

H e a d n o t e s

to the Judgement of the First Senate of 15th January, 2002

- 1 BvR 1783/99 -

- 1. If a non-German butcher who is a pious Muslim wants to slaughter animals without stunning them (ritual slaughter) in order to facilitate to his customers, in accordance with their religious conviction, the consumption of the meat of animals that were ritually slaughtered, the constitutionality of this activity is to be examined in accordance with Article 2.1 in conjunction with Articles 4.1 and 4.2 of the *Grundgesetz* (GG, Basic Law).**
- 2. In the light of these constitutional norms, § 4a.1 in conjunction with § 4a.2, number 2, part 2 of the *Tierschutzgesetz* (Animal Protection Act) is to be interpreted in such a way that Muslim butchers can be granted an exceptional permission for ritual slaughter.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 1783/99 -

Pronounced on 15th January, 2002 Achilles Amtsinspektorin Registrar of the Court Registry



IN THE NAME OF THE PEOPLE

In the proceedings

on

the constitutional complaint

of Mr. A. . . . ,

- authorised Attorneys Michael P. Stark and colleagues,
representatives: Gutzkowstraße 9, 60594 Frankfurt am Main -

1. directly against
 - a) the order of the *Verwaltungsgerichtshof* (Higher Administrative Court) of the *Land* (Federal State) Hessen dated 9th September, 1999 - 11 UZ 37/98 -,
 - b) the judgement of the *Verwaltungsgericht* (Administrative Court) of Gießen dated 2nd December, 1997 - 7 E 1572/97 (3) -,
 - c) the order, ruling on an objection by the complainant, issued by the office of the president of the Gießen regional administrative district dated 16th September, 1997 - 17 c - 19 c 20/07 -,
 - d) the order issued by the chief administrative officer of the Lahn-Dill district dated 7th July, 1997 - 19 c 20/07 -,
2. indirectly against

§ 4a.1 and § 4a.2, number 2 of the *Tierschutzgesetz* (Animal Protection Act), as promulgated on 17th February, 1993 (*Bundesgesetzblatt* [BGBl, Federal Law Gazette] I, p. 254)

the First Senate of the Federal Constitutional Court, with the participation of Judges Papier (Vice President),

Jaeger,
Haas,
Hömig,
Steiner,
Hohmann-Dennhardt
Hoffmann-Riem, and
Bryde

issued the following

J u d g e m e n t

on account of the oral argument of 6th November, 2001:

- 1. The order of the Higher Administrative Court of Hesse dated 9th September, 1999 - 11 UZ 37/98 -, the judgement of the Administrative Court of Gießen dated 2nd December, 1997 - 7 E 1572/97 (3) - and the order issued by the chief administrative officer of the Lahn-Dill district dated 7th July, 1997 - 19 c 20/07 - in the shape of the order, ruling on an objection by the complainant, issued by the office of the president of the Gießen regional administrative district, dated 16th September, 1997 - 17 c - 19 c 20/07 - violate the complainant's fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the *Grundgesetz* (Basic Law). The order of the Higher Administrative Court and the judgement of the Administrative Court are overturned. The matter is referred back to the Administrative Court.**
- 2. The Land Hesse shall reimburse the complainant the necessary expenses incurred in the constitutional complaint proceedings.**

Extract from grounds :

A.

The constitutional complaint concerns the grant of exceptional permissions for the so-called ritual slaughter, *i.e.*, the slaughter of warm-blooded animals without previously stunning them.

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I.

1. At the beginning of the 20th century, the ritual slaughter of animals in accordance with Jewish rites was permitted in large parts of Germany (cf. [...] BGH [Federal Court of Justice], DÖV [*Die öffentliche Verwaltung*] 1960, pp. 635-636). After National Socialism had come to power in the German *Reich*, more and more German states banned ritual slaughter. The *Gesetz über das Schlachten von Tieren* (Act on the Slaughter of Animals) dated 21st April, 1933 (*Reichsgesetzblatt* [RGBl, *Reich Law Gazette*] I, p. 203) made it compulsory in the whole of Germany to stun warm-blooded animals before slaughtering them; according to the finding of facts of the Federal Court of Justice, the law pursued the aim of affronting the Jewish part of the population as regards its religious feelings and customs (*loc. cit.*, p. 636). Exemptions from the ban on ritual slaughter were only granted in cases of emergency slaughter.

After the end of the Second World War, ritual slaughter was, in most cases, tacitly tolerated [...] (cf. Andelshäuser, *Schlachten im Einklang mit der Scharia*, 1996, pp. 140-141). However, the first regulation with Germany-wide validity on slaughter that, for religious motives, is performed without stunning the animal, was only introduced when the *Tierschutzgesetz* (hereinafter: TierSchG, Animal Protection Act) was amended by provisions on slaughter. Since the entry into force of the first amending law of the Animal Protection Act, dated 12th August, 1986 (Federal Law Gazette I, p. 1309; the latest amendments of the Act were promulgated on 25th May 1998, cf. Federal Law Gazette I, p. 1105 [...]), § 4a of the Animal Protection Act contains, in paragraph 1, a general ban on the slaughter of warm-blooded animals without previously stunning them. § 4a.2, number 2, however, provides the possibility of granting exceptional permissions for religious reasons. In the legislative procedure, the regulation contained in the second part of § 4a.2, number 2, of the Animal Protection Act was seen in the context of Jewish as well as of Islamic dietary laws (cf. *Bundestagsdrucksache* [BT-Drucks, Records of the *Bundestag*] 10/5259, p. 38).

At present, the wording of § 4a of the Animal Protection Act reads as follows:

(1) A warm-blooded animal may only be slaughtered if it was stunned before the draining of its blood begins.

(2) Notwithstanding paragraph 1, no stunning is required

1. (...),

2. if the responsible authority has granted an exceptional permission for slaughter that is performed without stunning the animal (ritual slaughter); the responsible authority may only grant the exceptional permission to the extent that this is necessary for meeting the needs of members of specific religious groups in the area of applicability of this law, to whom mandatory provisions of their religious group prescribe ritual slaughter or prohibit the consumption of the meat of animals that were not ritually slaughtered; or

3. if this has been established as an exception by a decree pursuant to § 4b, number 3. 9

2. Pursuant to the judgement of the *Bundesverwaltungsgericht* (Federal Administrative Court) dated 15th June, 1995 (BVerwGE [Decisions of the Federal Administrative Court] 99, p. 1), [...] paragraph 2, number 2 of the provision [...] requires that for the grant of an exceptional permission, it must be objectively established that a religious group has mandatory provisions about the ban on stunning animals before slaughtering them. According to the Court, it is required (1) that definite norms that are issued by the respective religious group exist; and (2) that these norms are regarded as mandatory in the conception that the group has of itself; this conception is what the state can assess. The Court held that an individual view, which only focuses on the subjective religious conviction of the members of a religious group - even if they regard this conviction as mandatory - is not compatible with the wording, the purpose and the history of the origins of the law (cf. *loc. cit.*, pp. 4 *et seq.*). 10

The Federal Administrative Court found that in this interpretation, § 4a.2, number 2 of the Animal Protection Act is not contrary to the Constitution. The Court held that in particular, the provision does not violate the fundamental right of the freedom of religion that is guaranteed in Articles 4.1 and 4.2 of the Basic Law. The denial of an exemption from the ban on ritual slaughter does not encroach upon this right if the religious conviction of the person concerned only prohibits him or her from the consumption of the meat of animals that were not ritually slaughtered. The ban on slaughter that is performed without stunning the animal does, according to the Court, not prevent the adherents of such a religion from a way of living that is in accordance with their religion. They are neither legally nor factually forced to eat the meat of animals that were not ritually slaughtered. The ban on ritual slaughter does not ban the consumption of the meat of animals that were ritually slaughtered. The adherents of such a religion can change over to food of vegetable origin or to fish, and they can resort to meat that is imported from other countries. Certainly, meat is a usual food today. Doing without meat, however, does, according to the Court, not constitute an unreasonable restriction of the freedom to develop one's personality. The court concluded that the difficulty that this restriction adds to planning one's diet, which is to be measured against the standard of Article 2.1 of the Basic Law is reasonable in the interest of the protection of animals (cf. *loc. cit.*, pp. 7-8). 11

In the case decided by the Federal Administrative Court, the Court regarded itself as bound by the finding of facts of the court of appeal, according to which the faith of Sunnites, just as the faith of Muslims in general, does not contain any mandatory provisions that ban the consumption of the meat of animals that were stunned before they were slaughtered (cf. *loc. cit.*, p. 9). 12

In the meantime, the Federal Administrative Court has modified this jurisprudence (cf. BVerwGE 112, p. 227). 13

II.

The complainant is a Turkish citizen and [...] a pious Sunnitic Muslim. He has been living in the Federal Republic of Germany for 20 years and operates [...] a butcher's shop that he [...] took over from his father. Until September, 1995, he was granted, pursuant to § 4a.2, number 2 of the Animal Protection Act, exceptional permissions for slaughter that is performed without previously stunning the animal for attending his Muslim customers. [...] Afterwards, the complainant filed further applications for the grant of such permissions. They were unsuccessful due to the above-mentioned judgement of the Federal Administrative Court dated 15th June, 1995. The action that the complainant brought, in the original proceedings, against the rejection order and against the order that ruled on the complainant's objection against the rejection order, was dismissed by the Administrative Court; in the grounds, also the Administrative Court referred to the above-mentioned judgement and, apart from this, to the appeal judgement in these proceedings. When turning down the complainant's motion seeking the leave to appeal, the Higher Administrative Court gave the following reasons:

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To the extent that the complainant expresses serious doubts concerning the correct application of the second part of § 4a.2, number 2 of the Animal Protection Act, no grounds are provided for substantiating the position that the Federal Administrative Court and the court of appeal, in their decisions to which reference is made, wrongfully found that the consumption of the meat of animals that were not ritually slaughtered is not mandatorily prohibited by highest and authoritative representatives of Sunnitic Islam. [...]

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The Higher Administrative Court further stated that there were also no constitutional reasons for serious doubts about the correctness of the Administrative Court judgement. If the second part of § 4a.2, number 2 of the Animal Protection Act encroached upon the complainant's right to freely practice his religion, this encroachment would, at any rate, not be unconstitutional, because it must be taken into account that the freedom of religion is also subject to limitations. The Court held that in accordance with the parliament's appraisal of the provision, the provision only regulates that, if someone voluntarily practices the occupation of a butcher, this person must accept that attending restrictions with regard to his or her basic religious attitude can be justified. In this respect, the provision adequately regulates the practice of the occupation.

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[...]

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III.

By way of his constitutional complaint, the complainant directly challenges the decisions issued in the administrative procedure and in the proceedings before the administrative courts, and he indirectly challenges § 4a.1 and § 4a.2, number 2 of the Animal Protection Act. He challenges, *inter alia*, the violation of Article 2.1, Articles 3.1 and 3.3, Articles 4.1 and 4.2 and Article 12.1 of the Basic Law, and he substanti-

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ates his position as follows:

1. Ritual slaughter and the possibility to provide oneself, without considerable difficulties, with the meat of animals that were ritually slaughtered fall under the scope of protection provided by Articles 4.1 and 4.2 of the Basic Law. Slaughter that is performed without previously stunning the animal is of central importance in the Islamic religion. Its ritual character does not only result from the fact that the obligation of slaughtering ritually can be directly inferred from the Koran. The manner in which ritual slaughter is performed is also precisely determined. The ban on ritual slaughter therefore constitutes an encroachment upon the fundamental right that is guaranteed by Article 4.1 and 4.2 of the Basic Law. This was misjudged in the challenged decisions. [...]

The complainant claims that for him, his customers and all adherents of the Sunnitic persuasion of Islam, the obligation to observe ritual slaughter is a mandatory provision under the terms of § 4a.2, number 2 of the Animal Protection Act. According to the complainant, the Federal Administrative Court's contrary interpretation in its decision dated 15th June, 1995, fundamentally misjudges the meaning of the freedom of religion. The complainant argues that with a view to the precept of the state's strict neutrality as regards religious and philosophical creeds, state courts cannot decide in a binding manner whether mandatory provisions in the mentioned sense exist for the individual member of the respective religious group. It is therefore sufficient if it can be inferred, with sufficient clarity, from the circumstances that a serious religious conviction exists. [...]

2. The complainant also claims a violation of his right to occupational freedom. He states that he is a Turkish citizen but has an unlimited residence permit for Germany that is unrestricted as regards its area of validity, and that he, with a view to his long-standing residence in the Federal Republic of Germany, is so strongly rooted there that he, as a *de facto* German, is to be granted, as regards his occupation as a butcher, not only the protection of Article 2.1 of the Basic Law, but a protection of his fundamental rights that is equivalent to the protection granted by Article 12.1 of the Basic Law.

The complainant states that the occupation of a Muslim butcher is an occupation in its own right because its practice requires qualifications that are not required from a conventional butcher. This does not only refer to the cut that is performed in ritual slaughter; the cut must be quick and clean in order to prevent unnecessary suffering of the slaughtered animal. The occupation of a Muslim butcher is also characterised by religious acts, e.g. the invocation of Allah.

The complainant asserts that for him, the ban on ritual slaughter factually results in a ban on practising his occupation, which, in turn, constitutes an objective restriction of his right to freely choose his occupation. The complainant claims that if the challenged decisions continue in force and if he is for ever denied an exceptional permission, he will have to look for a new occupation. [...]

3. According to the complainant, the ban on ritual slaughter also infringes Article 3.1 of the Basic Law. On account of their religious persuasion, Jewish butchers are rightfully granted exceptional permissions for ritual slaughter. Because there is no difference between the complainant's and the Jewish religious conviction as regards slaughter that is performed without stunning the animal, there is no room for unequal treatment. Apart from this, the complainant alleges a violation of Article 3.3 of the Basic Law. The incorporation of the concept of religious groups in the legal elements of § 4a.2, number 2 of the Animal Protection Act results, according to the complainant, in the fact that an individual religious conviction is no longer taken into consideration. The complainant argues that he is therefore placed at a disadvantage *vis-à-vis* the adherents of smaller and more homogeneous religious groups if his religious convictions differ from those of other Muslims. 24

IV.

Opinions regarding the constitutional complaint have been given [...] by: (1) the Federal Ministry for Consumer Protection, Food and Agriculture on behalf of the Federal Government; (2) the State Chancellery of Hesse; (3) the Muslims' Central Council in Germany; and (4) the *Deutscher Tierschutzbund* (German Association for the Protection of Animals). 25

The Federal Ministry regards the [...] regulation of § 4a.1 and 4a.2, number 2 as constitutional. According to the Ministry, the regulation serves, on the one hand, the [...] aim of implementing a protection of animals that is based on ethical principles; on the other hand, the regulation provides, in the second part of § 4a.2, number 2 of the Animal Protection Act, the possibility of permitting ritual slaughter for religious reasons as an exception and thus gives due consideration to the fundamental right of the freedom of religion. The grant of the corresponding permissions to Muslims also serves their integration in the Federal Republic of Germany. [...] The Ministry argued that to the extent that § 4a.2, number 2 of the Animal Protection Act uses the phrase "religious groups", it adopts a concept that is sufficiently flexible to take particularities that apply to Muslims into consideration. For qualifying as a religious group under the terms of this regulation, a minimum of organisational structures that safeguard the continuity of the group is sufficient. 26

In the opinion of the State Chancellery of Hesse, the constitutional complaint is inadmissible. On the one hand, the complainant's fundamental rights are not directly affected; on the other hand, the complainant's statements do not comply with the requirements that are placed on substantiation. 27

The Muslims' Central Council in Germany emphasised the great importance that the Islam attaches to the protection of animals and stated that slaughter that is performed without stunning the animal is mandatorily prescribed to Muslims as an essential element of the practice of their religion. The Muslim's Central Council in Germany stated that this view is shared by all important Islamic groups in Germany. To the extent that an expert opinion from Al Azhar University, Cairo, mentions that Muslims are also al- 28

lowed to eat the meat of animals that were not ritually slaughtered, this only applies to emergencies. As regards Muslims in Germany, their situation cannot be regarded as an emergency. [...]

In the opinion of the German Association for the Protection of Animals, slaughter without stunning causes more and stronger pain to animals than conventional slaughter. [...]

B.

The constitutional complaint is well-founded. Certainly, § 4a.1 in conjunction with § 4a.2, number 2, second part, of the Animal Protection Act is compatible with the Basic Law. However, the challenged decisions that are based on this regulation do not stand up to review by the Federal Constitutional Court.

I.

1. The Federal Constitutional Court's basis for review is, first and foremost, Article 2.1 of the Basic Law. In the original proceedings, the complainant, a pious Sunnitic Muslim, sought an exemption from stunning prescribed by § 4a.1 of the Animal Protection Act in order to facilitate to his customers, by practising his occupation as a butcher, the consumption of the meat of ritually slaughtered animals. In comparison to this, the complainant's providing of such meat for his own consumption comes second. The second part of § 4a.2, number 2 of the Animal Protection Act, on the basis of which the administrative authorities and administrative courts examined the complainant's application, therefore primarily affects the complainant's occupational activity as a butcher.

Because the complainant is not a German but a Turkish citizen, this activity is not protected by Article 12.1 of the Basic Law. The relevant statute that provides protection in this context is Article 2.1 of the Basic Law in the form that results from the special link between Article 12.1 of the Basic Law, which only applies to Germans, and Article 2.1 of the Basic Law, which is only of subsidiary validity for foreigners (in this context, cf. BVerfGE 78, p. 179 [at pp. 196-197]). For the complainant, however, ritual slaughter is not only a means for obtaining and preparing meat for his Muslim customers and for himself. It is, according to his statements, which have not been called into question in the challenged decisions, also an expression of a basic religious attitude that for the complainant as a pious Sunnitic Muslim, includes the obligation to perform the slaughter in accordance with the rules of his religion, which he regards as binding (in this context, cf. the general statements in: Andelshauser, *loc. cit.*, pp. 39 *et seq.*; Jentzsch, *Das rituelle Schlachten von Haustieren in Deutschland ab 1933*, 1998, pp. 28 *et seq.*; Mousa, *Schächten im Islam*, in: Potz/Schinkele/Wieshaider, *Schächten. Religionsfreiheit und Tierschutz*, 2001, pp. 16 *et seq.*). Even if ritual slaughter itself is not seen as an act of religious practice, the above-mentioned statements are to be given due consideration by enhancing the protection of the complainant's occupational freedom under Article 2.1 of the Basic Law by the special lib-

erty rights (*Freiheitsgehalt*) that are contained in the fundamental right of the freedom of religion under Articles 4.1 and 4.2 of the Basic Law.

2. The legal position which the complainant thus enjoys with a view to his occupational activity as a butcher, is, however, pursuant to Article 2.1 of the Basic Law, only guaranteed in the framework of the constitutional order. The constitutional order includes all legal norms that are, formally and as far as substance is concerned, compatible with the Basic Law (cf. BVerfGE 6, p. 32 [at pp. 36 *et seq.*]; 96, p. 375 [at pp. 397-398]; consistent case law). As concerns substance, this presupposes, above all, the safeguarding of the principle of proportionality and, in this context, the observance of the freedom of religion. 33

II.

§ 4a.1 in conjunction with § 4a.2, number 2, part 2 of the Animal Protection Act lives up to these standards. 34

1. It is true that the regulation encroaches upon the fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law, because it permits slaughter without stunning, in the framework of the occupational activity of a Muslim butcher, only under the restricting preconditions established by the second part of § 4a.2, number 2 of the Animal Protection Act as an exception from mandatory stunning stipulated by § 4a.1 of the Animal Protection Act. This encroachment, however, is not objectionable because it can be sufficiently justified under constitutional law. 35

a) It is the purpose of the Animal Protection Act to protect the life and well-being of animals out of responsibility for animals as humankind's fellow creatures. No one may, without reasonable cause, inflict pain, suffering or damage upon an animal (§ 1 of the Animal Protection Act). The aim of a protection of animals that is based on ethical principles (cf. BVerfGE 36, p. 47 [at pp. 56-57]; 48, p. 376 [at p. 389]; 101, p. 1 [at p. 36]) is also served by the regulation under § 4a.1 in conjunction with § 4a.2, number 2, part 2 of the Animal Protection Act. By incorporating in the Animal Protection Act the principle that warm-blooded animals are to be stunned before their blood is drained, the parliament intended to extend the fundamental concept of the Animal Protection Act, which is delimited in its § 1, to the area of slaughter (cf. Records of the *Bundestag* 10/3158, p. 16). This is a legitimate aim of a regulation, which also takes the feelings of broad sections of the population into consideration (cf. BVerfGE 36, p. 47 [at pp. 57-58], and especially with a view to ritual slaughter, Records of the *Bundestag* 10/5259, p. 32, under I 2a, number 3). 36

b) § 4a.1 in conjunction with § 4a.2, number 2, part 2 of the Animal Protection Act complies with the requirements of the principle of proportionality. 37

aa) The regulation is suitable and necessary for achieving the purpose of the regulation, *i.e.*, for extending a protection of animals that is based on ethical principles also to the slaughter of warm-blooded animals. 38

As concerns the appraisal of the means that the parliament chooses for enforcing the legislative aims of regulations with a view to their suitability and requisiteness, the Constitution grants the parliament a certain discretion. This also applies to the appraisal of the factual basis of a legislative regulation. In this respect, it cannot be assumed that an erroneous appraisal has occurred here. Certainly there are opinions that call into doubt that slaughter that is performed after the animal was stunned causes considerably less suffering and pain to the animal than slaughter without stunning (as concerns sheep and calves, see, e.g., the overview provided in the paper by Schulze/Schultze-Petzold/Hazem/Groß, *Deutsche Tierärztliche Wochenschrift* 85 [1978], pp. 62 *et seq.*). It seems, however, that there is no final scientific answer to this question as yet. For reasons of animal protection, other opinions, e.g., the one expressed by the German Association for the Protection of Animals during the oral argument, give a clear preference to slaughter that is performed with previous stunning. Article 12 of the European Convention for the Protection of Animals for Slaughter dated 10th May, 1979 (Federal Law Gazette 1983 II, p. 771) and Article 5.1, letter c of Directive 93/119/EC of the Council of the European Union on the protection of animals at the time of slaughter or killing dated 22nd December, 1993 (Official Journal L 340/21) proceed on the assumption that slaughter causes less pain and suffering to animals if they are stunned before their blood is drained. Under these circumstances, the German parliament's appraisal, which concurs with this opinion, and the parliament's assumption that mandatory stunning prescribed by § 4a.1 of the Animal Protection Act is suitable for achieving the aims of § 1 of the Animal Protection Act and is also necessary for lack of an equally effective alternative, is at least justifiable.

The same applies to the appraisal of the exemption provisions pursuant to § 4a.2, number 2, part 2 of the Animal Protection Act. The parliament placed the exemption from mandatory stunning prescribed by § 4a.1 of the Animal Protection Act under the reservation that it requires an exceptional permission because the parliament wanted to submit ritual slaughter to an increased supervision by the state. In particular, the parliament intended to create, apart from examining the applicants' expertise and personal aptitude, the possibility to ensure, through collateral clauses to the exceptional permission, that the animals that are bound for slaughter are spared any avoidable pain and suffering during transport, immobilisation and the ritual slaughter itself. This was supposed to be achieved, for instance, by orders about suitable premises, equipment and other devices (cf. Records of the *Bundestag* 10/3158, p. 20 on number 5). Thus, the regulation intends to prevent, wherever possible, domestic or other private slaughter, which often does not ensure due ritual slaughter and which therefore can result in particularly offensive suffering of the animals concerned; instead, it intends to promote slaughter in approved slaughterhouses (cf. Records of the *Bundestag* 10/5259, p. 39 on Article 1, number 5).

Apart from this, the prerequisite for the grant of an exceptional permission pursuant to § 4a.2, number 2, part 2 of the Animal Protection Act is that in the specific case, the needs of adherents of a religious group are to be met, who are, by mandatory provi-

sions of their religious group, prohibited from consuming the meat of animals that were not ritually slaughtered. The fact that the law permits only exemptions from the mandatory stunning prescribed by the Animal Protection Act if these prerequisites are met inevitably results in a decrease of the possible exemptions. In the case of Islam, it must also be taken into account that this religion itself, as the Muslims' Central Council in Germany stated in its opinion, requires that the killing of animals be performed as gently as possible (also see Andelshausen, *loc. cit.*, pp. 35, 62, 79-80). Ritual slaughter in accordance with the rules of Islam must be conducted in such a way that the death of the animal is effected as speedily as possible and that the animal's suffering is restricted to a minimum, with any kind of cruelty to the animal being avoided (also see *Österreichischer Verfassungsgerichtshof* [Austrian Constitutional Court], EuGRZ [*Europäische Grundrechtszeitung*] 1999, p. 600 [at p. 603]). Also on this basis, the parliament could proceed on the assumption that the reservation of an exemption under § 4a.2, number 2, part 2 of the Animal Protection Act constitutes a measure that is suitable, and also necessary, for ensuring a protection of animals that is based on ethical principles.

bb) The legal regulation that is in question here is also proportional in a narrower sense. In an overall weighing of the severity of the encroachment upon fundamental rights that is connected with § 4a.1 in conjunction with § 4a.2, number 2, part 2 of the Animal Protection Act, and the importance and the urgency of the reasons that justify the encroachment, it can be reasonably required of the person concerned (cf. BVerfGE 90, p. 145 [at p. 173]; 101, p. 331 [at p. 350]), under the conditions established by the parliament, to conduct the slaughter of warm-blooded animals without stunning only on the basis of an exceptional permission.

(1) The encroachment upon Muslim butchers' fundamental right to occupational freedom, however, carries much weight. Without the reservation of an exemption, it would no longer be possible for pious Muslims like the complainant to practice the occupation of a butcher in the Federal Republic of Germany. If they want to maintain their businesses at least as sales outlets, and not, as the complainant stated with regard to himself, give up their businesses to gain their livelihood in a different manner, they would have to restrict themselves to either selling imported meat of ritually slaughtered animals or meat of animals that were not ritually slaughtered, *i.e.*, that were slaughtered after having been stunned. Each of these decisions would lead to far-reaching consequences for the person concerned. The decision to only market the meat of ritually slaughtered animals as a salesperson would not only mean to forego the activity of a slaughterer but would also result in the uncertainty whether the meat that he offers really comes from ritually slaughtered animals and thus is suitable for consumption in accordance with the rules of the butcher's own faith and that of his customers. The decision to convert the butcher's business to selling the meat of animals that were not ritually slaughtered would mean that the owner of the business would have to win new customers. Finally, a complete occupational re-orientation, provided that it is still possible in the specific situation of the individual concerned,

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would mean that this person would have to make a completely new start.

The ban does not only concern the Muslim butcher but also his customers. When they demand meat of animals that were ritually slaughtered, this is obviously based on the fact that they are convinced that their faith prohibits them, in a binding manner, from eating other meat. If they were required to, basically, forgo the consumption of meat, this would not sufficiently take the eating habits in the Federal Republic of Germany into consideration. In Germany, meat is a common food, and it can hardly be regarded as reasonable to involuntarily renounce its consumption. It is true that the consumption of imported meat makes such renunciation dispensable; however, due to the fact that in this case, the personal contact to the butcher and the confidence that goes with such contact do not exist, the consumption of imported meat is fraught with the insecurity whether the meat really complies with the commandments of Islam.

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(2) These consequences for pious Muslim butchers and their pious customers must be weighed against the fact that the protection of animals constitutes a public interest that is attached high importance among the population. The parliament has taken this into consideration by not regarding animals as objects but as fellow creatures, which also feel pain, and by intending to protect them by special laws (cf. § 90a, sentences 1 and 2 of the *Bürgerliches Gesetzbuch* [BGB, German Civil Code], § 1 of the Animal Protection Act). Such protection is, above all, enshrined in the Animal Protection Act.

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However, the protection that is provided by the Animal Protection Act does not mean that animals, by virtue of law, must be spared any impairment of their well-being. Rather, the basic idea of the law merely is not to inflict, "without reasonable cause, pain, suffering or damage" upon an animal (cf. § 1 of the Animal Protection Act and BVerfGE 36, p. 47 [at p. 57]; 48, p. 376 [at p. 389]).

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Accordingly, the Animal Protection Act, not only in § 4a.2, number 2, provides exemptions from the obligation to kill animals only after previous stunning. Exemptions from mandatory stunning also exist in the case of emergency slaughter to the extent that stunning is not possible under the circumstances in the specific case (cf. § 4a.2, number 1 of the Animal Protection Act), and they can also be granted, for the slaughter of poultry, by an order pursuant to § 4a.2, number 3 in conjunction with § 4b.1, number 3 of the Animal Protection Act. Moreover, § 4.1(1) of the Animal Protection Act generally permits the killing of vertebrate animals without stunning them to the extent that this is reasonable under the specific circumstances and to the extent that pain can be avoided. If the killing of a vertebrate animal without stunning is permissible in the framework of the huntsmanlike performance of hunting or due to other legal provisions, or if it occurs in the framework of permissible measures of pest control, the killing may be performed pursuant to § 4.1(2) of the Animal Protection Act, if it does not cause more than inevitable pain.

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Especially the exceptions that were mentioned last show that the parliament has regarded it as compatible with a protection of animals that is based on ethical principles

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to move away from mandatory stunning in cases where factual considerations or reasons of tradition and social acceptance suggest exemptions.

(3) Under these circumstances, an exemption from the mandatory stunning of warm-blooded animals before their blood is drained cannot be precluded if the intention connected with this exemption is to facilitate, on the one hand, the practice of a profession with a religious character, which is protected by fundamental rights, and, on the other hand, the observation of religious dietary laws by the customers of the person who practices the occupation in question. Without such exemptions, the fundamental rights of those who want to perform slaughter without stunning as their occupation would be unreasonably restricted, and the interests of the protection of animals would, without a sufficient constitutional justification, be given priority in a one-sided manner. What is necessary instead is a regulation that, in a balanced manner, takes into consideration: (1) the fundamental rights that are affected; and (2) the aims of a protection of animals that is based on ethical principles.

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(a) § 4a.2, number 2, part 2 of the Animal Protection Act basically complies with these requirements. The regulation intends to facilitate, with a view to dietary laws that are valid, in particular, in the spheres of the Jewish and the Islamic faith (cf. Records of the *Bundestag* 10/5259, p. 38), ritual slaughter for religious motives on the basis of exceptional permissions (cf. Records of the *Bundestag* 10/3158, p. 20, on number 5). The instrument of exceptional permissions is supposed to open a way for counteracting public criticism of religiously motivated slaughter, in particular if it is performed in the shape of so-called domestic and private slaughter (cf. Records of the *Bundestag* 10/5259, p. 32, under I 2a, number 3). As has already been mentioned, exceptional permissions allow, *inter alia* through collateral clauses, that the animals bound for slaughter are spared any avoidable pain and suffering (cf. Records of the *Bundestag* 10/3158, p. 20, on number 5, and also Records of the *Bundestag* 10/5259, p. 39, on Article 1, number 5). This shows that it is the aim of the regulation to guarantee the protection of the fundamental rights of pious Muslims without abandoning the principles and obligations of a protection of animals that is based on ethical principles. Thus, also the complainant's rights are given due consideration.

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(b) The situation would be different, however, if [...] § 4a.2, number 2, part 2 of the Animal Protection Act were to be understood in the same way as it was construed by the Federal Administrative Court in its judgement dated 15th June, 1995 (BVerwGE 99, p. 1). The Federal Administrative Court held that the case at hand did not provide the legal elements required by this statute, because Sunnitic Islam, of which the complainant is an adherent, just as Islam in general, does not mandatorily ban the consumption of the meat of animals that were not ritually slaughtered (cf. *loc. cit.*, p. 9). The Court found that § 4a.2, number 2 of the Animal Protection Act requires the definite existence of mandatory provisions that a religious group issues about the ban on stunning before slaughter.

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The Court concluded that an individual view that only focuses on the subjective reli-

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gious conviction of the members of such a group - although this conviction is regarded by them as mandatory - is not compatible with the scope of regulation of the law (cf. *loc. cit.*, pp. 4 *et seq.*).

This interpretation does not live up to the meaning and the scope of the fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law. The result of this interpretation is that § 4a.2, number 2, part 2 of the Animal Protection Act is rendered ineffective for Muslims irrespective of their religious convictions. This interpretation prevents a butcher from exercising his occupation who intends to perform ritual slaughter because he, with a view to the faith that he and his customers adhere to, wants to ensure their supply with the meat of animals that were slaughtered without being stunned. This is an unreasonable burden for the persons concerned, which, in a one-sided manner, only takes the interests of the protection of animals into account. If it were interpreted in this manner, § 4a.2, number 2, part 2 of the Animal Protection Act would be unconstitutional.

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(c) This result, however, can be avoided by interpreting the legal elements "religious group" and "mandatory provisions" in a manner that takes the fundamental right under Article 2.1 in conjunction with Articles 4.1 and 4.2 of the Basic Law into account.

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As the Federal Administrative Court itself has, in the meantime, decided in its judgement dated 23rd November, 2000, (BVerwGE 112, p. 227), the concept of a "religious group" under § 4a.2.2 of the Animal Protection Act does not require that such a group: (1) fulfils the prerequisites for the recognition as a religious body under public law pursuant to Article 137.5 of the *Weimarer Reichsverfassung* [WRV, Constitution of the German *Reich* of August 11, 1919]; or (2) is entitled to engage in imparting religious instruction pursuant to Article 7.3 of the Basic Law. The Court found that for granting an exemption pursuant to § 4a.2, number 2 of the Animal Protection Act, it is sufficient that the applicant belongs to a group of persons who are united by a common religious conviction (cf. *loc. cit.*, pp. 234-235). This means that groups within Islam whose persuasion differs from that of other Islamic groups may also be considered as religious groups under the terms of § 4a.2, number 2 of the Animal Protection Act (cf. *loc. cit.*, p. 236). This interpretation of the concept of a "religious group" is in accord with the Constitution and, in particular, takes Articles 4.1 and 4.2 of the Basic Law into consideration. This interpretation is also compatible with the wording of the above-mentioned provision and corresponds to the parliament's intention to extend the scope of application of § 4a.2, number 2 of the Animal Protection Act not only to members of the sphere of the Jewish faith, but also to members of Islam and its different persuasions (cf. Records of the *Bundestag* 10/5259, p. 38).

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Indirectly, this interpretation has consequences also when it comes to dealing with the concept of "mandatory provisions" that prohibit the members of the religious group in question from the consumption of the meat of animals that were not ritually slaughtered. The competent authorities, and in the case of disputes, the courts, are to examine and to decide whether the religious group in question complies with this pre-

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requisite, because this is the legal element that is required for the grant of the exceptional permission that is sought. In the case of a religion that, as Islam does, takes different views as regards mandatory ritual slaughter, the point of reference of such an examination is not necessarily Islam as a whole or the Sunnitic or Shiitic persuasions of this religion. The question whether mandatory provisions exist is to be answered with a view to the specific religious group in question, which may also exist within such a persuasion (also cf. BVerwGE 112, p. 227 [at p. 236]).

In this context, it is sufficient that the person who needs the exceptional permission pursuant to § 4a.2, number 2, part 2 of the Animal Protection Act in order to supply the members of a religious group, states, in a substantiated and understandable manner, that the common religious conviction of the religious group mandatorily requires the consumption of the meat of animals that were not stunned before they were slaughtered (cf. BVerwGE 94, p. 82 [at pp. 87-88]). If such a statement has been made, the state, which may not fail to consider such a concept that the religious group has of itself (cf. BVerfGE 24, p. 236 [at pp. 247-248]), is to refrain from making a value judgement concerning this belief (cf. BVerfGE 33, p. 23 [at p. 30]). In the light of Article 4 of the Basic Law, the state cannot negate the "mandatory" nature of a religious norm for the sole reason that the respective religion has also rules that take its adherents' pressure of conscience into consideration by admitting exemptions, e.g., with a view to present environment of its adherents and the dietary habits that prevail there. An applicant who seeks an exceptional permission is to be granted such a permission to the extent that such grant is not precluded for other reasons. In this context, (1) collateral clauses to the permission; (2) the control of the compliance of such clauses; and (3) the examination of the applicant's expertise and personal aptitude, also with a view to the special skills required in ritual slaughter, are to ensure that the interests of the protection of animals are safeguarded as comprehensively as possible (also cf. BVerwGE 112, p. 227 [at p. 236]).

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2. If the possibility of an exemption that is regulated in the provision that was last referred to is interpreted in the above-mentioned sense, § 4a.1 in conjunction with § 4a.2, number 2, part 2 of the Animal Protection Act is, also in its other aspects, in accord with the Basic Law. In particular, there is no room for assuming an infringement of the principle of equality enshrined in Article 3.1 of the Basic Law or for assuming an infringement of the ban on discrimination under Article 3.3(1) of the Basic Law; in accordance with this interpretation, also Muslims may be granted an exceptional permission pursuant to § 4a.2, number 2, part 2 of the Animal Protection Act who, as butchers, want to supply the meat of ritually slaughtered animals to their customers, who, by mandatory provisions of their religious group, are prohibited from the consumption of the meat of animals that were not ritually slaughtered.

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III.

1. The challenged decisions that were issued by authorities and courts violate the complainant's fundamental right under Article 2.1 in conjunction with Articles 4.1 and

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4.2 of the Basic Law. The authorities and administrative courts misjudged the necessity and the possibility of a constitutional interpretation of § 4a.2, number 2, part 2 of the Animal Protection; they therefore restricted the above-mentioned fundamental right in a disproportionate manner when applying the exemption regulation concerning the ban on ritual slaughter. The denial of the exceptional permission that the complainant applied for and the confirmation of this decision in the objection proceedings and in the proceedings before the administrative courts are based on this circumstance. It cannot be ruled out that the complainant's customers, like the complainant himself, are members of a religious group in the above-mentioned sense that mandatorily requires that they observe ritual slaughter, and that, if the decision had been based on this fact, the complainant would have been granted the exceptional permission to facilitate the consumption of the meat of ritually slaughtered animals to his customers and to himself.

2. As regards the challenged decisions, the decisions made by the administrative courts are to be overturned pursuant to §95.2 of the *Bundesverfassungsgerichtsgesetz* [BVerfGG, Constitutional Court Act]. The matter is referred back to the Administrative Court because it can be expected that the dispute on a point of administrative law will be terminated there on the basis of the present judgement. [...]

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This decision was taken unanimously.

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Papier Jaeger Haas

Jaeger	Haas	Hömig
Steiner	Hohmann-Dennhardt	Hoffmann-Riem
	Bryde	

**Bundesverfassungsgericht, Urteil des Ersten Senats vom 15. Januar 2002 -
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