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The open society and its animals

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Enfranchising animals in legal institutions: Constitutional state objective

Introduction

The foregoing has illustrated that an ideal institutionalization of non-human animals' consideration right is not likely to be achieved in the political institutions of a liberal democracy. It is a logical move to now look into whether the legal institutions of liberal democracies are better equipped to give effect to non-human animals' consideration right. In liberal democracies, state power is typically subject to the rule of law, which means that the law—primarily the constitution—limits the authority of the government and the ways in which power may be exercised. Appealing to the rule of law thus might be a fruitful strategy to attain the institutional reform sought in this book: making liberal democratic states formally and systematically consider the interests of sentient non-human animals. Put the other way around, the goal is to limit the state's ability to unreasonably disregard the interests of sentient non-human animals. Appealing to the rule of law by adjusting the constitution in such a way that animal consideration becomes a constitutional duty for state officials then seems to be an attractive option. Constitutions, as the most prominent legal documents of liberal democratic states, define the most important values and principles of societies, the limits of state authority, the obligations that states have with respect to citizens, and the rights that citizens have in relation to the state and in relation to other citizens. These prominent documents could well be the proper place to institutionally arrange the enfranchisement of non-human animals in liberal democracies. Moreover, constitutional provisions are typically difficult to change, and constitutional adjustments are thus

particularly effective in establishing long-term effects and meaningful changes in the larger institutional framework of liberal democracies.

It thus seems fruitful to look for constitutional change that can bring about a duty for state officials to take due notice of non-human animal interests. Constitutional provisions can take many shapes, however. They can assign specific powers to certain governmental bodies, they can detail individual rights, they can explicate certain state objectives, and they can comprise general regulations of constitutional design and organization. What type of constitutional provision could possibly establish the desired reform?

There are two types of provisions that could reasonably be expected to potentially bring about a duty for state officials to take due notice of non-human animals' interests. There are, in other words, two contenders that are worth considering in our search for legally institutionalizing the consideration right of animals in the primary institutions of liberal democracies. First, a constitutional provision comprising a *state objective*. Such a provision could prompt governments to take animal welfare interests into account as part of their constitutional duties. Second, one or more provisions comprising *fundamental legal animal rights*. Sentient animals could be assigned (certain) fundamental legal rights, which would straightforwardly force a state to take non-human animal interests into account. These two legal options, and the question of whether they would have the potential to meet the normative enfranchisement criteria, will be investigated in the current chapter and the next chapter.

The main aim of this chapter, accordingly, is to explore one of the possibilities of legally institutionalizing the consideration right of non-human animals. More precisely, the option of introducing a constitutional provision that makes protecting animal welfare a state objective will be investigated. In the first section, the nature of state objectives in general and four political and legal effects of such a provision specifically in the context of animal welfare are discussed. In the second section, in what ways such a provision differs from legal rights will be elucidated. The third section comprises a case study: how does the already existing state objective on animal welfare in the Swiss Constitution currently function? The fourth

section analyses whether the constitutional state objective has the potential to bring about a position for non-human animals that meets the five enfranchisement criteria. The fifth section encompasses the conclusion of this chapter.

4.1 The constitutional state objective and its political and legal effects

One option of persuading governments to also take account of non-human animals' interests is introducing a constitutional provision comprising a state objective on animal welfare.[300] Such constitutionally embedded state objectives—which are sometimes also called "fundamental objectives," "policy principles," "constitutional objectives," or "directive principles of state policy"—are a relatively new phenomenon. Currently, Switzerland, India, Brazil, Slovenia, Germany, Luxembourg, Austria, and Egypt have a constitutional state objective on animal welfare, and Belgium is considering adopting one as well.[301] Furthermore, the *Treaty on the Functioning of the European Union* contains an atypical provision which might be understood to be a meta-state objective: it commands member states of the European Union and the Union itself to "pay full regard to the welfare requirements of animals" in formulating and implementing some of the Union's policies, "since animals are sentient beings."[302] In Switzerland, the first European country to adopt a constitutional state objective on animal welfare in 1973, the state objective reads: "The Confederation shall legislate on the protection of animals."[303] Germany, also a relatively early adopter (2002), has a

[300] Parts of this section have been published before in: Janneke Vink, "Het Constitutionaliseren van de Zorg voor Dieren als Wezens met Gevoel," Speech at an expert hearing regarding the proposal to revise article 7*bis* of the Belgian Constitution, recited in the Senate, Brussels (Belgium), March 19, 2018, and in: Janneke Vink, "Dierenwelzijn: Van Onderhandelbare Naar Grondwettelijke Waarde," *Nederlands Juristenblad* 93, no. 26 (July 2018): 1862–1869.

[301] Jessica Eisen, "Animals in the Constitutional State," *International Journal of Constitutional Law* 15, no. 4 (November 2017): 909; "Voorstel tot Herziening van Artikel 7bis van de Grondwet," 6-339/1, April 25, 2017 (Belgian constitutional revision bill).

[302] In doing so, "the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage" ought to be respected. Article 13 of the *Treaty on the Functioning of the European Union*.

[303] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 316–317; Article 80, first paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss

comparable but more extensive provision that is generally understood to be a state objective on animal welfare: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life *and animals* by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order" (italics JV).[304] These formulations of state objectives may seem quite permissive on first appearance, but we will see that their legal implications stretch further than what a purely literal interpretation might suggest.

Before we can proceed to discuss the general features and political and legal effects of a constitutional state objective, however, it must be noted that the exact meaning and precise implications of a state objective are, to a certain extent, always dependent on its specific implementation in a specific jurisdiction. Factors such as the formulation of the state objective, the (constitutional) legislator's original intentions in introducing it, and the wider constitutional context influence the legal implications and practical functioning of a constitutional state objective.[305] Obviously, legal systems around the world vary greatly, and although there are some generally accepted categories of legal systems with similar core characteristics (such as common law jurisdictions versus civil law jurisdictions), no two countries have the same and thus perfectly comparable legal structures. All jurisdictions have their local singularities and traditions, which complicates making transnational generalizations about the legal significance of constitutional state objectives. It seems nonetheless possible, however, to discern some generally recognized and accepted functions of state objectives. According to comparative law expert Joris Larik, who has done

Confederation), unofficial translation provided by the Swiss government, https://www.admin.ch/opc/en/classified-compilation/19995395/index.html.

[304] Article 20a of the *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany), official translation provided by the German government (trans. Christian Tomuschat, David P. Currie, Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag), https://www.btg-bestellservice.de/pdf/80201000.pdf.

[305] Generally, the more precisely a state objective is formulated, the less discretionary space there is for state officials. Inversely, the more permissively a state objective is formulated, the more it allows for different interpretations and the wider the discretionary space for state officials is. See also: Claudia E. Haupt, "The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause," *Animal Law* 16, no. 2 (Spring 2010): 227.

comparative research on constitutional state objectives and their doctrines in Germany, France, and India, doctrines on constitutional state objectives show "sufficiently similar legal features to speak of a norm category which transcends different jurisdictions." Larik argues that, in spite of the many differences between legal systems, constitutional state objectives are a norm category in their own right, which makes it possible to identify some general functions and effects of these constitutional provisions.[306]

Characteristic of constitutional state objectives is that they are formal expressions of a social-political goal that the state aims to pursue. In a generally accepted definition, drafted by a German expert commission on objectives of the state in a 1983 report, constitutional objectives are described as "constitutional norms with legally binding effect, which enjoin on public policy the continuous observance of, or compliance with certain tasks, i.e. objectively delineated objectives."[307] A different definition of *Staatszielbestimmungen*, as state objectives are appealingly called in German, is provided by comparative law expert Karl-Peter Sommermann (1956–), who describes them as "constitutional provisions which commit the government in a legally binding manner to the pursuit of a certain objective, without granting subjective rights to the citizen."[308] The constitutional state objective can thus be summarized as a type of governmental self-binding with the purpose of securing a lasting investment in a certain social-political goal.

State objectives have several functions. The most obvious is their symbolic function: they elucidate that a state considers a certain social-political goal significant enough to include it in its most important legal document: the constitution. Apart from their symbolic significance, constitutional state objectives also have more complex political and legal effects. Since they are binding constitutional provisions, they lift the

[306] Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford: Oxford University Press, 2016), 31, 64. The transnational comparability of constitutional state objectives specifically on animal welfare is discussed in: Eisen, "Animals in the Constitutional State," 909–913.
[307] Referenced in: Larik, *Foreign Policy Objectives in European Constitutional Law*, 31–32.
[308] Karl-Peter Sommermann, *Staatsziele und Staatszielbestimmungen* (Tübingen: Mohr Siebeck, 1997), 326; Larik, *Foreign Policy Objectives in European Constitutional Law*, 32.

respective aspect of the general good to a constitutional legal status, which, as we will see further on, has important legal implications.[309] The goal stipulated in a constitutional state objective requires primarily the legislator's attention, but is also binding for the executive and judicial branches.[310] The fact that the state is bound to further the constitutionalized social-political goal implies that decreasing the quality of pre-existing legislation or regulation on the respective matter (e.g. animal welfare standards) is unconstitutional.[311] Legislation that amounts to seriously compromising or frustrating the successful pursuit of a constitutional state objective is, according to mainstream legal opinion, also unconstitutional.[312] The most important legal function of a state objective, however, is that it may function as a legal basis for limiting the fundamental legal rights of humans.[313] This is possible through judicial interpretation, when (the outer boundaries of) fundamental rights are interpreted in the light of the constitution as a whole, or through legislation, when the (constitutional) legislator considers it necessary to limit a certain right in order to do justice to a constitutionally protected state objective. Further legal effects follow from legal interpretation at various levels and domains of governance, for instance in the interpretation of open norms in lower legislation. As a result of a state objective on, e.g., animal welfare, more weight may be attached to animal welfare when interpreting open norms or when weighing out interests in several (political or legal) contexts.[314] The enforceability of state

[309] Larik, *Foreign Policy Objectives in European Constitutional Law*, 64.
[310] Larik, *Foreign Policy Objectives in European Constitutional Law*, 32, 41, 64; Haupt, "The Nature and Effects of Constitutional State Objectives," 226; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 316.
[311] Haupt, "The Nature and Effects of Constitutional State Objectives," 228–229; Kate M. Nattrass, ""…Und Die Tiere": Constitutional Protection for Germany's Animals," *Animal Law* 10 (2004): 303; Gieri Bolliger, "Constitutional and Legislative Aspects of Animal Welfare in Europe: Animal Welfare in Constitutions," *Stiftung für das Tier im Recht*, February 1, 2007, 2.
[312] Larik, *Foreign Policy Objectives in European Constitutional Law*, 34–35, 42.
[313] Larik, *Foreign Policy Objectives in European Constitutional Law*, 15–65; Eisen, "Animals in the Constitutional State," 918–924; Haupt, "The Nature and Effects of Constitutional State Objectives," 237–257; Nattrass, "…Und Die Tiere," 302–304; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 315–319.
[314] Nattrass, "…Und Die Tiere," 288–289, 292–293, 298–300, 302–311; Haupt, "The Nature and Effects of Constitutional State Objectives," 216, 225–230, 246–251, 256; Vanessa Gerritsen, "Animal Welfare in

objectives differs per jurisdiction, but it varies between no possibilities of enforcement at all to marginal enforceability in exceptional cases.[315] Even though state objectives have many similarities with social rights (in formulation, goal, and function), there is a broad consensus that state objectives do not comprise individual legal rights, nor could they arise from them through creative interpretations.[316]

In the animal welfare context, a constitutional state objective could contain a state's duty to further the protection of animals' interests or the duty to take care of animals as a matter of constitutional obligation. It would thereby make explicit that devotion to animal welfare protection is not an optional hobby but a formally recognized objective of the state. It could, in other words, have the effect of reducing some of the ambiguousness concerning the state's attitude towards animal welfare by making the protection of animals' welfare an official goal of the state. We will now zoom in on how some of the previously mentioned key features of state objectives in general would function in the context of animal welfare. We can roughly distinguish four effects that a state objective on animal welfare has.

Effect I: A basis for limiting fundamental legal rights

The most important effect of a state objective on animal welfare is that it is a constitutional basis for limiting other constitutional values, among which even individual rights. In effect, if backed by a constitutional state objective, animal welfare protection can require that fundamental rights of humans are limited to a certain degree.[317]

Switzerland: Constitutional Aim, Social Commitment, and a Major Challenge," *Global Journal of Animal Law* 1 (January 2013): 2–3; Larik, *Foreign Policy Objectives in European Constitutional Law*, 15–65.

[315] Larik, *Foreign Policy Objectives in European Constitutional Law*, 31, 64–65; Haupt, "The Nature and Effects of Constitutional State Objectives," 225–230.

[316] Larik, *Foreign Policy Objectives in European Constitutional Law*, 32–33, 36–37, 40, 42; Haupt, "The Nature and Effects of Constitutional State Objectives," 222–226, 256; Jessica Eisen, "Liberating Animal Law: Breaking Free From Human-Use Typologies," *Animal Law* 17, no. 1 (Fall 2010): 62–64; Nattrass, "…Und Die Tiere," 302; Vink, "Dierenwelzijn," 1862–1863; Margot Michel and Eveline Schneider Kayasseh, "The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back—Many Steps to Go," *Journal of Animal Law* 7 (May 2011): 41.

[317] Larik, *Foreign Policy Objectives in European Constitutional Law*, 15–65; Eisen, "Animals in the Constitutional State," 918–924; Haupt, "The Nature and Effects of Constitutional State Objectives," 237–

That state objectives can have this effect has been confirmed by the German *Bundesverfassungsgericht* (Constitutional Court) on several occasions. In 2010, the German Constitutional Court explicitly acknowledged that animal welfare, precisely because of its constitutional status, can function as a justification for limiting other constitutional values, among which fundamental rights.[318] In a different case, the German Constitutional Court stated that animal welfare can be a legitimate ground for limiting the constitutional freedom of occupation.[319] The Court has also confirmed the legality of a legislative prohibition on sexual abuse of animals, while petitioners considered that prohibition an infringement on their constitutionally protected freedom of sexual autonomy.[320] The Court ruled, however, that sexually assaulting animals does not fall under the scope of the right to sexual autonomy, because animal welfare is a legitimate goal that limits that right. It thereby explicitly referred to the constitutional state objective on animal welfare.[321] That state objectives can have a limiting effect on fundamental rights is also confirmed in other jurisdictions and in the context of different state objectives and rights, among which property rights.[322] Importantly, however, the potential of restricting fundamental rights is limited. Undisputed is that animal welfare will obviously not attain automatic precedence over other constitutional values, but a proportionality test is required if a conflict of constitutional interests must be resolved.[323] Crucially, the state objective can only have limiting effects on the *periphery* of fundamental rights, not on their core, which means that human interests will retain their legal dominance.[324]

257; Nattrass, "…Und Die Tiere," 302–304; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 315–319.

[318] BVerfG, October 12, 2010 - 2 BvF 1/07, §121, ECLI:DE:BVerfG:2010:fs20101012.2bvf000107.

[319] BVerfG, July 3, 2007 - 1 BvR 2186/06, §37, ECLI:DE:BVerfG:2007:rs20070703.1bvr218606.

[320] Article 2, first paragraph in conjunction with article 1, first paragraph of the *Grundgesetz für die Bundesrepublik Deutschland.*

[321] BVerfG, December 8, 2015 - 1 BvR 1864/14 - §11-12, ECLI:DE:BVerfG:2015:rk20151208.1bvr186414.

[322] Larik, *Foreign Policy Objectives in European Constitutional Law*, 40, 43, 49–53, 64–65; Nattrass, "…Und Die Tiere," 303–304; Eisen, "Animals in the Constitutional State," 918–924.

[323] Haupt, "The Nature and Effects of Constitutional State Objectives," 216, 229–230; BVerfG, October 12, 2010 - 2 BvF 1/07, §121, ECLI:DE:BVerfG:2010:fs20101012.2bvf000107.

[324] Eisen, "Animals in the Constitutional State," 918; Eisen, "Liberating Animal Law," 62, 67–68, 75; Nattrass, "…Und Die Tiere," 306–307; Larik, *Foreign Policy Objectives in European Constitutional Law*, 43;

In Germany, the state objective on animal welfare was introduced precisely with the intention of offering a legal foundation on which fundamental legal rights could be limited, in order to make animal welfare regulations effective again.[325] Due to strong and extensive constitutional protection of humans, statutory animal welfare legislation was often practically useless previous to the introduction of the state objective on animal welfare—a phenomenon with which other jurisdictions struggle as well. This is because the rules of legal hierarchy dictate that constitutional interests take precedence over statutory legislation, unless there is a legal basis for limiting these constitutional interests in statutory law. Since German statutory animal welfare legislation had no such legal basis prior to the introduction of the state objective in 2002, it could only limit behaviour that was not protected by a constitutional right.[326] Due to the vast expansion of the scope of fundamental rights in the last few decades, however, many forms of unethical treatment of animals could not be effectively contested by statutory animal welfare law, because they were protected by fundamental rights. This even led a German government official to stating that a constitutional backing of general animal welfare legislation was imperative, else "it is not worth the paper it is written on."[327]

The legal discrepancy in constitutionally protected human interests on the one hand and animal interests without such a status on the other hand led to an almost automatic and ethically barely defensible precedence of often minor human interests over major animal interests. Balancing these interests was often legally impossible, because immediate precedence had to be given to constitutionally protected interests: those of humans, in spite of the weightiness of the opposing non-human animal interests. A famous German court case clearly illustrates how constitutional protections of fundamental rights of humans frustrated a proper execution of general

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Haupt, "The Nature and Effects of Constitutional State Objectives," 249; BVerfG, December 8, 2015 – 1 BvR 1864/14, §11–12, ECLI:DE:BVerfG:2015:rk20151208.1bvr186414.

[325] Nattrass, "…Und Die Tiere," 288–302; Haupt, "The Nature and Effects of Constitutional State Objectives," 216–221; Schaffner, *An Introduction to Animals and the Law*, 159–161.

[326] Haupt, "The Nature and Effects of Constitutional State Objectives," 217–219, 237–257; Nattrass, "…Und Die Tiere," 288–302; Eisen, "Liberating Animal Law," 64–66; Eisen, "Animals in the Constitutional State," 917–918.

[327] Referenced in: Nattrass, "…Und Die Tiere," 299.

animal welfare legislation prior to the introduction of the state objective. In a 1994 case, a researcher was initially denied a permit to do a study on the grounds that the research involved animal cruelty incompatible with the relevant animal welfare legislation. The researcher's idea was to sew the eyes of new-born monkeys shut for one year, then forcing the eyes open again, implanting an electrode in them, and forcing the monkeys to do visual exercises for half a year, while being tied to a chair. These activities would be in clear violation of the applicable statutory animal welfare legislation: the *Tierschutzgesetz*. In court, the researcher argued, however, that handling the monkeys in these ways would fall within the scope of his constitutionally protected freedom of research, and that denying him the permit thus constituted an unwarranted infringement of his constitutional right. The court followed him in this argument, and ruled that denying him a permit to conduct this animal experiment was indeed an unjustified infringement on his constitutionally protected freedom of research.[328] According to the court, the applicable animal welfare legislation (viz. *Tierschutzgesetz*) should be interpreted in the light of the Constitution, in which animal welfare had not yet been adopted as a state objective, but the freedom of research *was* protected. This meant, according to the court, that the decision on whether or not the proposed research involving animal cruelty fell within the scope of the constitutional freedom was left to the ethical discretion of the researcher himself.[329] In this case, the German animal welfare legislation thus had no value for animals, because the constitutional right of a human applied. Similar cases in which courts struggle with the legally inferior status of animal welfare legislation, effectively preventing them from paying due regard to animal welfare legislation, are also known in the context of the freedoms to (artistic) expression and religion.[330]

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[328] Article 5 of the *Grundgesetz für die Bundesrepublik Deutschland*.

[329] BVerfG, June 20, 1994 - AZ 1 BvL12/94; Nattrass, "…Und Die Tiere," 294; Erin Evans, "Constitutional Inclusion of Animal Rights in Germany and Switzerland: How Did Animal Protection Become an Issue of National Importance?" *Society and Animals* 18, no. 3 (2010): 235–236; Eisen, "Liberating Animal Law," 64–65.

[330] Nattrass, "…Und Die Tiere," 288–302; Haupt, "The Nature and Effects of Constitutional State Objectives," 213–257; Eisen, "Liberating Animal Law," 64–65; Evans, "Constitutional Inclusion of Animal Rights in Germany and Switzerland," 235–239.

This problem of ineffective animal welfare legislation that Germany faced prior to the introduction of the state objective on animal welfare is not typical to the German legal system, however. The constitutional rights of humans often have the potential of disarming statutory animal welfare legislation.[331] Sometimes, animal welfare legislation already makes an exemption for harmful behaviour that is protected by a fundamental right (such as a legislative exemption to the general command to stun animals prior to slaughter); other times, welfare prescriptions will lose their value when confronted with a fundamental right in a specific court case. Without the added constitutional weight, effective and consistent enforcement of statutory animal welfare legislation will oftentimes be subordinated to the protection of the constitutional rights of humans. This can make animal welfare legislation a toothless tiger whenever a human constitutional right is in question. Animal welfare legislation that has no constitutional backing thus can prohibit many types of practices infringing on animal welfare, but it cannot always limit practices that fall under the constitutional protection of individual rights. If animal-harming practices are protected by constitutional freedoms and animal welfare legislation is to prohibit these practices, and thus to limit these constitutional freedoms, it must have a solid legal basis to do so. A constitutional state objective can offer such a legal basis, because a fundamental right can be limited by countervailing constitutional interests, such as other individual rights or state objectives. In the context of limiting fundamental rights, the state objective's value thus lies primarily there where fundamental rights render animal welfare law ineffective due to the absence of a constitutional legal basis for it. In these cases, the state objective offers animal welfare legislation the opportunity to become effective again by providing a legal ground on which the periphery of fundamental rights can be limited.

A state objective on animal welfare thus can be used as a legitimate legal basis for existing but also for new legislation, yet to be developed, that aims to limit animal-harming human behaviour that falls within the peripheral sphere of fundamental rights. The state objective can legally back

[331] Schaffner, *An Introduction to Animals and the Law*, 38–49; Haupt, "The Nature and Effects of Constitutional State Objectives," 237–257; Nattrass, "…Und Die Tiere," 283–312.

new animal welfare legislation that bans certain animal-unfriendly practices that were previously impossible to prohibit. In this way, it can contribute to phasing out certain forms of animal abuse that fall under the scope (more precisely: the peripheral protection) of fundamental legal rights. Possible contenders for such out-phasing are: certain forms of animal harming which are protected under the freedom of (artistic) expression;[332] the unnecessary addition of extra suffering to the slaughter of animals by not stunning them, often protected as a religious freedom;[333] and excessive and prolonged torture of animals during experiments under the protection of scientific or academic freedom.[334] Such activities strongly compromise animal welfare, while allegedly not falling within the core protection of the respective fundamental rights of humans.

Effect II: Conflicts of interests, interpretation of open norms, and fuller review

The state objective may also have effects on the development, interpretation, application, and review of statutory animal welfare legislation and regulation. With regard to the development of the law, it must be noted that a state objective may encourage the legislative and executive branches to develop more and stricter legislation and regulation in the context of animal welfare.[335] With regard to the application, interpretation, and review of animal welfare legislation, the executive branch and the judicial branch are

[332] Nattrass, "…Und Die Tiere," 293–294, 303–304; Haupt, "The Nature and Effects of Constitutional State Objectives," 253–256; Schaffner, *An Introduction to Animals and the Law*, 38–43; Eisen, "Liberating Animal Law," 65–66.
[333] Haupt, "The Nature and Effects of Constitutional State Objectives," 237–246; Nattrass, "…Und Die Tiere," 291–292, 299, 301–305; Evans, "Constitutional Inclusion of Animal Rights in Germany and Switzerland," 236–239; Schaffner, *An Introduction to Animals and the Law*, 43–49; Cliteur, "Criteria voor Juridisch te Beschermen Godsdienstvrijheid," 3090–3096; Zoethout, "Animals as Sentient Beings," 308–326; Paul Cliteur, *Philosophical Criteria to Identify False Religion: Why Halal Animal Slaughter, Child Marriage, Circumcision, and the Burqa are Crimes* (Lewiston: Edwin Mellen Press, 2018).
[334] Haupt, "The Nature and Effects of Constitutional State Objectives," 246–253; Nattrass, "…Und Die Tiere," 291–294, 298–308; Evans, "Constitutional Inclusion of Animal Rights in Germany and Switzerland," 235–236; Eisen, "Animals in the Constitutional State," 919; Eisen, "Liberating Animal Law," 65.
[335] Nattrass, "…Und Die Tiere," 299; Haupt, "The Nature and Effects of Constitutional State Objectives," 226–229.

expected to apply and interpret relevant existing law in light of the constitutionally protected state objective.[336] Judicial decisions and development of the law through judicial interpretation ought to reflect the values laid out in the constitution. This may have far-reaching effects.

Most importantly, having to interpret relevant existing law in light of the constitutionally protected state objective has the effect of increasing the legal value attached to legislation concerning animal welfare. Incorporating the care for animals in the constitution as a state objective indirectly lifts animal protection to a higher level in the hierarchy of the law. This means that, in theory, the interest of safeguarding animal welfare, with its legal basis in the constitution, will be able to combat other constitutional values with almost equal legal force, even though it cannot infringe the core protection of fundamental rights, as was just noted. Additionally, the state objective may also affect the interpretation of open norms, which are omnipresent in animal welfare legislation. Such open norms require an ethical assessment in a specific case, and thus relatively leave a great deal of room for judicial interpretation. Examples of open norms in animal welfare legislation are legal provisions which prohibit the killing or harming of an animal "without a reasonable cause," "without necessity," when "ethically unjustifiable," when "ethically unacceptable," or "without a sound reason."[337] In solving conflicts of interests, for example when giving substance to these open norms in a specific case, the constitutional status of animal welfare means that judges and state officials must attach significant value to the welfare of animals as a matter of constitutional obedience, regardless of whether the respective parties value animal welfare or not.[338] After all, according to the principle of the rule of law, the state—judges included—is bound to the norms and values as reflected in the constitution. In the legal balancing of interests, animal welfare thus becomes an independent factor of undisputed importance which may not be ignored,

[336] Haupt, "The Nature and Effects of Constitutional State Objectives," 226, 229–230.
[337] Nattrass, "…Und Die Tiere," 288–290, 291–292; Haupt, "The Nature and Effects of Constitutional State Objectives," 246–253.
[338] Nattrass, "…Und Die Tiere," 299–300, 302–311; Haupt, "The Nature and Effects of Constitutional State Objectives," 216, 229–230, 246–251, 256; BVerfG, October 12, 2010 – 2 BvF 1/07, §121, ECLI:DE:BVerfG:2010:fs20101012.2bvf000107.

but has to be balanced against other interests. The protection of the welfare of animals can, as a result of its constitutional support, no longer be set aside as if it were an optional hobby of subordinate legal value. With the state objective, the need to protect animals' welfare acquires a non-negotiable, independent status in the legal balancing of conflicting interests, because the state objective commits governmental bodies to take the interests of animals into account. In this context, the state objective can prompt state officials to take some distance from human interests, a distance that is necessary for an objective interspecies weighing of interests.[339]

Furthermore, a state objective on animal welfare may also affect the substantialness of the review of animal welfare legislation and regulation. This review is often marginal, but as a result of the state objective, it is possible that this review will have to become more substantive.[340] State officials of the executive and judicial branches responsible, respectively, for dispensing and reviewing permits for animal-harming behaviour (such as permits for animal experiments and unstunned slaughter) may be required to switch from assessing permit requests or dispersions merely on purely procedural requirements to assessing them more substantially and thus also go into relevant ethical questions. They may, for example, be required to assess in depth whether the expected animal suffering weighs up to the countervailing interest (such as the importance of the expected result of the experiment) and whether less harmful alternatives were exhaustively explored and sufficiently considered. A fuller review of the permissibility of animal-harming activities in the light of the applicable animal welfare legislation may mean that permits for such activities will more often be denied on the ground of animal welfare concerns.[341] With this shift to a fuller review, part of the discretion in whether or not to execute behaviour that is harmful to animals also shifts from the individual citizen to (the executive and judicial branch of) the state.[342] This shift matches the more fundamental

[339] Haupt, "The Nature and Effects of Constitutional State Objectives," 250.
[340] Nattrass, "…Und Die Tiere," 288–289, 291–292, 299–300, 305, 307–308; Haupt, "The Nature and Effects of Constitutional State Objectives," 229–230, 246–256.
[341] Nattrass, "…Und Die Tiere," 288–289, 291–292, 299–300, 305, 307–308; Haupt, "The Nature and Effects of Constitutional State Objectives," 229–230, 246–256.
[342] Nattrass, "…Und Die Tiere," 292, 307–308; Haupt, "The Nature and Effects of Constitutional State Objectives," 251.

idea that the protection of animals' welfare is not merely a matter of individual and personal morality but also a political responsibility of the state.

Effect III: Presence in legislative and executive considerations

The third effect of the state objective is that it affects the considerations of the legislative and the executive branches in various ways. The state objective ideally functions as a guide for future legislative action and the development of society in the long term.[343] In other words, the state objective hints at giving due priority to protecting animal welfare and requires reasonable legislative attention and effort in that area. Furthermore, including a state objective in the constitution may also have the effect of preventing or removing political controversy on the respective subject, as respect for the constitution is assumed to be shared by all state officials.[344] Respecting animal welfare will thus become a cause of indisputable status, one that needs to be addressed in legislative and executive considerations as a matter of constitutional compliance. Legislative or policy choices that affect animal welfare must thus ideally reflect consideration for the welfare of animals.[345] Yet again, this may lead to a more balanced weighing between human and non-human interests in legislative and executive considerations.

How this could work in practice can be illustrated in the context of the oft-made executive decision to preventatively "destruct" (read: kill) healthy animals on a large scale when a cattle plague breaks out. When taking account of animal welfare becomes a constitutional objective, such a decision would have to rest on a more thorough justification than without the support of a state objective. Arguably, economic reasons alone, such as the fact that vaccinated meat may not be sold—which makes pre-emptive destruction more economically attractive—are not sufficient for taking such a radical measure.[346] With a state objective on animal welfare, the welfare of

[343] Haupt, "The Nature and Effects of Constitutional State Objectives," 224, 226–229; Larik, *Foreign Policy Objectives in European Constitutional Law*, 64–65.
[344] Haupt, "The Nature and Effects of Constitutional State Objectives," 224.
[345] Haupt, "The Nature and Effects of Constitutional State Objectives," 225–229; Nattrass, "…Und Die Tiere," 298–300, 302–303; Gerritsen, "Animal Welfare in Switzerland," 2–3 (footnote 7).
[346] Nattrass, "…Und Die Tiere," 293.

animals, too, should play a role in the political weighing of the different relevant interests. Moreover, the constitutional status of animal welfare could also mean that the government must actively search for alternatives of controlling the disease, alternatives that have a less destructive effect on animal welfare. The state objective can be understood to create a commitment to seriously consider such alternatives, even if they are more expensive.[347] Highly disputable would be executive decisions such as the one made by the Dutch government in 2017, when it decreed to slaughter sixty thousand healthy, productive, and even pregnant cows, and paid out forty-two million euros in public money (termed "kill subsidies" in the Dutch press) for that massacre.[348] The reason was that the government had to meet environmental standards in which it lagged behind because of the government's own negligence in the preceding years. Such policy decisions—ordering the mass killing of thousands of healthy animals as a result of bad environmental book keeping by the government—would be barely justifiable, arguably even unconstitutional, if taking care of animal welfare were a constitutional state objective.

Effect IV: Safeguarding progress

A fourth effect of a constitutional state objective on animal welfare is that it prevents degeneration of existing animal welfare protections in legislation and regulation.[349] Accordingly, this "locking effect" means that the government must, at a minimum, uphold the quality of animal welfare protections, but preferably improve it. The constitutional state objective thus has an inherently progressive effect. Although this locking effect is a generally accepted feature of state objectives, it must be noted that it is almost never legally enforceable in court. Generally speaking, the most

[347] Haupt, "The Nature and Effects of Constitutional State Objectives," 229, 247–253; Nattrass, "…Und Die Tiere," 293, 299–300, 302–303, 306; Gerritsen, "Animal Welfare in Switzerland," 3.
[348] Emiel Hakkenes, "De Koe Kan Sterven Met Subsidie," Trouw, February 17, 2017, https://www.trouw.nl/groen/de-koe-kan-sterven-met-subsidie~ac0c2fce/; Emiel Hakkenes, "Stormloop Op Sterfsubsidie Voor Melkkoeien," Trouw, February 21, 2017, https://www.trouw.nl/home/stormloop-op-sterfsubsidie-voor-melkkoeien~a32197c7/.
[349] Haupt, "The Nature and Effects of Constitutional State Objectives," 228–229; Nattrass, "…Und Die Tiere," 303; Bolliger, "Constitutional and Legislative Aspects of Animal Welfare in Europe," 2.

important body responsible for reviewing the government's compliance with this commitment to either maintain or improve the quality of animal welfare protections will be the legislative branch and ultimately the electorate, through the well-established paths of existing checks and balances. Only in highly exceptional cases will a (constitutional) court dare to assess whether the government has complied with the progressive commitment that the state objective entails.[350]

4.2 Difference with fundamental legal rights

To prevent confusion and disappointment on this point, it is important to also draw attention to a legal effect that a state objective does not have. As stated before, introducing a constitutional state objective is fundamentally different from introducing individual legal rights. By constitutionally transforming animal welfare into a state objective, animals are not granted legal rights, either positive or negative rights. A state objective is merely a formal testimony of commitment by the state, and offers animals no subjective legal ammunition to (through a legal representative) defend themselves with in court.

Occasionally, there seems to be some unawareness about the fact that a state objective does not confer rights on its beneficiaries, however. An occurrence in the Belgian parliamentary debate on the introduction of their first state objective (on sustainable development) is illustrative of some of the incomprehension regarding the legal categorization of state objectives. During this parliamentary debate, jurist and Member of Parliament Alfons Borginon (1966–) expressed reservations about introducing a new title in the Constitution specifically for state objectives. Instead, he said, "It would have been better if the new right [with which he meant the state objective] were anchored under Title II of the Constitution."[351] Title II of the Belgian Constitution contains fundamental rights, however, and is labelled "On

[350] Haupt, "The Nature and Effects of Constitutional State Objectives," 226–231; Larik, *Foreign Policy Objectives in European Constitutional Law*, 15–65.

[351] "Ontwerp tot Invoeging van een Titel I*bis* en een Artikel 7*bis* om Duurzame Ontwikkeling als Algemene Beleidsdoelstelling voor de Federale Staat, de Gemeenschappen en de Gewesten in de Grondwet in te Schrijven," DOC 51 2647/004, March 23, 2007, 9.

Belgians and their rights."[352] By referring to the state objective as a "right," and by suggesting that the new provision be included under the title for fundamental legal rights, Borginon revealed that there was, at least on his side, ambivalence about the legal status of the proposed state objective.

This confusion on the side of a legally schooled member of parliament about the legal categorization of a state objective is understandable, however. A plausible explanation of the incident is that Borginon might have conceived of the new provision as a positive right, instead of a (to Belgian constitutional law at that time) completely new type of provision: the state objective. In their formulation and function, constitutional state objectives bear close resemblance to positive rights.[353]

Positive rights are rights that typically demand action by the state (hence: "positive"). They must be distinguished from negative rights, which typically prescribe inaction of the state (hence: "negative").[354] Positive rights thus dictate that the state must actively pursue action in order to let citizens enjoy a certain right ("the right *to*" be provided with certain goods or services), whereas negative rights dictate that the state must refrain from infringing on certain liberties of citizens ("the right to be free *from*" certain state interference and coercion). Positive rights often entail economic, social, and cultural rights, whereas negative rights entail the more classical civil and political rights. Examples of positive rights are the entitlements to housing, a sustainable living environment, social security, health care, and education—they require an effort by the government. Examples of negative rights are the freedom of speech, freedom of religion, and the freedom from slavery—they require that the state does not infringe these individual liberties. Negative rights thus are the primary protection of citizens against harmful infringements by powerful governments, whereas positive rights are more instructive norms, explications of governmental aspirations. An

[352] *Belgische Grondwet* (Belgian Constitution), translation provided by the Belgian House of Representatives, https://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf.
[353] Larik, *Foreign Policy Objectives in European Constitutional Law*, 36–37.
[354] This distinction is not as strict as it may seem. It is often pointed out that respecting positive rights can occasionally require an inactive attitude from the state and that respecting negative rights can occasionally require an active attitude from the state. These are exceptions, however.

important difference between the two is that negative rights are almost always legally enforceable, whereas most positive rights are not enforceable in a court of law.[355] This is understandable in the light of the separation of powers. Positive rights impose upon the government the duty to respect, promote, and fulfil these rights, but the extent to which this is possible ultimately depends on the availability of resources. Deciding on the distribution of the state's resources is an inherently political task, for which the two political branches are best equipped and responsible, not the judicial branch.[356] Judicial review of the government's compliance with positive rights is thus, with reason, controversial in the light of the separation of powers, for it would require courts to go into the fundamentally political question of whether the state's resources were properly distributed.

Positive legal rights thus bear a close resemblance to constitutional state objectives, for they both demand a positive effort by the state, often without corresponding legal enforceability. Furthermore, the formulation of positive rights and state objectives is often very similar. Compare, for example, the close resemblance in formulation of the *state objective* on animal protection in the Swiss Constitution and the *positive right* to public health in the Dutch Constitution. The Swiss state objective reads: "The Confederation shall legislate on the protection of animals."[357] The Dutch positive right to health reads: "The authorities shall take steps to promote the health of the population."[358] Both the state objective and the positive right are put into the same template of: "Governmental entity X shall put effort into social goal Y." This is a wider phenomenon among social rights and state objectives, which makes it hard to distinguish between the two based on their mere formulations.

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[355] Some positive rights are more readily subject to judicial enforcement than others, however. Cass R. Sunstein, "Against Positive Rights," *East European Constitutional Review* 35, (Winter 1993): 36–37.
[356] Sunstein, "Against Positive Rights," 37.
[357] Article 80, first paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).
[358] Article 22, first paragraph of the *Grondwet voor het Koninkrijk der Nederlanden* (Constitution of the Kingdom of the Netherlands), official translation provided by the Dutch government, https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.

Yet another factor that also seems to blur the lines between state objectives and positive rights is that the same social goals are, in practice, sometimes legally framed as a state objective and other times as a positive right. For example, governments' responsibility to preserve a sustainable living environment for citizens: in some jurisdictions, this social goal is framed as a positive right, in other jurisdictions as a state objective.[359] In the Netherlands, for instance, this governmental goal is conceptualized as a social right. Article 21 of the Dutch Constitution reads as follows: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment."[360] The German Constitution, however, formalizes this governmental goal via the legal construction of a state objective: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."[361] Although they have a comparable function in explicating the state's seriousness in pursuing this social goal, the Dutch legal construction confers a positive right upon citizens, whereas the German legal construction does not.

Like the member of the Belgian Parliament Alfons Borginon, one might easily get the impression that, given these similarities, there is no real difference between state objectives on the one hand and positive rights on the other. They both have the function of expressing the state's commitment to putting effort into pursuing a certain goal, without automatically creating a legally enforceable commitment. They are also similarly formulated, and both legal concepts are used to constitutionalize the same social objectives. In spite of these similarities, however, positive rights and state objectives are

[359] Tim Hayward points out that "more than 70 countries have constitutional environmental provisions of some kind," and that "in at least 30 cases these take the form of environmental rights." This does not imply, obviously, that the rest of the provisions are state objectives, but what it does illustrate is that the options of constitutionalizing environmental protections are diverse. Tim Hayward, "Constitutional Environmental Rights: A Case for Political Analysis," *Political Studies* 48, no. 3 (June 2000): 558.
[360] Article 21 of the *Grondwet voor het Koninkrijk der Nederlanden* (Constitution of the Kingdom of the Netherlands).
[361] Article 20a of the *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany).

not identical. This becomes immediately clear when we take a look at the placement of state objectives in constitutions. An analysis of the placement of state objectives in constitutions teaches that they are not categorized as (positive) rights. In Germany, the state objective on animal welfare is placed in Title II, on "The Federation and the *Länder*," instead of in Title I, on "Basic Rights."[362] In Switzerland, the state objective on animal protection is not listed under the title (II) that contains fundamental rights, named "Fundamental Rights, Citizenship and Social Goals," but under the title (III): "Confederation, Cantons and Communes."[363] The placement of state objectives concerning animal welfare in national constitutions seems to imply that the provisions in question are not intended by the constitutional legislators to bring about positive (nor, clearly, negative) rights.

More fundamental than this practical evidence of a difference in constitutional placement of state objectives and positive rights is that, in spite of being hardly enforceable, a positive right still is in essence a fundamental *right*, and a state objective is not.[364] Fundamental rights are typically held by individuals against the state and sometimes also against other people—the so-called "horizontal effect." State objectives, on the other hand, are part of the law that organizes the state. Put differently: state objectives are part of objective law and do not grant concrete subjective rights to particular legal subjects. Positive rights, by contrast, can be a source of specific subjective rights in the sense that particular beneficiaries can derive concrete powers and entitlements from these provisions. The beneficiaries of a constitutional right are thus provided with the right to the explicated good, whereas a state objective does not provide its beneficiaries with rights or entitlements. This difference can be illustrated if we consider the previously discussed social goal of providing citizens with a sustainable living environment. We have seen that this goal can be legally conceptualized as both a state objective and a positive right, in relatively

[362] Article 20a of the *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany).
[363] Article 80 of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).
[364] Larik, *Foreign Policy Objectives in European Constitutional Law*, 32–33, 36–37, 40, 42; Haupt, "The Nature and Effects of Constitutional State Objectives," 222–226, 256; Eisen, "Liberating Animal Law," 62–64; Nattrass, "…Und Die Tiere," 302; Vink, "Dierenwelzijn," 1862–1863.

similar words. Still, a positive right to a sustainable living environment has a fundamentally different legal meaning than a state objective on a sustainable living environment. As a positive right, it provides citizens with the *right* to a sustainable living environment, even though this may not always be enforceable in a court of law. As a state objective, however, it creates no subjective rights for citizens. The state objective is merely a *declaration* of a state's intention to provide citizens with a sustainable living environment. It is a declaration about the prioritizations in the fundamental organization of the state that does not create rights.

Even though the practical effects of positive rights and state objectives may often be similar, differentiating between state objectives and positive rights is important, especially in the context of protecting animals. Given the legal status of non-human animals, there currently seems to be no unambiguous way of legally conceptualizing the social goal of taking notice of animal welfare as a hypothetical positive right. It has been pointed out earlier that non-human animals are currently categorized as ("animated") legal objects, not subjects (possible rights bearers). If regard for animal welfare were legally constructed as a positive right, however, the legal status of non-human animals might become ambiguous.[365] The fact that animals are not (yet) categorized as legal subjects implies that they cannot have rights, and so legally framing the governmental goal of having regard for animal welfare as a positive right could be interpreted as a legal recognition that non-human animals are legal subjects with rights. Alternatively, to prevent ambiguousness concerning the legal status of non-human animals, a positive right of animal welfare could also be implemented (or interpreted) as being a right of *humans*, not of non-human animals themselves. In that way, non-human animals would still not have rights, and thus their legal status would remain unaffected. This option, however, would lead to a circuitous, legally ugly, and inconsistent construction in which the beneficiaries of a constitutional right are not the same entities as the rights holders.[366] A state objective on animal welfare, on the other hand, rightly recognizes non-human animals as its primary beneficiaries, but does not affect their legal

[365] Vink, "Dierenwelzijn," 1862–1863 (footnote 4).
[366] Vink, "Dierenwelzijn," 1862–1863 (footnote 4).

status as ("animated") objects. In this light, a constitutional state objective may in many respects look much like a positive right, but it is the better alternative of the two if one's goal is to unambiguously preserve the legal ("animated") object status of non-human animals (which is likely to be a goal of many states for some time to come).

4.3 State objective on animal welfare in Switzerland

Now that we have a clearer view of the effects that a constitutional state objective has and does not have in theory, it may be informative to look into the actual functioning and effectiveness of a state objective on animal welfare in a country that already has one. Switzerland is an appropriate choice for providing such an impression. It was the first European country to include animal welfare as a specific issue within its Constitution, and its legal system appears to offer animals some of the best protections in the world.[367] The Swiss Federal Constitution (abbreviated as SFC) has two allegedly ground-breaking provisions concerning animals. First, article 80 SFC, containing a state objective that declares animal welfare in general to be a state matter. Second, article 120 SFC, which declares (or "acknowledges," depending on one's philosophical outlook) that living beings have dignity. Because of this combination, Swiss constitutional protection for animals is relatively high, which makes this country particularly suitable for study. If the practical functioning of the Swiss state objective appears to fail at meeting the enfranchisement criteria, then the legal constructions in other countries with a state objective but without the added dignity protection are even less likely to meet the enfranchisement criteria. Moreover, Switzerland has had a constitutional state objective for a long time (over forty years), and

[367] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 316–317; Bolliger, "Constitutional and Legislative Aspects of Animal Welfare in Europe"; Gerritsen, "Animal Welfare in Switzerland," 8; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 17; Cecilia Mille and Eva Frejadotter Diesen, "The Best Animal Welfare in the World? An Investigation into the Myth About Sweden," trans. Niki Woods, Djurens Rätt, 2009, 29; Smith, *Governing Animals*, 118. Switzerland is one of the few countries that gets an A-ranking (the best in the A to G ranking) in the Animal Protection Index, a classification of fifty countries around the world by their commitments to protect animals and improve animal welfare in policy and legislation. "Swiss Confederation: Animal Protection Index 2014 ranking: A," World Animal Protection, November 2014, https://api.worldanimalprotection.org/sites/default/files/api_switzerland_report.pdf.

the country thus has had plenty of time to reflect on the functioning of the state objective and correct any possible deficiencies or shortcomings found in its legal construction.

The Swiss state objective on animal welfare is constitutionalized in article 80 of the Swiss Federal Constitution. The first section of this provision reads: "The Confederation shall legislate on the protection of animals."[368] The second section contains a list that specifies the legislative fields that are of particular importance (animal keeping, animal trade, animal experimentation, etc.).[369] The third section assigns competence to the twenty-six cantons in enforcing animal welfare regulations.[370] It is the prevailing legal opinion that with the introduction of this provision on animal welfare into the Swiss Federal Constitution, Switzerland made animal welfare a legally protected national interest with a constitutional status equal to other national objectives and that the provision binds all three governmental branches.[371] The state objective also functions as a constitutional basis for statutory animal welfare protection, which makes it possible for animal welfare prescriptions to compete with fundamental rights of humans on a more equal footing.[372] The introduction of animal welfare into the constitution therefore not only has symbolic value, European animal law expert Gieri Bolliger (1968–) argues, but also far-reaching practical significance.[373]

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[368] Article 80, first paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).

[369] "It shall in particular regulate: a. the keeping and care of animals; b. experiments on animals and procedures carried out on living animals; c. the use of animals; d. the import of animals and animal products; e. the trade in animals and the transport of animals; f. the killing of animals." Article 80, second paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).

[370] "The enforcement of the regulations is the responsibility of the Cantons, except where the law reserves this to the Confederation." Article 80, third paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).

[371] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 3, 11; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 318; Gerritsen, "Animal Welfare in Switzerland," 2–3 (footnote 7).

[372] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 318–319; Gerritsen, "Animal Welfare in Switzerland," 2–3.

[373] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 318–319.

The Swiss legislator has acted on the state objective. In 1981, in an attempt to give due regard to the state objective, the Swiss parliament passed Switzerland's most important animal welfare legislation: the *Tierschutzgesetz* (Animal Welfare Act, abbreviated as AWA).[374] The Animal Welfare Act comprises rules on animal welfare applicable to all animals in all sectors (in animal farming and in animal experimentation, but also to companion animals and wild animals). The legal animal welfare framework set out in the AWA is further specified in the *Tierschutzverordnung* (Animal Welfare Ordinance, abbreviated as AWO), a federal ordinance lower in the legal hierarchy, enacted by the Swiss Federal Council (a seven-member executive body of the Swiss government, elected by both chambers of the Federal Assembly).[375] The Animal Welfare Ordinance includes more than 220 articles and has five appendices which all further address the general rules of the AWA.[376] The introduction of the AWA and the AWO are the most important and measurable actual effects of the Swiss state objective so far.

As stated before, the Swiss Constitution also contains a provision that acknowledges the "dignity of living beings" (*Würde der Kreatur*), which is taken to include non-human animals in Swiss doctrine.[377] Switzerland was the first country to have introduced such a constitutional provision, and it did so as early as 1992.[378] It is important to also include this provision in our analysis of the practical meaning of the Swiss constitutional state objective,

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[374] *Tierschutzgesetz* (Swiss Animal Welfare Act), unofficial translation provided by Interpharma, https://www.globalanimallaw.org/downloads/database/national/switzerland/Tierschutzgesetz-2005-EN-2011.pdf.

[375] *Tierschutzverordnung* (Swiss Animal Welfare Ordinance), unofficial translation provided by Interpharma, https://www.globalanimallaw.org/downloads/database/national/switzerland/TSchV-2008-EN-455.1-2011.pdf.

[376] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 320.

[377] Article 120, second paragraph of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation). Swiss doctrine has given the term "living beings" the unnatural meaning of excluding humans but including non-human animals and plants, and possibly also other organisms, such as bacteria, algae, and mildew. Bolliger, "Legal Protection of Animal Dignity in Switzerland," 326–327 (including footnote 91); Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 4.

[378] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 3; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 311, 313, 323–324; Bolliger, "Constitutional and Legislative Aspects of Animal Welfare in Europe."

because this provision on the dignity of living beings could add flesh to the bones of the state objective. It has the potential to enrich the significance of the state objective. Constitutionally recognizing the dignity of animals could have revolutionary effects, if it indeed expands the philosophical concept of dignity, formerly only accorded to humans, to other animals as well.[379] If accorded to them in the original Kantian way, animal dignity protection would, at minimum, mean the end of using animals as mere means to an end.[380] In theory, it could have the effect of impeding all state action that facilitates using animals purely as objects (such as dispensing permits for animal experimentation and providing public subsidies for animal farming), and possibly even prompt the government to outlaw all such purely instrumental uses of animals.

When raising such high expectations of a significant transition, article 120 SFC, covering animal dignity, can only disappoint. The first section of the provision reads as follows: "Human beings and their environment shall be protected against the misuse of gene technology." The second section reads: "The Confederation shall legislate on the use of reproductive and genetic material from animals, plants and other organisms. In doing so, *it shall take account of the dignity of living beings* as well as the safety of human beings, animals and the environment, and shall protect the genetic diversity of animal and plant species" (italics JV).[381] Paradoxically, the dignity of living beings, a concept that originally meant the opposite of using an individual as a mere means to an end, is here mentioned in the context of using animals for genetic engineering. This immediately gives rise to a certain scepticism: is the concept of dignity given a different meaning than how it is generally used? It is also remarkable that article 120 SFC is not an article that independently recognizes the dignity of living beings, but an article primarily focused on genetic engineering, which *en passant* recognizes the dignity of living beings. The sceptical reader might say that, since this

[379] See on Kantian animal philosophy: Regan, *The Case for Animal Rights*; Frederike Kaldewaij, *The Animal in Morality: Justifying Duties to Animals in Kantian Moral Philosophy* (Zutphen: Wöhrmann Print Service, 2013).
[380] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 7, 9–10; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 389.
[381] Article 120 of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).

acknowledgement of living beings' dignity is merely done in the context of genetic and reproductive engineering, it can have no legal implications outside of that context. He might ask why the legislator first and only introduced this concept in the context of reproductive and genetic engineering if he meant to recognize the dignity of living beings as a general principle. The legislator could have created a separate article for living beings' dignity, as he did for human dignity. Article 7 of the Swiss Federal Constitution recognizes human dignity without referring to a specific context: "Human dignity must be respected and protected."[382] Human dignity is thus independently recognized, and in addition to this independent general recognition of human dignity, the importance of respecting human dignity in several medical-technical contexts is repeated in other articles (118b, 119, and 119a of the SFC). A similar general and self-contained article recognizing living beings' dignity does not exist, however. The absence of an independent article on living beings' dignity could mean that the legislator intended to recognize it only in the context of genetic and reproductive engineering.

On the other hand, from a more philosophical point of view, it remains to be seen whether recognizing dignity in one context can have meaning for that context only. The philosophical concept of dignity seems to resist such an interpretation, because dignity pre-eminently indicates comprehensiveness and permanency. Dignity is a matter of either having it or not, it is an all-or-nothing concept.[383] From this point of view, the dignity of a living being, once recognized, cannot be valid in one context and absent in the other. The *opinio juris* also follows this line of thought. Even though the dignity of living beings was specifically and exclusively mentioned in the context of gene technology, its implications are taken to exist beyond that context. According to Swiss doctrine, the protection of animal dignity is a general constitutional principle that must not only be respected in all state

[382] Article 7 of the *Bundesverfassung der Schweizerischen Eidgenossenschaft* (Federal Constitution of the Swiss Confederation).
[383] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 325–326, 328.

action, but also in the complete Swiss legal system.[384] As with article 80 SFC, the dignity-of-living-beings provision binds all three governmental branches.[385]

The constitutional recognition of animal dignity seems to have had some effect on lower Swiss legal sources. The most important effect it has had, is that the recognition of animal dignity was copied into the Animal Welfare Act in 2008, although it lost some of its meaning in the process. Whereas the dignity concept in article 120 of the Constitution recognizes the dignity of *all animals* except humans, the AWA dignity provision quite controversially merely covers vertebrates, cephalopods, and decapods.[386] In spite of this loss, the dignity concept is given a prominent role as a guiding principle in the AWA. The first provision of the act emphasizes the importance of animal dignity for the rest of the document and for all other regulations based on the AWA (most notably the AWO).[387] The AWA gives this commitment further content by legally protecting animals against certain infringements of their welfare. In principle, non-human animals are protected against inflictions of pain, suffering, harm, and the inducement of anxiety.[388] A violation[389] of the animal's dignity, however, is also legally constituted when he is "exposed to anxiety or humiliation, if there is major interference with its appearance or its abilities or if it is excessively instrumentalised."[390] This is where the added value of dignity protection in

[384] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 3–4; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 325–330; Gerritsen, "Animal Welfare in Switzerland," 2–3 (including footnote 5).
[385] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 328.
[386] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 335 (footnote 154), 326–327, 369–370.
[387] Article 1 of the *Tierschutzgesetz* (Swiss Animal Welfare Act); Bolliger, "Legal Protection of Animal Dignity in Switzerland," 334–335; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 14.
[388] Article 4, second paragraph and article 26, first paragraph of the *Tierschutzgesetz* (Swiss Animal Welfare Act); Bolliger, "Legal Protection of Animal Dignity in Switzerland," 336–337; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 14.
[389] The AWA uses the term "violation" to indicate a transgression of animal dignity that may be justified and the term "disregarding" to indicate a transgression of animal dignity that cannot be justified. This deviates from common legal practice in which the term "violation" is used to indicate a transgression of a legally protected interest that cannot be justified. Bolliger, "Legal Protection of Animal Dignity in Switzerland," 345 (including footnote 236).
[390] Article 3, section a and article 26, first paragraph of the *Tierschutzgesetz* (Swiss Animal Welfare Act); Bolliger, "Legal Protection of Animal Dignity in Switzerland," 337–343.

comparison with common animal welfare legislation comes to the fore: the animal also finds himself legally protected against certain actions that do not necessarily inflict physical injury.[391]

The aforementioned legal protection of animals and their dignity is, however, not robust, but rather of relative value.[392] The actions that *in principle* constitute a violation of the animal's dignity (causing pain, suffering, harm, anxiety, humiliation, substantial interference with his appearance or abilities, and excessive instrumentalisation) may, according to the law, be legally *justified* by "overriding interests."[393] Put the other way around, all of these sometimes extremely harmful practices done to animals are legally permissible if they serve "overriding interests." In order to be justified, the interest of a person in violating an animal's dignity must, on balance, outweigh the animal's interest of not having his dignity violated.[394] The amount of *actual* legal protection based on the animal's dignity, therefore, only becomes clear after all relevant interests are balanced in a certain given case. The AWA offers no instructions on how this balancing of interests must be done—a significant hiatus in the construction of this law, especially given the risk of biased weighing because one of the involved parties (humans) have to do the balancing themselves. Luckily, however, we are not completely left empty-handed here. The principle of proportionality is generally employed in matters like this, and doctrine also recognizes the proportionality test as the right procedure in this matter.[395] In this context, the legally required weighing of interests therefore comes down to the following. In order to be legal, the action that affects the animal's dignity (causing pain, suffering, harm, anxiety, humiliation, substantial interference with their appearance or abilities, and excessive instrumentalisation) must:

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[391] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 337–338; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 14.
[392] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 344–345; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 14.
[393] Article 3, section a and article 4, second paragraph of the *Tierschutzgesetz* (Swiss Animal Welfare Act); Bolliger, "Legal Protection of Animal Dignity in Switzerland," 344–353; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 13–14.
[394] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 337–338, 344–345; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 13–14.
[395] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 346.

(I) be suitable, (II) be necessary to achieve a legitimate purpose, and (III) serve a legitimate interest that proportionally prevails over the severity of the stress caused to the animal.[396] Important to note here is that in the balancing of these interests, animal dignity is on the same normative level as other constitutionally protected values, such as the fundamental rights of humans, due to its constitutional basis.[397] The fact that all are protected in the Constitution suggests that giving human interests general and absolute precedence is impermissible. Such would, according to Swiss animal law experts Margot Michel and Eveline Schneider Kayasseh, "undermine the quintessence of the dignity of the Creature and reduce it to an empty phrase."[398]

In addition to the previous analysis, two questions need to be further addressed. First: whether this legally required balancing of interests is consistent with any reasonable explanation of animal dignity. Second: whether this legally required balancing of interests is as promising in practice as it appears in theory.

With regard to the first issue, the foregoing analysis confirms the scepticism articulated earlier: it seems that the dignity of animals is not given a legal meaning that is anything similar to that of the dignity of humans, nor does it come close to any other reasonable understanding of dignity. In Swiss law, the legal implementation of animal dignity has essentially led to a legal framework that does precisely the opposite of implementing dignity protection. Neither the dignity concept in the Constitution nor its implementation in the AWA offers animals the absolute protection against purely instrumental use that reasonably could have been expected on the basis of the philosophical and commonsensical understanding of the concept of dignity.[399] Whereas human dignity is generally taken to have an inviolable core content which is unconditionally

[396] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 346.
[397] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 345.
[398] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 9; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 345.
[399] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 311–395.

protected by law, Swiss animal law subordinates animal dignity protection to "overriding" human interests.[400] The dignity protection offered to animals thus is completely fluid, because it is—in clear violation of all reasonable explanations of dignity protection—subordinate to utilitarian calculations. Furthermore, not only does the law not inexorably forbid causing animals severe pain, suffering, and harm, even the animal's life is not protected against destruction, a thorn in the side of many Swiss animal law experts.[401] The dignity protection, which according to prevailing legal opinion should include respect for the inherent value of animals,[402] is thus completely hollowed out, for as Gieri Bolliger aptly notes: "a value can hardly be more ignored than by its complete destruction."[403]

Despite the constitutional recognition of animals' dignity and the basic philosophical meaning of dignity as deserving of being treated as a subject and not degraded to a replaceable object, Swiss law still allows the lives and basic interests of animals to be sacrificed on the altar of human need (and greed). Since constitutional dignity protection has not led to a core protection of some elementary animal interests, it thus has not lived up to its potentials in this sense. Precisely in unconditionally protecting certain core interests of non-human animals, a legal system with dignity protection could have had added value over a legal system with merely a state objective on animal welfare. Instead, in Switzerland, just like in countries without dignity protection, the law allows for the killing and harming of animals if legally justified by mere "overriding interests." Animal experimentation, and many other practices in which animals are used as sole means to an end, are still legal under Swiss law, in spite of constituting clear violations of animal

[400] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 5–7; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 329–333.
[401] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 10, 15–17, 41; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 357–358, 371–373; Gerritsen, "Animal Welfare in Switzerland," 7–8, 10.
[402] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 325–326 (including footnote 83), 335–337, 393; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 7–11, 14; Gerritsen, "Animal Welfare in Switzerland," 6.
[403] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 371.

dignity (in the philosophical sense).[404] It is legal, for instance, to rear animals for the sole reason of killing them. This would obviously be unthinkable if it involved humans, because it would be the gravest violation of their dignity. With regard to humans, dignity is taken by many to be the philosophical basis for granting them fundamental rights, it prohibits exclusive instrumentalisation, and it leads to a legally inviolable core protection. Importantly, this core protection, which includes for instance protection against torture, is absolute and unrestricted, which means that it may not be compromised in any weighing of interests.[405] Animal dignity, in contrast, has not led to the granting of fundamental legal rights to animals, the unconditional prohibition of exclusive instrumentalisation, or to a legally inviolable core protection of animals' most important interests—human interests may always prevail.[406] The legal concept used in the Swiss Federal Constitution, "dignity," thus has two fundamentally different meanings depending on the species of the entity to which it applies. According to some Swiss law experts, attaching poor legal meaning to the concept of dignity of animals in comparison to that of humans is not only highly hypocritical, but also a serious problem for the legal system of Switzerland. A coherent legal system ought not to attach two almost opposite meanings to the same legal concept, or legislative contradictions are likely to arise.[407] The fact that the animal version of dignity is robbed of its original meaning in Swiss law is thus not only worrisome in itself, but also because it brings incoherence into the Swiss legal system.

Although insufficient when set against the rather high standard of the philosophical concept of dignity, the legal structures of Switzerland may still be interesting from a less demanding point of view. After all, Swiss law seems to require weighing the interests of humans and non-human animals

[404] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 314, 358, 368–395; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 9–10, 13; Gerritsen, "Animal Welfare in Switzerland," 1–15.
[405] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 5–6; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 329–331.
[406] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 7–11, 14–17; Bolliger, "Legal Protection of Animal Dignity in Switzerland," 331–333.
[407] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 331–333; Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 7.

against one another when certain animal-harming behaviour is legally assessed, which would be quite revolutionary. As stated above, according to legal doctrine, only proportional harms to the animals are legally allowed. Accordingly, an action that injures an animal seems, in principle, only legal if it is suitable, necessary to achieve a legitimate purpose, and if it serves an interest that prevails over the severity of the stress caused to the animal. If actually applied in this way, the unique Swiss combination of a state objective on animal welfare and dignity protection would signify a vast improvement of the legal structures from an interspecies point of view.

Despite this promising requirement of having to balance interests, however, the actual functioning of this legal framework has so far been rather disappointing. The legal escape route which allows for harming animals on the grounds of "overriding interests" is eagerly taken and creatively interpreted to allow for even the most harmful (and dignity violating) actions. Somehow, humans almost always find their own interests to be prevailing over non-human animals' interests, leaving non-human animals in the cold. To Swiss humans and legal practice, the utility of animals is still much more important than their basic interests or their dignity, even though the Swiss Constitution recognizes that they have it.[408] Despite all constitutional efforts, animals in Switzerland are still horribly, but legally exploited in numerous ways, exploitations that could not be justified if truly objectively tested against the proportionality criteria that have been accepted as applicable here by legal doctrine. It is unthinkable that a truly sincere and objective (non-speciesist) balancing of interests—as, according to doctrine, is required by law—would lead to the conclusion that, for example, humans' gastronomical preferences outweigh a farmed animal's interest in avoiding a life full of pain, suffering, and eventually slaughter.[409] That one individual's gastronomical preferences are more important than another individual's most elementary interests may be the prevailing opinion in society, but could hardly be the outcome of a truly objective weighing of interests.

[408] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 17.
[409] Singer, *Animal Liberation*.

It should not come as a surprise that many experts in Swiss law criticize the rather disappointing application of the constitutional provisions on animals in practice. Swiss animal law expert Vanessa Gerritsen is disillusioned that "As in other countries, Swiss society and authorities are not willing to stop the exploitation of animals. There are strict limits to the use of animals, but their disposability is not essentially in question."[410] Margot Michel and Eveline Schneider Kayasseh both subscribe to that analysis. They also note that the usability of animals is not fundamentally questioned, and add that the value of the protection of animals against the infliction of suffering remains restricted due to the subordination to human interests.[411] Gieri Bolliger too, concludes that "the far-reaching conceptual reorganization of Swiss animal law has not yet led to a fundamental change in the human-animal relationship in practice."[412] Intensive rearing of animals in order to kill them is still legal under Swiss law, despite the fact that it is, as Bolliger points out, the textbook example of mere instrumentalisation and disproportional animal use.[413]

4.4 Normative assessment of the constitutional state objective

Let us now move away from the Swiss situation and analyse state objectives on animal welfare more generally from a normative perspective. Compared to some of the political options of enfranchising animals that were addressed earlier, the here-discussed model of the constitutional state objective seems more promising—at least in theory. Appealing to the constitution allows a liberal democracy to legitimately steer legislation, policy, and state action into a certain (in this case: more animal-friendly) direction, without compromising on liberal democratic values. From the perspective of the enfranchisement criteria, the state objective on animal welfare is not fully ideal, however. In this section, important pros and cons of the constitutional state objective on animal welfare will be assessed in the context of the enfranchisement criteria.

[410] Gerritsen, "Animal Welfare in Switzerland," 9.
[411] Michel and Schneider Kayasseh, "The Legal Situation of Animals in Switzerland," 17.
[412] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 312.
[413] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 373–376.

The independence criterion

It seems that a state objective on animal welfare is quite an attractive theoretical option when it comes to living up to the independence requirement. It has the potential to establish a more independent position for animals and their welfare in the constitutional structures of the liberal democratic state.

We have seen that in liberal democracies without a state objective on animal welfare, the welfare of animals has no meaningful independent status in the political or legal balancing of interests. To be included in such considerations, animal welfare generally has to coincide with human interests or preferences. In other words, in states without a state objective on animal welfare, it is generally not required to address animal welfare as a separate issue which is of importance for its own sake. In theory, a constitutional state objective on animal welfare can alter this. With a constitutional state objective on animal welfare, animal welfare evolves from a non-committal value into an independent value of constitutional importance, and this implicitly and explicitly recognizes that animal welfare is an inherently important and legitimate aspect of the constitutional state.[414] Since a constitution with a state objective on animal welfare recognizes animal welfare as an independent value, it ought to be separately addressed in legislative and executive deliberations. As a consequence of the state objective, animal welfare is thus no longer only of importance if it coincides with values that humans cherish, but it becomes a value to be pursued independently.

Apart from improving the independent status of animal welfare in legislative and executive considerations, the state objective also has the potential to improve the independent status of animal welfare in the context of more specific conflicts of interests, such as in court cases. Whereas without a state objective, animal welfare could often be ignored in such contexts, or could only have played an indirect role as an interest that is secondarily pursued by humans, the state objective requires that animal welfare is noticed as an independent player on the field of interests. That is:

[414] Vink, "Dierenwelzijn," 1862–1869.

regardless of human endorsement, because its independent value now stems from the constitution and need no longer be externally inserted by humans. Furthermore, due to a state objective, the interests of animals even get a chance of prevailing over human interests as protected in the peripheral sphere of fundamental rights. However, despite the fact that, in theory, the state objective facilitates these improvements in relation to the independence requirement, it is not at all certain that they will be realized. This will be clarified in the next subsection.

The non-contingency criterion

The state objective also has the potential to reduce the contingency with which animal interests are taken into account in liberal democracies. The state objective is a formal reflection of the state's commitment to be involved in the lives and welfare of its non-human inhabitants, notably laid down in the most important document of the liberal democratic state. This is an important improvement when it comes to the relationship between animal welfare and the liberal democratic state, regardless even of whether a state truly adheres to the state objective. Even if a constitutional state objective on animal welfare were to be completely ignored in practice, it nonetheless would continuously send the message that the situation *should be* otherwise, and thus consequently put pressure on state officials to change the status quo in accordance with what is required by the constitution. In this way, a state objective on animal welfare, even if not adhered to by the state, is functional in the sense of pointing out that there might be a legitimacy problem with current governance.[415] It is also important that adopting such a serious commitment to the welfare of animals in a constitution removes political controversy on the issue in question.[416] This should have the indirect effect of removing some of the contingency of paying due attention to animal interests by state officials. If indeed accepted as a constitutional principle, the welfare of a state's animal inhabitants can no longer be the exclusive concern of politicians affiliated with green parties and animal

[415] Larik, *Foreign Policy Objectives in European Constitutional Law*, 24–25.
[416] Haupt, "The Nature and Effects of Constitutional State Objectives," 224, 256.

advocacy parties, but rather must be the concern of *all* state officials, for all of them are, given the rule of law, bound by constitutional values and norms. These consequences of the state objective may subtly improve the non-contingency with which animal interests are taken into consideration by the state.

Despite these improvements, however, it is clear that even with a constitutional state objective, the inclusion of animals' interests in governmental deliberations is, to a great extent, still dependent on several other factors, such as the integrity and personal commitment to animal welfare of individuals in key governmental positions, the societal willingness to respect animal welfare, and the urgency of other state matters that require attention and resources. In other words, a state objective has the potential to have important effects, such as limiting fundamental rights when this is necessary for respecting animal welfare, making animal welfare a factor of importance in specific legal disputes and in wider policy and legislative considerations, and safeguarding progress on this issue in the longer term, but these effects are not automatically realized. Putting flesh to the bones of the state objective requires sincere and active commitment and dedication from state officials.

The same is true for the theoretical improvements in relation to the independence requirement as just discussed. Addressing animal welfare as an independently important issue, and thus making the state objective meaningful in practice, also requires commitment and dedication from state officials. Characteristic of a state objective, however, is leaving state officials a large amount of discretionary space in giving effect to the objective. Respecting animal welfare is thus an objective of the state that, although it may not be actively frustrated, is practically just waiting to be addressed whenever state officials are of the opinion that there is enough urgency and resources to actually address it. In determining when, how, and to what extent acting on the state objective is required, governments are typically allowed significant discretion.[417]

[417] In Germany, for example, decisions on *whether* to take action to pursue the state objective, *when* to do so, and *how* to do so remain at the discretion of the legislature. Haupt, "The Nature and Effects of Constitutional State Objectives," 226–227.

Furthermore, the state objective has inherent limitations that, regardless of the level of governmental commitment, seem to render it insufficient to ever secure a truly non-contingent and equal consideration of animals' interests. We have seen that, even though they are included in the same important legal document, constitutional state objectives cannot fully and equally compete with the fundamental rights of humans, for they cannot justify infringing on the core protection of fundamental legal rights. Due to this limitation, a true equal weighing of interests remains ultimately impossible, for even animal welfare rules backed by a constitutional state objective cannot prevail over human interests that fall under the core protection of fundamental legal rights—no matter how elementary or weighty they are. This fact that a state objective cannot function as a basis for competing with the fundamental rights of humans on an equal footing means that animal interests will continue to remain fundamentally legally subordinate to human interests, even in jurisdictions which have adopted a state objective on animal welfare.

Yet another shortcoming is that a state objective does not automatically create a legal basis on which hypothetical legal animal representatives could actively pursue the enforcement of animal welfare rules in court.[418] Undertaking legal action on behalf of an animal in order to address certain illegal animal-harming behaviour or the failure of administrative agencies to enforce animal protection rules thus remains impossible, for even in the presence of a state objective, the required legal standing is still lacking (with the exception of the earlier-discussed standing for some animal welfare organizations in some jurisdictions under specific circumstances).

The inability of the state objective to secure a non-contingent and equal weighing of humans' and non-human animals' interests in all state actions also came to the fore in the case study regarding the Swiss constitutional provisions on animal welfare. Not even the country with the best constitutional protection for animals on earth has succeeded in attaining this goal. This is not to deny that the introduction of animal welfare as a

[418] Haupt, "The Nature and Effects of Constitutional State Objectives," 231–237; Nattrass, "…Und Die Tiere," 304.

state objective and the recognition of animal dignity in the Swiss Constitution have had a significant effect on Swiss law. Most notably, it improved the protection of animal welfare in the law, and even though supporting empirical data seems unavailable, possibly also the actual treatment of animals in Switzerland. However, the purpose of the Swiss case study was not to investigate whether the Swiss constitutional protection of animals has improved actual animal welfare, but whether it improved the political and legal position of animals from the perspective of the enfranchisement criteria. In the context of the non-contingency criterion, it seems that the Swiss construction did not come close to ensuring a serious and non-contingent position for animals and their interests. Even in Switzerland, non-human animals' most elementary interests are still fundamentally subordinated to all kinds of human interests, and an objective and fair weighing of these interests is not guaranteed.[419] The Swiss case study has elucidated that even in the company of a constitutional recognition of animal dignity, a state objective cannot alter the unwarranted dominance of human interests in the legal sphere. Although, according to Swiss legal doctrine, the legal structures should prompt judges to only accept infringements on animals' welfare that are truly proportional and necessary, we see that, in practice, legal norms are anthropocentrically interpreted and applied so as to allow for many forms of animal harm and even pure instrumentalisation.

Most likely, this loose interaction with the state objective is caused by the fact that the state objective itself does not explicitly instruct state officials (including the judiciary) to weigh interspecies interests in the equal way that is required according to legal doctrine. It is possible that state officials may be reluctant in culling human freedoms to use, abuse, and instrumentalise other animals as long as there is no clear or explicit assignment and authorization to do so. After all, weighing human and other animals' interests non-contingently and equally against one another would have greatly disruptive effects on current liberal democratic societies, in which

[419] Bolliger, "Legal Protection of Animal Dignity in Switzerland," 311–395; Gerritsen, "Animal Welfare in Switzerland," 1–15.

disproportional animal (ab)use and instrumentalisation are omnipresent.[420] State officials might be reluctant to cause such disruptive effects on society on the mere basis of the legal *doctrine* on how the weighing of interests should take place. Possibly and understandably, they are only willing to take that legal leap if such a requirement were backed by a strong democratic authorization in the form of explicit legislative instructions in that direction. A constitutional state objective, with its inherent allowance for great discretionary and interpretation space, may be understood by many to not send a clear enough message or offer a firm enough legal mandate to demand such a ground-breaking legal shift. Absent explicit legislative authorization to weigh non-human animal interests non-contingently and, in principle, equally to those of humans, state officials may thus feel inclined to continue attaching greater weight to human interests while subordinating or even ignoring non-human animals' interests as a way of reflecting societal opinions on this matter.[421]

As a matter of handling the state objective, this is understandable, given its open and multi-interpretable nature. However, with Switzerland's additional constitutional recognition of animal dignity, giving this much power to public opinion in, for instance, judicial decisions is less defensible. Unlike a state objective, a constitutional recognition of animal dignity should not be open to many interpretations. The meaning of dignity is primarily determined by centuries of philosophical contemplations on the concept and by the commonsensical use of the term, which means that the options of legally interpreting "dignity" are limited. Protection of dignity should primarily include a protection against exclusive instrumentalisation that is not subject to utilitarian considerations, as this seems implied in the very meaning of "dignity." Once animal dignity is constitutionalized, public opinion on whether or not forms of exclusive instrumentalisation can be "justified" by other interests is thus redundant and should not be necessarily relevant to judicial contemplations on what dignity protection requires precisely. Clear constitutional demands, after all, commit a judge to respecting them, even if this contradicts a temporarily popular opinion.

[420] Gerritsen, "Animal Welfare in Switzerland," 14–15.
[421] "Societal" is then obviously understood anthropocentrically, as merely comprising human society.

Whereas a state objective inherently leaves much room for interpretation favourable to public opinion, constitutional dignity protection seems to require hard and unnegotiable norms which the judiciary is expected to apply regardless of societal support in a certain circumstance. As stated before, this is where dignity protection of animals could have had added value over a state objective on animal welfare: it would have been logical if dignity protection had covered an absolute core protection of animals. We must, however, conclude that dignity protection as realized in Switzerland has not lived up to this potential of offering this added value over a mere state objective. The most horrible ways of using, abusing, and, crucially, purely instrumentalising animals are still a daily and legal routine in the country that is formally burdened with the task of protecting animal welfare and that recognized the dignity of animals in its most eminent legal document. In sum, it is safe to say that the state objective, even if combined with constitutional dignity recognition, has trouble in meeting the non-contingency requirement, because it seems unable to secure a non-contingent and equal weighing of humans' and non-human animals' interests in the considerations of the state.

Enforceability

One of the aspects of a state objective on animal welfare that causes it to fall short in relation to the non-contingency requirement is the fact that a state objective can hardly be legally enforced. There seem to be two interrelated reasons for this. First, the checks and balances that generally work well to establish compliance with the constitution seem to malfunction here. Second, the fact that a state objective typically allows for much discretionary room makes it rather unsuitable to be strictly enforced.

Many of the general checks and balances in liberal democracies are anthropocentric in the sense that they ultimately rely on the selfish motives of the human electorate. This leads to problems when the same mechanisms are used to establish compliance with a constitutional provision that, quite revolutionary, does *not* primarily aim to protect human interests, but non-human interests instead. In that case, checks and balances that are ultimately

anthropocentrically driven (by the egoism of the human political agent, that is) struggle to establish compliance with the norm.

As discussed, a state objective ought to have various institutional effects, and which body is ultimately responsible for reviewing compliance with these effects differs by jurisdiction. In most cases, however, the legislator, the electorate, and the judiciary (in general, or a constitutional court) will be responsible for monitoring compliance with the state objective.[422] When it comes to the responsibility of the legislative branch or (ultimately) the electorate to check compliance with the state objective—for example the extent to which the executive branch succeeds in giving due regard to animal welfare in its considerations—we know that there is a clear anthropocentric incentive at play. Since the electorate is exclusively human, this may mean that state officials under popular control are neither intrinsically nor institutionally inclined to correct the executive branch if it does not succeed in paying due regard to animal interests.

With regard to the checking mechanism that calls on the judiciary to review compliance with the state objective, we have seen that there may be some more or less legitimate reticence to effectively give priority to animal interests when they are, objectively speaking, weightier. As discussed above, this judicial self-restraint may well be based on a (in light of the separation of powers) healthy reservation to not exert powers that are not explicitly assigned by law and to not enforce norms that are not explicitly stated in law. The vagueness that is inherent to state objectives thus also plays a big role here, but this aspect will be more extensively addressed further below.

It seems safe to say that enforcing a constitutional state objective is very hard and that a state objective never automatically constitutes legal guarantees, which is partly due to the malfunctioning of general checks and balances in this context. This is worrisome in the light of the non-contingency requirement. Therefore, we might consider improving the checks and balances that function in the context of the state objective before we can definitively reject the state objective on animal welfare as an animal enfranchisement option on grounds of normative deficiency. In

[422] See for an elaboration on the Dutch checks and balances in the context of a hypothetical state objective: Vink, "Dierenwelzijn," 1865–1866.

contemplating improving these checks and balances, we may learn from some of the institutional changes that have been proposed by Kristian Skagen Ekeli in the context of future people and their constitutional protection. By this route, we will also arrive at the second reason for why state objectives are hardly enforceable: they are inherently permissive.

In one of his constitutional models, Kristian Skagen Ekeli proposes making the protection of the interests of future people a state objective.[423] Specifically, he proposes a "posterity provision," a constitutional provision that commits a state to "avoid and prevent decisions and activities that can cause avoidable damage to critical natural resources that are necessary to provide for the basic physiological (biological and physical) needs of future generations."[424] Ekeli signals the same problem we have encountered as well: the practical value of a constitutional state objective is generally little, due to the fact that it is hardly enforceable. He, however, proposes some additional procedural changes in an attempt to make a state objective on future peoples' interests more enforceable and holds that his proposed provision thus constitutes "a better and more adequate basis for judicial enforcement than the [existing] alternatives."[425] It might be useful to now elaborate a little on Ekeli's posterity provision model, especially the procedural remedies he proposes to remedy the permissiveness of the state objective.

The posterity provision that Ekeli proposes has three sections, the first of which contains the state objective itself, which, in short, commits the state to preventing avoidable damage being done to resources that are critical to future people. To escape the trap of proposing a provision that has little or no practical effect, Ekeli attempts to improve the practical value of this state objective by complementing it with two additional procedural sections. These procedural sections regulate the process of enforcement and

[423] Even though Ekeli does not explicitly refer to the provision he proposes as a "state objective," (he mentions that it includes "a statement of public policy," however) it has all the relevant characteristics of a state objective and thus will be treated as such in this chapter. Ekeli, "Green Constitutionalism," 378–401.
[424] Ekeli, "Green Constitutionalism," 379, 391.
[425] Ekeli, "Green Constitutionalism," 378–379, 399.

are thus meant to function as a big stick to ensure compliance with the state objective by the legislative and executive branches.

The goal of the second section is to enable legal guardians to initiate legal proceedings on behalf of posterity, through which they can attempt to have the state objective enforced in court. More precisely, this section must be understood to assign courts the competence to appoint such guardians and to provide the legal basis of legal standing for such guardians.[426] Translated into our context, we could consider creating a similar procedural addition to state objectives on animal welfare that allows legal guardians to initiate legal proceedings on behalf of non-human animals in order to attempt to have the state objective enforced in court. Courts will then be able to review the state's compliance with the constitutional state objective, and legal guardians of animals will be able to contest state behaviour in court. This would, in principle, allow the courts to review all actions of the legislative and executive branches that might interfere with the state objective, among which bills, acts of parliament, and decisions and regulations made by the executive branch.

The third section of Ekeli's posterity provision describes three measures that the reviewing court can impose in an attempt to make the state comply with the state objective. According to Ekeli, courts should be enabled to "(1) require that state authorities undertake environmental and technological *impact assessments* before they make decisions affecting critical natural resources; (2) require that the final *enactment of a proposed law is delayed* until a new election has been held if the court believes that … the law in question can cause avoidable damage to critical natural resources; or (3) require a *referendum* on the law proposal under consideration" (italics JV).[427] Translated into the context of a state objective on animal welfare, this would mean that courts would be enabled to: (I) require that the state authorities undertake animal welfare impact assessments before they make decisions affecting animal welfare, (II) require that the final enactment of a proposed law is delayed until a new election has been held if the court believes that the law in question can cause avoidable damage to animal welfare, and (III)

[426] Ekeli, "Green Constitutionalism," 391–394.
[427] Ekeli, "Green Constitutionalism," 394–395.

require a referendum on the proposed law under consideration. With these competences, reviewing courts can interfere with the legislative and executive processes if their assessment leads them to believe that the state objective is about to be disrespected by the state. This may improve the enforceability of a state objective, and, as Ekeli considers important, possibly also the process of deliberation and decision-making.[428]

How are we to appreciate these procedural additions in the light of improving the enforceability of a state objective on animal welfare? Could procedural additions such as the ones proposed by Ekeli in the context of future people take away some of the permissiveness of a state objective on animal welfare? The effectivity and normative desirability of the proposed type of judicial review will now be discussed.

To start with, there may be some reservations about the model that Ekeli proposes from the perspective of effectivity. More precisely, the measures that the courts can impose in order to compel the legislative and executive branch to act in line with the state objective, namely ordering an impact assessment, delaying the enactment of law, and ordering a referendum, are not likely to be effective in the animal welfare context. With regard to the first measure, which would allow the court to require that state authorities undertake animal welfare impact assessments before they make decisions affecting animal welfare, it is unclear how this would be effective in establishing compliance with the state objective. Governmental decisions regarding animal welfare, especially executive ones, are not always publicly announced before they are made. Decisions made without prior public notification thus remain deprived of judicial review, for it remains unclear how a legal guardian could pre-emptively start legal proceedings regarding such a decision. More importantly, however, with regard to decisions that do end up under judicial scrutiny, it remains unclear how ordering that an impact assessment on animal welfare must be made can establish compliance with the state objective. An impact assessment does not seem to give any guarantees with regard to the substantial decision that follows after the impact assessment is conducted. In other words: requiring an impact

[428] Ekeli, "Green Constitutionalism," 395–397.

assessment to be undertaken is not the same as requiring officials to take due notice of the state objective. Even if an impact assessment is made, government authorities may still decide to negate or disproportionally harm animal interests, which would constitute a disregard for the state objective that the court cannot prevent or sanction.

The second measure, the one that enables courts to require of the legislator that the final enactment of a proposed law is delayed until a new election has been held if the court believes that that law may cause avoidable damage to animal welfare, struggles with the same problem. It does not in any way guarantee that animal interests will be paid due respect after delay and new elections. To the contrary, we have already seen that general elections are a particularly poor device for remedying disregard for animal interests (or, for that matter, future people's interests). General elections introduce rather than remove anthropocentric and "presentist" incentives, because only presently living human agents vote. Additionally, delaying the legislative deliberation process can, on its own, offer no guarantees with regard to the substantial outcome of that process.[429] It is thus not clear how a court could force or even persuade legislators to pay due respect to animal welfare in a proposed law by merely delaying the legislative process and ordering new elections.

Moreover, the same is true with regard to the third measure: requiring a referendum on a proposed law. In this case, too, it is not clear how a referendum, or delay, could make the legislator change a proposal of law so as to make it sufficiently respectful of animal interests. A referendum, like general elections, also constitutes an anthropocentric (and presentist) incentive, due to the specific characteristics of voters. Yet again, this measure, if imposed by a court, seems to be unable to persuade, let alone force the state to comply with the state objective.

In sum, it seems that the type of judicial review that Ekeli has proposed is not likely to be effective in adding practical value to a state objective on animal welfare. Even with the competences that Ekeli proposes,

[429] See on deliberative improvements and their (in)significance to substantial outcomes in the context of animal welfare: Garner, "Animal Rights and the Deliberative Turn in Democratic Theory," 1–21; Garner, "Animals, Politics and Democracy," 103–117.

courts still cannot make governmental bodies respect the state objective. In spite of its probable ineffectiveness, however, there is also a serious normative argument against introducing the type of review that Ekeli proposes. More precisely, the emphasis that Ekeli's model places on judicial review is troublesome in the light of the separation of powers.

Given the open nature of state objectives and the consequential fact that they do not create clear and firm obligations, Ekeli-like judicial review would lead to a situation in which highly sensitive and political matters would have to be decided by a branch that is not directly democratically legitimized, nor equipped for that task. Since state objectives do not create clear rights or even relatively clear instructions with which the judicial branch can work, the judiciary will be forced to make substantive considerations relating to the state objective. In an animal welfare version of Ekeli's model, courts will be required to determine whether the intended decisions and activities of the executive and legislative branches are consistent with the formal *objective* to pay due respect to animal welfare. This is an almost impossible task, for an objective lays out very few concrete norms in the context of which the judiciary can assess state behaviour. Without additional legislative clarification on what this objective requires precisely, the judicial branch would be forced to give substance to this open norm itself, which raises concerns with regard to the separation of powers.

Ekeli has tried to remedy this problem by specifying what the state objective requires: government authorities are to prevent making decisions that can eventually cause "avoidable damage," in order to avoid judicial interference with their work. This does not ease the judicial task at all, however, for "avoidable damage" still is a soft norm very much open to debate. Determining what constitutes "avoidable damage" to "critical resources for future generations" or, in our case, animal welfare, is still a highly political matter. Whether damage is "avoidable" is not only interlinked with inconclusive risk assessments but also with the availability of resources and the distribution of these resources in a society.[430] Whether,

[430] Kristian Skagen Ekeli recognizes these difficulties: he does not deny that "judicial enforcement of the posterity provision poses important problems—especially with regard to uncertainty about the future

and how many resources are to be spent on preventing certain inconclusive risks of future damage are inherently political questions to which there are no clear-cut objectively "true" answers, only political ones.[431] Due to their political nature, these questions ought to be answered by the political branches only. In Ekeli's model, however, the judiciary is burdened with determining these political matters, which seems an unwise violation of the separation of powers. Additionally, burdening the judiciary with establishing these political matters also puts its neutrality and a-political reputation at risk, which may ultimately result in a dangerous loss of public respect and general societal support for (decisions of) the judicial branch. For all these reasons, the judicial branch should ideally not be burdened with making the controversial and political considerations that giving substance to a vague state objective would require it to.

Ekeli anticipated critique from the angle of the separation of powers, however, and defends his model against such critique by stating that it "does not imply that legislators will be deprived of their power to make decisions on the above mentioned complex and politically controversial issues."[432] Additionally, Ekeli seems to argue that there is nothing atypical about the judicial review implied in his model, that it is merely a form of ordinary checking and balancing.[433] To start with the latter statement, contrary to Ekeli's view, the substantial judicial review as proposed by Ekeli seems quite extraordinary. As mentioned earlier, comparative research shows that the actual enforceability of state objectives in court varies between no possibilities of enforcement at all to marginal enforceability in

effects of present decisions and activities," and he furthermore admits that it is "by no means an easy task for courts to weigh and balance the short-term socio-economic interests of present people against the interests of future generations." For Ekeli, however, these difficulties do not constitute a decisive argument against accepting judicial enforcement of the posterity provision. Ekeli, "Green Constitutionalism," 387–390, 392–394.

[431] Given the resemblances between positive rights and state objectives, Cass R. Sunstein's view that it is unrealistic to expect courts to enforce positive rights seems equally valid when it comes to the enforcement of state objectives: courts lack the tools of a bureaucracy and cannot create government programs, because they do not have a systematic overview of government policy. Sunstein, "Against Positive Rights," 37.

[432] Ekeli, "Green Constitutionalism," 383–387, 393.

[433] Ekeli, "Green Constitutionalism," 393.

exceptional cases.[434] There is a good reason for this general lack of judicial enforceability of existing state objectives: state objectives are generally too indefinite and permissive to be enforceable in court without jeopardizing the separation of powers. In *ordinary* checking and balancing, the judiciary ideally has fairly clear guidelines and preferably not a decisive vote on highly political matters. In this case, however, the guideline is a state objective, an open political mandate, the legal implications of which are not explicated in the law itself, and thus a poor guideline for judges.

Ekeli's second statement that attempts to save his model from critique from the perspective of the separation of powers is that the legislative branch will not be deprived of their power to make decisions on these politically controversial issues. There are two ways in which one could respond to this statement. First, we could point out that, even though the power of the legislative branch to make decisions on these politically controversial issues is, legally speaking, not "taken away" in the sense that its mandate is reduced, its power is nonetheless *practically* curtailed. Courts will gain decisive reviewing powers on these matters, which means that the legislative powers are, in practice, restricted. It is thus possible to defend the position that, practically speaking, power is transferred from the legislative to the judicial branch.

The second way in which one could respond to Ekeli's statement is by pointing out that his statement misses the point. Even if, for the sake of argument, we were to agree that judicial review as proposed by Ekeli does not *take away* power from the legislative branch and transfer it to the judicial branch, this still does not make his model acceptable in light of the separation of powers. The single fact that the judiciary *gains* substantial reviewing powers on highly political matters, regardless of where this power is coming from, is sufficient cause for concern. The fact that the judicial branch always has the last word in a liberal democracy means that courts, in Ekeli's model, will effectively be able to correct or even bar state action whenever it deems this appropriate, and thus will be enabled to make

[434] Larik, *Foreign Policy Objectives in European Constitutional Law*, 31, 64–65; Haupt, "The Nature and Effects of Constitutional State Objectives," 225–230.

decisive politically controversial decisions.[435] This, on its own, is enough reason to reject the type of judicial review that Ekeli proposes.

In addition to the critique of Ekeli's posterity provision model, two final adjacent points must be stressed. First: the critique on the substantial judicial review of a state objective that Ekeli proposes does not imply a rejection of judicial review in general. Second: substantial judicial review of state objectives seems unwise in general, however.

Firstly, the rejection of the type of judicial review that Ekeli proposes does not imply a rejection of judicial review *per se*, nor is it a defence of the too simplistic idea that courts can function as value-free calculators which merely apply the law. This would be a simplification of the reality in which (especially constitutional) courts interpret law on a daily basis. It is unavoidable that courts work with and interpret open norms and that they sometimes even have to go into politically sensitive questions. The purpose of open norms in law then is to give courts some discretion to work with the law in all the widely differing cases with which they will be confronted. What is disturbing about the thorough review of the state objective proposed by Ekeli, however, is that the purpose of employing an open norm here is not to leave the *judiciary* broad discretionary space to interpret it, but the political branches themselves. A state objective is primarily directed at the legislative branch, and the purpose of the vagueness in the formulation of a state objective is to offer this branch broad discretionary space. As a consequence, a state objective necessarily encompasses few guidelines on how the government should act and thus how the judiciary can legally assess governmental acts.

Secondly, it may be clear by now that as a result of their permissive and political nature, state objectives are particularly unsuitable to be enforced in court. State objectives are legal devices primarily aimed at the

[435] Ekeli challenges the uncontroversial observation that courts have the last word in such cases, because: "the legislature should have the opportunity to change judicial decisions—for the future—by amending constitutional laws," or so he argues. This argument does not seem very convincing, however. Legislation is necessarily future-oriented and can thus not retrospectively "change judicial decisions." The legislator could, of course, change the law in such a way that future law diverges from what courts have determined it to be in the past, but even then courts will still have the last word about this new law if judicial review in an Ekeli-like fashion were possible. Ekeli, "Green Constitutionalism," 393.

political branches, and as such they are intentionally vaguely formulated in order to allow for much discretion. Political branches need this discretion in order to remain flexible and be able to adequately respond to unpredictable social realities. As a result of this vagueness, however, judicial review becomes necessarily problematic, because in order to review them, courts would be required to fill in the open norm with more detailed norms themselves. This would be problematic from the perspective of the separation of powers, because it would enable the judiciary to make key political considerations, to judicially construct norms, and to make politically controversial decisions that do not necessarily have democratic approval.

In light of the foregoing, it seems that the contingent character of the state objective is not a flaw that ought to be fixed, but rather inherent to the nature of a state objective. The political-legal instrument of codifying a state objective has its limits in what it can do for a liberal democracy: a state objective simply does not seem to allow for a high level of enforceability. Trying to improve the enforceability of the state objective then misses the point, because a state objective is necessarily vague and necessarily goes hand in hand with a certain discretionary space for the political bodies—for example, the room to specify how and when this goal has to be pursued. Crucially, this amount of liberty for the legislature and executive branch necessarily constitutes a certain contingency. To the extent to which these bodies are free to pursue the state objective how and when they choose, animal interests consideration will remain contingent. It thus seems that the state objective is ultimately unfit to secure due attention to animals' interests in de considerations of liberal democratic states. As a result, we must conclude that a constitutional structure with a state objective on animal welfare does not meet the non-contingency requirement of animal enfranchisement.

4.5 Conclusion

This chapter has assessed one of the options of institutionalizing the consideration right of non-human animals in the legal institutions of liberal democracies: the constitutional state objective on animal welfare. We have

seen that a state objective on animal welfare may, in theory, have four important effects which improve the extent to which the state has regard for animal interests in various political and legal considerations. These effects of the constitutional state objective could imply significant improvements when it comes to the independence and non-contingency requirements of animal enfranchisement. In other words: a constitutional state objective on animal welfare has the potential to have some positive effects on the political and legal status of non-human animals in liberal democracies when compared to their position in liberal democracies without such a state objective. A state objective on animal welfare has the potential to serve as a basis for addressing animal welfare in several political and legal contexts, and it is an important formal recognition of the independent value of the welfare of animals. Such a state objective quite straightforwardly expresses that the welfare of animals is not a matter of importance only if humans attach value to it, but a serious and elementary aspect of liberal democratic governance that, in some way or another, requires political attention. A state objective thus may improve the independent status of animal welfare and decrease the casualness with which it is addressed in political and legal considerations.

Importantly, the state objective may serve as a basis for these positive effects without in any way compromising on the democratic process or principles that are essential to the functioning of liberal democracies—that is, if substantial judicial review of compliance with the state objective is omitted. Unlike many of the options of pure political animal enfranchisement that were discussed in the previous chapter, the state objective does not have dangerous undemocratic shortcomings which should prevent us from implementing it, nor does it seem to bring about any other risks to liberal democracies. This is because it employs constitutions' unique and well-embedded function of legitimately influencing the law and political actions of the liberal democratic state. It seems that the state objective can only offer improvements when compared to the status quo in liberal democracies without a state objective on animal welfare, while not facing the problems that a purely political enfranchisement of animals

would give rise to. In other words: it seems that the result of adopting a constitutional state objective on animal welfare can only be positive.

At the same time, our enthusiasm about the state objective must be tempered, because we have seen that merely adopting a state objective on animal welfare does not lead a state to meeting the criteria for non-human animal enfranchisement. Although it may theoretically function as a basis from which further improvements may stem, and in that sense has some potential, the state objective offers very few guarantees in practice. The case study regarding the Swiss state objective on animal welfare illustrated that a state objective may be more satisfying in theory than in practice. Its biggest shortcomings are related to the non-contingency requirement and the independence requirement: a state objective has too little structural effect, and as a result of its permissiveness, much of its potential in relation to the independence requirement is not realized in practice. We have seen that, as an expression of policy preference, a state objective does not provide clear instructions. On that account, politicians are relatively free to interpret the objective as they seem fit in specific circumstances, and they are hardly accountable for how they give substance to the state objective. Given the vague instruction of the state objective and the broad discretionary space that it offers state officials, a relative disregard for the goal stated in the state objective can be unsatisfactory, but is hard to pin down as clearly unconstitutional.

It is unlikely that the contingent relationship between the state and its concern for animal interests will fundamentally change merely as result of adopting a state objective on animal welfare. The contingency of a state objective, and thus its allowance for human abuse of power against non-human animals, is likely to remain a problem, because it is rooted in the permissive nature of state objectives. The body to which the political branches are accountable (directly or indirectly) under common checks and balances is the electorate. The exclusively human electorate is not likely to require politicians to give a rich meaning to the state objective, however, since this is likely to come at the expense of their own liberties and their share of societal resources. We have also seen that not even combining a state objective with a constitutional recognition of the dignity of animals (the

Swiss model), nor enhancing the state objective by introducing substantial judicial review of it (the Ekeli model) can solve this contingency problem. Even if the state objective is complemented with a provision that recognizes the dignity of animals, the state objective remains a relatively weak legal instrument. The other option that was investigated which could possibly have strengthened the state objective was to mandate the judiciary to review the state's compliance with the state objective. This approach also failed, however. State objectives essentially do not create hard and measurable rules for governmental action. As a result of this general permissiveness of state objectives, an effective judicial check on compliance with a state objective would require a thorough type of review that would be problematic in light of the separation of powers. Judicial review of the state's compliance with a state objective thus can only be very marginal if we are to prevent a breach of the separation of powers, which is so central to the rule of law and the functioning of liberal democracies. Mere marginal judicial review, however, cannot improve the state objective in such a way that it meets the non-contingency requirement.

With its typical allowance of significant discretion for the political branches, a constitutional state objective can only offer a basis from which animal welfare may be furthered if human society demands it, but it cannot offer the institutional guarantees to which non-human animals are entitled. This legal instrument could certainly open some doors that would otherwise remain closed, but does, on its own, not suffice from the perspective of non-human animals' consideration right. We have to conclude that, although a state objective on animal welfare may be an interesting intermediate model in the historical process of the political and legal emancipation of non-human animals, it has to be rejected as an ideal model, because it remains normatively deficient in light of the enfranchisement criteria, and thus cannot give non-human animals the political and legal status to which they are entitled.