" . . . UND DIE TIERE" *CONSTITUTIONAL PROTECTION FOR GERMANY'S ANIMALS*

By
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In the summer of 2002, Germany welcomed animals into the folds of constitutional protection. With the addition of the words "and the animals," Germany became the first country in the European Union ("E.U."), and the second on the European continent,[1] to guarantee the highest level of federal legal protection to its nonhuman animals. Though a welcomed development in the eyes of most Germans, this groundbreaking event received very little attention on the world stage. Common misconceptions about the ramifications of the constitutional amendment resulted in limited to no accurate representation in worldwide media. Likewise, international policymakers and animal protectionists have shown little awareness of this development and its potential implications. In addition to possible legal effects, the social implications of such an occurrence in a major western country are vast. International leaders will certainly take note as the effects of this change begin to take place in Germany's laws and, increasingly, in its international policies. More importantly, the global animal protection community should take note of what is possible, and what can be learned from the achievements of Germany's animal protection community. This study traces the legal and social developments leading to Germany's constitutional amendment which provides protection to animals, showing how this legal highpoint was achieved. Multiple sources are used, including congressional, judicial, and party doc-

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1 BV 1992 § 24 (in 1992, Switzerland recognized the inherent worth of animals (*die Würde der Lebewesen*) in its constitution). Federal laws of a similar manner exist in Germany (Animal Protection Law implemented Sept. 1, 1990, art. 90a *Tierschutzgesetz in der Fassung der Bekantuachung (Tierschutzgesetz)*, v. March 25, 1998 (BGB l I 1094) [hereinafter *Tierschutzgesetz*], and Austria (Art. 285 ABGB implemented July 1, 1988), but Switzerland was the first country to acknowledge the interests of animals within its national constitution. This development had virtually no international impact, however, and receives little attention outside of Switzerland.

uments, press releases, international media reports, personal communication with leaders in four major German animal protection organizations, interviews with a key Ministry official, and published materials. This study will also critically assess the claims of the animal protection and opposition communities in order to predict where German animal law is going and what effects this change will have on the treatment of animals both within Germany and internationally. Concluding thoughts will address how the international animal protection community can understand this legal victory in a constructive context.

I. LIST OF TERMS

BUNDESMINISTERIUM FÜR VERBRAUCHERSCHUTZ, ERNÄHRUNG, UND LANDWIRTSCHAFT (BMVEL) – German ministry of consumer protection, food, and agriculture

BERUFSFREIHEIT – freedom to practice one's profession

BUNDESRAT – Parliamentary house which represents the individual German states

BÜRGERLICHES GESETZBUCH – German civil code

BUNDESTAG – Parliamentary house which represents the German people through directly elected delegates from political parties

BUNDESVERFASSUNGSGERICHT (BVERFG) – highest German federal constitutional court

GRUNDGESETZ – basic law (the constitution) of the Federal Republic of Germany

GRUNDRECHTE – basic rights of the German constitution

KUNSTFREIHEIT – freedom of art, associated with the freedom of expression

RELIGIONSFREIHEIT – freedom of religion

STAATSZIELBESTIMMUNG – statement of a goal or responsibility of the federal government

STAATSZIELBESTIMMUNG TIERSCHUTZ – name for the constitutional amendment declaring animal protection a goal of the German government

TIERSCHUTZGESETZ – Animal Protection Law

WISSENSCHAFTSFREIHEIT – freedom of research

II. DEVELOPMENT OF ANIMAL PROTECTION CONSCIOUSNESS IN GERMANY

Though it is difficult to trace the origins of a cultural predisposition for compassion toward animals, it has been suggested that Germany's political history may have played a role.[2] While most of Europe was developing the democratic national structures that persist today, Germany remained a collection of independent kingdoms well into the nineteenth century. Though democracies may have difficulty enacting only moderately popular social policies such as animal protection, German monarchs were capable of outlawing cruel practices toward animals by simple decree. Kaiser Joseph II, for example, outlawed the baiting of animals for public entertainment in 1789, and countless other directives regarding both domestic and wild animals were enacted in the German lands as far back as 1417.[3] German romanticism,

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[2] *See e.g.* Charles D. Niven, *History of the Humane Movement* 97 (Morrison & Gibb Ltd. 1967).

[3] These historical laws are often cited in German animal law-related literature, without specific legal citations. One such source was provided and confirmed by German Ministry official, Rolf Krieger. *See* R. Krieger, *KurzerÜberblick über das deutsche Tierschutzrecht*, (presented at the Intl. Symposium for the Symbiotic Relationship between

including the works of Goethe, had a marked influence on the awareness of nature and the sensibilities of the German people. In particular, the philosopher, Schopenhauer, is credited with having engaged German-speaking lands in an ethical debate about interactions with nonhuman animals in the early 1800s.[4] By 1871, when Germany united as one nation, its culture had already been significantly influenced by these and other social movements that contributed to the developing European humane movement. While Germany is not credited as the first country to have enacted national anti-cruelty laws, Germany already had more success in developing socially pervasive humane attitudes by the late 19th century than its neighboring European democracies.

Germany's first formal animal protection laws surfaced shortly after the passage of Martin's Law, the first animal protection law in England.[5] An 1838 anti-cruelty statute in Saxony closely reflected developing humane attitudes in other parts of Europe.[6] Like Martin's Law, however, the first German laws were based firmly on the anthropocentric grounds that animal abuse was imprudent and unseemly. Likewise, the first national German law in 1871 punished anyone who "*publicly* or *offensively* beats or plainly mishandles an animal."[7]

The first comprehensive German animal protection law was developed during the 1920s and finally enacted under National Socialism in 1933.[8] It voided prior laws and enacted the first ethically-based animal protection law in Germany.[9] The act expanded on prior animal protection laws by regulating specific acts, such as a reduction in animal experimentation, and the banning of animal slaughter without prior stunning (effectively outlawing the kosher slaughter of animals), and it carried a strong penalty for violations.[10] In many ways, the Nazi regime used animal protection as a means of promoting its own unethical and highly convoluted social agenda.[11] Despite the tragic effects of

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Humans & Animals, Kyoto/Tokyo 2002); E-mail from Rolf Krieger, PhD, Ministry of Consumer Protec., Food, and Agric. (BMVEL) to Kate Nattrass (Sept. 29, 2003) (on file with author).

[4] Arthur Schopenhauer is often cited in animal-ethics circles for his influential works. Arthur Schopenhauer: *Die Welt als Wille und Vorstellung*, (In: Arthur Hübscher, ed.: *Schopenhauers ges. Werke.* Wiesbaden 1972. Vol. II).

[5] Often cited as the first national animal protection law, Martin's Law was signed into British law on July 22, 1822. Due to its historical nature, exact legal reference on the law is difficult to obtain. One source that details the background of the law is: J. Nivens, *Reckoning with the Beast: Animals, Pain and Humanity in the Victorian Mind*, ch.2–3 (Baltimore: Johns Hopkins University Press 1980).

[6] Nivens, *supra* n. 5.

[7] *Reichsstrafgesetzbuch* No. 360 (1871, amended 1888) (emphasis added).

[8] *Reichstierschutzgesetz* (1933).

[9] A. Rojahn, A.: *Entstehung und Entwicklung des Tierschutzgesetzes* (Deutsches Tieraertzliche Wochenschrift Vol. 100, Nr. 2, 43–47).

[10] Art. 5–8 *Reichstierschutzgesetz* (1933).

[11] *See generally* Boria Sax, *Animals in the Third Reich: Pets, Scapegoats, and the Holocaust* (Continuum, 2000); A. Arluke, *Boundary Work in Nazi Germany* in A. Arluke & C. Sanders, *Regarding Animals* (Temple U. Press, 1996).

such an agenda, the fact that animal protection was a solid platform on which to win popular approval attests to the widespread German acceptance of animal protection as a legitimate issue by the 1930s. A 1937 article in the *Deutsches Tierärzteblatt* declared that the animal, under National Socialism, enjoyed "a protection that reflects its value as a member of the German community."[12] Furthermore, the same law persisted virtually unchanged after the foundation of the new Federal Republic of Germany in 1949.

Animal protection expanded rapidly in Germany in the period of change that followed World War II. The 1950s and 1960s brought amendments and proposals to the Animal Protection Law, or *Tierschutzgesetz*, including regulations regarding slaughter, transport, and animal husbandry.[13] With an expanding set of regulations, the object of the *Tierschutzgesetz* evolved from a set of restrictions into a law centered on regulation and control of permissible activities. In 1972, the Bundestag rescinded the old *Tierschutzgesetz* completely and formulated an updated law to reflect the changing needs of animal protection and regulation.[14] It maintained the ethical basis of the 1933 law for "protecting animals on the basis of humans' responsibility for the animals in their care"[15] and enacted modern regulations to reflect this moral foundation. Lawmakers were thereafter compelled to weigh the ethical requirements of animal protection against the economic and educational interests of humans.[16]

A positive attitude toward animals is plainly visible throughout much of German society, and is reflected in the wide variety of proactive organizations and in positive legal strides made over the past quarter century. A German government press release from 2002 states that "animal protection has an important place in our society,"[17] and at least 80% of German citizens have supported the addition of animal protection to the national constitution since 1993.[18] Animal protection organizations have taken root in nearly every major German city, ranging from grassroots to high-profile political organizations. Other manifestations of German attitudes toward animals have become more prevalent in the past few decades. Programs for animal-assisted therapies and centers promoting positive human-animal interactions have become widespread throughout the country.

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12 Peter Köpf, *Ein Herz für Tiere* 51 (Verlag J.H.W. Dietz Nachfolger GmbH 1996).

13 R. Krieger, *supra* n. 3.

14 *Tierschutzgesetz* (1972).

15 Art. 1 *Reichstierschutzgesetz*.

16 *Id.*

17 Bundesregierungonline, *Tierschutz als Staatsziel*, http://www.bundesregierung.de/dokumente/,-440180/Artikel.htm (press release, Sept. 19, 2002).

18 Forsa-Poll cited in *Wie Ernst ist es dem Politikern mit dem Tierschutz?* (informational release of the German Animal Protection League 2000).

III. ANIMAL PROTECTION LAW (*TIERSCHUTZGESETZ*)

This section will outline key features of the basic German Animal Protection Law, which is considered a strong law by the standards of most nations. Through many changes and amendments, the law has maintained its character as an ethics-based animal welfare act. The first section of the law declares that the motivation of animal welfare legislation in Germany is to "protect the life and well-being of animals as fellow creatures."[19] In addition, the German civil code (*Bürgerliches Gesetzbuch*) was expanded in 1990 to recognize that "[a]nimals are not things. They are protected by special laws. Laws pertaining to physical objects apply to them only so far as there is no special regulation concerning them."[20] Though this phrase was greeted with skepticism and called an "emotional declaration,"[21] it followed an Austrian law of the same character, and later served as an impetus for Switzerland to make a similar declaration in its national constitution.[22]

As a federal act, the *Tierschutzgesetz* overrides legislation at the state level. The strength of the law indicates the secure status of animal protection in Germany, as compared to regulations that vary drastically from state to state and by type of animals, such as in the United States[23] and Canada.[24] Furthermore, the German law applies to all animals, vertebrates and invertebrates alike, without exception. However, there exists consensus that greater consideration should be granted to progressively "higher" species.[25]

In addition to the ethical basis of the *Tierschutzgesetz*, the most notable feature is the fundamental guideline that "[n]obody may injure or cause the suffering of an animal without *sound reason*."[26] For instance, the *Tierschutzgesetz* bans the docking of tails of dogs, except for medical reasons or of hounds[27] and prohibits specific mutilation-type animal husbandry practices in certain farm animals.[28] In 1999, the

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19 Art. 1 *Tierschutzgesetz*.

20 *Bürgerlichen Gesetzbuch* § 90a.

21 *Reichtierschutgesetz*, *supra* n. 15.

22 The Swiss and Austrian laws are generally regarded as successful by animal protectionists in their respective countries. *See generally* H. Herbrüggen, *Österreichisches Tierschutzrecht im Lichte der europäischen Integration* (Braumüller 2001); *see also* Gieri Bollinger, *Europäisches Tierschutzrecht* (Schultness Juristische Median 2000).

23 This varies drastically from the United States Animal Welfare Act, 7 U.S.C. § 2131 et seq. (1966), which regulates primarily commercial and research activities. The U.S. law covers only vertebrate species, and even then excludes rats, mice, and birds.

24 *See* Christiane Meyer, *Animal Welfare Legislation in Canada and Germany, a Comparison* (Peter Lang 1996) (comparing German and Canadian laws protecting animals).

25 Bundesrat document 14/758: Proposal of a law to change the constitution (*Staatsziel: Tierschutz*).

26 Art. 1 *Tierschutzgesetz* (emphasis added).

27 Art. 6 *Tierschutzgesetz* (prohibits amputations or removal of organs or tissues of any animal, partially or in total. While exceptions allow such procedures with the approval of a veterinarian, docking for aesthetic reasons is considered unacceptable.).

28 Art. 5 *Tierschutzgesetz*.

right to crop ears and tails of canines was challenged on the basis of the constitutional freedom to practice one's profession.[29] The court upheld the *Tierschutzgesetz* on the basis that preventing unnecessary suffering is a legitimate mandate of the law—even if it interferes with standard occupational practice—when the customs of a profession dictate removal of a naturally developed body part.[30] Orders issued by the *Bundesministerium für Verbraucherschutz, Ernährung, und Landwirtschaft* (BMVEL),[31] with approval of the Bundesrat, updated farm animal husbandry standards in keeping with this guideline in order to ensure standard animal husbandry does not promote unnecessary suffering due to mutilation.

Furthermore, it is illegal to kill a vertebrate animal without sound reason.[32] Of course, the term "sound reason" leaves room for considerable ethical and legal interpretation, but this ambiguity, which was intentionally included in the language of the law to leave the interpretation open to developments in research, knowledge, and attitude of society,[33] has surprisingly never led to a discussion of the term in the courts. In theory, the killing of an animal is permissible only if a legal good of equal or higher value demands it. In practice, such justifications include killing for food production, risks to human health or for the health of their animals, impairment of agriculture, forestry, and fishery, peril for traffic or vehicles, peril for the existence of endangered plants or animals, extermination of pests or poisonous animals, and hunting.[34] The German Animal Protection League has used this law as the basis for its shelter regulations by which no animal may be euthanized due to lack of space or inability to find a home.

Beginning with a reformulation of the bill in 1986, the federal ministries were given responsibility for creating regulations concerning care of agricultural animals, animals being transported, animals being slaughtered, and animals used in research. The ministries are also accountable to European Union regulations regarding animal care and protection. This task primarily falls to the BMVEL, though proposed regulations must be approved by the Bundesrat.[35] Such regulations have come to highly regulate animal agriculture in Germany, resulting in the progressive standards for which Germany is recog-

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29 1 BvR 875/99 (note that German citation does not require case name).

30 *Id.* at ¶ 2.

31 German ministry of consumer protection, food, and agriculture.

32 Art. 17, No. 1 *Tierschutzgesetz*.

33 E-mail from Rolf Krieger, PhD, Ministry of Consumer Protec., Food, and Agric. (BMVEL) to Kate Nattrass (Sept. 29, 2003).

34 Karin Schwabenbauer, *The Reasonable Reason According to Art. 17 No. 1 of the Animal Protection Law*, 99 Deutsche Tierärztliche Wochenschrift 8 (1992).

35 Congressional house in which the German states are represented. The German Congress consists of two houses, the Bundesrat and the Bundestag. In the Bundesrat, or "States' chamber," the interests of the states are represented by prime ministers, ministers, or other representatives of the states. The Bundestag, or "Peoples' House," consists of delegates who are directly elected as members of the political parties to which they belong.

nized. Such regulations include the banning of veal crates,[36] restrictions on travel, rest, and feeding times during animal transport[37] and, most recently, the outlawing of battery cages for laying hens effective in 2007. [38] A ban on keeping sows in permanent closed confinement is currently under discussion in the Bundesrat.[39]

IV. PROBLEMS WITH IMPLEMENTING THE *TIERSCHUTZGESETZ*

Despite the successes for German animal protection, animal protectionists believe that major insufficiencies in the German system prior to the constitutional amendment prevented the *Tierschutzgesetz* alone from reaching its full ethical potential. Several specific features of the *Tierschutzgesetz* including criminal prosecution, slaughter regulations, and research animal laws were less effective in practice than intended in protecting animals against the increasingly demanding interests of humans. Furthermore, weakness in the legal status of animal protection arose when the *Tierschutzgesetz* conflicted with German citizens' basic rights outlined in the federal constitution, or *Grundgesetz*.

A. Criminal Prosecution

The *Tierschutzgesetz* outlines strict guidelines regarding the treatment of animals in the care of humans. Unfortunately, penalties for those convicted of animal abuse are, in reality, rather weak. The *Tierschutzgesetz* requires the state authorities to employ an enforcement officer and suggests additional consultation with a veterinary officer. Violations of the *Tierschutzgesetz* can result in either misdemeanor or felony prosecution, depending on the motivation of the offender and severity of the action. Felony prosecutions carry up to two years imprisonment and fines of up to 50,000 DM or Euro 25,000.[40] Automatic felony prosecutions result from killing a vertebrate without reasonable cause, or for causing persistent and repeated pain and suffering. However, enforcement officers often have large areas to cover and responsibilities other than enforcing animal protection laws. Some of the most egregious violations in recent years resulted in fines as low as 15 DM and included minor prison sentences.[41]

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[36] § 7–9 *Tierschutnutztverordnung* (1992).

[37] *Tierschutztransportverordnung* (*Bundesgesetzbuch* II 1997, 348; amended Nov. 6, 1999).

[38] § 12–15 *Tierschutztnutzverordnung* (2002).

[39] Bundesgesetzblatt Jahrgang 2002, Teil 1 No. 16.

[40] The exchange rate in the late 1990s was approximately DM2 = US $1 (where DM stands for Deutsch Mark, the German currency). The Euro fluctuates but is roughly equivalent to the US Dollar.

[41] A dog owner in Celle who attempted to hang his dog, but upon failing to do so beat the dog to death, was sentenced to 25 days imprisonment and 15 DM. A dog owner in Hagen who allowed his dog to starve to death by withholding food for 4 weeks was sentenced to 30 days imprisonment and 30 DM. Similar sentences for extreme cruelty

B. Slaughter

The *Tierschutzgesetz* requires that any warm-blooded animal be rendered unconscious prior to slaughter and that slaughter must be performed by a proficient, trained individual.[42] Exceptions are for emergency situations, such as injured or suffering cattle, and pest removal, but methods that cause as little suffering as possible must be utilized.[43]

The other major exception is in the case of ritual slaughter, which is a highly contentious exception for most Germans. Kosher slaughter practices are highly protected in light of Germany's history of extreme anti-Semitism, but a majority of Germans view this practice to be cruel and inhumane.[44] A religious individual trained in proper technique must obtain a permit prior to performing a slaughter without stunning. In order to obtain such a permit, one must prove religious conviction showing that consuming an animal slaughtered while stunned would cause great harm, that the individual in question has never before consumed an animal slaughtered by any other method, and certification of training.[45] Though the law primarily pertains to those of Jewish faith, some Sunnite Muslims also believe the Koran forbids contact with meat from any animal slaughtered while unconscious. A *Bundesverfassungsgericht* (BVerfG)[46] case in 1995 denied Muslims the right to obtain such permits, deciding that little proof existed that followers of Islam are compelled to eat only meat from an animal slaughtered while fully conscious.[47] In this instance, the *Tierschutzgesetz* carried weight over an argument based on constitutional religious freedom. In the decision, the provisions of the *Tierschutzgesetz* concerning humane slaughter law were interpreted to not interfere with the freedom to continue to practice Islam. This decision was overturned with the notorious "Schächt-Urteil" (slaughter decision) of the *Bundesverfassungsgericht* in early 2002.[48]

C. Research

Unlike agricultural and slaughter practices, animal experimentation is regulated in the *Tierschutzgesetz* itself.[49] The *Tierschutzgesetz*

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were the rule rather than the exception. As reported in: *Wie Ernst ist es dem Politikern mit dem Tierschutz?* (informational release of the German Animal Protection League, 2000).

42 The term schlachten (slaughter) refers to the slitting of a stunned animal's throat so that it will bleed to death. A different term (schächten) is used to describe the form of religious slaughter in which the throat is slit without prior stunning of the animal.

43 Art. 4(a), 4(b) *Tierschutzgesetz*.

44 In contrast, slaughter performed without prior stunning is outlawed without exception in Sweden, Norway, and Switzerland.

45 BVerfGE 1 BvR 2284/95 (1995).

46 Analogous to the Supreme Court in the United States.

47 BverfGE 1 BvR 2284/95.

48 BVerfG, 1 BvR 1783/99 (2002).

49 Art. 7 *Tierschutzgesetz*.

states that "[r]esearch on vertebrate animals may only be undertaken when the expected pain, suffering, or injury to the animal are ethically acceptable."[50] Animal Welfare Committees in each state are commissioned to review all proposed animal experimentation, detailing what is to be undertaken and why the experiment is necessary (reasonable cause). In addition, researchers are required to follow specific guidelines including use only of animals bred specifically for research, to maintain standards of care according to the requirements of the species, to anesthetize and control pain where possible, and to use reduced numbers or alternatives to animal models whenever available.

Animal protection advocates claim that the law does little to prevent the suffering of animals in research despite the strict restrictions. In practice, the Animal Welfare Committees control applications only for scientific and grammatical mistakes as opposed to content, regardless of a 1986 congressional recommendation that the committees employ experts in both research and animal protection. As a result, permits for proposed experiments are rarely denied. Additionally, permission is not required for experiments which are mandatory under other legislation (e.g. consumer safety) or if the experiment would not cause damage, pain or suffering to the animals involved. Despite the language in the *Tierschutzgesetz*, restricting an animal research activity on ethical grounds is nearly impossible and is left almost entirely to the discretion of the researcher and his or her institution.

D. Basic Rights (Grundrechte)

In spite of the compelling ethical basis for the *Tierschutzgesetz*, it can be overridden by what the German constitution and legal tradition refer to as *Grundrechte*, or basic rights. When restrictions regarding the use of animals collide with the basic rights outlined in Section 1 of the *Grundgesetz*,[51] these rights take precedence over other normative laws, thereby rendering the *Tierschutzgesetz* ineffective. Some of the most notorious examples come from the freedom to practice one's profession, freedom of artistic expression, and the freedom of research.

1. Freedom of Profession (Berufsfreiheit)

Modern agricultural practices pose complex problems for animal protection. Agricultural practices must conform to a number of standards written by the BMVEL, but the ministry must walk a fine line between regulating animal use and standards while allowing the agricultural industry in Germany to remain competitive. Furthermore, the "sound reason" for killing a vertebrate animal has always been interpreted to include slaughter for human consumption. Some activists would make the case that the global abundance of meat and availabil-

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[50] § 7, ¶ 3 *Tierschutzgesetz*.

[51] There are 19 articles, or basic rights, that make up Section 1 of the German Constitution (*Grundgesetz*).

ity of other foods renders further slaughter unnecessary. Although this argument is not likely to arise in a legal forum in the near future, it sheds light on the flexibility of "sound reason" in the law and how it does not apply in light of ingrained practices.

As a result, the increased industrialization of animal husbandry presents serious problems for policymakers. Egregious violations of the *Tierschutzgesetz* specifications for species-appropriate containment such as gestation crates and veal crates have been outlawed However, battery cages, used to confine egg-laying hens, remain legal until the law prohibiting the device takes full effect in the year 2007. A BMVEL representative commented that the ministry would like to strengthen standards based on the *Tierschutzgesetz*-defined suffering of animals, but runs up against the *"Berufsfreiheit"*[52] in formulating regulations.[53] Any stringent standard that challenges common agricultural practice may cause German farmers to lose their ability to compete in the international market, and is thus viewed as a violation of a constitutionally protected freedom. As such, the ministry's hands are tied in light of the increasing global industrialization of animal agriculture and some of the most egregious violations of animal welfare.

Furthermore, agricultural interests can directly violate the language in the *Tierschutzgesetz*. Thousands of pigs were destroyed during the swine fever epidemic that swept Europe in the early 1990s. Rather than utilize the vaccine that would prevent the spread of illness while rendering the meat unfit for the international market, German policymakers chose to authorize mass killing of thousands of pigs. In the late 1990s, when numerous Bovine Spongiform Encephalopathy (BSE) cases outside the United Kingdom shattered the European beef market, a European program was launched to kill and destroy healthy cattle in order to control the beef market. Because Germany was obliged to take part in this European program, the government created a "sound reason" for killing cattle by exporting the BSE-free beef to North Korea without charge. Many infuriated animal welfare sympathizers claimed that economic interest alone was not a "sound reason." Such situations illuminate how virtually any practice can be legally permissible within the flexibility of the *Tierschutzgesetz*.

2. *Freedom of Artistic Expression (Kunstfreiheit)*

The *Tierschutzgesetz* states that "[i]t is forbidden to use an animal in a film, public show, advertisement, or similar display if pain, suffering, or injury of the animal will result."[54] However, article 5 of the German constitution guarantees the freedom of expression and art. In a case brought to the circuit court of Kassel, an artist was charged with animal cruelty on the basis of the above article of the *Tierschutzgesetz*.

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[52] Art. 12 GG.

[53] E-mail from Rolf Krieger, PhD, Ministry of Consumer Protec., Food, & Agric. (BVMEL) to Kate Nattrass (June 12, 2003).

[54] Art. 3, No. 6 *Tierschutzgesetz*.

The artist had bound a bird in a glue-like substance made of egg yolk and ground sausage in order to represent how humans are often mishandled in modern society. The bird, unable to fly, was forced to hobble about the exhibit in obvious distress. While the Kassel court agreed that the bird had suffered and experienced pain, it ruled that the constitutionally protected freedom of artistic expression took precedence over the animal protection law.[55] Consequently, animals used in many similar expositions may not be protected under the *Tierschutzgesetz*.

3. *Freedom of Research (Wissenschaftsfreiheit)*

In addition to the problems outlined above, the constitution guarantees the freedom of research. In 1994, a Berlin college teacher sued over a denied permit to pursue his research.[56] He had proposed to sew the eyes of newborn monkeys shut for one year, at which point they would be forced open to have a copper electrode implanted. The monkeys would then be bound to a "primate chair" for up to six months while coerced to do visual exercises. The researcher sued on the basis of his constitutional freedom of research.[57] The court ruled that the *Tierschutzgesetz*, in accordance with the constitution, left experiments to the ethical discretion of the researcher.[58] In so ruling, the *Tierschutzgesetz* was rendered ineffective in regulating the protection of animals used in research.

V. DEVELOPMENT OF THE CONSTITUTIONAL AMENDMENT

Beginning in the late 1980s, the insufficiency of the laws to protect animals led to a movement within the animal protection community to strengthen the *Tierschutzgesetz*. The most widely supported tool for accomplishing this was a proposal to include animal protection in the German constitution. By granting animal protection the highest federal legal status, animal laws would be put "at eye level" with other constitutionally protected rights.[59]

A. *Reunification and Environmental Protection*

The first serious attempts to incorporate animal protection in the constitution occurred in connection with an environmental initiative in the wake of German reunification. A committee commissioned with the task of updating the new, "modern" German constitution proposed the

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[55] *Tierschutz: Drei Beispiele*, Bündnis 90/Die Grünen, http://www.gruene-fraktion.de/rsvgn/rs_dok/0,,3772,00.htm (Mar. 12, 2002).

[56] *See Wie Ernst ist es dem Politikern mit dem Tierschutz?* (informational release of the German Animal Protection League, 2000).

[57] Art. 5 GG.

[58] *Id.*

[59] German Animal Protection League (*Deutscher Tierschutzbund*), *Tierschutz ins Grundgesetz – Langer Atem führt zum Erfolg – Konsequente Umsetzung angemahnt – Verbandsklagerecht für Tierschutzorganisationen nächstes Etappenziel*, http://www.tierschutzbund.de/aktuell/presse/index.htm (press release, May 17, 2002).

addition of an environmental protection clause or "Declaration of an Objective of the Government" (*Staatszielbestimmung*) on environmental protection. The clause carried no specific legal responsibilities, but would require the government to strive toward maintaining the ideal of environmental protection in its lawmaking, policymaking, and judicial activities. The concept was sharply debated because ambiguity of the wording left interpretation open to anthropocentric values, because of the difficulty of proving any action in violation of the "goal," and because the effects it could have on other laws were unknown. Despite minor misgivings, however, the Bundestag finally accepted the proposal on June 30, 1994 in the total package proposed by the commission, adding the following to Section 20a of the German constitution: "[t]he state protects, in the interest of future generations, the natural basis of life, within the framework of constitutional laws and through the making of laws, and in accordance with ordinances and through judicial decision."[60]

Animal protection entered into the initial discussion only insofar as it related to the "natural basis of life," which was interpreted to mean the basis of human life. Wildlife habitat was therefore protected in order to protect species, but individual animals gained no protection from this constitutional amendment. The majority coalition in the Bundestag at the time, the Christian Democratic Union (CDU/CSU), maintained that animals, including those in the care of humans, make up the "natural basis of life." Some academics and lawyers also attempted to make the case that the constitution did, in fact, extend constitutional protection to animals, but these attempts have generally been considered failures.[61] In its ruling on primate research discussed above, the Berlin court implied that whoever wanted animal protection in the constitution had to put it there explicitly.[62]

As a result, animal protection in the early 1990s found itself legally emancipated from environmental protection in German legal circles for the first time. Though the concept of adding animal protection to the updated constitution had been considered separately, it failed to pass the constitutional commission because of many of the same arguments that had initially threatened the environmental protection

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[60] Article 20 of the German Fed. Const., which immediately follows the basic rights (Art. 1–19), outlines the goals and principals of the German government in four points: (1) the German Republic is a democratic and social state; (2) the state represents the people; (3) application of the law and lawmaking must agree with the constitution; and (4) the state has the right to defend itself against any who attempt to defy the constitution. Article 20a follows directly as a supplemental goal of the state.

[61] U. Nickel, *Zur Notwendigkeit einer Staatszielbestimmung Tierschutz im Deutschen Grundgesetz,* 89–94 (Forschung ohne Tierversuche 2000); V.H. Schelling, *Tierversuche und medizinische Forschungsfreiheit* 4 Natur und Recht 188 (2000).

[62] *Wie Ernst ist es dem Politikern mit dem Tierschutz?* (informational release of the German Animal Protection League 6–7, 2000).

clause.[63] The primary cause for the failure of the proposal was that many felt the normative laws covering animals were sufficient, or could be updated to become sufficient. Adding animals to the constitution was simply too big a leap at the time. Despite an 84% popular approval of the addition of an animal protection clause to the constitution, the debate was perhaps too new for some politicians.[64] While the case for environmental inclusion in the constitution had been publicly raging since the mid-1970s, the struggle for constitutional animal protection gained momentum only in the mid- to late 1980s.

B. Legislative Attempts 1994–2000

Numerous attempts to add the animal protection clause over the next several years signaled a shift in public opinion and growing receptivity of legislators to the concept. Throughout the 1994–98 legislative period, each of the parties represented in the Bundestag, with the exception of the majority CDU/CSU, submitted its own proposal for an animal-protection *Staatszielbestimmung*. These proposals were sent to committee as a stalling tactic by the majority party and were not seriously considered further.

The 1998–2002 legislative period brought new hope for animal protection. Elections put the Social Democratic Party (SPD) in control, in coalition with the Green Party (Bündnis 90/Die Grünen), for which animal protection is a high priority.[65] The issue was taken up in the coalition contract in 1998, and proposals were put forth again in the following year by each of the major parties except the now minority opposition CDU/CSU.

Proposals for a constitutional amendment, placed immediately following the environmental protection *Staatszielbestimmung* (Article 20a), read:

> Animals will be protected within the framework of the current laws.
>
> -Free Democratic Party (FDP)
>
> Animals will be held in appropriate containment facilities, protected from destruction of their habitats as well as from preventable pain and suffering. Animal experimentation is only permitted when it is imperative for the development and health of humans.
>
> -Socialist Party (PDS)
>
> Animals will be treated as fellow creatures. They will be protected from inappropriate containment, avoidable suffering, and in their natural habitats.

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[63] The vote failed to reach the required two-thirds majority of the commission with 33 votes in favor and 19 votes against adding animal protection to the updated constitution.

[64] Forsa-Poll, *supra* n. 18.

[65] Each party has an identifying color: red for SPD and green for the Greens. This leadership was commonly referred to as the "Red-Green Coalition." *See e.g. Fight Intl. Terrorism, Practice Critical Solidarity, Continue the Red-Green Coalition, Resolution Passed at the 17th Regular Natl. Conference of Delegates of Bündnis 90/Die Grünen*, http://www.greens.org/s-r/28/28-15.html (Nov. 24, 2001).

-SPD/Greens[66]

The following year, after failing to reach a compromise, and with the necessary support of the CDU/CSU unlikely, the four parties joined together in a compromise proposal to add the three words "and the animals" ("*und die Tiere*") to the existing Article 20a. It would read "The state protects, in the interest of future generations, the natural basis of life and the animals within the framework of constitutional laws and through the making of laws, and in accordance with ordinances and through judicial decision."[67]

Animal protection groups, including the State Veterinary Associations, the German Animal Protection League, and Humans against Vivisection/People for Animal Rights, lobbied hard during this period. Numerous articles detailing the failures of the *Tierschutzgesetz*, as well as ethical appeals to protect animals from the horrors of factory farming and research, led to a huge upswing in letters, postcards, and calls to the members of the Bundestag. Though the vote to reach the two-thirds majority necessary to pass a constitutional amendment would be close, animal protectionists, party leaders, and Renate Künast, the Minister of Consumer Protection, Food and Agriculture, were hopeful. In addition, individual members of the CDU/CSU promised support for the measure in spite of their party's position.

Despite huge popular support, the proposal again failed to pass the Bundestag. A last minute CDU/CSU party convention resulted in minimal crossing of party lines. Only four CDU representatives voted in favor of the amendment, with five abstaining. The final vote of 391 to 205 failed to meet the two-thirds requirement by six votes.[68] In so doing, the CDU/CSU "ignored the concerns of 80% of citizens, which will not be without consequences," according to the president of the German Animal Protection League.[69]

C. State Politics

The Bundesrat made its own proposal during this legislative period, though it also failed to receive notice in Bundestag. The federal states represented in the Bundesrat were frustrated by the stagnation on the issue of adding an animal clause to the constitution. As a result, eleven of the sixteen federal states took matters into their own hands,

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[66] Authentication of these quotations is on file with the author and their accuracy rests solely with the author.

[67] Art. 20a GG (emphasis added). Despite initial failure, this language was added by majority vote in 2002.

[68] German Animal Protection League (*Deutscher Tierschutzbund*), *Staatsziel Tierschutz – Abstimmung Im Deutschen Bundestag*, http://tierschutzbund.de/AKTUELL/KAMPAGNE/KAM_STAATSZIEL_ABST.HTM (Apr. 13, 2000).

[69] German Animal Protection League (*Deutscher Tierschutzbund*), *Deutsche Tierschutzbund veröffentlicht Namensliste zur Bundestagsabstimmung 'Tierschutz ins Grundgesetz'–charfer Angriff gegen Jürgen Rüttgers* (press release, Apr. 18, 2000).

adding a *Staatszielbestimmung* to their state constitutions between 1992 and 2001.[70]

The states' attempts to bridge the gap between the goals of the *Tierschutzgesetz* and its legal ineffectiveness were primarily symbolic. As no law in a state constitution can take precedence over any law in the federal constitution, animal protection remained subordinate to the basic rights in the federal constitution. However, the state initiatives were not entirely ineffective.

Certain responsibilities are specifically delegated to the states. Among them is the right to control the schools, and in this realm, the state laws had the potential to affect animal welfare policy. For instance, it would be possible to mandate that students be allowed to choose whether to participate in a classroom dissection, whereby federal courts may decide that a school or teacher has ultimate influence over the students' participation.

State committees are also responsible for regulating animal research, as outlined in the *Tierschutzgesetz*.[71] However, because this is the execution of a federal law, states' activities in this realm cannot be improved upon by a state-level constitutional declaration commanding greater consideration for animal protection. As determined in the case described above, an ethical rejection of proposed research violates a constitutional right. In this situation, states can be more vigilant regarding the regulations, but are unlikely to make major changes in animal research laws.

The final and most important effect of the states' constitutional amendments concerns the *Grundgesetz* itself, and the federal government's responsibility to maintain the law in the interest of the entire population.[72] The states showed even more pointedly than public polls that constitutional protection of animals was an important objective of the members of the German federation. This was used as a legal basis on which to pressure the Bundestag to act on the concerns of the states.

D. Expectations

Numerous animal protection groups, a majority of politicians (especially Greens and Social Democrats), Minister of Consumer Protection, Food and Agriculture Renate Künast, and 79% of the German

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[70] The following states incorporated a *Staatsziel Tierschutz* into their state constitution (*Landesverfassung*): Brandenburg (1992), Saxony (1993), Thuring (1993), Berlin (1995), Niedersachsen (1997), Bremen (1997), Bavaria (1998), Saarland (1999), Rheinland-Pfalz (2000), Nordrhein-Westfalen (2001), Baden-Wurtemburg (2001).

[71] Art. 7 *Tierschutzgesetz*.

[72] *See* Art. 72 *Tierschutzgesetz* (stating that the federal government shall make laws when the interest of legal or economic unity requires regulation of all the states. Some officials interpreted this clause to mean that the federal government is obligated to make laws when a consensus of the states demands it. However, the federal government neither acknowledged nor acted upon this opinion.).

population supported the initiative.[73] They hoped that a *Staatszielbestimmung* would improve the ability of the government to protect animals from cruelty and suffering in Germany. The primary effect of the constitutional amendment would be to allow the *Tierschutzgesetz* to function legally as it was written. Constitutional status would close the loopholes in the law by placing animal protection at the same constitutional level as basic rights. Though the *Tierschutzgesetz* would remain among normative laws, it would be the primary avenue through which the government could apply the constitutional directive and meet its "goal" to protect animals. Until then, the language protecting animals was subject to changing interpretations of "reasonable cause" in light of constitutional freedoms. "The *Tierschutzgesetz* must be supported through a constitutional amendment," said Minister Renate Künast, "or it is not worth the paper it is written on."[74]

Advocates of the amendment believed that it would affect three areas of government policy. The strongest argument was its potential effects within the judicial system. By effectively guaranteeing animal protection in the constitution, advocates hoped that the courts would no longer find egregious violations of the *Tierschutzgesetz* by religious groups, artists, and researchers permissible. A directive to rank animal protection highly would also strengthen criminal prosecutions. Additionally, advocates hoped that the amendment would influence lawmakers to strengthen existing animal protection laws and clarify ambiguous sections of the *Tierschutzgesetz*. Finally, the constitutional amendment would function through the ministries, compelling them to pass stronger regulations in keeping with their federal directive to protect animals from suffering.

The primary appeal for supporting the amendment was ethical. Where the language of the *Tierschutzgesetz* had proven weak, animal advocates hoped the term "sound reason," when placed under greater scrutiny, would revert to the ethical basis on which it was written. Such an interpretation could preclude precedence being given automatically to humans' profit and pleasure. A constitutional amendment would allow animals to be protected individually.

For example, advocates claimed that cruelties associated with animal experimentation would be mitigated because such experimentation would have to be more acutely scrutinized for an ethical basis.[75] This would also compel researchers to use alternatives to live animals whenever possible, and some legislators even claimed that more

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[73] EMNID poll 2002, German Animal Protection League (*Deutscher Tierschutzbund*), *Tierschutz ins Grundgesetz – Aktuelle Emnid-Umfrage bestätigt Mehrheitswillen der Bevölkerung*, (press release, Mar. 19, 2002).

[74] German Animal Protection League (*Deutscher Tierschutzbund*), *Tierschutz ins Grundgesetz – Langer Atem führt zum Erfolg – Konsequente Umsetzung angemahnt – Verbandsklagerecht für Tierschutzorganisationen nächstes Etappenziel*, http://www.tierschutzbund.de/aktuell/presse/index.htm (press release, May 17, 2002).

[75] *Tierschutzgesetz*, *supra* n. 28.

money would be directed toward developing alternatives to animal research. Animal advocates, as well as some scientists, welcomed the possibility that research would have more narrowly defined ethical controls and claims of "necessity." Research would also become more efficient and invite less criticism, preparing the industry for what is almost certain to become an increasingly strict national and international regulatory environment.

Animal protection groups also hoped that the *Staatszielbestimmung* would be successful in changing specific industrial practices. A *Staatszielbestimmung* would force the BMVEL to pass stronger regulations regarding husbandry facilities for animals raised for agricultural purposes.[76] Cruelties of factory farming were a rallying point for animal protection groups, and many of these issues were already well-publicized due to the 2001 campaign to end the use of battery cages in egg production. Animal groups claimed that long-distance animal transport is another area causing an unreasonable amount of suffering, preventable through a *Staatszielbestimmung*.[77]

The final motivation for animal protectionists was the potential effects a constitutional amendment could have on European policy. A *Staatszielbestimmung* would require German politicians to strive for animal protection in all of its pursuits, which include international policy and trade issues. Germany would serve as a forerunner in progressive animal protection in Europe, and in doing so, would have a stronger basis on which to propose strengthening existing E.U. standards. Specifically, Germany's influence would benefit a growing campaign to include animals in the European constitution.

Though majority support of the amendment shows that resistance was low, some objections were heard. The most prevalent objections came from German research organizations, which feared that it would become difficult or impossible to conduct research using animals in Germany. Some agricultural interest groups also objected to the amendment, claiming that stronger regulations would make animal husbandry even more expensive and would hinder the industry's ability to compete. The CDU/CSU opposed the amendment on these bases. CDU/CSU party leaders hoped that normative laws could instead be modified to correct the most egregious infractions of animal welfare, without causing sweeping changes that could have detrimental effects on Germany's industries.

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[76] Johannes Caspar, *Staatsziel "Tierschutz," Auswirkung der Grundgesetzänderung fur die landwirtschaftliche Nutztierhaltung* (Kritischen Agrarbericht 2003, forthcoming 2003) (ms. on file with author).

[77] SPD Bundestag, Drucksache 14/7180, *SPD-Fraktion will den Tierschutz verbessern; Tierschutzbeauftragte*, http://www.spdfraktion.de/cnt/rs/rs_dok/0,,22670,00.htm (press release, Oct. 17, 2001).

E. "Slaughter Decision"

Despite the convincing arguments of animal protectionists and broad public support for a change, the animal protection amendment appeared politically stagnant until early 2002. On January 15, 2002, early in an election year with the CDU/CSU struggling to regain control of the Bundestag, the Supreme Court made a decision that turned the political tide.

A Sunnite Muslim who had been denied a permit to perform ritual slaughter by the state of Hessia appealed to the Supreme Court in 1999, on the basis of a constitutional right to practice religion, and the right to practice his occupation.[78] In 1994, a factually-similar case was decided in favor of the *Tierschutzgesetz*, ruling that the Muslim religion made no claims that an animal must be conscious prior to slaughter.[79] The relevant text in the Koran forbids the consumption of animal blood, which certain Muslim groups believe necessitates the slaughter without prior stunning because it slows circulation and does not allow the animal to fully drain of blood. However, in 1998, the state of Hessia again denied the permit on the basis that the religious text does not specifically forbid the stunning of animals for slaughter. Furthermore, it claimed that Muslim laws make an exception for individuals in foreign countries in which ritual slaughter is not legal or feasible. Another factor was that a type of stunning, electric short-interval stunning, which has been proven not to inhibit the bleeding of the animal. Muslim butchers in some regions of Germany practice and find this type of stunning religiously acceptable.

Sunnite Muslims strictly follow their religious laws, which, according to one interpretation, require an animal to be allowed to bleed to death as a result of a specially performed cut to the throat. In 2002, the Supreme Court finally ruled in favor of the Muslim butcher on the basis that religion, as interpreted and practiced faithfully by the individual, is a constitutionally protected right. Furthermore, the inability to perform such slaughter inhibited the ability of the plaintiff to serve his Sunnite Muslim clientele, effectively limiting the ability to practice his occupation. Because constitutional law takes precedence over normative animal protection laws, the Court ruled that Muslim slaughter must be permitted as an exception to the *Tierschutzgesetz*. The court also wrote that legal status of ritual slaughter would help the Muslim minority community integrate into German society.

Though the case did not present a new argument regarding animal protection, it initiated a tide of public outcry. Though kosher slaughter, which also requires the animal to be conscious when killed, has been tolerated in Germany since the end of World War II, most Germans oppose the practice on the basis that allowing a conscious animal to bleed to death is cruel and inhumane. Furthermore, Islamic

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[78] *Tierschutzgesetz supra* n. 50.

[79] BverfGE 1 BvR 2284/95.

groups, and specifically the large Turkish population in Germany, are not as well integrated and accepted as Germany's Jewish population. Animal protectionists and the media suggested that this decision would result in further isolation of the Muslim communities in Germany.

The press reported the case as a failure of the law to protect animals. The CDU/CSU was blamed for the failure because it had held up previous attempts to strengthen animal protection, and heavy pressure was put on the party to reverse its position. Animal protection groups, the Minister of Consumer Protection, Food and Agriculture, and SPD and Green politicians also used the momentum of media attention to put intense pressure on the CDU to agree to the amendment they had blocked in 2000. When Edmund Stoiber, CDU contender for Chancellor, publicly came out in support of the animal protection clause in the constitution, the vote was effectively cast. On May 15, 2002, the Bundestag voted 542 to 19 in favor of the proposal to add the words "and the animals" ("*und die Tiere*") to Article 20a of the German constitution.[80] Closely followed by a vote in the German Bundesrat in which 15 of the 16 states approved the amendment, the constitutional amendment became effective on August 1, 2002.

VI. LEGAL IMPLICATIONS OF THE CONSTITUTIONAL AMENDMENT (*STAATSZIEL TIERSCHUTZ*)

Media assessments of the constitutional amendment varied widely, from claims that it was symbolic and meaningless to statements that animal rights now dominate the German constitution. Neither is accurate. In reality, the amendment is a much more tempered result of delicately balanced rights and laws, the final outcome of which will not be clear for many years. Far from meaningless, the amendment has already had small but meaningful effects for animal protection in Germany.

The three words, "*und die Tiere*," did not give any rights to animals in Germany. Rights are reserved for humans, and human well-being remains at the center of the *Grundgesetz*. The Directive of the State (*Staatszielbestimmung Tierschutz*) declares protection of animals a value and goal of the state, and mandates the state to exercise this value in all its official capacities. By committing itself to protecting animals, the state holds itself to a much higher standard for fulfilling its obligations to animals.

The primary legal apparatus through which the *Staatszielbestimmung* functions is the *Tierschutzgesetz*. Because the *Tierschutzgesetz* is Germany's only legal definition of animal protection, the government is now compelled to uphold the specifics of the law as well as its ethical spirit. Animal protection as defined in the *Tierschutzgesetz* now

[80] 374 votes were necessary to reach the requisite 2/3 majority. "No" votes included 18 CDU/CSU and 1 FDP.

carries constitutional weight, and where the protection of animals and the rights of humans collide, organs of the state will be compelled to consider the constitutional status of animal protection laws. This cannot guarantee victory for animal protection, but does create a pathway through which the interests of animals to remain unharmed can be weighed evenly against the interests of humans.

This opens considerable room for social interpretation. The existence of the constitutional amendment does not assist in further defining "reasonable cause." However, in keeping with a stronger legal mandate to protect animals, state bodies will be forced to prove the ethical acceptability of any interaction with animals sanctioned by regulation, and may be compelled to interpret ethical acceptability within narrower confines. Ethical acceptability and "sound reason" remain to be defined by German society, and their definitions will continue to evolve.

For this reason, it is important that the amendment was ultimately a compromise solution containing few words. Though it does not provide substantive protection for animals by itself, the amendment implies the whole of the *Tierschutzgesetz* in its definition of animal protection. By not limiting the constitutional protection of animals to areas specifically named in the amendment, the constitution can be used as an expansive basis for animal protection as industries change and social attitudes shift. Furthermore, the *Tierschutzgesetz*, as a normative law, requires only a majority vote of the Bundestag to be modified or expanded. High social consciousness of animal protection in Germany suggests that animal protection will continue its expansive trajectory, and it should not be difficult for a majority coalition to enact amendments to the *Tierschutzgesetz* that reflect this evolving status. Even if a ruling coalition were to favor less encompassing animal protection, the *Staatszielbestimmung* prevents animal protection standards from degenerating. In essence, they can only become stronger. As the social consciousness and legal definition of animal protection in Germany evolve, so will the law's constitutional strength.

A. Animal Protection in the Courts

Where the interests of animals and the basic rights of humans conflict, a court will have to decide which takes precedence. While the basic rights outlined in the constitution "bind the legislature, the executive, and the judiciary as inalienable rights,"[81] they can be constrained by certain laws or by other constitutional rights. For instance, the Supreme Court found that environmental protection, under Article 20a of the German Constitution (enacted prior to the animal amendment) constrained the freedom of art when exercising that freedom was environmentally harmful.[82] Animal protection can have a similar effect on basic rights if they interfere with the ethical basis of the

[81] Art. 1, ¶ 3 GG.

[82] 1 BvR 1762/95;1 BvR 1787/95 (2000).

animal protection law. In the case against the artist who bound a bird in glue, it is likely that the decision would be reversed as a result of the animal protection amendment. The right to practice one's profession might be equally limited, if the profession involves a serious compromise of the animal protection standards.

However, this feature of the *Staatszielbestimmung* is seriously limited by the fact that no organization currently has standing to sue on the behalf of animals. Only a directly harmed party has this legal right, and only in very few cases, such as harm to a companion animal, can a human claim direct harm from a violation of the *Tierschutzgesetz*. Currently, animal protection organizations are seeking, through normative laws, the right to sue as organizations (*Verbandsklagerecht*) on behalf of animals.[83] A *Verbandsklagerecht* would recognize animal protection organizations and give them standing to sue on behalf of an animal or animals. A similar *Verbandsklagerecht* was passed in 2002 for environmental organizations, in order to better enforce environmental protection under Article 20a. However, in the case of environmental protection, more individuals can claim direct harm resulting from an infraction. Animal welfare organizations are hoping for the introduction of a *Verbandsklagerecht* in animal welfare within the next election cycle, because the most widely sanctioned results of the animal protection clause would go unenforced without such a law. It seems likely that this will eventually transpire, though perhaps not as soon as animal activists may hope.

Criminal prosecutions have already been affected by the amendment. In a December 2002 case of animal cruelty in Niedersachsen, a man was convicted of drowning his dog, and fined 2400 Euros, which was considerably higher than previous fines for comparable cruelty cases.[84] Because officials responsible for charging offenders are currently under extreme political pressure to fulfill their constitutional obligation to uphold animal protection laws, it is likely that more prosecutions and stiffer sentences will become the norm in the near future. Without vigilance on behalf of the state oversight organs and animal protection groups, however, pressure and funding for these activities could subside and result in a return to lax criminal enforcement. For this reason, it is even more imperative that the *Verbandsklagerecht* be passed so animal protection organizations can keep animal protection visible and active on all judicial levels.

In contrast to the claims of nearly the entire animal protection community, however, the least effect may be seen in the area of religious slaughter. The "Slaughter Decision" of 2002 that resulted in the political pressure to pass the amendment may not, in fact, be affected by the *Staatszielbestimmung*. In the decision, Supreme Court judges

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[83] E-mail from Peter Puschel, Rep. of the Intl. Fund for Animal Welfare (IFAW) in Hamburg, Germany (June 10, 2003) (on file with author).

[84] *Strenge Urteile im Sinne des Tierschutzes* 1 du und das Tier 28 (Magazine of the German Animal Protection League) (2003).

did not rule the *Tierschutzgesetz* unconstitutional. Rather, it was only necessary for the justices to find that the religious and occupational freedoms had been violated in order to rule in favor of the Muslim butcher. Furthermore, the court ruled that religion is defined by the individual's practice, not by interpretation of others.[85] The decision was made in light of the clause within the *Tierschutzgesetz* that compels states to issue permits for slaughter outside the normal confines of humane slaughter, and the decision confirms that the Muslim butcher had met those requirements. Unless a court has the opportunity to redefine "religion" or the specifications in the *Tierschutzgesetz* itself are modified, the Muslim community has a right grounded firmly in both the *Tierschutzgesetz* and the constitution to obtain permits for exceptions to the humane slaughter laws.

Nevertheless, the *Staatszielbestimmung* has had an effect on the permit process. Despite the Supreme Court's infamous decision, the state of Hessia is again restricting permits. The same butcher who won the case has since been denied a permit to perform slaughter without stunning in a decision declaring that his case was not strong enough to withstand the legal mandate for animal protection.[86] The German population is also now more aware of the issues surrounding religious slaughter, which has had a negative effect on the social integration of some Muslim communities.

Though some German animal protection groups are currently engaged in an anti-Muslim slaughter campaign, the most effective legal route to reducing the suffering of animals may be for these groups to reach out to the Muslim community. Some Muslims are unaware of the possibility or accessibility of electric short-interval stunning, which is practiced by much of the Muslim community in parts of Germany. Offering solutions to those who will accept them may be a more constructive route than battling a constitutional right that cannot be rescinded. Furthermore, it is likely that the slaughter regulations in the *Tierschutzgesetz* will continue to exempt the Jewish community, because to do otherwise would, given Germany's history, have implications that the German government does not want to broach. By offering solutions to the problem, the animal protection community can also prevent the further driving of ritual slaughter underground. A BMVEL representative pointed out that the number of permits a state issues has little bearing on the amount of slaughter performed outside humane regulations that occurs in that region.[87] The more restricted the practice becomes, the less it will be able to be regulated, resulting in the further alienation of an already downcast minority community.

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85 *Tierschutzgesetz supra* n. 49.

86 AZ: 2 K 548/02 (2002).

87 Schwabenbauer *supra* n. 34.

B. Agriculture

"Intensive animal farming is an obvious infraction of the *Staatszielbestimmung*," wrote one lobbyist.[88] However, it is unrealistic to conceive of an entire segment of the economy as unlawful. Change is more likely to happen through a gradual development of stricter ministry regulations than through a change in actual legislation.[89] The constitutional amendment is also unlikely to radically change the animal agriculture system, though a shift over time to more humane animal husbandry practices will undoubtedly occur.

The effectiveness of the *Staatszielbestimmung* on animal husbandry will manifest primarily in BMVEL regulations, since BMVEL is the ministry delegated specific responsibility for both animal protection and agricultural regulation. While there has been no change in the language of the *Tierschutzgesetz* instructing the ministry in creating regulations, the amendment will most likely be viewed as an open political mandate to enforce stricter regulations on practices involving the well-being of animals. Currently in final revision are more humane standards for the husbandry of swine and fur mink, whose conditions, though currently legal, do not reflect the species-appropriate standards provided for in the *Tierschutzgesetz*.[90] Stronger standards regarding the husbandry of some of the species whose regulations are least sufficient, including turkeys, roosters, and broilers, can be expected in the near future.[91]

The BMVEL is compelled to use the most current and available ethological data to create its policies. With better data forthcoming on the specific physical and psychological needs of animals, current standards could be rendered insufficient in meeting the guidelines laid out in the *Tierschutzgesetz* and would therefore be in violation of a constitutional mandate. Profit motivation alone will no longer be adequate "reasonable cause" for animals to suffer or be injured by common practices. However, this will most likely be a gradual process, as regulations are modified one at a time, and only as ethological data and ethical considerations drive the field forward. At this time, the only avenue through which an insufficient regulation will be brought to light will be through the courts. Until a *Verbandsklagerecht* is secured to allow animal protection organizations to police the industry, it is highly unlikely that farmers will sue for stronger standards. Little oversight means that animal protection is vulnerable to the agenda of a ministry that changes hands with the majority coalition.

The BMVEL has traditionally been forced to walk a fine line between fulfilling its obligations to enforce the *Tierschutzgesetz* without compromising the economic stability of Germany's agriculture. In the

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88 K. Wolf, *Tierschutz* 25 Focus 57 (2002).

89 Nickel, *supra* n. 61, at 91.

90 Art. 2, No. 1–3 *Tierschutzgesetz*.

91 Schwabenbauer *supra* n. 34.

past, though the ministry may have favored stricter standards, the threat of being sued on the basis of the right to practice one's profession, for instance, thwarted attempts to tighten regulations. That threat has now been mitigated to some degree, but the ministry must also uphold a responsibility to German consumers and their economy while balancing against a constitutional mandate to ensure animal welfare. Though ranked highly among the German government's core values, animal protection will realistically be constrained by other primary considerations of economic and political value.

For example, the slaughter of animals for food has never been found to violate the ethical basis of "reasonable cause" for killing a vertebrate animal. Despite more serious weight given to ethical considerations, the ethics and laws themselves have not changed. It will be easier to regulate practices already considered in violation of animal protection laws, but only a radical shift in social attitude will allow the extension of these ethics to new areas such as the use of animals for food, materials, and labor.

Animal agriculture in Europe has experienced difficult times in the past decade. Foot-and-Mouth disease, BSE, and increasing reports of the detrimental effects of antibiotics and other agents used in animal agriculture have led to sharp criticism of the industry. In the midst of such a crisis, ethical standards and animal welfare may not realistically rank high on the political agenda. As demonstrated during the BSE crisis, which resulted in the destruction of thousands of healthy cattle for economic reasons, existing ethical laws cannot override the hysteria and political repercussions of a human health crisis. A *Staatszielbestimmung* cannot be expected to change such a stark reality, despite the efforts of the animal protection community.

C. Animals Used for Research

Though the strongest opposition to the *Staatszielbestimmung* came from the research sector, it is the sector least likely to be heavily impacted by the passage of the amendment. Because animal experimentation is carefully regulated within the *Tierschutzgesetz* itself and not by ministry order, the existing laws can only be better enforced. Contrary to the claims of the research community that the amendment will lead to "legal insecurity in research and education,"[92] the constitutional amendment will likely result in only minor changes to the majority of the research field.

The most likely effect of the amendment is that state regulatory bodies responsible for approval of research protocols will be increasingly required to consider more than technical formalities in their evaluation of research proposals. The right to conduct research and pursue one's profession has historically resulted in difficulty enforcing the *Tierschutzgesetz* in the research sector. With that hurdle removed,

[92] Americans for Medical Progress, *German Passage of Animal Rights Called 'Black Friday'* , http://www.amprogress.org/News/News.cfm?ID=275&c=64 (June 6, 2003).

committees will now be legally required to consider the potential of the proposed research to yield substantive results against the ethical acceptability of an experiment, and potential substitutes or animal replacement methodologies and their availability.

Ethical consideration is a huge leap forward for the regulation of research. It would result in constraints on research of a specific nature, though that nature is largely determined by what German society deems ethically appropriate in light of human health. Research is, in itself, an exception to the definitions of cruelty found elsewhere in the *Tierschutzgesetz*. It is only necessary to show reasonable evidence that research can yield results that will benefit the well-being of humans or animals in order to claim "sound reason" to cause an animal harm.[93] Though previously unenforceable, the concept of "sound reason" has not become any less ambiguous under the protection of the constitution.

It is unlikely that legislators will allocate more funds toward the development of alternatives to animal research in the future. The federal government already runs a huge program to fund the development of alternative and improved methods for research. Experience over the past twenty years has shown that resources are sufficient to fund all research projects in this realm, resulting in a couple of validated worldwide accepted methods.

Concern that the research industry will be harmed is unfounded for the near future. International collaborations will only be disturbed if they involve animal experiments that are considered "unethical" in Germany. Like the BMVEL, however, state regulatory agencies must walk a fine line between fulfilling their ethical obligation to animals and maintaining Germany's edge in the increasingly competitive research and biomedical industries. Animal protectionists claim that stricter evaluation will lead to improvement and less social criticism of the research industry. To the contrary, ethical criticism is only likely to increase with time and as substitute models become more available. In the very long-term, the *Staatszielbestimmung* will support and reinforce movement toward more ethical rejections of research proposals.

D. Wildlife

The group of animals for which the least change is likely under the constitutional amendment is wildlife. Due to the nature of wildlife policy, animals are managed in terms of population and habitat, both of which were covered previously under the environmental clause of Article 20a. As individual animals, wildlife will remain protected subject to the laws pertaining to them, including strict regulation of hunting and habitat disturbance, as well as international treaties such the Convention on the International Trade in Endangered Species of

[93] Art. 7, No. 2 *Tierschutzgesetz*.

Fauna and Flora ("CITES").[94] Little has changed in the case of individual nuisance animals, as the humane treatment of all creatures, including insects and other invertebrates, is upheld by the *Tierschutzgesetz*. It is important to remember that the laws have not changed; the legal mandate to uphold them has merely been strengthened.

E. International Policy

Impacts of the *Staatszielbestimmung Tierschutz* on Germany's foreign policy will be relatively minor. The most important of Germany's international obligations lie with the E.U. which has set out several guidelines on the care and use of animals within E.U. member states. Though E.U. regulations regarding animal protection are not as extensive as Germany's regulations, the ethics-based concept of animal protection that prevails throughout the northern European states has had considerable influence on European policies. It is not within the scope of this discussion to deal extensively with the politics of animal protection within the E.U., but a few points must be addressed.[95]

So far as Germany has influence over the policymaking of the E.U., German members of the European Parliament are compelled to advocate animal protection. The *Staatszielbestimmung* changes little in this regard, as Germany has a record of advocating stricter animal welfare policies within Europe. However, Germany's national policies may not be implemented in a way that interferes with trade among member states. According to the Treaty of Amsterdam,[96] national legislation may not supercede or interfere with European legislation if it has economic impacts on member states.[97] Therefore, Germany's animal protection laws cannot impact the international trade or importation of agricultural goods from other European nations whose products meet European, but not German, standards.

In this sense, German agriculture may be negatively impacted by competition with other European agricultural products not held to the same high welfare standards. However, concerted efforts of several European animal protection organizations, many of which are centered in

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[94] *Convention on the International Trade in Endangered Speices of Fauna and Flora*, preamble (Mar. 3, 1973) 27 U.S.T. 1087, T.I.A.S. No. 8249 (version of Treaty available at http://www.cites.org/eng/disc/text.shtml#texttop (accessed Apr. 10, 2004)).

[95] For a more in-depth discussion of European animal protection policies, consult *supra* nn. 12, 14.

[96] *The Treaty of Amsterdam, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, art. 8(2) (Oct. 2, 1997) O.J. (C 340) 1 (version of the Treaty available at http://www.eurotreaties.com/amsterdamtreaty.pdf (accessed Apr. 10, 2004)).

[97] Individual countries were once able to impose higher national standards under *The Treaty of Rome*, art. 36 (Mar. 25, 1957) (version of Treaty available at http://www.eurotreaties.com/rometreaty.pdf (accessed Apr. 10, 2004)) which established the E.C. In 1997, the Union amended its treaty to directly address animal protection, at which point that became the standard within the Union to which all nations were obliged to comply.

Germany, are currently mounting a campaign to improve animal welfare within the entire E.U. by including a clause on animal welfare in the European constitution.[98] Even without such a development, standards within the E.U. are likely to improve over time, creating progressively more stringent standards for animal care and welfare. As this occurs, Germany's progressively stricter standards will hold Germany's agriculture in good stead. It will be the forerunner, rather than being forced to continually revise its practices to meet new standards.

The case for increased standards in Europe is also made stronger by Germany's example. While Europe is unlikely to adopt unilateral standards that greatly surpass those of any of its member states, Germany, which has the most votes of any member nation in the European Parliament, can set a strong example and drive European change forward. If the protection of animals is explicitly acknowledged among European objectives, it will enhance the status of legislation concerning animals, and might lead to an optimum provision and better implementation.[99]

Despite prospects for future improvement in the E.U., the issue of transnational live animal transport will not likely be directly affected by the German constitutional change, despite the claims of animal activists and the international media. European legislation, with which member states must comply, carefully regulates the manner and length of time an animal may be transported.[100] Germany may not prohibit transport of this nature through its borders or the sale of products that result from such a practice. Germany's animal protection standards can be reflected in much of its international trade only by using its influence to strengthen European standards. Other international partnerships may also prove impossible barriers in the wholesale implementation of Germany's animal welfare policy. Tensions between trade rules and animal protection policies might arise due to the fact that the primary objective of international trade under WTO and GATT is to seek the substantial reduction of trade barriers. Animal protection policies often run counter to the objectives of trade agreements, as can also be seen within the E.U. Unlike in the E.U., however, arrangements such as WTO and GATT do not seek to closely

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98 A current movement is underway to include animals in the forthcoming European constitution. The constitution, which currently is without an animal protection clause, is expected to be ratified by all member states by May 2004. *See e.g.* Bundesverband der Tierversuchsgegner/Menschen für Tierrechte e.V., *animals' constitution*, http://www.animals-constitution.info/uk/impressum.html (accessed Apr. 10, 2004).

99 Eurogroup for Animal Welfare, *Animal Welfare In Europe: European Legislation and Concerns* (David B. Wilkins, ed., Intl. Envtl. L. & Policy Series, Kluwer Law 1997).

100 Council Directive 91/628/EEC (1991) (specifying a maximum journey time in livestock vehicles of 24 hours for pigs and horses, though there is no distance restriction. An eight-hour journey maximum is imposed if ordinary trucks are used. The necessity of long-distance live animal transport has been debated in recent years. Alternative methods would be to slaughter near the point of origin and transport the resultant animal products, or to use the products near the point of origin rather than transporting similar products from one country to another.).

integrate the nations involved or to build on common goals and values. In fact, the number of GATT challenges to environmental, conservation, and animal protection regulations have increased dramatically over the past decade, with no indication that this trend will subside.[101] In essence, Germany has a great deal of influence over its national policies, limited influence over those of the E.U., and almost no influence over the implementation of its economic and trade alliances further abroad.

VII. CONCLUSION

The potential of the *Staatszielbestimmung Tierschutz* is limited only by what society believes it should be. Its formulation leaves considerable room for interpretation in legislation, regulation, and enforcement, but a trend toward greater consideration for animals offers an optimistic prognosis for the development of animal protection in Germany. The most important legacy of the constitutional amendment is that Germany has an ongoing legal mandate to reinforce this social shift. Animal welfare is, and will remain, a legitimate political and social issue in Germany. There now exists a legal infrastructure allowing the German government to reflect the ethic that dominates modern sentiment in its laws and policies.

The amendment did not give rights to animals, nor does it alone strengthen current national regulations. The major accomplishment of the amendment is in allowing national law to reflect the status that animals have attained in German society, and to bring current regulation to the level at which it was intended to function. This implies, however, that the most important work of the German animal protection community has only just begun. As open as the *Staatszielbestimmung* is to elaboration, it is equally vulnerable to attenuation. The international community should bear in mind that their German animal protection colleagues must be supported in every way possible in order to allow this groundbreaking development to reach its full ethical and legal potential. History has shown that the progress of one nation can be the precursor for another; the international community has a mandate to recognize and support the achievements of the German animal protection community in the interest of international social and legal progress.

While generating such progress, it is necessary to recognize that this constitutional amendment is not a spontaneous political victory. German society has undergone a long ethical trajectory, from the recognition of the social benefits that are gained through compassion toward animals to a respect for environment and habitat for the benefit of both humans and animals that dominated most of the past century. More recently developed is the recognition of the inherent value of ani-

[101] Caspar, *supra* n. 76, at 135.

mals' lives. Without such an evolution in social ethics, constitutional recognition would have been unimaginable.

International onlookers must recognize the implications of the changes occurring in German animal protection law. The interests of animals may now be considered equal to human interests under the law, and in time, German legal practice may truly embody this goal. More importantly, this is an attainable and plausible goal. The success of the German amendment is pinned to a previously existing law that not only regulates specific activities, but has an ethical foundation compelling humans to consider the interests of other animals. This basis makes the constitutional amendment not an endpoint, but a genesis for further expansion of society's consideration for animals. In this, the international community can take note that the development of a social ethic, rather than minor legal victories, will ultimately better serve the animals. Concurrently, it is the role of the legal community to globally reinforce the social development that has already taken place in their own cultures. By working in tandem, international, social, and legal progress may eventually realize the goals laid out in Germany's constitution.