

## The Swiss Primate Case: A Judicial Unicorn or Justice in Action?

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### Abstract

In 2016, a citizens' initiative was launched in the Swiss Canton of Basel-Stadt, demanding that the rights catalogue in the Cantonal Constitution be complemented by a fundamental right to life and bodily and mental integrity for non-human primates. This initiative became the subject of a three-year legal dispute that ended with a decision by the Swiss Federal Supreme Court in September 2020, ruling that the initiative is legally valid and must be put to the people for a vote. This case note discusses the key developments in the dispute, including the ground-breaking decision by the Constitutional Court of Basel-Stadt, which held that cantons are free to 'expand the circle of rights holders beyond the anthropological barrier'. The authors – who have been involved in the drafting of the initiative and have acted as legal advisers – offer first-hand insights into legal strategies and shed light on the importance of the case in the context of the ongoing efforts to secure rights for primates around the world.

**Keywords:** animal rights, primates, citizens' initiative, right to life, right to bodily and mental integrity, Switzerland

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Conflict of interest disclaimer: Both authors have been involved in the drafting of the primate rights initiative and have acted as legal advisers to the supporters of the initiative in all stages of the legal dispute. Striving to adopt a neutral stance where possible, the authors report on all the relevant arguments invoked on both sides of the legal dispute.

## 1. INTRODUCTION

Human beings possess a range of legal rights that protect their fundamental interests. Among these are the right to life and the right to bodily and mental integrity.<sup>1</sup> Chimpanzees, orangutans, macaques, gibbons, and lemurs, on the other hand, have no such rights.<sup>2</sup> This is despite the fact that, like human beings, they are primates who have an interest in being alive and being protected from bodily and mental harm.<sup>3</sup> In 2016, the Swiss organization Sentience Politics launched a citizens' initiative in the Swiss Canton (or state) of Basel-Stadt, demanding that the cantonal constitutional rights catalogue be amended to include a basic right to life and bodily and mental integrity for all non-human primates.<sup>4</sup>

Efforts to put the primate rights initiative to a vote by the people of Basel-Stadt came to a halt when the Grand Council (the parliament of Basel-Stadt) declared the initiative invalid.<sup>5</sup> The initiative, and the question of whether non-human primates should be granted certain basic rights,

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<sup>1</sup> See, e.g., Arts 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), New York, NY (US), 16 Dec. 1966, in force 23 Mar. 1976, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>2</sup> See, e.g., A. Staker, 'Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals' (2017) 6(3) *Transnational Environmental Law*, pp. 485-507; A. Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (2016) 5(1) *Transnational Environmental Law*, pp. 25–53. Some limited exceptions are outlined at p. 18 below.

<sup>3</sup> See generally on primates C.P. Groves & J.R. Napier, 'Primate (Mammal)', in *Encyclopaedia Britannica* (2020), available at: <https://www.britannica.com/animal/primate-mammal>.

<sup>4</sup> Kanton Basel-Stadt, Kantonsblatt Archiv, 'Grundrechte für Primaten', 22 June 2016, available at: <https://www.kantonsblatt-archiv.ch/articles/18163>.

<sup>5</sup> Grand Council of Basel-Stadt, Decision, 10 Jan. 2018, Kantonsblatt no. 4, at p. 59.

then became the subject of a three-year legal dispute. This dispute led to a ground-breaking decision by the Constitutional Court of Basel-Stadt in early 2019, which ruled that the initiative was, for the most part, legally valid and that citizens should be allowed to vote on the question of whether to ‘expand the circle of rights holders beyond the anthropological barrier’.<sup>6</sup> After six members of the Grand Council appealed this decision, the Swiss Federal Supreme Court delivered a final verdict on 16 September 2020. The Court upheld the Cantonal Constitutional Court’s decision on the validity of the initiative and thereby paved the way for the first direct-democratic vote in the world on whether at least some non-human animals should be afforded fundamental rights.<sup>7</sup>

In this case note, the authors – who were involved in drafting the initiative and acted as independent legal advisers in the court proceedings – discuss the key developments in the dispute and offer first-hand insights into the legal strategies behind the initiative and the court filings. By considering issues such as legal personhood under private versus public law, the protection of animals through rights versus welfare measures, and the protection of animals in federal states, the authors also seek to add critical dimensions to ongoing efforts to secure rights for primates around the world.

The case note unfolds as follows. In section 2, we provide context for the primate rights initiative by outlining the current state of animal welfare law in Switzerland and highlighting its shortcomings, especially with respect to protecting primates’ basic interests. In section 3, we then turn to the central strategic considerations behind the initiative and the key developments surrounding its launch and the proposed amendment to the cantonal Constitution. Section 4 then considers the decision by the cantonal authorities to declare the initiative invalid. This leads to a consideration

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<sup>6</sup> Constitutional Court of Basel-Stadt, 15 Jan. 2019, VG.2018.1, para. 3.7.3 (our translation).

<sup>7</sup> Swiss Federal Supreme Court, Judgment, 16 Sep. 2020, 1C\_105/2019.

of the ground-breaking decision by the Cantonal Constitutional Court in Section 5, and the recent ruling by the Supreme Court to uphold that decision, in Section 6. Finally, in Section 7, we discuss why this case is relevant in a transnational context and what can be learned from the decision for the animal rights movement more broadly.

## 2. ANIMAL WELFARE LAW IN SWITZERLAND

The Swiss generally consider themselves as having one of the strictest legal regimes for animal welfare in the world.<sup>8</sup> This claim is not entirely without merit. Switzerland has played a pioneering role in global animal law and ranks among the most progressive countries in the World Animal Protection Index.<sup>9</sup> In 1992, for example, it became the first country to ban battery cages and the first to protect the dignity of non-human animals in its constitution.<sup>10</sup> Just recently, Switzerland took the lead in banning the killing of lobsters without prior stunning, effectively banning boiling lobsters alive.<sup>11</sup>

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<sup>8</sup> See, e.g., R. Schmidlin, ‘Neue Regelungen im Tierschutzgesetz’, *St. Galler Tagblatt*, 16 Dec. 2010, available at: <https://www.tagblatt.ch/ostschweiz/wil/neue-regelungen-im-tierschutzgesetz-ld.439682>.

<sup>9</sup> Animal Protection Index, ‘Switzerland’ (2020), available at: <https://api.worldanimalprotection.org/country/switzerland>.

<sup>10</sup> See Art. 120(2), Swiss Federal Constitution (1999), available at: <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>; M. Häne, B. Huber-Eicher & E. Fröhlich, ‘Survey of Laying Hen Husbandry in Switzerland’ (2000) 56(1) *World’s Poultry Science Journal*, pp. 21-31, at 21.

<sup>11</sup> J. Calfas, ‘This Country Is Making It Illegal to Boil Live Lobsters’, *TIME*, 16 Jan. 2018, available at: <https://time.com/5103892/switzerland-boil-lobsters>; Art. 179a(1)(j), Swiss Animal Welfare Ordinance (2008), available at: <https://www.admin.ch/opc/de/classified-compilation/20080796/index.html>.

These laws suggest that Switzerland has a strong track record of protecting animals. In practice, however, Switzerland's approach to the protection of animals is in many ways indistinguishable from other countries. For example, despite banning battery cages, factory farming is still a reality in Switzerland.<sup>12</sup>

This is because the 2005 Swiss Animal Welfare Act (SAWA),<sup>13</sup> which is the principal piece of legislation governing the protection of animals in the country, is based on a welfarist paradigm. One of SAWA's guiding principles is that '[a]ny person who handles animals must ensure their well-being *as far as the intended purpose permits*'.<sup>14</sup> Human purposes for using animals, in other words, take precedence over animals' interests in their own well-being. Switzerland also still considers animals to be property: while the Swiss Civil Code provides that animals are not legal objects, it states that, where no special rules apply, they 'are subject to the provisions governing objects'.<sup>15</sup>

Non-human primates are subject to the same welfarist regime. While human primates enjoy a robust set of fundamental rights, including the right to life and to bodily and mental integrity,<sup>16</sup>

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<sup>12</sup> Swiss Federal Office for Agriculture, 'Eier', 31 Mar. 2020, available at: <https://www.blw.admin.ch/blw/de/home/markt/marktbeobachtung/eier.html>; Swiss Federal Office for Agriculture, 'Agrarbericht 2019: Fleisch und Eier' (2019), available at: <https://www.agrarbericht.ch/de/markt/tierische-produkte/fleisch-und-eier>.

<sup>13</sup> Swiss Animal Welfare Act (2005), available at: <https://www.admin.ch/opc/en/classified-compilation/20022103/index.html>.

<sup>14</sup> *Ibid.*, Art. 4(1)(b) (emphasis added).

<sup>15</sup> Art. 641a(2), Swiss Civil Code (1907), available at: <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>.

<sup>16</sup> Art. 10, Swiss Federal Constitution, n. 10 above.

the same fundamental interests of non-human primates are neither recognized nor protected by the law. This is despite the fact that all primates<sup>17</sup> – human and non-human alike – are highly complex

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<sup>17</sup> The interests and capacities-based approach to rights that has informed the primate rights initiative is not without its critics. Some have argued that this approach is ableist and threatens the rights of human beings who lack the relevant capacities: see, e.g., R.L. Cupp, ‘Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood’, *Pepperdine University Legal Studies Research Paper No. 12* (2016) pp. 1-56, available at: <http://papers.ssrn.com/abstract=2775288>. Others contend that, on this approach, only interests and capacities that are similar to those of humans warrant protection, and that, as a result, only animals who are like humans would be afforded rights: see especially M. Deckha, ‘Critical Animal Studies and Animal Law’ (2012) 18(2) *Animal Law*, pp. 207-36, at 231-4; T.L. Bryant, ‘Similarity or Difference as a Basis for Justice: Must Animals Be like Humans to Be Legally Protected from Humans?’ (2007) 70(1) *Law and Contemporary Problems*, pp. 207-54; C.A. MacKinnon, ‘Of Mice and Men: A Fragment on Animal Rights’ in J. Donovan and C.J. Adams (eds), *The Feminist Care Tradition in Animal Ethics* (Columbia University Press 2007), pp. 316-33. We acknowledge this debate, but it is beyond the scope of this case note to consider this issue in detail.

beings,<sup>18</sup> who have an essential interest in being alive, being free from pain, and having their physical and mental integrity respected.<sup>19</sup>

Establishing the basic rights of non-human primates to life and to bodily and mental integrity would entail official recognition and protection of their most essential interests. Any proposed infringements of these interests would require justification and be subject to a strict balancing of interests test, as is the case where human rights may be infringed.<sup>20</sup> To justify infringing a primate's rights, a proposed act would need to have a sound legal basis, represent a legitimate interest, and be proportionate (suitable and necessary to achieve a legitimate goal and to protect a weightier interest).<sup>21</sup> Furthermore, rights in Switzerland are also considered to have a so-called *Kerngehalt*

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<sup>18</sup> See A.Z. Rajala, et al., 'Rhesusmonkeys (Macacumulatta) Do Recognize Themselves in the Mirror' (2010) 5(1) *PLoS ONE*, pp. 1-8; M.W. de Veer, et al., '8-Year Longitudinal Study of Mirror Self-Recognition in Chimpanzees (Pan Troglodytes)' (2003) 41(2) *Neuropsychologia*, pp. 229-34; J.J. Couchman, 'Self-Agency in Rhesus Monkeys' (2012) 8 *Biology Letters*, pp. 9-41; W.A. Roberts, 'Mental Time Travel: Animals Anticipate the Future' (2007) 17(11) *Current Biology*, pp. 418-20; T. Suddendorf & M.C. Corballis, 'Behavioural Evidence for Mental Time Travel in Nonhuman Animals' (2010) 215(2) *Behavioural Brain Research*, pp. 295-8.

<sup>19</sup> See P. Singer, *Animal Liberation* 2<sup>nd</sup> edn (Pimlico, 1990), pp. 15, 19; M. Nussbaum, 'Beyond "Compassion and Humanity": Justice for Nonhuman Animals', in C.R. Sunstein & M. Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2005), pp. 300-19; T. Regan, 'The Case for Animal Rights', in P. Singer (ed.), *In Defence of Animals* (Basil Blackwell, 1985), pp. 13-26.

<sup>20</sup> R. Fasel et al., 'Fundamental Rights for Primates: Policy Paper by Sentience Politics' (2016), pp. 1-16, at 6, available at: <https://ea-foundation.org/files/Fundamental-Rights-for-Primates.pdf>.

<sup>21</sup> See Article 36 Swiss Federal Constitution, n. 10 above.

(core content), the violation of which cannot be justified under *any* circumstances.<sup>22</sup> The core content of human beings' right to life, for example, protects humans against targeted killing in circumstances where they pose no threat. Establishing equivalent rights for non-human primates would involve a true paradigm shift for these animals: they could not, as a rule, be killed for human purposes, regardless of how important humans might consider these purposes to be.

One might consider that a simple ban on the killing of primates in zoos and for research purposes would sufficiently protect their right to life, and that primates therefore do not need basic rights more generally. However, bans of this kind are specific, context-dependent, and only negatively protect interests. In contrast, fundamental rights are general, applicable in myriad situations, and work positively toward realizing their beneficiaries' interests.<sup>23</sup> Another notable advantage of establishing rights for primates is the actionability and enforceability of such rights.<sup>24</sup> As is the case in most other countries, the responsibility for the enforcement of Swiss laws that protect animals lies with underfunded agencies which may have different, and potentially conflicting, mandates (for example, environmental protection or enabling research or farming). While animal welfare protections could, in theory, also be enforced through human proxies, this mechanism is more commonly available with respect to the enforcement of fundamental rights. Infants or human beings with certain disabilities, for example, may have their rights enforced in court by legal guardians.

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<sup>22</sup> G. Biaggini, *BV Kommentar*, 2<sup>nd</sup> edn (Orell Füssli, 2017), Art. 36, at para. 45.

<sup>23</sup> C. Blattner, 'Rethinking the 3Rs: From Whitewashing to Rights', in K. Herrmann & K. Jayne (eds), *Animal Experimentation: Working Towards a Paradigm Change* (Brill, 2019), pp. 168-93, at 178-80.

<sup>24</sup> W.A. Edmundson, 'Do Animals Need Rights?' (2014) 22(2) *Journal of Political Philosophy*, pp. 345-60, at 349.

### 3. A CITIZENS' INITIATIVE TO CHANGE THE LAW

To reform this legal status quo, Sentience Politics decided to launch a citizens' initiative. Citizens' initiatives are direct democratic instruments that exist on both the federal and cantonal level in Switzerland and allow a group of citizens to form a so-called 'initiative committee' to propose a constitutional amendment. If the group manages to collect a sufficient number of signatures from other citizens within a given timeframe, then the proposal will be put to a binding vote by the citizenry as a whole.

In the case of the primate rights initiative, Sentience Politics first had to consider whether the initiative should target constitutional change at the federal or cantonal level. Swiss law allows amendments to the Federal Constitution through citizens' initiatives, but such amendments are difficult to achieve, as they require collecting 100,000 signatures and a vote by the majority of the people and the cantons.<sup>25</sup> In contrast, citizens' initiatives at the cantonal level require fewer signatures (3,000 in the case of Basel-Stadt) and a majority vote by the people (as compared to a majority vote by the people *and* the cantons). It is this lower threshold that has made cantons the laboratories of direct democracy, and secured them a pioneering role in driving socio-political change. For example, various cantons, including Basel-Stadt, introduced voting rights for women long before the federal government did.<sup>26</sup>

Of the 26 cantons of Switzerland, the urban canton of Basel-Stadt was chosen as the most suitable forum for the primate rights initiative due to it being one of the most progressive cantons

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<sup>25</sup> Art. 139, Swiss Federal Constitution, n. 10 above.

<sup>26</sup> B. Studer, 'Das Frauenstimm- und Wahlrecht in der Schweiz 1848-1971' (2015) 26(2) *Österreichische Zeitschrift für Geschichtswissenschaften*, pp. 14-40.

in the country, not least with respect to animal protection issues. Despite Basel-Stadt's small size and population (just over 200,000 inhabitants), it is a hotspot for life sciences, and biomedical and pharmaceutical research, with Novartis and Roche – the second- and third-largest pharmaceutical companies worldwide<sup>27</sup> – having their registered offices there. Furthermore, Basel Zoo owns an estimated 250 primates, which would all be affected by the initiative.<sup>28</sup> For these reasons, Basel-Stadt seemed a particularly promising canton to launch the primate rights initiative.

A central conviction of Sentience Politics, the organization that launched the initiative, was that a citizens' initiative should be used to ignite a broad, public debate on this fundamental question of justice. For this purpose, Sentience Politics published a comprehensive policy paper on the issue in early 2016.<sup>29</sup> At around this time, we began working as independent legal advisers for the initiative and produced a draft provision to be inserted into the cantonal Constitution, which we circulated among experts, including constitutional law and animal law experts. Questions that we grappled with included how detailed the proposed constitutional provision should be, and where the provision should be placed in the Constitution. We finally agreed that Article 11(2) of the Constitution, which lists the basic rights guaranteed by the Canton such as humans' right to life, bodily and mental integrity, freedom from torture, right to autonomy and security, and a ban on forced

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<sup>27</sup> Roche, 'Roche in Switzerland' (2020), available at: [https://www.roche.com/careers/country/switzerland/ch-your-job/roche\\_in\\_switzerland.htm](https://www.roche.com/careers/country/switzerland/ch-your-job/roche_in_switzerland.htm); Novartis, 'Novartis in Switzerland' (2020), available at: <https://www.novartis.com/sites/www.novartis.com/files/passport-novartis-in-switzerland.pdf>.

<sup>28</sup> Estimate based on a personal visit and the Zoo's website, available at: [www.zoobasel.ch](http://www.zoobasel.ch).

<sup>29</sup> Fasel et al., n. 20 above.

labour and human trafficking, should be complemented with a new provision in the following terms:<sup>30</sup>

[This constitution guarantees, among others:]

the right of non-human primates to life and bodily and mental integrity.<sup>31</sup>

#### 4. EARLY DEVELOPMENTS IN THE PRIMATE CASE

Following the launch of the initiative in June 2016 and the collection of the required 3,000 signatures, the initiative was submitted to the cantonal Executive Council of Basel-Stadt for examination. The Executive Council undertook an initial review to ensure that the proposed reform was not unconstitutional or impossible to implement. As a result of this review, the Executive Council concluded that the initiative violated federal law.<sup>32</sup> Shortly thereafter, in early 2018, the Grand Council of Basel-Stadt affirmed the Executive Council's decision, and declared the initiative invalid.<sup>33</sup>

In their reports, the Executive Council and Grand Council of Basel-Stadt first stated that the initiative contravened the federal Civil Code. The Civil Code, they held, determines exhaust-

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<sup>30</sup> Art. 11, Constitution of Basel-Stadt (2005), available at: [https://www.gesetzessammlung.bs.ch/app/de/texts\\_of\\_law/111.100](https://www.gesetzessammlung.bs.ch/app/de/texts_of_law/111.100).

<sup>31</sup> Sentience Politics, 'Grundrechte für Primaten' (2020), available at: <https://sentience-politics.org/de/politik/grundrechte-fuer-primaten-basel> (authors' translation). In German, the wording is: '*Diese Verfassung gewährleistet überdies (...) das Recht von nichtmenschlichen Primaten auf Leben und auf körperliche und geistige Unversehrtheit.*'

<sup>32</sup> Executive Council Basel, *Kantonale Volksinitiative 'Grundrechte für Primaten' Bericht über die rechtliche Zulässigkeit und das weitere Verfahren*, Report, 13 Dec. 2017, GD/P171389, pp. 1-10.

<sup>33</sup> Grand Council of Basel-Stadt, n. 5 above, p. 59.

ively who qualifies as a legal person, and therefore leaves no room for legal personhood for animals. Specifically, they referred to Article 11, which establishes the legal capacity of natural persons,<sup>34</sup> and to Article 53, which regulates the legal capacity of legal persons.<sup>35</sup> These exhaustive provisions, they held, preclude the Cantons from establishing legal personhood for non-human primates and affording them legal rights.<sup>36</sup> Secondly, the Councils held that the power to protect animals is an exclusive competence of the federal government. Article 80 of the Federal Constitution determines that '[t]he Confederation shall legislate on the protection of animals', while the Cantons are responsible for '[t]he enforcement of the regulations'.<sup>37</sup>

In February 2018, the team behind the initiative commenced legal proceedings before the Constitutional Court of the Canton of Basel-Stadt, challenging the Grand Council's decision. In their appeal, they countered the Councils' first conclusion by arguing that the definition of legal personhood in the Civil Code does not apply to public law matters, such as the present matter. The Civil Code regulates legal relations between private parties. This means that the federal government can issue regulations that pursue private law objectives and traditionally belong to the private law sphere, particularly if these measures create or restore the prerequisites for a functioning private legal transaction.<sup>38</sup> Accordingly, although the Civil Code determines legal personhood, it does so only with respect to *legal relations between private entities*. The team behind the initiative then argued that, in contrast, legal personhood for the purpose of conferring basic rights is conceptually

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<sup>34</sup> Art. 11(1), Swiss Civil Code, n. 15 above.

<sup>35</sup> Ibid. Art. 53.

<sup>36</sup> Executive Council Basel, n. 32 above, p. 6.

<sup>37</sup> Art. 80(1) and (3), Swiss Federal Constitution, n. 10 above.

<sup>38</sup> Biaggini, n. 22 above, Art. 122, at para. 3.

distinct from legal personhood, as provided for by the Civil Code. In particular, legal personhood in the former context is not civil (or private) in nature, as it is not designed to enable participation in private legal transactions. Rather, legal personhood for the purpose of establishing basic rights is a genuinely public and, more specifically, constitutional matter, as it pertains to the relationship between primates and public bodies. The team behind the initiative argued that in this public law context, cantons are free to establish legal personhood for any type of entity, including primates.

With respect to the Councils' second conclusion that the initiative violated federal public law, the initiative's case on appeal accepted that Article 80 of the Swiss Constitution gives the federal government broad legislative competence in all matters of animal *protection*, such as the keeping and care of animals; experiments on animals; procedures carried out on living animals; the use of animals; and their killing. These areas, in which the federal government enjoys comprehensive competence,<sup>39</sup> are not exhaustively enumerated but operate as *inhaltliche Leitplanken* (content-based guidelines).<sup>40</sup> However, the federal government's competence in these areas is primarily focused on making animals and their bodies accessible for humans, by prescribing how animals may be kept, bred, used, traded, and killed.<sup>41</sup> Mechanisms to protect animals from these acts are subject to a skewed balance of interest test, which considers whether use of the animal is 'necessary' from a human perspective, rather than 'proportionate' from a species-neutral perspective.<sup>42</sup>

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<sup>39</sup> Ibid., Art. 80, at n. 6 above.

<sup>40</sup> L. Schärmeli & A. Griffel, 'Artikel 80 BV', in B. Waldmann, E.M. Belser & A. Epiney (eds), *Bundesverfassung: Basler Kommentar* (Helbing & Lichtenhahn, 2015), Art. 80, at n. 17.

<sup>41</sup> See Art. 80, Swiss Federal Constitution, n. 9 above.

<sup>42</sup> Art. 4(2), Swiss Animal Welfare Act, n. 13 above; see also M. Michel, 'Tierschutzgesetzgebung im Rechtsvergleich', in M. Michel, D. Kühne & J. Hänni (eds), *Animal Law: Tier und Recht* (Dike, 2012), pp. 594-624, at 600.

This shows that the federal government's competence to protect animals – and the SAWA – is primarily *utilitarian* in nature.<sup>43</sup> The federal government, acting on the basis of Article 80 of the Constitution, is bound by and inherently anchored to this 'use paradigm'.<sup>44</sup> Consequently, animals' lives are effectively not protected under Swiss law,<sup>45</sup> and ending them does not require justification.<sup>46</sup> This federal competence in matters of animal protection can be contrasted with the deontological framework on which traditional concepts of fundamental rights are based, and is conceptually different from the legal rights regime which the primate rights initiative seeks to establish.

Another critical argument made on appeal to the Constitutional Court was that, under Swiss law, citizens must be allowed to vote on an initiative when there is doubt as to its legality.<sup>47</sup> This duty is encapsulated by the principle of *in dubio pro populo*. It was argued that this fundamental principle at the core of Swiss democracy and law would be violated if the Court were to uphold the Parliament's decision to declare the initiative invalid.<sup>48</sup>

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<sup>43</sup> S. Stucki, *Grundrechte Für Tiere* (Nomos, 2016), p. 110.

<sup>44</sup> See further W. Kymlicka, 'Social Membership: Animal Law Beyond the Property/Personhood Impasse' (2017) 40(1) *Dalhousie Law Journal*, pp. 123-55, at 148.

<sup>45</sup> Art. 1 *a contrario* Swiss Animal Welfare Act, n. 13 above.

<sup>46</sup> Stucki, n. 43 above, p. 103.

<sup>47</sup> Swiss Federal Supreme Court, Judgment, 14 Dec. 2016, BGE 143 I 129, at p. 132, para. 2.2; Swiss Federal Supreme Court, Judgment, 10 Jul. 1985, BGE 111 Ia 292, at pp. 299–300, para. 3c/cc.

<sup>48</sup> Arts 34 & 36(2), Swiss Federal Constitution, n. 10 above.

## 5. THE DECISION BY THE CANTONAL CONSTITUTIONAL COURT

On 15 January 2019, the Constitutional Court of the Canton of Basel-Stadt, in a much-awaited decision, delivered a ground-breaking judgment in which it sided with the appellants.<sup>49</sup> At the heart of the Court's ruling was the question of whether the primate rights initiative was inconsistent with federal law and therefore invalid.

The Court first considered whether the Civil Code precludes animals from having fundamental rights. It ruled that if the initiative sought to expand legal personhood of natural or legal persons under the Civil Code, or to establish distinct personhood for animals under the Code (as a sort of 'animal personhood'), this would contravene the Code and require an amendment to the Code.<sup>50</sup> However, the Court accepted the appellants' argument that the Civil Code is directed at relations between *private citizens*, rather than at the conceptually distinct relationship between private entities and the state, which is governed by public law. Because the initiative sought reform in the realm of public law – essentially with respect to the relationship between individuals and the state – the Court held that there was no conflict with civil/private law. In the striking words of the Court, within the realm of public law, cantons are free to 'expand the circle of rights holders beyond the anthropological barrier'.<sup>51</sup>

The Court then considered whether the initiative concerns animal protection, which falls within the exclusive competence of the federal government, as stipulated by the Federal Constitution.<sup>52</sup> The Court again found for the appellants, holding that the initiative does not violate the

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<sup>49</sup> Constitutional Court of Basel-Stadt, n. 6 above.

<sup>50</sup> *Ibid.*, para. 3.3.

<sup>51</sup> *Ibid.*, para. 3.7.3 (authors' translation).

<sup>52</sup> Art. 80, Swiss Federal Constitution, n. 10 above.

Constitution. However, the Court arrived at this conclusion via a different route. The Court did not accept that there is a fundamental difference between welfare protection and fundamental rights, and considered that such a distinction conflates ends with means.<sup>53</sup> However, the Court held that the initiative seeks to better protect primates,<sup>54</sup> and that it uses the instrument of fundamental rights to achieve this aim.<sup>55</sup> In other words, rights are not categorically different from welfare protections; they are simply a means to achieve better welfare for animals. Viewed in this way, the Court considered that the primate rights initiative would conflict with federal law only if it were to force private individuals to observe stricter standards than those provided by the SAWA.<sup>56</sup> It would not be permissible, for example, for the initiative to affect the Basel Zoo, which is a private company.

Rather than declaring the initiative invalid, however, the Court held that there is nothing in the federal Constitution or the SAWA that prevents cantons from imposing on their own authorities stricter standards than those imposed federally on private individuals, including by creating fundamental rights for primates.<sup>57</sup> Cantons have the right to introduce more onerous standards for their own institutions as part of their organizational autonomy. Cantonal public organizations, such as public hospitals or cantonal universities (for example, the University of Basel) could therefore be required to observe primates' basic rights.<sup>58</sup> Because Basel-Stadt has the authority to establish rights for primates that are binding on its own authorities, the Court held that the initiative must be

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<sup>53</sup> Constitutional Court of Basel-Stadt, n. 6 above, para. 3.8.2.

<sup>54</sup> Or, more precisely, to 'tighten' animal protection: see *ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, paras. 3.8.3, 4.2.1, 4.2.3.

<sup>57</sup> *Ibid.*, para. 3.8.3.

<sup>58</sup> With the caveat that these rights would have to be weighed against researchers' right to scientific freedom, see *ibid.*, para. 4.2.1.

put to the vote of the people. The Court considered that the question of whether rights should be established for primates is an entirely political (as opposed to legal) question that the people are best placed to decide.<sup>59</sup>

Finally, the Court addressed the question of how the primate rights initiative could be implemented, which demonstrates that it took seriously the initiative's demands. The Court found that primates would need legal proxies – a task that could be carried out by special officers at the cantonal department for veterinary services, by the agency mandated with protecting children and adults, by an ombudsperson, or by an independent attorney for primates. The Court added that primates' rights could also be exercised collectively, such as by vesting organizations with the right to file suit and appeal decisions, in line with the federal Code of Criminal Procedure.<sup>60</sup>

## **6. THE DECISION BY THE FEDERAL SUPREME COURT**

In February 2019, a few weeks after the judgment of the Constitutional Court was published, six members of the Grand Council of Basel-Stadt appealed the decision in the Swiss Federal Supreme Court. They argued that if parts of the initiative are invalid, the initiative must either be interpreted to fit within constitutional parameters or its text must be changed by the cantonal authorities. The first approach, they reasoned, was not possible because it would undermine the primary purpose of the initiative (namely, granting fundamental rights to primates). They argued that the second approach was equally impossible because the text would have to be changed completely. As such, the initiative would be deprived of its purpose and have no practical effect. The proponents of the

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<sup>59</sup> Ibid., para. 3.8.3.

<sup>60</sup> Ibid., para. 4.3.

initiative countered the appeal on both procedural and substantive grounds. Our focus here is on the latter.

Regarding the appellants' first argument, the proponents of the initiative argued that there was no need to interpret the initiative to fit within constitutional parameters because the initiative does not touch on any of the legislative competences of the federal government. There is a difference, the proponents argued, between norms that establish legislative competences and norms that establish basic rights.<sup>61</sup> Specifically, establishing rights is a competence-neutral endeavour, and because of this, conflict over competences cannot arise where the issue of basic rights is concerned.

In the alternative, the proponents argued that the initiative can be interpreted in accordance with the Federal Constitution, as was done by the Cantonal Constitutional Court. Accordingly, even if the Supreme Court were to follow the Cantonal Constitutional Court's judgment that the initiative can only affect public cantonal authorities, the initiative must be upheld because it is partially valid, and, if necessary, could also be rewritten in small parts.<sup>62</sup> Even if this was necessary, the initiative would still satisfy the primary goal of establishing basic rights for primates. As the Cantonal Constitutional Court recognized, the initiative would still have practical consequences by changing how cantonal authorities, such as hospitals or universities, treat primates. However, the proponents argued, even if the initiative were purely theoretical in nature and did not have a single practical effect, it would still be valid, and have to be put to a vote. This is because, according to long-standing jurisprudence of the Supreme Court, citizens' initiatives do not need to have practical effect to be legally valid. For these reasons, the proponents argued that, in order to comply with the *in dubio pro populo* principle, the Court must declare the initiative legally valid.

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<sup>61</sup> Biaggini, n. 22 above, Arts. 42-136, *Vorbemerkung*.

<sup>62</sup> See Swiss Federal Supreme Court, Judgment, 26 Sep. 1984, BGE 110 Ia 176.

On 16 September 2020, exactly three years after submission of the citizens' initiative, the first (public law) chamber of the Supreme Court handed down its decision in a rare public hearing that took place on the same day.<sup>63</sup> In its decision, the Supreme Court upheld the Cantonal Constitutional Court's ruling, thereby rejecting the appellants' claims about the initiative's invalidity.

The Supreme Court largely affirmed the reasoning of the Cantonal Constitutional Court. After setting aside the procedural concerns that had been raised by the proponents of the initiative,<sup>64</sup> the Court moved on to determine whether the initiative was consistent with federal law or whether it could be interpreted as such. The Court stated that this question was to be determined based on the wording of the proposed amendment to the Constitution, although it would also be possible to consider explanations included in the initiative sheet (which contains the proposed amendment, a list of the members of the initiative committee, the reasons for the amendment, and a form that can be signed by citizens) and to determine how a reasonable citizen would understand the initiative. Invoking the principle of *in dubio pro populo*, the Court reasoned that the initiative would have to be declared valid as long as it was possible to interpret it in a way that is not incompatible with federal law.<sup>65</sup>

Applying these considerations, the Court found that, based on the initiative's wording, it was clear that the initiative aimed to create fundamental rights to life and to integrity for non-human

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<sup>63</sup> Swiss Federal Supreme Court, n. 7 above.

<sup>64</sup> Swiss Federal Supreme Court, n. 7 above, at pp. 5-6, para. 1.2. N. Jecker, 'Höchst zweifelhafte Finanzierung: Kanton bezahlt Grossräten Beschwerde gegen Affen-Rechte,' *Basler Zeitung*, 19 Nov. 2020, available at: <https://www.bazonline.ch/kanton-bezahlt-grossraeten-beschwerde-gegen-affen-rechte-986041909486>.

<sup>65</sup> Swiss Federal Supreme Court, n. 7 above, at p. 8, para. 6.2.

primates. It emphasized that cantons do in fact have the power to create new fundamental rights that go beyond minimum standards guaranteed by the rights catalogue in the Federal Constitution. Following the Cantonal Court's reasoning, the Supreme Court held that such fundamental rights are a matter of public law rather than private law because they primarily concern the relationship between individuals and the state rather than the relationship between individuals. The narrow understanding of legal subjecthood in the context of civil/private law is therefore inapplicable and does not prevent the Canton from extending fundamental rights to beings other than humans.<sup>66</sup>

The Court emphasized in this respect that the initiative does not aim to extend existing human constitutional rights to animals, but instead seeks to create special fundamental rights for non-human primates.<sup>67</sup> The emphasis on this difference is interesting not only because it was not strictly necessary for the Court's decision, but also because the initiators never drew this distinction. Furthermore, it can be contrasted with a recent trend in animal rights scholarship which emphasizes the overlaps (rather than differences) between human and animal rights.<sup>68</sup>

Be that as it may, the Court concluded that because the initiative would only bind the Canton's own bodies, the federal Parliament's exclusive competence to legislate in civil/private law

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<sup>66</sup> Ibid. at pp. 8-11, paras 7.1-8.3.

<sup>67</sup> Ibid. at pp. 11, para. 8.2.

<sup>68</sup> See, e.g., A. Cochrane, 'From Human Rights to Sentient Rights' (2013) *Critical Review of International Social and Political Philosophy*, 16(5), pp. 655-75; J. Wills, 'Human Rights and Animal Rights: A Synergistic Approach' Conference paper delivered at the European Animal Rights Law Conference 2019, Cambridge, 15 Sep. 2019.

matters is not violated.<sup>69</sup> In fact, the Supreme Court went further than the Cantonal Court, suggesting that while private individuals could not be directly bound by primate rights on the cantonal level, it is possible that they would be indirectly affected by the increased level of protection accorded to primates.<sup>70</sup>

Finally, the Court rejected the appellants' argument that applying the initiative solely to public bodies would change its original purpose and therefore amount to an illegitimate reinterpretation of the initiative. Drawing on the explanations provided in the initiative sheet, the Court found that although the initiative may have implied applicability to private individuals, it was clear that even a more limited scope of application (namely, to cantonal entities only) would still serve the initiative's original purpose: to extend fundamental legal rights to primates.<sup>71</sup> Although the sheet may therefore have falsely suggested that the initiative would have immediate practical implications for primates, which are currently only kept by private entities in Basel-Stadt, the Court considered that the initiative could nevertheless protect primates in the future.

## **7. TRANSNATIONAL RELEVANCE OF THE DECISION**

The decisions by the Swiss Federal Supreme Court and the Cantonal Constitutional Court are part of a recent wave of judicial decisions around the world that explicitly deal with the question of whether non-human beings deserve basic rights akin to human rights.<sup>72</sup> This is because Switzerland

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<sup>69</sup> Swiss Federal Supreme Court, n. 7 above, at pp. 9, 12, paras 7.1, 8.3.

<sup>70</sup> Ibid. at pp. 12, 14, paras 8.3, 9.2.

<sup>71</sup> Ibid. n. 7 above, at pp. 13, para. 9.1.

<sup>72</sup> See, e.g., Staker, n. 2 above.

is not the only jurisdiction in which non-human animals lack fundamental legal rights. In fact, in almost no country do non-human primates, let alone other animals, possess such rights.<sup>73</sup>

However, the legal status quo is slowly changing. Some of the most prominent recent animal rights decisions include a 2014 ruling from India which held that the right to life protected by the Indian Constitution also extends to the life of non-human species;<sup>74</sup> a 2016 decision from Argentina granting a writ of *habeas corpus* to a chimpanzee who was found to be a legal person with a right to life;<sup>75</sup> and a 2020 judgment from Pakistan which held that animals' natural right to life must be respected.<sup>76</sup>

In addition to these cases, the Swiss case also bears resemblance to the work of the Nonhuman-Rights Project (NhRP), which has been filing *habeas corpus* writs for non-human animals in the United States (US).<sup>77</sup> There are, however, also some differences between the Swiss initiative and the work of the NhRP as well as that of other animal rights organizations around the world.

Firstly, the Swiss initiative focuses not only on great apes (as the NhRP and other animal rights projects have until recently), but on a larger category of primates. The Swiss approach is

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<sup>73</sup> See Animal Protection Index (2020), available at: <https://api.worldanimalprotection.org/#> (which does not include granting fundamental rights to animals as a factor influencing how advanced states' animal laws are).

<sup>74</sup> *Animal Welfare Board of India v. A Nagaraja, et al.* [2014] Supreme Court of India 2014 (5) SCJ 614.

<sup>75</sup> [2016] *Tercer Juzgado de Garantías Mendoza P-72.254/15*, Ana María Hernández tr, available at: [https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia\\_translation-FINAL-for-website.pdf](https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf).

<sup>76</sup> [2020] Islamabad High Court W.P. No.1155/2019, Athar Minallah CJ.

<sup>77</sup> Nonhuman Rights Project, 'Litigation', available at: <https://www.nonhumanrights.org/litigation/>.

based on evidence that all primates possess the capacities and interests for holding the rights to life and to bodily and mental integrity. Secondly, because Switzerland is a civil law country, legal change is not primarily effected through courts, but through legislation. Given Switzerland's long tradition as a direct democracy, referenda and citizens' initiatives are particularly common tools for citizens to contribute to and participate in lawmaking processes.

The judgments of the Constitutional Court of Basel-Stadt and the Swiss Federal Supreme Court are therefore not the only cases that deal explicitly with the question of fundamental legal rights for animals. However, they represent a major and unique success for non-human rights advocates around the world. In particular, the fact that the continental European legal tradition has so far resisted conferring basic rights on beings who are not human (or corporations) presented no barrier to the courts' rulings. In contrast to other courts,<sup>78</sup> the Swiss courts therefore accepted that the concept of fundamental rights-holdership can be extended beyond existing categories of rights-holders. Furthermore, the courts accepted that non-human primates can, in principle, be holders of fundamental legal rights. In contrast to other courts, they did not question whether primates possess seemingly 'relevant' capacities, such as self-awareness, autonomy, or the capacity to bear duties.<sup>79</sup> In doing so, the Swiss courts may have also opened the door for the recognition of rights of other animals. Finally, the Swiss decisions support the view that requirements for fundamental rights-holdership, and the corresponding definition of legal subjecthood, may vary from one area of law to another within the same legal system.

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<sup>78</sup> See, e.g., *Tilikum et al. v. Sea World Parks & Entertainment, et al.* [2012] United States District Court, Southern District of California, pp. 4-7.

<sup>79</sup> See, e.g., *Matters Nonhuman Rights Project v. Patrick C. Lavery, et al.* [2017] Supreme Court of New York, Appellate Division, First Judicial Department, Webber J, p. 10.

To our knowledge, the Swiss rulings are the first of their kind to specifically address the relationship between animal rights and federalism. As discussed above, the courts endorsed the view that cantons are free to recognize animals as rights-holders even when the federal system does not. This finding may help lead the way for similar constitutional amendments in other federal jurisdictions, such as the US, India, or Germany.

## **8. CONCLUDING REMARKS**

On 16 September 2020, the Swiss Federal Supreme Court paved the way for the first ever direct-democratic vote on whether some animals should be granted basic rights to life and bodily and mental integrity. Together with the ground-breaking ruling of the Constitutional Court of Basel-Stadt, this should be hailed internationally as an important success for the animal rights movement.

Among the numerous factors that were critical for this success were: a commitment on the part of individual residents in Basel-Stadt in whose name the initiative was submitted; a core group of people dedicated to arguing the case, with substantive expertise; respectful and reliable cooperation and mutual support; and, finally, sufficient funding. These insights and the arguments made in court, as discussed in this case note, can serve to further inform animal rights advocacy and pending cases in other countries to secure basic rights for non-human animals.

Interestingly, in the Swiss case, it would not have been possible for the courts to dismiss the idea of extending fundamental rights to life and bodily and mental integrity to primates without also limiting the political rights of the citizens of Basel-Stadt. In this case, the principle of *in dubio pro populo* therefore also meant *in dubio pro animale*: in case of doubt, the people, not public officials, should be the ones to decide whether they want to ‘expand the circle of rights holders

beyond the anthropological barrier.’<sup>80</sup> Whether the people of Basel-Stadt are prepared to cast the first democratic vote in favour of protecting non-human primates’ most basic interests will be seen in late 2021 or early 2022, when the vote is expected to take place.

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<sup>80</sup> Constitutional Court of Basel-Stadt, n. 6 above, at para. 3.7.3.