hirt et al., *supra* n. 19, at 57; Obergfell, *supra* n. 23, at 2296; Caspar & Geissen, *supra* n. 35, at 913.

<sup>50</sup> BT-Drucksache 14/8860, Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Staatsziel Tierschutz) 3 (Apr. 23, 2002) (available at <http://dip21.bundestag.de/dip21/btd/14/088/1408860.pdf>) (last accessed Feb. 22, 2010); see also Hirt et al., *supra* n. 19, at 58–59 (discussing the explanatory note as well as the debates in the federal legislature).

<sup>51</sup> *Id.* at 1.

<sup>52</sup> *Id.* at 3.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> BT-Drucksache 14/8860, Entwurf eines Gesetzes zur Änderung des Grundgesetzes (Staatsziel Tierschutz) 3.

<sup>57</sup> *Id.*



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Introducing animal protection into the Basic Law followed a clear trend in legal literature, which had increasingly demanded the inclusion of animal protection as a state objective.<sup>58</sup> Further, the amendment to Article 20a put the Basic Law in line with the majority of state constitutions, as eleven of the sixteen German states (*Länder*) had already included provisions for animal protection in their respective state constitutions.<sup>59</sup> However, due to the supremacy of federal legislation over state legislation,<sup>60</sup> the state constitutions did not have any effect on the clash between fundamental rights protected in the Basic Law, especially those without limitation clauses, and the interest in animal protection. As related to that conflict, the provisions contained in the state constitutions, although perhaps politically important, had a primarily symbolic character.<sup>61</sup>

## III. THE NATURE OF STATE OBJECTIVES

Constitutional provisions designed as state objectives are a common feature of German state constitutions as well as the Basic Law. In addition to environmental protection and animal protection in Article 20a, the Basic Law contains the social state principle in Article 20(1),<sup>62</sup> the state objectives of European integration in Article 23(1),<sup>63</sup> the objectives relating to securing peace in Article 24(2)<sup>64</sup> and Article 26(1),<sup>65</sup> and the objective of ensuring economic balance in Article

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<sup>58</sup> Obergfell, *supra* n. 23, at 2296; Hirt et al., *supra* n. 19, at 58.

<sup>59</sup> Obergfell, *supra* n. 23, at 2296.

<sup>60</sup> Grundgesetz [GG] [Constitution] art. 31 (F.R.G.).

<sup>61</sup> Obergfell, *supra* n. 23, at 2297.

<sup>62</sup> "The Federal Republic of Germany is a democratic and social federal state." Grundgesetz [GG] [Constitution] art. 20(1) (F.R.G.). For English translation, see Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 510 (2d ed., Duke U. Press 1997).

<sup>63</sup> "To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate [Bundesrat], delegate sovereign powers. Article 79 II & III is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorized." Grundgesetz [GG] [Constitution] art. 23(1) (F.R.G.). For English translation, see Axel Tschentscher, *The Basic Law (Grundgesetz): The Constitution of the Federal Republic of Germany* 27 (Jurisprudentia Bern 2009) (available at <http://ssrn.com/abstract=1501131> (Nov. 12, 2009) (last accessed Feb. 18, 2010)).

<sup>64</sup> "With a view to maintaining peace the Federation may become a party to a system of collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world." Grundgesetz [GG] [Constitution] art. 24(2) (F.R.G.). For English translation, see Kommers, *supra* n. 62, at 511.

<sup>65</sup> "Any activities apt or intended to disturb peaceful international relations, especially preparations for military aggression, shall be unconstitutional. They shall be made a criminal offense." Grundgesetz [GG] [Constitution] art. 26(1) (F.R.G.). For English translation, see Kommers, *supra* n. 62, at 511.

109(2).<sup>66</sup> An additional state objective, contained in the pre-unification version of the Preamble, was to achieve German unity;<sup>67</sup> however, since the objective was realized, the Preamble was changed accordingly.<sup>68</sup>

State objectives are even more frequently found in state constitutions.<sup>69</sup> Following reunification, the question of including state objectives in state constitutions was raised, especially in connection with the drafting of new constitutions for the eastern German states.<sup>70</sup> Eventually, such provisions were included in all newly drafted constitutions, including, but not limited to, environmental protection, employment, housing, art, and sports.<sup>71</sup>

In the new East German constitutions, the distinction between social welfare provisions and actual “rights” in the usual sense has been emphasized.<sup>72</sup> In particular, “it is important to maintain some distance from the concept of ‘constitutional right’ or ‘basic right’ as those terms are used in the jurisprudence of the Supreme Court of the United States or the German Constitutional Court.”<sup>73</sup> For instance, social welfare provisions “are carefully qualified . . . by provisions that obligate the state to achieve such aspirations only to the extent of its ability to do so.”<sup>74</sup>

Initially, the following discussion turns to the theoretical considerations of including provisions designed as state objectives into a consti-

<sup>66</sup> “The Federation and the States [Länder] give due regard in their budget management to the requirements of overall economic equilibrium.” Grundgesetz [GG] [Constitution] art. 109(2) (F.R.G.). For English translation, see Tschentscher, *supra* n. 63, at 88.

<sup>67</sup> The relevant part of the old preamble read: “The entire German People remains obliged to fulfill the unity and freedom of Germany in free self-determination.” Tschentscher, *supra* n. 63, at 15 n. 11.

<sup>68</sup> The new preamble reads, in relevant part: “The Germans in the states [Länder] of . . . have achieved the unity and freedom of Germany in free self-determination.” Tschentscher, *supra* n. 63, at 15.

<sup>69</sup> Sommermann, *supra* n. 36, at 352.

<sup>70</sup> See e.g. Peter Christian Fischer, *Staatszielbestimmungen in den Verfassungen und Verfassungsentwürfen der neuen Bundesländer* (Verlag V. Florentz 1994); Peter Neumann, *Staatsziele in der Verfassung des Freistaats Thüringen*, 6 Landes- und Kommunalverwaltung [LKV] 392 (1996); Sven Hölscheidt & Irina v. Wiese, *Grundrechte und Staatsziele im Verfassungsentwurf für Mecklenburg-Vorpommern*, 2 LKV 393 (1992); Christian Pestalozza, *Die überarbeitete Verfassung von Berlin: Integrationsbeitrag und Fusionsmitgift*, 5 LKV 344 (1995); Sommermann, *supra* n. 36, at 352–55 (discussing state objectives in the new East German state constitutions).

<sup>71</sup> Ute Sacksofsky, *Landesverfassungen und Grundgesetz – am Beispiel der Verfassungen der neuen Bundesländer*, 12 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 235, 238 (1993).

<sup>72</sup> Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, at 312; see also Sommermann, *supra* n. 36, at 354–55 (stating that the distinction between fundamental rights and state objectives in the new state constitutions is less clear than would be desirable).

<sup>73</sup> Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, at 312; see also Sommermann, *supra* n. 36, at 351 (stating that while the Basic Law itself does not define the difference between fundamental rights and state objectives, a doctrinal distinction has been established in legal scholarship).

<sup>74</sup> Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, at 312.

tution such as the Basic Law. It will then examine the legal function of such provisions in relation to each branch of government and outline common criticism against state objectives. Understanding the nature of state objectives more generally is critical in assessing their function in any particular area. Moreover, as will be shown, while all state objectives contained in the Basic Law share certain design features, they also display significant differences that influence their individual applications.

### A. State Objectives in the Basic Law

Scholarly analysis of Basic Law provisions designed as state objectives dates back to the 1950s.<sup>75</sup> In the early 1980s, an expert commission (*Sachverständigenkommission Staatszielbestimmungen / Gesetzgebungsaufträge*), instituted by the Federal Minister of Justice and the Federal Minister of the Interior, was charged with investigating whether to add state objectives to the Basic Law.<sup>76</sup> Its final report, issued in 1983, recommended the addition of state objectives in the areas of environmental protection and culture.<sup>77</sup> While these recommendations were not initially implemented, and state objectives regarding culture have still not been implemented, the commission report generated wide scholarly and political debate.<sup>78</sup> Perhaps most importantly, the report established state objectives as a separate category of constitutional provisions contained in the Basic Law.<sup>79</sup> In particular, more recently, prominent discussions surrounded the inclusion of environmental protection and social welfare rights into the Basic Law after German reunification.<sup>80</sup>

<sup>75</sup> Sommermann, *supra* n. 36, at 347–49 (citing Hans-Peter Ipsen, *Über das Grundgesetz, Rede gehalten anlässlich des Beginns des neuen Amtsjahres des Rektors der Universität Hamburg* 14, 17 (Nov. 1949) (Hamburg 1950) as the earliest examination of what he called “state objectives” in the Basic Law).

<sup>76</sup> Hans H. Klein, *Staatsziele im Verfassungsgesetz – Empfiehlt es sich, ein Staatsziel Umweltschutz in das Grundgesetz aufzunehmen?*, 106 *Deutsches Verwaltungsblatt* [DVBl] 729, 731 (1991); Caspar & Schröter, *supra* n. 45, at 16; Glock, *supra* n. 19, at 35–36; Faller, *supra* n. 9, at 134.

<sup>77</sup> Klein, *supra* n. 76, at 731; *see also* Ekkehard Wienholtz, *Arbeit, Kultur und Umwelt als Gegenstände verfassungsrechtlicher Staatszielbestimmungen*, 109 *Archiv des öffentlichen Rechts* 532, 537–52 (J.C.B. Mohr 1984) (providing an in-depth discussion of the commission’s suggested additions).

<sup>78</sup> Klein, *supra* n. 76, at 731; *see also* Wienholtz, *supra* n. 77, at 532–35 (summarizing the political debate).

<sup>79</sup> Sommermann, *supra* n. 36, at 349.

<sup>80</sup> *Cf. supra* Part II(B); Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, *passim* (describing the evolution and treatment of social welfare issues in Germany’s legal framework); Klein, *supra* n. 76, at 731 (discussing debates surrounding environmental protection state objective). Notably, there is a close historical proximity to the larger discussion of including social welfare rights in the new Eastern European constitutions. *See e.g.* Cass R. Sunstein, *Something Old, Something New: Rights, Aspirations and State Action in Eastern European Constitutions*, 1 *E. Eur. Const. Rev.* 18, 18–20 (1992) [hereinafter Sunstein, *Something Old, Something New*] (describing social welfare issues as falling into the controversial “second generation” of understanding as

The key question in considering whether state objectives should be included in the Basic Law concerns the role and function of a constitution more generally. Certainly, a constitution need not contain state objectives at all; identifying, articulating, and implementing such objectives may fairly be left to the political process—namely, a democratically elected legislature.<sup>81</sup> If, however, the constitution is intended to “[formulate] a design for the political future,”<sup>82</sup> the inclusion of state objectives may be desirable. A constitution may serve as a fundamental model of justice that guides future legal developments and gives direction to the future advancement of society.<sup>83</sup> By setting forth certain normative guidelines, a framework for future political choices is established.<sup>84</sup> Thus, including state objectives that guide future developments gives constitutions a dynamic element.<sup>85</sup> Moreover, by articulating certain goals, state objectives “inspire the state to be active in the respective area.”<sup>86</sup>

Former Federal Constitutional Court judge Hans Klein offers two motives for including state objectives in the Basic Law. First, determining certain goals by virtue of the constitution removes them from political controversy, and their survival and continuing observance becomes independent of shifting parliamentary majorities.<sup>87</sup> Second, he identifies a pedagogical function of state objectives in that those with political power are bound to further the proclaimed objective and use the objective to focus their activities.<sup>88</sup> He also points out that when citizens’ key concerns are addressed, the constitution has the potential to achieve further integration and strengthen the legitimacy of the state.<sup>89</sup>

While some suggest that state objectives have been a component of constitutions ever since the adoption of the Virginia Bill of Rights of

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to what rights should be included in a constitution); Cass R. Sunstein, *An Argument Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe*, 2 E. Eur. Const. Rev. 35 (1993) [hereinafter Sunstein, *Argument Against Positive Rights*] (arguing that Eastern European countries should use their constitutions to produce “firm liberal rights” and “the preconditions for some kind of market economy”).

<sup>81</sup> Philip Kunig, *The Principle of Social Justice*, in *The Constitution of the Federal Republic of Germany* 178, 194–95 (Ulrich Karpen ed., Nomos Verlagsgesellschaft 1988).

<sup>82</sup> *Id.*; see also Klein, *supra* n. 76, at 735 (enumerating constitutional functions such as providing a framework for political structures to take shape); Sommermann, *supra* n. 36, at 1 (asserting that modern constitutions are written to act as guides for society’s growth).

<sup>83</sup> Dieter Sterzel, *Staatsziele und soziale Grundrechte*, 26 *Zeitschrift für Rechtspolitik* [ZRP] 13, 13–14 (1993); Sommermann, *supra* n. 36, at 1.

<sup>84</sup> Sterzel, *supra* n. 83, at 14; Klein, *supra* n. 76, at 735.

<sup>85</sup> Sommermann, *supra* n. 36, at 374–76.

<sup>86</sup> Kunig, *supra* n. 81, at 195; see also Hans Peter Bull, *Staatszwecke im Verfassungsstaat*, 8 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 801, 806 (1989).

<sup>87</sup> Klein, *supra* n. 76, at 733. See also Bull, *supra* n. 86, at 805–06 (making the case that goals implemented as state objectives are politically easier to accomplish).

<sup>88</sup> Klein, *supra* n. 76, at 733.

<sup>89</sup> *Id.* at 733–34.

1776,<sup>90</sup> others find them to be primarily a feature of twentieth century constitutions.<sup>91</sup> In terms of categorizing different generations of constitutional rights, negative rights—those rights traditionally prohibiting government invasions on person or property, as found in the U.S. Bill of Rights—are considered “first generation” constitutional rights, while social welfare rights are deemed “second generation” rights.<sup>92</sup> Finally, group and collective rights are categorized as “third generation” rights. “Some of these ‘third generation’ rights discussed by scholars include such diffuse and aspirational guarantees as a right to ‘international peace and security.’ Other proposals are more focused, directed toward guaranteeing to minority groups the preservation of their language and culture.”<sup>93</sup> Among the “third generation” rights discussed are environmental protection rights contained in several twentieth-century constitutions.<sup>94</sup> Most countries have moved away from the more minimalist constitutional model which relies exclusively on protecting individual freedom through negative rights.<sup>95</sup>

Notably, with respect to Germany, “as far back as 1919, the Weimar Constitution contained a provision declaring that ‘monuments of nature’ as well as ‘the countryside’ [die Landschaft] enjoy the protection and cultivation of the state.”<sup>96</sup> The Weimar Constitution contained a large number of unenforceable policy goals; consequently, the Basic Law consciously rejects such provisions.<sup>97</sup> Rather, the Basic Law’s claim is to offer normatively binding determinations.<sup>98</sup> This raises the question of the legal functions of state objectives.

### B. Legal Function of State Objectives

The Basic Law contains no definition of the term “state objective,” but a definition generally accepted and referenced in constitutional scholarship was originally established by the 1983 commission report previously mentioned.<sup>99</sup> Most importantly, state objectives do not pro-

<sup>90</sup> Schwarz, *supra* n. 24, at 42; Sterzel, *supra* n. 83, at 14. Both Schwarz and Sterzel specifically quote the passage “pursuing and obtaining happiness and safety . . .”

<sup>91</sup> Quint, *Twentieth-Century Constitution*, *supra* n. 42, at 240 (“But one thing that the eighteenth-century Constitution of the United States did not do was impose significant obligations on the government: the Constitution does not instruct the government that it must act in a certain manner and that it has no discretion to decline to do so.”).

<sup>92</sup> *Id.* at 243.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 243–44 (citing environmental protection clauses in the constitutions of Germany, South Africa, and India).

<sup>95</sup> Sommermann, *supra* n. 36, at 1.

<sup>96</sup> Quint, *Twentieth-Century Constitution*, *supra* n. 42, at 244 (citing Article 150(1) of the Weimar Constitution); Klein, *supra* n. 76, at 731.

<sup>97</sup> Bull, *supra* n. 86, at 804; Sterzel, *supra* n. 83, at 14; Klein, *supra* n. 76, at 736.

<sup>98</sup> Sterzel, *supra* n. 83, at 14.

<sup>99</sup> Under the Commission Report’s definition, state objectives are constitutional norms with legally binding force. They place a demand on state action to continuously observe or fulfill certain obligations of goals whose substantive content they delineate. (“*Verfassungsnormen mit rechtlich bindender Wirkung, die der Staatstätigkeit die fortdauernde Beachtung oder Erfüllung bestimmter Aufgaben – sachlich umschriebener*”

vide individual rights.<sup>100</sup> Thus, no actionable rights for citizens or animal protection organizations arise from the animal protection state objective.<sup>101</sup> State objectives do, however, have an obligatory character in the sense that they command adherence and realization of certain goals.<sup>102</sup>

State objectives are addressed to all three branches of government, and all three are bound by them.<sup>103</sup> They outline a specific program for activities of the state and serve as a guideline for interpreting statutes and administrative rules. Thus, these provisions are arguably more than mere political declarations of policy.<sup>104</sup> However, there remains a lack of clarity, especially with respect to the degree to which the state is actually bound by the state objective.<sup>105</sup> In order to understand the legal function of state objectives, one must bear in mind the distinction between rules and principles: While rules contain a conditional structure, that is they conditionally tie a legal consequence to a set of clear elements in an “if-then” fashion, principles are open-ended in setting forth goals or purposes to be realized by weighing processes.<sup>106</sup> In this sense, then, Article 20a is designed as a legal principle.<sup>107</sup>

### 1. Legislative Branch

State objectives demand that the legislative branch act in a manner that conforms to the objective by creating or improving the applica-

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*Ziele – vorschreiben.*”) They are a guideline or directive for state action, including the interpretation of statutes and other law (“*Richtlinie oder Direktive für das staatliche Handeln, auch für die Auslegung von Gesetzen und sonstigen Rechtsvorschriften.*”). Glock, *supra* n. 19, at 35–36 (quoting Commission report, p. 7). See also Caspar & Schröter, *supra* n. 45, at 16 (discussing what is clear as well as uncertain under the definition); Faller, *supra* n. 9, at 134 (describing the implications of a law’s embodiment as state objective).

<sup>100</sup> See e.g. Federal Constitutional Court [Bundesverfassungsgericht], May 10, 2001, 20 Neue Zeitschrift für Verwaltungsrecht [NVwZ] 1148, 1149 (2001) (holding that various constitutional state objectives do not confer a private cause of action). See also Hirt et al., *supra* n. 19, at 59; Faller, *supra* n. 9, at 135 (describing state objectives as creating obligations, but not rights); Obergfell, *supra* n. 23, at 2297; Caspar & Geissen, *supra* n. 35, at 914 (discussing the animal protection clause in Article 20a).

<sup>101</sup> Clemens Christoph Hillmer, *Auswirkungen einer Staatszielbestimmung “Tierschutz” im Grundgesetz, insbesondere auf die Forschungsfreiheit* 141 (Peter Lang 2000). For a discussion on standing, see *infra* Part IV.

<sup>102</sup> Kunig, *supra* n. 81, at 195; Obergfell, *supra* n. 23, at 2297; Caspar & Geissen, *supra* n. 35, at 914; Hillmer, *supra* n. 101, at 140; Faller, *supra* n. 9, at 134.

<sup>103</sup> Kunig, *supra* n. 81, at 195; Sommermann, *supra* n. 36, at 383; Hillmer, *supra* n. 101, at 141; Hirt et al., *supra* n. 19, at 61; Caspar & Schröter, *supra* n. 45, at 19; Faller, *supra* n. 9, at 151.

<sup>104</sup> Hirt et al., *supra* n. 19, at 59; Hillmer, *supra* n. 101, at 140–41.

<sup>105</sup> Caspar & Schröter, *supra* n. 45, at 16–17; Kunig *supra* n. 81, at 195 (stating that “[t]he intensity by which such goals are to be deemed as obligatory criteria steering the choice of alternatives, is not easy to define.”).

<sup>106</sup> Caspar & Schröter, *supra* n. 45, at 17; Sommermann, *supra* n. 36, at 359–62.

<sup>107</sup> Jarass & Pieroth, *supra* n. 44, at 512 at art. 20a no. 1.

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ble laws.<sup>108</sup> Thus, state objectives outline the content of future state activity. However, the decision of whether to take action, when to act, and what means to employ to implement the goal set forth in the state objective remains at the discretion of the legislature.<sup>109</sup> The question of “whether to act,” however, must be correctly understood because the legislature does not decide if the state objective is binding. Rather, “whether to act” means that the legislature can decide if, given the current status of legislation, furtherance of the state objective is already sufficiently ensured.<sup>110</sup> Moreover, the legislature may not, by its inaction, entirely obstruct pursuit of the goal contained in the state objective.<sup>111</sup> The textual preciseness of the respective state objective, moreover, determines the degree of discretion left to the legislature. The more broadly a goal is stated, the more latitude there is for the legislature to specify the goal.<sup>112</sup> This vagueness, in fact, is a defining feature of state objectives.<sup>113</sup> As Professor Philip Kunig explains, “[t]he programmatic strength of a ‘Staatszielbestimmung’ is inversely proportional to the degree of its vagueness.”<sup>114</sup> Indeed, the state objectives of the Basic Law greatly vary in their textual precision as to the goal stated and the means sought to implement it.

The state objective of German unity, for example, is perhaps the best example of a state objective describing a clear final status: the unity of West Germany and East Germany. This precision allows an unambiguous determination as to realization of the goal.<sup>115</sup> In this case, the goal was achieved on a specific date (October 3, 1990) by performance of a specific act (reunification). The Preamble did not, however, “define the measures or the alternative ways, which may lead to the goal.”<sup>116</sup> An example of a relatively precise textual command on the legislature with respect to specific actions is contained in Article 26(1), which states that preparations for military aggression are unconstitutional and must be made punishable by criminal law.<sup>117</sup> Thus, the legislature is obliged by the explicit command of the Basic Law itself to pass a criminal statute penalizing preparations for military aggression.<sup>118</sup> Passing such a criminal statute, however, is not in itself

<sup>108</sup> Hillmer, *supra* n. 101, at 141; Hirt et al., *supra* n.19, at 61; Caspar & Schröter, *supra* n. 45, at 19; Faller, *supra* n. 9, at 160.

<sup>109</sup> Caspar & Schröter, *supra* n. 45, at 19; Hillmer, *supra* n. 101, at 141. See *infra* Part IV for discussion on a possible obligation on the legislature to create a standing provision for animal protection organizations.

<sup>110</sup> Sommermann, *supra* n. 36, at 379–80.

<sup>111</sup> Caspar & Schröter, *supra* n. 45, at 19; Sommermann, *supra* n. 36, at 384.

<sup>112</sup> Caspar & Schröter, *supra* n. 45, at 19; Faller, *supra* n. 9, at 160; Kunig, *supra* n. 81, at 195; Sommermann, *supra* n. 36, at 383–84, 439–42.

<sup>113</sup> Hillmer, *supra* n. 101, at 141.

<sup>114</sup> Kunig, *supra* n. 81, at 196.

<sup>115</sup> Klein, *supra* n. 76, at 734; Sommermann, *supra* n. 36, at 374.

<sup>116</sup> Kunig, *supra* n. 81, at 195–96.

<sup>117</sup> Grundgesetz [GG] [Constitution] art. 26(1).

<sup>118</sup> See Strafgesetzbuch [StGB][Criminal Code] Nov. 13, 1988, BGBl. I at 3322, last amended by law, June 29, 2009, BGBl. I at 1658, §§ 80-80a (imposing punishment of life

considered sufficient to fulfill the requirements of the state objective to secure peace.<sup>119</sup>

In most instances, the objective and its method of implementation are not as precise; the state is then charged with continuous efforts to approximate the goal as best as possible over time.<sup>120</sup> Article 23(1), containing the state objective of European integration, sets a framework as to how the goal may be achieved in a constitutionally permissible manner.<sup>121</sup> This framework is then applied to the continuing process of European integration as most recently done by the Federal Constitutional Court with respect to the Lisbon Treaty.<sup>122</sup> In its decision, the Court stated:

The structure-securing clause of Article 23.1 sentence 1 of the Basic Law restricts the objective of participation laid down in the determination of the objective of the state to a European Union which corresponds, in its elementary structures, to the core principles that are protected by Article 79.3 of the Basic Law also from amendment by the constitution-amending legislature. The elaboration of the European Union with a view to sovereign powers, institutions and decision-making procedures must correspond to democratic principles (Article 23.1 sentence 1 of the Basic Law).<sup>123</sup>

The social state principle of Article 20 is particularly vague; nonetheless, it has functioned as an important guideline.<sup>124</sup> Initially, the Federal Constitutional Court suggested that the social state principle might be important in interpreting the Basic Law, but the Court proceeded to give more substantive importance to the state objective.<sup>125</sup> In fact, the objective is the constitutional anchor for social welfare legislation such as the comprehensive social insurance schemes codified in the ten-volume Social Insurance Code (*Sozialgesetzbuch, SGB*).

With respect to the legislative process—as well as administrative rulemaking—several key requirements of the animal protection clause in Article 20a can be identified.<sup>126</sup> Since the state objective's goal is to improve animal protection, the legislature may not, consistent with the constitution, lower the existing standard; the same was true for

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imprisonment or imprisonment not less than ten years for preparing military aggression and imposing punishment of imprisonment from three months to five years for public incitement to prepare for military aggression).

<sup>119</sup> Jarass & Pieroth, *supra* n. 44, at art. 26 no. 7.

<sup>120</sup> Klein, *supra* n. 76, at 734; Sommermann, *supra* n. 36, at 374.

<sup>121</sup> Grundgesetz [GG] [Constitution] 23(1).

<sup>122</sup> Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] June 30, 2009, (123) Entscheidungen des Bundesverfassungsgerichts [BVerfGE] (267) (F.R.G.) (consolidated for joint adjudication); English translation available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html) (last accessed Feb. 11, 2010).

<sup>123</sup> *Id.* at 363–64.

<sup>124</sup> See e.g. Kunig, *supra* n. 81, *passim*; Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, *passim* (discussing the social state principle).

<sup>125</sup> Sommermann, *supra* n. 36, at 348–49.

<sup>126</sup> Hirt et al., *supra* n. 19, at 62; Caspar & Geissen, *supra* n. 35, at 914.



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the environmental protection part of Article 20a.<sup>127</sup> Legislation must be adapted according to advancing scientific insights, for example, by introducing terms of review into the legislation to ensure its flexibility.<sup>128</sup> Further, there must be impact studies on the effect of legislation on animals, and animal-friendly alternatives must be chosen if a negative impact is expected.<sup>129</sup> Arguably, the state objective also requires proactive legislation for situations in which harm to animals can reasonably be expected.<sup>130</sup> Part IV, *infra*, examines in further detail whether the introduction of the animal protection state objective obliges the legislature to create a standing provision for animal protection organizations.

## 2. *Executive Branch*

The executive and judicial branches must apply the state objective in the interpretation of the law and the weighing of interests.<sup>131</sup> The administrative agencies play a key role in specifying state objectives.<sup>132</sup> Within the framework of their competences, they must further specify the goal set forth in the state objective by implementing corresponding administrative rules and regulations.<sup>133</sup> In interpreting the law, particularly within proportionality analyses, the state objectives must be taken into account. The same applies to the judicial branch in the development of the law by judicial interpretation.<sup>134</sup>

## 3. *Judicial Branch*

The Federal Constitutional Court will measure state action against state objectives, but since the political actors have wide latitude in determining the methods of best implementing the stated goals, the Court will not intervene unless state action clearly contravenes a state objective.<sup>135</sup> This approach has been praised as judicial self-restraint on the part of the Court.<sup>136</sup>

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<sup>127</sup> Hirt et al., *supra* n. 19, at 62.

<sup>128</sup> *Id.* at 63.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 64.

<sup>131</sup> *Id.* at 61; Caspar & Schröter, *supra* n. 45, at 20; Sommermann, *supra* n. 36, at 385–86.

<sup>132</sup> Under Articles 83 and 84(1) of the Basic Law, the states (*Länder*) implement the Animal Protection Act as their own matter. Thus, the acting administrative agencies pursuant to section 15(1)1 of the Animal Protection Act are those of the individual states. Grundgesetz [GG] [Constitution] art. 83, 84(1) (F.R.G.); Tierschutzgesetz [Animal Protection Act], July 24, 1972, BGBl. I at 1277, last amended May 25, 1998, BGBl. I at 1105 § 15(1)1 (F.R.G.).

<sup>133</sup> Caspar & Schröter, *supra* n. 45, at 20; Hirt et al., *supra* n. 19, at 67.

<sup>134</sup> Caspar & Schröter, *supra* n. 45, at 20; Hirt et al., *supra* n. 19, at 67; Sommermann, *supra* n. 36, at 386.

<sup>135</sup> Sterzel, *supra* n. 83, at 15 (citing Federal Constitutional Court [Bundesverfassungsgericht][BVerfG] 26 Neue Juristische Wochenschrift [NJW] 1539 (1973)).

<sup>136</sup> *Id.*

State objectives and other constitutional provisions—including the fundamental rights—are of the same constitutional rank, and in case of conflict between state objectives and fundamental rights, neither take precedence.<sup>137</sup> Rather, conflicts between constitutional provisions must be resolved by applying the proportionality principle to determine which provision prevails in each individual case. In applying this principle, each provision must be implemented to its maximum possible extent while limited by the conflicting provision.<sup>138</sup> The introduction of animal protection into the Basic Law, therefore, demands improving the role, but does not demand the primacy, of animal protection in the legal system.<sup>139</sup> The effect of the amendment in constitutional adjudication will be illustrated in Part V.

### C. Criticisms

Various concerns have been raised about state objectives in general and about the animal protection state objective in particular. State objectives may unduly raise hopes of the public, but these hopes would be inevitably shattered because state objectives do not confer rights upon individuals.<sup>140</sup> State objectives may thus lead to increased dissatisfaction with politics and diminished integrative force of the constitutions.<sup>141</sup> However, even if it were true that state objectives only have symbolic function, constitutions serve not only a legal purpose, but also a political purpose by declaring the values upon which a society is built.<sup>142</sup>

This argument was also articulated with respect to the animal protection state objective where the emotional element in many human-animal relationships must also be taken into account.<sup>143</sup> Citizens would expect change that likely would not occur, and the discrepancy between the constitutional provision and reality would result in an overall loss of the legal authority of the constitution.<sup>144</sup> Another concern was the potential limiting effect on legislatures, arguably confined to implementing the policy goals set forth in the state objectives of the respective constitution.<sup>145</sup> This criticism, however, fails to recognize that legislative activity is not limited to implementing state objectives, and legislatures can choose to implement goals not anchored in

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<sup>137</sup> Hirt et al., *supra* n. 19, at 60; Caspar & Geissen, *supra* n. 35, at 915.

<sup>138</sup> Hirt et al., *supra* n. 19, at 60.

<sup>139</sup> *Id.*; Faller, *supra* n. 9, at 114.

<sup>140</sup> Kluge, *supra* n. 24, at 10; Hillmer, *supra* n. 101, at 131; Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, at 315.

<sup>141</sup> Klein, *supra* n. 76, at 733; Sacksofsky, *supra* n. 71, at 240.

<sup>142</sup> Sacksofsky, *supra* n. 71, at 240; Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, at 314.

<sup>143</sup> Hillmer, *supra* n. 101, at 131–32.

<sup>144</sup> *Id.*; Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 Harv. Env'tl. L. Rev. 1, 29 (1992).

<sup>145</sup> Kluge, *supra* n. 24, at 10–11; Sterzel, *supra* n. 83, at 15.

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such provisions.<sup>146</sup> Moreover, the inclusion of state objectives into the constitution may enable the courts to decide the substantive content of the state objectives. Thus, judges would ultimately assume the role of legislators.<sup>147</sup> With respect to the East German state constitutions, these fears were deemed unfounded. In fact, the courts have earned scholarly praise for their restrictive approach to interpreting state objectives; by refraining, for the most part, from inquiries into the legislative content and instead focusing primarily on a rational basis inquiry into the manner of implementing state legislation under the state objectives.<sup>148</sup> Similarly, the Federal Constitutional Court will only become active if a measure of the legislative branch obviously contravenes a state objective.<sup>149</sup>

## IV. EFFECTS ON LEGISLATIVE ACTIVITY

In assessing the effects of the animal protection clause on the legislative branch, a key question is whether it creates an obligation for the legislature to pass a standing provision for animal protection groups. Standing for animal protection organizations has been the central and overarching concern in animal protection law in Germany since the introduction of the animal protection state objective.<sup>150</sup> As a general rule, German administrative procedure bases standing on the assertion of violation of a plaintiff's individual right.<sup>151</sup> By instituting a so-called *Verbandsklagerecht* (interest group standing), certain recognized animal protection organizations would be allowed to sue even if they did not suffer a violation of their own rights.<sup>152</sup> Absent such a

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<sup>146</sup> Faller, *supra* n. 9, at 131–33.

<sup>147</sup> *Id.* at 172–74; Klein, *supra* n. 76, at 734–38; Caspar & Schröter, *supra* n. 45, at 19 (mentioning the possibility of direct intervention of the Federal Constitutional Court in the legislative process as one of the criticisms articulated); Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, at 315 (pointing out one critic's assessment that "the balance of power would shift dangerously from the legislature to the courts").

<sup>148</sup> Kluge, *supra* n. 24, at 10–11. See also Quint, *Constitutional Guarantees of Social Welfare*, *supra* n. 39, at 316 ("Because [the state constitutional courts] are the authoritative interpreters of the state constitutions, the manner in which these courts will approach the provisions of the eastern state constitutions will be crucial in determining their ultimate meaning. An activist approach to the provisions of the state constitutions . . . could yield results that would be quite different from conclusions reflecting a more modest method of interpretation.").

<sup>149</sup> Sterzel, *supra* n. 83, at 15 (citing Federal Constitutional Court [Bundesverfassungsgericht][BVerfG] 26 Neue Juristische Wochenschrift [NJW] 1539 (1973)).

<sup>150</sup> Johannes Caspar, *Verbandsklage im Tierschutzrecht durch Landesgesetz?* 61 Die öffentliche Verwaltung [DÖV] 145 (2008) [hereinafter Caspar, *Verbandsklage*].

<sup>151</sup> Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Procedure] Jan. 1, 1960, Bundesgesetzblatt, Teil 1 [BGBl. I] 686, last amended by Gesetz, Aug. 21, 2009, [BGBl. I] 2870 § 42(2) (F.R.G.).

<sup>152</sup> Oberfell, *supra* n. 23, at 2298; Magnotti, *supra* n. 8, at 492. The *Verbandsklagerecht* already exists in environmental law and others such as Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Protection Act] March 25, 2002, BGBl. I 1193, last amended by Gesetz, Dec. 22, 2008, BGBl. at 2986 § 61 (F.R.G.) (containing statutory inclusion of standing); Gesetz gegen den unlauteren Wettbewerb [UWG] [Unfair Com-

procedural instrument, no lawsuits can be brought by private individuals or groups against administrative acts violating animal protection legislation or failure of administrative agencies to act in order to implement animal protection legislation.<sup>153</sup> The currently available procedural alternative, abstract review (*abstrakte Normenkontrolle*),<sup>154</sup> is insufficient because it provides only very limited standing.<sup>155</sup>

A. *Interest Group Standing in Environmental and Nature Protection Law*

Since Article 20a contains the environmental protection as well as the animal protection clause, the procedural considerations in the area of environmental law are especially instructive. Since the 1970s, the question of standing in environmental protection has been discussed.<sup>156</sup> As in animal protection law, there was a noticeable deficit in the application and execution of environmental protection legislation, partly because challenges could not be launched absent violations of individual rights.<sup>157</sup> Since challenges are only permissible against administrative actions or inactions that allegedly violate the rights of individuals, violations of provisions designed to protect common interests such as climate protection are rendered unreviewable.<sup>158</sup> The assortment of provisions interpreted as designed to protect individual interests, moreover, is rather small; provisions dealing with preventive

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petition Act] July 3, 2004, BGBl. I 1414, last amended by Gesetz, July 29, 2009, BGBl. I at 2413 § 8 (F.R.G.); Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen [UKlaG] [Law Authorizing Suits for Injunctive Relief in Consumer Protection and other Matters] Nov. 11, 2001, BGBl. I 3422, 4346, last amended by Gesetz, July 29, 2009, BGBl. I. at 2355 § 3 (F.R.G.).

<sup>153</sup> Hirt et al., *supra* n. 19, at 34; Caspar, *Verbandsklage*, *supra* n. 150, at 146.

<sup>154</sup> Grundgesetz [GG] [Constitution] art. 93(1) No. 2 (F.R.G.); Bundesverfassungsgerichtsgesetz, [BVerfGG] [Code of Procedure of the Federal Constitutional Court] Mar. 12, 1951, Bundesgesetzblatt, Teil 1 [BGBl. I] 1473, last amended by Gesetz, Dec. 1, 2009, [BGBl. I] 3822 §§ 13 No. 6, 76 et seq. (F.R.G.). Abstract review was successfully employed in the animal protection context in challenging the Regulation on the Protection of Laying Hens Held in Cages (*Hennenhaltungsverordnung*). Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 6, 1999, 101 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.).

<sup>155</sup> Abstract review allows for the direct (facial) challenge of a law to the Federal Constitutional Court, but abstract review standing is limited to the federal government, state governments, and one-third of the members of the federal legislature (*Bundestag*).

<sup>156</sup> Hans-Joachim Koch, *Die Verbandsklage im Umweltrecht*, 26 Neue Zeitschrift für Verwaltungsrecht [NVwZ] 369 (2007) (citing as the pathbreaking work Eckard Reh binder, Hans-Gerwin Burgbacher & Rolf Knieper, *Bürgerklage im Umweltrecht* (Schmidt 1972); Christian Calliess, *Die umweltrechtliche Verbandsklage nach der Novellierung des Bundesnaturschutzgesetzes—Tendenzen zu einer “Privatisierung des Gemeinwohls” im Verwaltungsrecht?* 56 Neue Juristische Wochenschrift [NJW] 97 (2003); Robert Seelig & Benjamin Gündling, *Die Verbandsklage im Umweltrecht—Aktuelle Entwicklungen und Zukunftsperspektiven im Hinblick auf die Novelle des Bundesnaturschutzgesetzes und supranationale und internationale rechtliche Vorgaben*, 21 Neue Zeitschrift für Verwaltungsrecht [NVwZ] 1033, 1035 (2002).

<sup>157</sup> Calliess, *supra* n. 156, at 97.

<sup>158</sup> Koch, *supra* n. 156, at 369.

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measures in environmental protection, for example, do not belong in that category.<sup>159</sup> Therefore, the introduction of the *Verbandsklagerecht* in environmental protection law was a suitable measure to ensure standing in cases challenging violations of provisions designed to protect common interests.<sup>160</sup>

When the Federal Nature Protection Act (*Bundesnaturschutzgesetz*) was first enacted in 1976, standing for nature protection organizations was not included.<sup>161</sup> Absent a federal law, the states remained free to introduce standing for environmental protection groups on the state level. The majority of the sixteen German states—with the exception of Bavaria, Baden-Württemberg, and Mecklenburg-Western Pomerania—implemented such provisions in varying forms.<sup>162</sup> In 2002, the Federal Nature Protection Act was amended to include standing for nature protection organizations on the federal level.<sup>163</sup>

Under the federal provision, a nature protection organization must meet several requirements to have standing. The organization must assert that an administrative act violates nature protection laws;<sup>164</sup> the violation must concern the organization in its statutory area of activity, upon which state recognition of the organization as a nature protection organization is based;<sup>165</sup> and the organization must be entitled to participate in administrative proceedings and either submit a statement in the matter or have been prevented from participation.<sup>166</sup> Moreover, the organization is precluded from presenting arguments that were already made or could have been made during the administrative proceedings.<sup>167</sup> The provision serves as a minimum requirement on the federal level, leaving the states free to enact more far-reaching standing provisions for nature protection organizations.<sup>168</sup> Overall, the *Verbandsklagerecht* may be suitable to remedy the implementation deficit in nature protection law. The administrative agencies must now be more careful in their respective decision-

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<sup>159</sup> *Id.* at 369–70.

<sup>160</sup> *Id.* at 372; Seelig & Gündling, *supra* n. 156, at 1035.

<sup>161</sup> See Seelig & Gündling, *supra* n. 156, at 1034–35 (for a discussion of the Nature Protection Act between 1976 and 2002).

<sup>162</sup> Calliess, *supra* n. 156, at 97–98. See also Koch, *supra* n. 156, at 372–73 (discussing the state legislation).

<sup>163</sup> Calliess, *supra* n. 156, at 97. See also Magnotti, *supra* n. 8, at 492.

<sup>164</sup> Bundesnaturschutzgesetz [BNatSchG] [Federal Nature Protection Act] March 25, 2002, BGBl. I 1193, last amended by Gesetz, Dec. 22, 2008, BGBl. at 2986 § 61(2) no. 1 (F.R.G.).

<sup>165</sup> *Id.* at 61(2) no. 2.

<sup>166</sup> *Id.* at 61(2) no. 3.

<sup>167</sup> *Id.* at 61(3).

<sup>168</sup> *Id.* at 61(5); see also Seelig & Gündling, *supra* n. 156, at 1037–38 (for an in-depth discussion of section 61 of the Federal Nature Protection Act).

making processes because of the increased threat of lawsuits by nature protection organizations.<sup>169</sup>

*B. The Standing Problem in Animal Protection Law*

Absent a corresponding provision in animal protection law, only “too much” animal protection can be the subject of legal challenges.<sup>170</sup> If an administrative agency decides against an animal user or owner, the decision can be challenged in court, possibly at three different levels (*i.e.*, administrative court, State Administrative Court, and Federal Administrative Court); moreover, restitution claims can be brought.<sup>171</sup> If, however, a decision burdening animals is made by an agency, there is no opportunity for legal challenges under the current laws.<sup>172</sup> Giving standing to animal protection organizations would enable them to bring lawsuits to ensure compliance with the Animal Protection Act.<sup>173</sup>

There have been expressions of confidence in the past that passage of a law granting standing to animal protection organizations was within reach:

While no such *Verbandsklagerecht* has yet been adopted for animal rights organizations, it is anticipated that one may be passed during the next election cycle, particularly because approximately ninety-four percent of German citizens supported the Federal Nature Conservation Act, including the “introduction of the right of associations to take legal action . . . established in the [Act].”<sup>174</sup>

So far, however, legislative initiatives have been unsuccessful despite several pieces of legislation that were introduced on both the state and national level.<sup>175</sup> A legislative initiative of the state government of Schleswig-Holstein to create a federal *Verbandsklagerecht* in the area of animal protection, introduced in the state chamber (*Bundesrat*) in 2004, failed.<sup>176</sup> The city-state of Bremen is the only German state so far that has instituted the *Verbandsklagerecht* on the state level.<sup>177</sup> Similar legislation is pending in the states of Baden-

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<sup>169</sup> See *e.g.* Seelig & Gündling, *supra* n. 156, at 1038; Koch, *supra* n. 156, at 372 (discussing the new threat of litigation). The standing provision in Section 61 of the Federal Nature Protection Act, however, has to be distinguished from standing in other areas of environmental law. Introducing the *Verbandsklagerecht* solely for the area of nature protection law in fact is argued to be insufficient to address the implementation deficit in environmental law more generally and, moreover, to be in violation of international obligations. See also Seelig & Gündling, *supra* n. 156, at 1038.

<sup>170</sup> See *e.g.* Hirt et al., *supra* n. 19, at 36; Caspar & Geissen, *supra* n. 35, at 913.

<sup>171</sup> Caspar & Geissen, *supra* n. 25, at 913.

<sup>172</sup> Hirt et al., *supra* n. 19, at 35.

<sup>173</sup> Caspar, *Verbandsklage*, *supra* n. 150, at 146.

<sup>174</sup> Magnotti, *supra* n. 8, at 492.

<sup>175</sup> Hirt et al., *supra* n. 19, at 36. See also Caspar, *Verbandsklage*, *supra* n. 150, at 145 (discussing the states' legislative competence on this issue).

<sup>176</sup> BR-Beschluss v. 5.11.2004, BR-Drucksache 157/04. See also Caspar, *Verbandsklage*, *supra* n. 150, at 145–46.

<sup>177</sup> Caspar, *Verbandsklage*, *supra* n. 150, at 146.

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Wurttemberg, Lower Saxony, Saarland, Berlin, and North Rhine-Westphalia.<sup>178</sup>

A currently debated question is whether the states have the necessary legislative competence to enact such laws or whether only a federal law can create standing. Concurrent legislative competence is granted to the federal legislature in Article 74(1) No. 1 Basic Law for the law of procedure and in Article 74(1) No. 20 Basic Law for animal protection.<sup>179</sup> As long as there is no federal law on point, the states remain free to legislate. However, it is unclear whether the absence of standing in the Animal Protection Act can be considered a conclusive denial of standing or whether it is best interpreted as leaving the issue open for state legislation.<sup>180</sup> Until the introduction of a *Verbandsklagerecht*, the implementation problems outlined above continue to exist.

### C. Is the Legislative Branch Obligated to Act?

If the state objective's goal to create an effective animal protection regime is to be realized, animal protection provisions must be enforceable.<sup>181</sup> To ensure enforcement, standing for animal protection organizations would be beneficial since animals cannot themselves enforce their legal interests.<sup>182</sup> However, this is only possible if appropriate procedural instruments are available.<sup>183</sup> While the legislature has wide latitude in implementing the goals set forth by the state objective, it must choose the most effective means to fulfill its obligation.<sup>184</sup>

It seems that an impasse has been reached. Animal interests must be protected under the animal protection state objective,<sup>185</sup> but state objectives are not interpreted to place specific obligations on the legislature, such as creation of a standing provision. This results in repetition of the tenet that the legislature has wide latitude in implementing the state objective, and there is no requirement to create standing.<sup>186</sup> It appears, though, that this claim is primarily based on considerations applicable in environmental protection. For example, one leading Basic Law commentary mentions environmental protection and animal protection together in its assertion that the courts have decided

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<sup>178</sup> *Id.*; Hirt et al., *supra* n. 19, at 36.

<sup>179</sup> See e.g. Caspar, *Verbandsklage*, *supra* n. 150, passim; Hirt et al., *supra* n. 19, at 36–38 (both arguing for a state competence and discussing the arguments of both sides).

<sup>180</sup> Hirt et al., *supra* n. 19, at 37; Caspar, *Verbandsklage*, *supra* n. 150, passim.

<sup>181</sup> Hirt et al., *supra* n. 19, at 36; Caspar & Schröter, *supra* n. 45, at 51. See generally Sommermann, *supra* n. 36, at 447–49 (discussing the *Verbandsklage* as an instrument of implementing state objectives).

<sup>182</sup> Hirt et al., *supra* n. 19, at 36; Caspar & Schröter, *supra* n. 45, at 50.

<sup>183</sup> Hirt et al., *supra* n. 19, at 66; Caspar & Schröter, *supra* n. 45, at 49.

<sup>184</sup> Hirt et al., *supra* n. 19, at 36; Caspar & Schröter, *supra* n. 45, at 51.

<sup>185</sup> Hirt et al., *supra* n. 19, at 66.

<sup>186</sup> *Id.*

against an obligation to create standing, but cites only environmental protection cases.<sup>187</sup>

The Federal Administrative Court has addressed the question of whether the environmental protection state objective requires the creation of standing for nature protection organizations. The case involved a state law that denied standing to nature protection organizations if any individual third party would have standing, regardless of whether the third party actually brought suit.<sup>188</sup> The court stated that the state objectives contained in the federal and state constitution did not require standing for nature protection organizations.<sup>189</sup> The fact that the state law in question severely limits interest group standing may be questionable as a political matter. Under the state objective, the legislature, not the courts, decide whether to create standing.<sup>190</sup>

The First Chamber of the Federal Constitutional Court's First Senate addressed a similar question and denied standing to a nature protection group.<sup>191</sup> The court held that neither Article 19(4) nor Article 9(1) confer a *Verbandsklagerecht*.<sup>192</sup> The court also denied the argument that Article 20a confers standing on nature protection organizations, reiterating that state objectives do not create individual rights.<sup>193</sup> The legislature must create standing provisions.<sup>194</sup> The case involved a Hamburg state law that allowed for challenges to violations of especially protection-worthy protected nature areas and national parks, but not those that were less protection-worthy. This distinction, the court held, was a legitimate exercise of legislative discretion.<sup>195</sup>

Implicit in these decisions seems to be the concept that some individual might have standing, regardless of whether a suit is brought. Of course, neither the parties seeking standing nor the courts would have pointed this out because, at the time, only human interests were included in the Basic Law, providing the abstract possibility of individual harm to a person who would have standing. Conversely, no animals would have standing.

In summary, the considerations underlying environmental protection standing may not apply in animal protection. Even if the animal protection clause cannot place a definitive demand on the legislature to create standing because of its nature as a state objective, it does come very close by requiring efficient implementation of the goal. In

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<sup>187</sup> Jarass & Pieroth, *supra* n. 44, at art. 20a no. 21.

<sup>188</sup> Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Nov 6, 1997, 17 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 398 (1998).

<sup>189</sup> *Id.* at 399.

<sup>190</sup> *Id.*

<sup>191</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 10, 2001, 20 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 1148 (2001) [hereinafter *Mühlenberger Loch Decision*].

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1149.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*



fact, the arguments for organizational standing in animal protection law seem much stronger than in environmental protection law. Thus, the discretion left to the legislature to create a standing provision in the area of animal protection law may be reduced considerably.

## V. EFFECTS ON CONSTITUTIONAL ANALYSIS

The animal protection state objective envisions an increased overall importance of animal protection, but how this increased importance will play out in the administrative process and in the courts is yet to be determined. This Part considers how the animal protection state objective might influence constitutional analysis. As indicated, conflicts between animal protection and fundamental rights not subject to a textual limitation clause are of special significance. Thus, freedom of religion, freedom of teaching, science and research, and freedom of artistic expression will be addressed in turn.

### A. Freedom of Religion

The Basic Law guarantees religious freedom<sup>196</sup> without placing it under a limitation clause.<sup>197</sup> The protected freedom includes holding a religious belief and engaging in religious activities accordingly.<sup>198</sup> In the context of ritual slaughter, religious freedom can come into conflict with section 4a(1) of the Animal Protection Act, which contains a general prohibition on slaughtering warm-blooded animals without prior stunning.<sup>199</sup> However, section 4a(2) no. 2 permits granting an exemption for religious reasons when mandatory rules require ritual slaughter or when mandatory rules prohibit the consumption of meat of

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<sup>196</sup> See Grundgesetz [GG] [Constitution] art. 4 (F.R.G.) (The relevant part of Article 4 reads: "(1) Freedom of faith, of conscience, and of creed, religious or ideological, shall be inviolable. (2) The undisturbed practice of religion is guaranteed.") (Translation: Kommerz, *supra* n. 62, at 507).

<sup>197</sup> *But see* Gerhard Robbers, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Germany*, 19 Emory Intl. L. Rev. 841, 849 (2005) ("There is a minority opinion holding that religious freedom can be limited by ordinary law according to Article 136 Section Verfassung der Weimarer Republik ('WRV' or 'Constitution of the Weimar Republic') . . . The Federal Constitutional Court and the majority opinion have rejected this, mostly saying that this provision is not a limitation clause but serves as a guarantee for religious equality."). In the context of ritual slaughter, the Federal Administrative Court in one instance adopted this view. Bundesverwaltungsgericht [BVerwG][Federal Administrative Court] Nov. 23, 2000, 54 Neue Juristische Wochenschrift [NJW] 1225 (2001). *See also* David P. Currie, *The Constitution of the Federal Republic of Germany* 256–57 (U. of Chi. Press 1994) (pointing out that the Parliamentary Council had rejected placing a limitation clause on Article 4 and concluding that "[i]t hardly appears likely that adoption of Article 136(1) was intended to reverse the convention's deliberate rejection of a provision that would expressly have subjected the exercise of religion to provisions of the general laws.").

<sup>198</sup> Jarass & Pieroth, *supra* n. 44, at art. 4 no. 10–12.

<sup>199</sup> Tierschutzgesetz [Animal Protection Act], May 18, 2006 BGBl. I 1206, 1313 (F.R.G.) (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.html> (last accessed Feb. 11, 2010)).

animals not ritually slaughtered.<sup>200</sup> The relevant part of section 4a reads:

- (1) Warm-blooded animals may be slaughtered only if stunned before exsanguination.
- (2) By way of derogation from paragraph (1), no stunning shall be required if:
  1. it is impossible under the circumstances in the case of an emergency slaughter;
  2. the competent authority [has] granted an exemption for slaughter without stunning (ritual slaughter); this exemption may be granted only where necessary to meet the requirements of members of religious communities in the territory covered by this Act whose mandatory rules require ritual slaughter [or] prohibit consumption of meat of animals not slaughtered in this way . . . .<sup>201</sup>

### 1. “Religious Community” and “Mandatory Rules”

The focus of the ritual slaughter exemption concerns the terms “religious community” and “mandatory rules.” The most important interpretations of those terms, given prior to the inclusion of the animal protection state objective, were offered by the Federal Administrative Court<sup>202</sup> and the Federal Constitutional Court.<sup>203</sup> The Federal Administrative Court found the term “religious community” to be subject to court interpretation.<sup>204</sup> For purposes of the religious slaughter exemption, a religious community must be clearly distinguishable and display the internal capacity to subject its members to binding requirements.<sup>205</sup> The court found the Sunni denomination of Islam to be the applicable religious community; conversely, a Muslim butcher’s customers did not constitute a separate religious community because of a lack of external distinguishability and internal coherence.<sup>206</sup> This interpretation presupposes a hierarchical organization of the religious community; further, it does not allow a subgroup to create “mandatory rules” because the subgroup would not qualify as a “religious community.” In contrast, the Federal Constitutional Court held that provisionally exempt religious communities can include subgroups within Islam whose beliefs differ from those of other subgroups.<sup>207</sup> The court found this interpretation constitutional, based on the religious freedom provisions as well as the text and legislative intent of the statu-

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] June 15, 1995, 15 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 61 (1996).

<sup>203</sup> Ritual Slaughter Decision, *supra* n. 17.

<sup>204</sup> Bundesverwaltungsgericht, *supra* n. 202, at 62; *see also* Haupt, *supra* n. 17, at 858 (giving a brief summary of the decision).

<sup>205</sup> Bundesverwaltungsgericht, *supra* n. 202, at 62.

<sup>206</sup> *Id.*

<sup>207</sup> Ritual Slaughter Decision, *supra* n. 17.

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tory exemption provision which extends to Jewish religious communities and the different branches of Islam.<sup>208</sup>

Requiring an objective determination of the applicable “mandatory rules” on the issue of ritual slaughter illustrates an additional dilemma: The courts must inquire into religious doctrine.<sup>209</sup> An argument advanced in the literature suggests that the provision should not be read to encourage non-adherents (such as non-Muslim judges) to interpret the mandatory rules of a religious community.<sup>210</sup>

Similarly, the plaintiff in the Federal Administrative Court case argued that her customers consider it mandatory under the Koran to slaughter animals without prior stunning, and this should suffice to qualify as a religious community.<sup>211</sup> The Federal Administrative Court acknowledged but dismissed this argument, because the text of the provision does not grant an exemption if individuals *deem* consumption of certain meat prohibited.<sup>212</sup> Instead, it speaks of “mandatory rules” that *demand* or *proscribe* certain activities of their members, suggesting that the religious community must have authoritatively made such rules or views them as made by a superior, transcendental instance.<sup>213</sup> Thus, there is no room for individual interpretation of the rule.<sup>214</sup>

The court found support for its view in the legislative goals and legislative history of the Animal Protection Act. During the legislative proceedings, the judiciary committee of the *Bundestag* requested that an exemption be granted only if it is “mandatory” for members of a religious community.<sup>215</sup> The drafting committee rejected the request, pointing out that the word “mandatory” made it necessary for state agencies to interpret the rules of religious communities, which would be unacceptable in a religion-neutral democratic state.<sup>216</sup> The state chamber (*Bundesrat*) sought to ensure that exemptions only be granted when ritual slaughter itself is a religious act.<sup>217</sup> Although the *Bundesrat* did not prevail, the enacted compromise included the “mandatory rules” wording.<sup>218</sup>

The Federal Constitutional Court agreed that the existence of mandatory rules must be determined by the administrative agencies or the courts.<sup>219</sup> However, the point of reference for a religion such as

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<sup>208</sup> *Id.* at 354.

<sup>209</sup> Bundesverwaltungsgericht, *supra* n. 202, at 62.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 61.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*; *see also* Tierschutzgesetz [Animal Protection Act] §4a(2) no. 2 (speaking of “mandatory rules”) (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (last accessed Feb. 10, 2010)).

<sup>214</sup> Bundesverwaltungsgericht, *supra* n. 202, at 61.

<sup>215</sup> *Id.* at 62.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Ritual Slaughter Decision, *supra* n. 17, at 354.

Islam, which has several different dietary rules, cannot be Islam as a whole or even the Sunni or Shiite branches of the religion. Rather, the subgroup must declare whether it is bound by mandatory rules, even if the religion overall allows for deviation from its rule in certain circumstances.<sup>220</sup> The Federal Constitutional Court thus found it sufficient that the existence of a mandatory ritual slaughter requirement according to a shared religious belief is simply demonstrated in a substantiated and comprehensible manner.<sup>221</sup>

The courts also disagreed about whether the denial of an exemption infringed on religious freedom. The Federal Administrative Court held that the religious belief merely prohibits consumption of certain kinds of meat; consuming meat of animals does not itself constitute a religious act, thus, abstaining from meat consumption does not result in a violation of religious duties.<sup>222</sup> Adherents are neither legally nor actually forced to consume meat of animals not slaughtered according to their religious belief, and nothing prohibits the consumption of meat from animals that were ritually slaughtered. Individuals can switch to a vegetarian diet, or eat fish, and they can also eat meat imported from countries that do permit ritual slaughter.<sup>223</sup> Although meat may be a common foodstuff, the court found that abstaining from meat consumption is not an untenable limitation on personal freedom which could be limited by the Animal Protection Act.<sup>224</sup>

The Federal Constitutional Court rejected this reasoning, too, because demanding that the butcher's customers abstain from meat consumption altogether would be unreasonable in light of the dietary customs in Germany.<sup>225</sup> Moreover, consuming imported meat means that there is no direct personal contact with the butcher and, thus, no basis of trust that the meat does in fact conform to the religious requirements.<sup>226</sup> Thus, under the jurisprudence of the Federal Constitutional Court prior to inclusion of the animal protection state objective, subgroups of a religion can establish mandatory rules. They must assert these mandatory rules in the administrative process in a substantiated and comprehensible manner.

Nonetheless, the decision of the Federal Administrative Court is particularly instructive. On one hand, it clearly illustrates the difficulties prior to the inclusion of Article 20a into the Basic Law because the court makes a strenuous (and, as the Federal Constitutional Court later ruled, erroneous)<sup>227</sup> effort to avoid direct conflict between the

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<sup>220</sup> *Id.* at 354–55.

<sup>221</sup> *Id.*

<sup>222</sup> Bundesverwaltungsgericht, *supra* n. 202, at 62.

<sup>223</sup> *Id.* at 63.

<sup>224</sup> *Id.*

<sup>225</sup> Ritual Slaughter Decision, *supra* n.17, at 350.

<sup>226</sup> *Id.* at 351.

<sup>227</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan 18, 2002, 55 Neue Juristische Wochenschrift [NJW] 1485 (2002) (holding that the Federal Administrative Court's interpretation of § 4a(2) no. 2 alternative 2 Animal Protection Act

Animal Protection Act and religious freedom. On the other hand, the decision also elaborates on a state interest in general application of the Animal Protection Act, though without the necessary constitutional basis to prevail in a direct conflict with religious freedom. After the introduction of the animal protection state objective, the Federal Administrative Court's reasoning—its emphasis on available dietary alternatives, including the import of meat, Islam's allowance for Muslims living in predominantly non-Muslim societies to deviate from the ritual slaughter rule—might regain significance.

## 2. *Future Effects on Adjudication*

After the Federal Constitutional Court remanded the ritual slaughter case and the Administrative Court of Gießen granted in part an exemption, the State Administrative Court of Hesse addressed the changed legal situation on appeal.<sup>228</sup> The legislature amended Article 20a between the time of the remand and the rendering of the State Administrative Court's decision. The State Administrative Court made an effort to distinguish the legal situation before and after the constitutional amendment and assessed which parts of the Federal Constitutional Court's ritual slaughter decision remained relevant.<sup>229</sup> Insofar as the ritual slaughter decision was premised on animal protection as an important but sub-constitutional interest, it lost its binding character.<sup>230</sup>

The State Administrative Court maintained the Federal Constitutional Court's interpretation of "religious community" as a subgroup with a shared religious belief.<sup>231</sup> The court emphasized the legislative intent of the religious slaughter exemption provision, which sought to accommodate the varying dietary rules in Islam and Judaism. In the court's view, this prior intent had not been superseded by the animal protection state objective.<sup>232</sup> The objective is primarily directed at the legislative branch, which remains free to retain or abolish the ritual slaughter exemptions.<sup>233</sup> The legislature had made no changes to the exemption provision since the introduction of the state objective two years prior, and the state objective itself could not be interpreted as changing the statute.<sup>234</sup> In other words, as long as the Animal Protection Act is not changed by the legislature, the courts will not interpret the provision differently than before the introduction of the animal protection state objective.

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would render the provision unconstitutional under Article 12 and Article 4(1) and (2) of the Basic Law).

<sup>228</sup> VGH Kassel, Nov. 24, 2004, 27 *Natur und Recht* 464 (2005).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 465.

<sup>231</sup> *Id.* at 466–67.

<sup>232</sup> *Id.* at 467–68.

<sup>233</sup> *Id.* at 467.

<sup>234</sup> *Id.*

This approach is questionable for two reasons. First, it signals that the court may not be fully applying the state objective, either as it was intended in the constitutional materials, or by its text, which explicitly refers to the judicial branch. Second, the legislative history of the exemption provision is ambiguous at best and could therefore be cited for different propositions, as illustrated by the court's discussion of the disagreement between the Federal Administrative Court and the Federal Constitutional Court prior to the constitutional amendment. Therefore, reliance on the legislative history may not be particularly helpful.<sup>235</sup>

The State Administrative Court found that, consistent with the animal protection state objective, a ritual slaughter exemption is only permissible in exceptional instances where a firm religious belief prohibits consumption of other meat.<sup>236</sup> Unlike the Federal Constitutional Court, which had found a substantiated and comprehensible assertion of a common religious belief sufficient for an exemption request, the State Administrative Court demanded that the level of proof be raised.<sup>237</sup> The court reasoned that while the statutory regime remained unchanged, the constitution was amended to increase the status of animal protection, which in turn affected the proof requirement.<sup>238</sup> Proof of "mandatory rules" must be brought by first identifying a religious rule from which the requirement follows, then demonstrating that the interpretation of this religious requirement is shared by a substantial religious group, and finally, establishing that the members of the religious group deem the religious requirement binding and practice accordingly.<sup>239</sup>

The Federal Administrative Court likewise maintained the interpretation of "religious community" on further appeal.<sup>240</sup> It also found the constitutionality of the exemption provision to be unaffected by the introduction of the animal protection clause. The Federal Administrative Court, however, did not uphold the State Administrative Court's heightened standard of proof.<sup>241</sup> The animal protection state objective does not prohibit granting exemptions from the stunning requirement, since the intended goal of the state objective was not to award one-sided preference to animal protection.<sup>242</sup> However, there is a shift in the assessment of the constitutionality of the exemption provision. Previously, the court asked whether an exemption to the prohibition of

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<sup>235</sup> See also Hans-Georg Kluge, *Das Schächten als Testfall des Staatszieles Tierschutz*, 25 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 650, 653–54 (2006) (asserting the inadequate use of legislative history by the State Administrative Court).

<sup>236</sup> VGH Kassel, *supra* n. 228, at 468.

<sup>237</sup> *Id.* at 469.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 470.

<sup>240</sup> Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Nov 23, 2006, 26 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 461 (2007).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 462.

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slaughter without prior stunning was an inappropriate limitation of the fundamental rights of the individual seeking an exemption. Now, conversely, the court asks whether granting permission to slaughter without prior stunning is compatible with animal protection.<sup>243</sup> The court asserted that it is primarily up to the legislature to reconcile countervailing constitutional interests.<sup>244</sup> Thus, the religious slaughter exemption has continuing effect. Like the State Administrative Court, the Federal Administrative Court found that the legislative intent on this issue was not modified by the state objective.<sup>245</sup> A different assessment would lead to a precedence of animal protection that is not intended by the constitution or legislature and that would lead to an elimination of the protection of religious freedom.<sup>246</sup>

Scholars have criticized the Federal Administrative Court for its continued declaration that animal protection is an important “public interest”; using this language might indicate a lack of respect for the constitutional status of animal protection and its capacity to limit constitutional rights not subject to a limitation clause.<sup>247</sup> Although the Federal Administrative Court did address whether the religious slaughter exemption provision is constitutional under the animal protection state objective, the analysis seems to lack depth.

While the Federal Administrative Court correctly states that the possibility of granting an exemption does not contravene the goal of animal protection, the question is whether the exemption provisions may be too broad in light of the state objective. The Federal Administrative Court does not explicitly reach this question; the State Administrative Court defers to the legislature by following the notion that state objectives are primarily addressed at the legislative branch. Indeed, on further analysis, the religious slaughter exemption may be found irreconcilable with the state objective if the slaughtering is not itself a religious act protected by religious freedom. This reasoning is analogous to the Federal Administrative Court’s 1995 decision.<sup>248</sup>

The first clause of section 4a(2) no. 2 grants the religious exemption itself.<sup>249</sup> This might render the exemption in the second clause of section 4a(2) no. 2 unconstitutional.<sup>250</sup> Due to the introduction of the animal protection state objective, the federal courts must eventually address this question to create necessary legal certainty.

Greatly varying assessments illustrate the current legal uncertainty concerning the role of the state objective in religious slaughter

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Hirt et al., *supra* n. 19, at 233.

<sup>248</sup> Bundesverwaltungsgericht, *supra* n. 202.

<sup>249</sup> Tierschutzgesetz [Animal Protection Act] BGB1. I, May 25, 1998 at 1094 art. 4a(2) no. 2 (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (last accessed Feb. 11, 2010)).

<sup>250</sup> *Id.*

cases. Some scholars assert that, perhaps somewhat ironically, the state objective exerts the least effect in the area of religious slaughter, at least in instances where there is a binding requirement.<sup>251</sup> The State Administrative Court of Hesse<sup>252</sup> and numerous scholars<sup>253</sup> conversely point out that the animal protection state objective was introduced specifically in response to the Federal Constitutional Court's ritual slaughter decision. It seems, however, that the courts shied away from engaging in a full balancing between the two constitutional interests and instead deferred to the legislative branch.

Even scholars who disagree with the State Administrative Court's decision credit it with providing the first truly thoughtful attempt at analyzing the new legal situation.<sup>254</sup> However, both the State Administrative Court and the Federal Administrative Court did not go far enough in their analyses. For instance, the courts should consider the availability of alternative methods for obtaining meat. They should also take into account the rule allowing Muslims living abroad to consume meat of animals stunned prior to slaughter. Such analysis is possible even without extensive inquiries into religious doctrine, at least in such instances in which the very applicant points to the existence of this rule.<sup>255</sup> The resulting analysis may be similar to the decision rendered by the Federal Administrative Court in 1995;<sup>256</sup> Article 20a now provides the constitutional basis lacking at the time of that decision.<sup>257</sup>

### 3. *Future Effects on the Administrative Permit Process*

In each case presented, the administrative agencies decide whether to grant an exemption under section 4a(2) no. 2,<sup>258</sup> weighing animal protection concerns at each step. The applicant must belong to a religious community and, under the Federal Constitutional Court's standard, must present the mandatory rule of ritual slaughter in a substantiated and comprehensible manner.<sup>259</sup> Further, the agency determines whether the exemption is necessary to meet the demands of the religious community, requiring the balancing of religious freedom

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<sup>251</sup> Schwarz, *supra* n. 24, at 49 (concluding that since the slaughter requirements are an integral part of the Jewish religion, religious freedom will insofar continue to outweigh animal protection); Natrass, *supra* n. 8, at 304–05.

<sup>252</sup> VGH Kassel, *supra* n. 228, at 465.

<sup>253</sup> Such as Kluge, *supra* n. 235, at 653.

<sup>254</sup> *Id.* at 650 (also pointing out that other courts have simply ignored the changed constitutional provision).

<sup>255</sup> Bundesverwaltungsgericht, *supra* n. 202, at 63; *see also* Kluge, *supra* n. 235, at 653 (reaching the same result).

<sup>256</sup> Bundesverwaltungsgericht, *supra* n. 202, at 63.

<sup>257</sup> Grundgesetz [GG] [Constitution] art. 20a (F.R.G.).

<sup>258</sup> Schwarz, *supra* n. 22, at 49; *see also* Natrass, *supra* n. 8, at 303 (asserting that the constitutional status of animal protection “cannot guarantee victory for animal protection, but does create a pathway through which the interests of animals to remain unharmed can be weighed against the interests of humans”).

<sup>259</sup> Hirt et al., *supra* n. 19, at 234.



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with animal protection.<sup>260</sup> With respect to the religious community, it is still unclear which areas must be subject to a common belief. While a religious community is not required to share all beliefs, the common belief cannot be limited to the belief in ritual slaughter, as pointed out by the Federal Administrative Court.<sup>261</sup> A mandatory rule must be regarded as definitely binding and important enough to determine membership of the group.<sup>262</sup>

The administrative agencies are now entitled to determine the content of “mandatory rules.”<sup>263</sup> Exemptions from the stunning requirement are only permitted if they can objectively determine such rules to be mandatory.<sup>264</sup> If they cannot make an objective determination as such, an exemption cannot be granted.<sup>265</sup> This essentially fulfills the standard articulated in the 1995 decision of the Federal Administrative Court<sup>266</sup>. However, it still involves inquiry into religious doctrine. If a religion itself allows for exceptions from the general ritual slaughter requirement, such as for Muslims living abroad, a court would likely find it permissible to deny the exemption based on the religion’s own rule.<sup>267</sup>

Moreover, those who have previously employed a method of slaughter that involved prior stunning cannot now assert a religious belief to the contrary.<sup>268</sup> The applicant must demonstrate to the administrative agency that the religious rules are actually practiced in everyday life.<sup>269</sup> To meet this demand, the plaintiff in the State Administrative Court of Hesse decision submitted affidavits from his customers stating that they had purchased only meat of animals that were not stunned prior to slaughter in the past and that they plan to purchase this meat from the plaintiff in the future.<sup>270</sup>

Further, administrative agencies may inquire whether butchers practice ritual slaughter only to supply members of the religious community with meat; the Federal Administrative Court stated that they may practice ritual slaughter only to the extent necessary.<sup>271</sup> The state has a strong interest in ascertaining that the meat of animals not stunned prior to slaughter is only sold to members of the religious community.<sup>272</sup> In the permit process, this may include requesting state-

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<sup>260</sup> *Id.*

<sup>261</sup> Bundesverwaltungsgericht, *supra* n. 240, at 461.

<sup>262</sup> Hirt et al., *supra* n. 19, at 235.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> Caspar & Geissen, *supra* n. 35, at 916–17.

<sup>266</sup> Bundesverwaltungsgericht, *supra* n. 202.

<sup>267</sup> Hirt et al., *supra* n. 19, at 236.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> VGH Kassel, *supra* n. 228.

<sup>271</sup> Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] June 15, 1995, 15 Neue Zeitschrift für Verwaltungsrecht [NVwZ] 61 (1996). Bundesverwaltungsgericht, *supra* n. 240, at 461.

<sup>272</sup> Hirt et al., *supra* n. 19, at 240.

ments regarding the relation between the extent of ritual slaughter and the number of members of the religious community.<sup>273</sup> This may impose a significant burden on the free sale of such meat. Although the Federal Constitutional Court emphasized the connected relationship between the butcher and his customers, it did not find that the meat can only be sold to members of the religious community.<sup>274</sup> However, after inclusion of the animal protection state objective, these concerns may no longer apply. The free sale of meat would be considered in the context of freedom of occupation,<sup>275</sup> which is subject to a textual limitation clause.<sup>276</sup>

### B. Freedom of Teaching, Science, and Research

Article 5(3) of the Basic Law protects freedom of teaching, science, and research; it can only be limited by countervailing constitutional interests.<sup>277</sup> The Animal Protection Act, however, contains several provisions establishing various requirements related to conducting animal experiments.<sup>278</sup> Thus, the Animal Protection Act imposes limits on the freedom of science and research.<sup>279</sup> Pursuant to section 7 of the Animal Protection Act, experiments are only permissible if they are “indispensable” for one of the enumerated purposes,<sup>280</sup> and animal experiments on vertebrates must be “ethically justifiable.”<sup>281</sup>

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<sup>273</sup> *Id.*

<sup>274</sup> Schwarz, *supra* n. 24, at 55.

<sup>275</sup> Grundgesetz [GG] [Constitution] art. 2(1), art. 12 (F.R.G.) (art. 12 if applied to German citizens or art. 2(1) if applied to foreign citizens).

<sup>276</sup> The Federal Constitutional Court examines Article 12 limits under the “three step theory” (*Dreistufentheorie*). Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 377 (F.R.G.). The court distinguishes between regulations regarding the practice of a profession, regulations of subjective conditions regarding the admission to practice, and regulation of objective conditions regarding admission to a profession. With each step, the justification for infringements is increased. *Id.* at 405–08. Animal protection likely qualifies as an overwhelmingly important state interest for purposes of the three step theory. *See e.g.* Obergfell, *supra* n. 23, at 2298 (arguing that it is hardly imaginable that animal protection as a constitutional interest could not justify even regulations on the highest level).

<sup>277</sup> Jarass & Pieroth, *supra* n. 44, art. 5 no. 131.

<sup>278</sup> Tierschutzgesetz [Animal Protection Act] BGB1. I, May 25, 1998.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* (The enumerated purposes are: (1) the prevention, diagnosis or treatment of diseases, suffering, bodily defects or other abnormalities or the detection or exertion of influence of physiological conditions or functions in human beings or animals; (2) the detection of environmental hazards; (3) the testing of substances or products to ensure that they are safe in terms of human or animal health or that they are effective against animal pests; and (4) basic research) (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (Feb. 9, 2010))

<sup>281</sup> *Id.* (“Experiments may be carried out on vertebrates only if the pain, suffering or harm they can be expected to inflict on the laboratory animals is ethically justifiable in view of the purpose of the experiment. Experiments causing lasting or repeated severe pain or suffering to vertebrates may be carried out only if the results are expected to be of outstanding importance for the fundamental needs of human beings or animals, in-

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Thus, “indispensable” and “ethically justifiable” are the key terms in cases involving freedom of science and research; the impact of the animal protection clause with respect to this provision will be examined in further detail.

Section 8(1) imposes a permit requirement on experiments on vertebrates, detailing that the requirements of section 7 must be met to obtain a permit.<sup>282</sup> Section 8(b) demands that an opinion regarding every permit application be rendered by the applying institution’s animal protection officer; every institution that conducts animal experiments must appoint such an officer<sup>283</sup> with specified training.<sup>284</sup> Section 8a(1) places a notification requirement on experiments on any vertebrates not covered by section 8(1), as well as on other experiments.<sup>285</sup>

Likewise, the Animal Protection Act contains requirements related to the use of animals in teaching, thus creating a limit on freedom of teaching. Sections 8a and 8b also apply to teaching.<sup>286</sup> Section 10(1) limits the use of animals in teaching to certain institutions and for certain uses.<sup>287</sup> The key provision states that operations or treatment causing animals pain, suffering, or harm “may be performed only when there is no other way of attaining the same purpose, for example, by showing films. Reasons shall be given to the competent authority on

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cluding the solution of scientific problems.” (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (date) (Feb. 9, 2010)).

<sup>282</sup> *Id.*

<sup>283</sup> Section 8b(3) specifies the duties of the animal protection officer as follows: “The animal welfare officer shall be obliged: (1) to ensure that the provisions, conditions and requirements shall be observed in the interest of animal welfare; (2) to advise the institution and the staff involved in animal experiments and the keeping of laboratory animals; (3) to give his opinion on each application for authorization to conduct an experiment on animals; (4) to work towards the development and introduction of procedures and means for avoiding or reducing experiments on animals inside the institutions.” (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (accessed Feb. 11, 2010)).

<sup>284</sup> Section 8b(2) provides: “Only persons who have completed university studies of veterinary medicine, medicine or biology (specializing in zoology) may be appointed as animal welfare officers. They must possess the expertise and reliability needed to discharge their tasks. In individual cases the competent authority may grant exemptions from the first sentence.” English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (last accessed Feb. 10, 2010).

<sup>285</sup> Pursuant to section 15(1), the permits are granted by, and the notifications given to, those administrative agencies designated by each state; it further requires that in order to determine whether an animal experiment is permissible, the administrative agency appoints an animal experimentation commission, also known as ethics commission (*Ethikkommission*), that assists in reaching a decision.

<sup>286</sup> Section 10(2) Animal Protection Act.

<sup>287</sup> Section 10(1) Animal Protection Act states in relevant part: “Operations or treatment causing animals pain, suffering or harm may be carried out for purposes of education, training and further training only (1) at a university, another scientific establishment or a hospital, or (2) as part of a vocational or further training course for medical or scientific ancillary professions.” English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (last accessed Feb. 10, 2010).

request why the purpose of the operations or treatment cannot be attained in any other way.”<sup>288</sup>

1. “Indispensible” and “Ethically Justifiable”

In the past, the animal experimentation provisions could not be effectively enforced because animal protection was not a constitutional interest, and the Animal Protection Act’s permission requirements were largely superseded by the constitutionally protected interest in freedom of science and research.<sup>289</sup> Scientists were given great latitude in determining the indispensability and ethical justifiability of their own experiments on animals.<sup>290</sup> Though required to present scientific explanations for the indispensability and the ethical justifiability, scientists did not have to present evidence to support them.<sup>291</sup> Moreover, the administrative agencies and the courts could not substantively review the scientific explanations.<sup>292</sup> Any negative decisions constituted infringements on the constitutionally protected freedom of science and research, and absent a constitutional justification, such infringements were impermissible.<sup>293</sup>

The impact of the animal protection state objective on the interpretation of “indispensability” and “ethical justifiability” is unclear. There is virtually no judicial interpretation practice regarding for these terms because the prior legal situation effectively precluded review.<sup>294</sup>

Now, two competing constitutional interests must be reconciled on a case-by-case basis, and administrative decisions are subject to full review by the administrative courts.<sup>295</sup> The administrative agency issuing the permit must engage in substantive inquiry into supporting evidence to determine indispensability and ethical justifiability.<sup>296</sup>

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<sup>288</sup> *Id.*

<sup>289</sup> Caspar & Geissen, *supra* n. 35, at 915. *See also generally*, Martin Fielenbach, *Die Notwendigkeit der Aufnahme des Tierschutzes in das Grundgesetz* (Peter Lang 2005); Hillmer, *supra* n. 101 (both focusing on freedom of science and research in arguing for inclusion of an animal protection provision into the Basic Law); Eva Inés Oberfell, *Wissenschaftsfreiheit und Tierschutz—Zur Wertigkeit des Tierschutzes im deutschen Verfassungssystem*, 34 *Zeitschrift für Rechtspolitik* [ZRP] 193 (2001) (providing a critique of the prior situation).

<sup>290</sup> Caspar & Geissen, *supra* n. 35, at 915; Caspar & Schröter, *supra* n. 45, at 73; Oberfell, *supra* n. 23, at 2298.

<sup>291</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 20, 1994, 13 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 894, 895 (1994); *see also* Hans-Georg Kluge, *Grundrechtlicher Freiraum des Forschers und ethischer Tierschutz*, 13 *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 869 (1994) (discussing the decision of the Federal Constitutional Court).

<sup>292</sup> Caspar & Geissen, *supra* n. 35, at 915; Caspar & Schröter, *supra* n. 45, at 71.

<sup>293</sup> Caspar & Geissen, *supra* n. 35, at 915; Caspar & Schröter, *supra* n. 45, at 72.

<sup>294</sup> Caspar & Schröter, *supra* n. 45, at 76.

<sup>295</sup> Oberfell, *supra* n. 23, at 2298; Hirt et al., *supra* n. 19, at 291; Caspar & Schröter, *supra* n. 45, at 73; Caspar & Geissen, *supra* n. 35, at 915.

<sup>296</sup> Oberfell, *supra* n. 23, at 2298; Caspar & Schröter, *supra* n. 45, at 74–75; Hirt et al., *supra* n. 19, at 275.

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In the past, scholars raised the concern that administrative agencies and courts will usurp the permit process and create “science-judges.”<sup>297</sup> Moreover, it was argued that the introduction of an animal protection state objective would not lead to a substantive change because conducting animal experiments falls into the core protection of freedom of science and research, making infringements impermissible.<sup>298</sup> The permit requirements for animal experiments, however, do not place all scientific and research activity under a permit requirement.<sup>299</sup> Whether an infringement on freedom of science and research violates Article 5(3) of the Basic Law can only be determined by applying the principle of proportionality. Thus, it is not evident that limiting animal experiments to those indispensable and ethically justifiable generally impermissibly limits Article 5(3).<sup>300</sup>

Indispensability is based on the “principle of the three Rs”: replace, reduce, and refine.<sup>301</sup> First, any available methods that replace the animal experiment or limit the experiment to lower organisms must be used. Second, if no such methods exist, the number of animals used must be kept to a minimum (reduced), and the harm caused to the animals must be minimized by optimizing methods and pain treatment (refine).<sup>302</sup>

“Indispensable” means that the intended purpose of the experiment cannot be realized with other methods or procedures.<sup>303</sup> The law demands use of available alternative methods that do not harm animals, including those that do not involve animals or that lessen the harm to animals qualitatively or quantitatively.<sup>304</sup> Animal experiments are not indispensable merely because they are cheaper or less time-intensive than available alternatives.<sup>305</sup> The applicant must either demonstrate that the result is unknown or verify a known result. Thus, if the expected or known results do not yield new insights, the experiment is likely not necessary.<sup>306</sup>

“Ethically justifiable” involves balancing the interests of animals against those of scientists; the anticipated benefits of an animal experiment must outweigh the harm to the animal. The animal experimentation provision of the Animal Protection Act illustrates the close connection between ethical justifiability and proportionality. It states that experiments that lead to extended or repeated suffering and pain may only be conducted “if the results are expected to be of outstanding

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<sup>297</sup> Caspar & Schröter, *supra* n. 45, at 75 (citing Hans-Jürgen Papier, *Genehmigung von Tierversuchen*, 13 *Natur und Recht* [NuR] 162 (1991)). Notably, Professor Papier was President of the Federal Constitutional Court from 2002 until 2010.

<sup>298</sup> Spranger, *supra* n. 40, at 289.

<sup>299</sup> Caspar & Schröter, *supra* n. 45, at 74.

<sup>300</sup> *Id.* at 75.

<sup>301</sup> Hirt et al., *supra* n. 19, at 271.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Caspar & Schröter, *supra* n. 45, 77–78.

<sup>305</sup> *Id.* at 78; Hirt et al., *supra* n. 19, at 275.

<sup>306</sup> Caspar & Schröter, *supra* n. 45, at 78.

importance for the fundamental needs of human beings or animals.”<sup>307</sup> Administrative agencies make this normative decision in every case, weighing the interests of the animals and the scientists.<sup>308</sup> One of problems lies in the fact that harm to animals is to be measured against detriment to humans, and harm to animals that is certain to occur is to be weighed against potential benefit to humans that may possibly occur.<sup>309</sup> However, administrative agencies and courts must often make such probabilistic determinations where different values and uncertainties collide. Despite the differences in the competing interests, a common evaluation generally develops fairly quickly when the possible results of all conceivable alternatives are investigated comprehensively. The weighing of interests must then occur with substantial distance from the interests involved.<sup>310</sup> The obvious problem here is that judges must somehow attain distance from human interests, which may prove difficult since humans likely give more weight to human interests over animal interests. The animal protection state objective, however, is designed to protect the animals for their own sake, not merely for the benefit of humans.<sup>311</sup> Inclusion of this underlying value determination enters judicial assessments of “ethical justifiability” poses the key challenge in future judicial interpretation.

An administrative regulation<sup>312</sup> provides four categories for assigning the expected harm to animals: none, low, medium, and significant.<sup>313</sup> If harm to animals and benefit to humans have different weight, the decision-making process is relatively easy; experiments causing significant harm with a low expected benefit are impermissible.<sup>314</sup> With respect to closer cases, however, several different suggestions have been made in the past.<sup>315</sup> Overall, it seems that the Animal Protection Act and the administrative regulation leave the administrative agencies and courts without much guidance in close cases, aside from the lofty philosophical goal of “ethical justifiability.” However, administrative agencies, courts, and the scientific community need a clearer understanding of the term. Perhaps a dialogue on “ethical jus-

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<sup>307</sup> Tierschutzgesetz [Animal Protection Act], May 25, 1998 BGBl. I at 1094, § 7(3) (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (last accessed Feb. 11, 2010)).

<sup>308</sup> Caspar & Schröter, *supra* n. 45, at 79.

<sup>309</sup> Hirt et al., *supra* n. 19, at 291–92.

<sup>310</sup> *Id.* at 292.

<sup>311</sup> See Hirt et al., *supra* n. 19, at 17–18, 57.

<sup>312</sup> Allgemeine Verwaltungsvorschrift zur Durchführung des Tierschutzgesetzes (AVV) vom 9. Februar 2000, Bundesanzeiger Nr. 36a vom 22. Februar 2000 (available at [http://www.verwaltungsvorschriften-im-internet.de/bsvwbund\\_09022000\\_32135220006.htm](http://www.verwaltungsvorschriften-im-internet.de/bsvwbund_09022000_32135220006.htm)).

<sup>313</sup> Hirt et al., *supra* n. 19, at 292.

<sup>314</sup> *Id.* at 295.

<sup>315</sup> Caspar & Schröter, *supra* n. 45, at 79 (citing David G. Porter, *Ethical Scores for Animal Experiments*, 356 *Nature* 101–02 (1992)); Hirt et al., *supra* n. 19, at 292–97.

tifiability” that leads to discursive establishment of a normative standard will develop in administrative or judicial practice.<sup>316</sup>

## 2. Teaching

Procedures conducted on live animals for the purpose of teaching are subject to section 10 of the Animal Protection Act, and procedures conducted on animals killed prior to their use in teaching are subject to section 4 of the Animal Protection Act.<sup>317</sup> Under section 10(1)(2), procedures may be conducted for teaching if the purpose cannot be achieved otherwise with any other methods.<sup>318</sup>

In the past, in light of the constitutional protection for teaching and the lack of constitutional protection for animal welfare, the courts left the decision on alternative methods to the teachers.<sup>319</sup> As alternative methods, including movie screenings and computer simulations, are developed, the question of necessity has to be reassessed.<sup>320</sup> Here, too, the lack of constitutional rank made administrative or judicial inquiry impossible. This has changed with the introduction of animal protection into the Basic Law.<sup>321</sup> Due to the constitutional rank of animal protection, the teacher can no longer be the sole determinant of whether alternative methods are available; rather, the administrative agency must make the determination. Further, the courts may fully review the agency’s determination, with the assistance of court-appointed expert witnesses if necessary.<sup>322</sup>

In the past, several students—primarily in the fields of biology, medicine, and veterinary medicine—have brought claims, based on

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<sup>316</sup> A currently pending case at the Administrative Court of Bremen that has gained national attention might contribute to this dialogue. The court issued a preliminary injunction allowing a scientist at the University of Bremen to continue animal experiments after the administrative agency had denied a permit extension based on the “ethical justifiability” requirement. *Verwaltungsgericht Bremen* [Administrative Court of Bremen] Dec. 19, 2008, no. 5 V 3719/08.

<sup>317</sup> Procedures are limited by section 10(1) as follows: “Operations or treatment causing animals pain, suffering or harm may be carried out for purposes of education, training and further training only: (1) at a university, another scientific establishment or a hospital or (2) as part of a vocational or further training course for medical or scientific ancillary professions. They may be performed only when there is no other way of attaining the same purpose, for example, by showing films. Reasons shall be given to the competent authority on request why the purpose of the operations or treatment cannot be attained in any other way.” *Tierschutzgesetz* [Animal Protection Act], May 25, 1998 BGBl. I at 1094, § 10(1) (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (last accessed Feb. 11, 2010)).

<sup>318</sup> *Tierschutzgesetz* [Animal Protection Act], May 25, 1998 BGBl. I at 1094, § 10(1)(2) (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (last accessed Feb. 11, 2010)).

<sup>319</sup> Caspar & Geissen, *supra* n. 35, at 915–16; Obergfell, *supra* n. 23, at 2298; Hirt et al., *supra* n. 19, at 349.

<sup>320</sup> Caspar & Geissen, *supra* n. 35, at 916; Hirt et al., *supra* n. 19, at 347–49 (listing alternative methods).

<sup>321</sup> Caspar & Geissen, *supra* n. 35, at 916; Caspar & Schröter, *supra* n. 45, at 82; Obergfell, *supra* n. 23, at 2298.

<sup>322</sup> Caspar & Schröter, *supra* n. 45, at 83; Hirt et al., *supra* n. 19, at 349–50.

their freedom of conscience, asserting a right to study without animal experiments.<sup>323</sup> In those cases, the courts balanced the teachers' freedom of teaching against the student's freedom of conscience and routinely rejected the students' claim without consideration of the animals' interests.<sup>324</sup> The Federal Administrative Court held that if a conflict arises between freedom of teaching and freedom of conscience regarding the use of animals, the student bears the burden of demonstrating availability of alternative teaching methods.<sup>325</sup> However, this distribution of the burden may no longer be tenable under the animal protection state objective. The administrative agency must now investigate available alternatives within section 10(1). After the introduction of the animal protection state objective, there is no longer reason to grant deference only to the teachers' freedom of research.<sup>326</sup> Section 10(1)(3) requires the teacher, upon request, to demonstrate to the administrative agency that the educational goal cannot be achieved otherwise.<sup>327</sup> Thus, it would be inconsistent to ask the students to bear the burden of demonstrating that alternatives are available.<sup>328</sup>

Further, section 10(1) allows only those procedures whose purpose cannot be achieved otherwise; the university can only demand student attendance for demonstrations and experiments conducted for legal teaching purposes.<sup>329</sup> Invoking freedom of conscience on the student's part is thus only necessary in instances when there is no alternative method.<sup>330</sup>

The student's freedom of conscience claim is then supplemented by the animal protection state objective and weighed against freedom of teaching. Given the constitutional rank of all interests, and in light

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<sup>323</sup> See e.g. VGH Kassel, Dec 29, 1993, 47 Neue Juristische Wochenschrift [NJW] 1608 (1994); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] June 18, 1997, 105 Entscheidungen des Bundesverwaltungsgerichts 37 (1997) (both cases involving challenges to animal experiments); see also Klaus Brandhuber, *Kein Gewissen an deutschen Hochschulen?*, 44 Neue Juristische Wochenschrift [NJW] 725 (1991) (discussing cases involving claims brought by students).

<sup>324</sup> Caspar & Schröter, *supra* n. 45, at 83–84; Hirt et al., *supra* n. 19, at 351. Some courts did affirm a right to study physiology as part of the curriculum in medical school without procedures conducted on animals. For example, VG Frankfurt/Main, Oct 24, 1990, 44 Neue Juristische Wochenschrift [NJW] 768 (1991); VGH Kassel, Dec. 12, 1991, 45 Neue Juristische Wochenschrift [NJW] 2373 (1992).

<sup>325</sup> Bundesverwaltungsgericht, *supra* n. 323.

<sup>326</sup> Caspar & Schröter, *supra* n. 45, at 84. Currently, 42% of German universities do not use procedures performed on animals in physiology as part of the medical school curriculum, 30% do not perform procedures on animals in biology. In addition, 14% of medical schools and 33% of biology faculties allow their students to opt out of the procedures that are part of the curriculum. In veterinary medicine, twelve universities allow opting out. By contrast, all students can refuse to participate based on freedom of conscience in the Netherlands, Sweden, and Italy. Hirt et al., *supra* n. 19, at 352.

<sup>327</sup> Caspar & Schröter, *supra* n. 45, at 84.

<sup>328</sup> *Id.* at 84–85.

<sup>329</sup> *Id.* at 85; Hirt et al., *supra* n. 19, at 352.

<sup>330</sup> Caspar & Schröter, *supra* n. 45, at 85.



of the general trend away from animal use in teaching, it seems more likely that the student will prevail in future challenges.<sup>331</sup>

### C. Freedom of Artistic Expression

The fundamental right to freedom of artistic expression, also not subject to a textual limitation clause,<sup>332</sup> has come into conflict with animal protection in previous cases that have been characterized as “quite bizarre.”<sup>333</sup> The first challenge is to assess the definitional coverage of this fundamental right since “art” evades definition as a matter of its very nature. Nonetheless, in the legal context, art must be defined. To avoid imposing a state definition of art, the term must be interpreted liberally.<sup>334</sup> Freedom of artistic expression can be limited by countervailing constitutional values, but infringements must have a statutory basis.<sup>335</sup> Under the Animal Protection Act, it is prohibited to use an animal for filming, exhibition, advertising, or similar events causing the animal pain, suffering, or harm.<sup>336</sup>

#### 1. Pre-Amendment Analysis

Prior to the animal protection state objective, courts struggled with reconciling animal protection and artistic freedom, reaching different results.<sup>337</sup> One case of dubious fame involved a performance “honoring” the fortieth anniversary of the Federal Republic of Germany in which an artist placed a canary in a glass with beaten eggs and sausage scraps and swayed it back and forth to the sound of the national anthem.<sup>338</sup> The artist appealed the administrative fine, imposed for a violation of the Animal Protection Act, based on freedom of artistic expression. The district court found the performance to be art.<sup>339</sup> Since freedom of artistic expression is a constitutional value, it took precedence over the Animal Protection Act, and thus the artist

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<sup>331</sup> See also Hirt et al., *supra* n. 19, at 352 (reaching the same result).

<sup>332</sup> Grundgesetz [GG] [Constitution] art. 5(3) (F.R.G.).

<sup>333</sup> Caspar & Schröter, *supra* n. 45, at 86; Caspar & Geissen, *supra* n. 35, at 916.

<sup>334</sup> Jarass & Pieroth, *supra* n. 40, Art. 5 No. 106.

<sup>335</sup> *Id.* at No. 113.

<sup>336</sup> [Animal Protection Act], May 25, 1998 BGBl. I, § 3 No. 6 (English translation available at <http://www.animallaw.info/nonus/statutes/stdeawa1998.htm> (last accessed Feb. 11, 2010)).

<sup>337</sup> Hirt et al., *supra* n. 19, at 200.

<sup>338</sup> Amtsgericht [AG] [District Court] Kassel, Oct. 5, 1990, 11 *Neue Zeitschrift für Strafrecht* [NSrZ] 443 (1991); see also Caspar & Schröter, *supra* n. 45, at 86 (discussing the case); Caspar & Geissen, *supra* n. 35, at 916 (discussing the case).

<sup>339</sup> AG Kassel, *supra* n. 338, at 444.

could not be punished for animal cruelty.<sup>340</sup> In the absence of a constitutional animal protection clause, this decision was justified.<sup>341</sup>

On appeal, the Regional District Court (*Oberlandesgericht*) of Frankfurt/Main denied the significance of the harm inflicted on the bird,<sup>342</sup> possibly to avoid a complex legal analysis.<sup>343</sup> However, it was speculated that the appeals court apparently did not realize that section 3(6) of the Animal Protection Act was applicable in this case.<sup>344</sup> Since that provision only speaks of infliction of pain, suffering, or harm, without mentioning any requirement that it be “significant,” it was erroneous to consider the significance of the harm.<sup>345</sup> This is cited as an example of the court’s lack of sensitivity in the area of animal protection.<sup>346</sup>

Another case concerned the decapitation of a chicken during a theater performance to protest human rights violations.<sup>347</sup> The court held that the animal was killed without good reason in violation of the Animal Protection Act.<sup>348</sup> However, with respect to freedom of artistic expression, the court found a countervailing constitutional interest in Article 2(1) of the Basic Law.<sup>349</sup> The court argued that this constitutional provision was implicated because the moral law was violated.<sup>350</sup> The court must weigh the interests in the moral order of humans and animals on one hand and the interests of individuals on the other.<sup>351</sup> Although the artists argued that they wanted to call attention to the violation of human rights, the court found that killing a defenseless animal in need of human protection was itself questioning humanity.<sup>352</sup> The court emphasized the overall value structure of the consti-

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<sup>340</sup> *Id.*; see also Michael Selk, *Anmerkung*, 11 Neue Zeitschrift für Strafrecht [NSTZ] 444, 445 (1991) (pointing out that the court did not address section 3 no. 6 of the Animal Protection Act at all but instead considered only the administrative fine provision of section 18(1)(1) of the Animal Protection Act).

<sup>341</sup> Caspar & Schröter, *supra* n. 45, at 87; see also Obergfell, *supra* n. 23, at 2298; Caspar & Geissen, *supra* n. 35, at 916 (pointing out that previously, freedom of artistic expression trumped the prohibition of section 3(6) of the Animal Protection Act).

<sup>342</sup> Oberlandesgericht [OLG] [Regional Court of Appeals] Frankfurt June 4, 1991, 45 Neue Juristische Wochenschrift [NJW] 1639, 1640 (1992).

<sup>343</sup> Caspar & Schröter, *supra* n. 45, at 86 n. 377; see also Selk, *supra* n. 345, at 445 (arguing that the district court already should have presented to the Federal Constitutional Court, pursuant to Article 100(1) of the Basic Law, the question of whether section 18(1)(4) in connection with section 3(6) of the Animal Protection Act is unconstitutional).

<sup>344</sup> Caspar & Schröter, *supra* n. 45, at 86 n. 377. Indeed, in its decision, the court addressed only a violation of Article 18(1)(1) of the Animal Protection Act. OLG Frankfurt, *supra* n. 342, at 1639–1640 (1992).

<sup>345</sup> OLG Frankfurt, *supra* n. 342, at 1639–40.

<sup>346</sup> Caspar & Schröter, *supra* n. 45, at 86 n. 377.

<sup>347</sup> Landgericht [LG] [Regional District Court] Cologne, Feb. 2, 1989, 11 Natur und Recht [NuR] 42 (1991).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

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tution,<sup>353</sup> and did not specifically address whether artistic freedom is subject to a textual limitation clause. Thus, the decision was at least constitutionally questionable prior to the introduction of the state's animal protection objective.

## 2. *Lessons from the Environmental Protection Amendment*

Now the constitutional interest in animal protection must be weighed against the freedom of artistic expression, and may justify prohibiting uses of animals in art that cause pain, suffering, or harm to the animal. The prohibition would be a proportional limit on the freedom of artistic expression.<sup>354</sup> The relationship between animal protection and freedom of artistic expression is likely to experience significant changes after the introduction of animal protection in the constitution. Although the court must give maximum effect to both constitutional interests while weighing them, the prohibition on inflicting pain, suffering, and harm might generally outweigh freedom of artistic expression. There are alternative methods for artists to express artistic concepts. Requiring such alternatives may cause less harm to the artist than the harm that would be inflicted on the animal if such alternative methods were not used.<sup>355</sup>

Prior cases involving conflicts between freedom of artistic expression and the environmental protection state objective are instructive. One case concerned the importation and sale of elephant ivory.<sup>356</sup> The court stated that freedom of artistic expression does not demand that ivory carvings be generally exempted from a prohibition on the sale of ivory. The legislature may take actions protecting nature to reach the goal set forth in the environmental protection state objective, and passage of a law concerning the protection of the species qualifies as such an action. The laws concerning the protection of the species do not generally trump freedom of artistic expression, and conflicts must be resolved on a case-by-case weighing of interests. The court found it legitimate that the federal legislature—also bound by international environmental law—gave precedence to species protection over freedom of artistic expression; otherwise, it would be virtually impossible to protect the elephant species.<sup>357</sup> However, in individual cases where freedom of artistic expression outweighs protection of species, an exemption may be granted under the statute.<sup>358</sup>

Another example of such a conflict concerned a building permit for two monumental statues near a house in primarily wooded or agricul-

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<sup>353</sup> LG Cologne, *supra* n. 347.

<sup>354</sup> Caspar & Schröter, *supra* n. 45, at 87; Caspar & Geissen, *supra* n. 35, at 916; Obergfell, *supra* n. 23, at 2298.

<sup>355</sup> Hirt et al., *supra* n. 19, at 200.

<sup>356</sup> *Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Sept 21, 1995*, 49 *Neue Juristische Wochenschrift [NJW]* 1163 (1996).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

tural surroundings.<sup>359</sup> The court addressed the relationship between the Federal Building Code (*Baugesetzbuch, BauGB*); environmental protection; and the freedom of artistic expression, which includes the ability to erect monuments in certain locations.<sup>360</sup> The Federal Administrative Court reiterated that Article 20a does not grant individual rights and is primarily addressed at the legislature, which is charged with implementing the goals expressed in the state objective.<sup>361</sup> Moreover, environmental protection must be reconciled with other constitutional principles and interests, including those under Article 5(3).<sup>362</sup> The court stressed that the nature of the architecture may be taken into account in this weighing process.<sup>363</sup> Architectural structures, distinguished from moveable art, presuppose land ownership, which is subject to the societal obligations on real property imposed by Article 14.<sup>364</sup> Moreover, architectural structures are inserted into a pre-existing environment and affect their surroundings, giving significant weight to nature protection.<sup>365</sup>

The weighing processes that involve the prior version of Article 20a in these two cases illustrate how the conflict between artistic freedom and the environmental protection state objective is resolved in adjudication. Translating the weighing procedure to the conflict between artistic freedom and animal protection is difficult because the weighing takes place on a case-by-case basis. However, the ivory carvings case indicates that wholesale exemptions on the basis of artistic freedom will probably be hard to attain. General claims of artistic freedom will likely not be successful when animals are harmed as part of artistic performances.

## VI. CONCLUSION

The addition of the “three words, ‘und die Tiere,’ did not give any rights to animals in Germany.”<sup>366</sup> Indeed, the clause neither grants animals a fundamental right to life nor does it prohibit slaughter, animal experimentation, or other uses of animals. Rather, the clause removed the disproportionality between unlimited constitutional rights and animal protection, and it eliminated any doubts regarding the constitutionality of the Animal Protection Act with respect to fundamental rights without limitation clauses. In the future, the administrative agencies and the courts must give greater weight to animal

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<sup>359</sup> Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] Apr. 13, 1995, 48 *Neue Juristische Wochenschrift* [NJW] 2648 (1995).

<sup>360</sup> *Id.* at 2648.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> Article 14(2) states: “Property imposes duties. Its use should also serve the public weal.” (English translation available in Kommers, *supra* n. 62, at 510).

<sup>365</sup> *Bundesverwaltungsgericht, supra* n. 359 at 2649.

<sup>366</sup> Natrass, *supra* n. 8, at 302.

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protection, especially in the area of unlimited liberty rights.<sup>367</sup> Further, the legislature is now generally mandated to optimize the goal of animal protection and to make laws to that effect.<sup>368</sup>

The nature of the provision decidedly influences its application. Since the state objective is addressed at *all* branches of the government, all must work towards realizing the goal of animal protection. This also applies to the legislature when determining whether to create standing for animal organizations.

As the discussions of freedom of religion and freedom of science, research, and teaching demonstrate, the courts may be tempted to escape difficult weighing processes by deferring to the legislative branch. The intent of the constitutional amendment, however, was to strengthen animal protection in the weighing process. Thus, the administrative agencies as well as the courts must take on the challenge of case-by-case balancing of constitutional interests. In the area of artistic expression, a useful analogy may be drawn to the conflict between artistic expression and environmental protection; general exemptions from the Animal Protection Act seem unlikely.

Overall, some commentators speak of a new dynamic to further changes in the area of animal protection.<sup>369</sup> The inclusion of the animal protection state objective into the constitution has made the goal of effective animal protection, as envisioned in the Animal Protection Act, more attainable.<sup>370</sup> Nonetheless, the content of Article 20a will only be determined in the process of constitutional interpretation through discursive deliberation.<sup>371</sup>

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<sup>367</sup> Caspar & Geissen, *supra* n. 35, at 917; Pabel, *supra* n. 24, at 231.

<sup>368</sup> Caspar & Geissen, *supra* n. 35, at 917.

<sup>369</sup> *Id.*

<sup>370</sup> Obergfell, *supra* n. 23, at 2298.

<sup>371</sup> Faller, *supra* n. 9, at 24.

