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Slaughtering Religious Freedom at the Court of Justice of the European Union

Andrea Pin and John Witte, Jr.[1]

Abstract

The Court of Justice of the European Union is rapidly emerging as the new boss of religious freedom in Europe, and it has issued several important judgments. Most of these cases have had decidedly mixed results. But especially in a trio of recent religious slaughtering cases, the Court of Justice has demonstrated an especially narrow, weak, and troubling understanding of religious freedom. In all three cases, the Court rejected challenges to against local regulations that sharply limited halal and kosher ritual slaughtering. All three cases feature rather blunt dismissal of the claims of discrete religious minorities whose central religious practices were targeted and subordinated to state concerns for animal welfare. The Court's main concern was to ensure that the state laws in question were neutral on their face – a standard that both European and American courts have shown provides marginal judicial protection for religious minorities.

Key Words: Court of Justice of the European Union; religious freedom; ritual slaughtering; religious neutrality; Judaism; Islam

The New Age of Rights

In the 1990s, the European Union (EU) seemed to be done. The Old Continent was pacified. Soviet imperialism had melted away. European dictatorships -- from Portugal to Spain, from Greece to Romania -- had ended. European citizens could

[1] Andrea Pin is Associate Professor of Comparative Public Law, University of Padova Law School, and Senior Fellow in the Center for the Study of Law and Religion at Emory University. John Witte, Jr. is Robert W. Woodruff University Professor, McDonald Distinguished Professor of Religion, and Director of the Center for the Study of Law and Religion at Emory University. They are coauthors of “Meet the New Boss of Religious Freedom: The New Cases in the Court of Justice of the European Union,” *Texas International Law Review* 55 (2020): 223-268 and “Faith in Strasbourg and Luxembourg? The Fresh Rise of Religious Freedom Litigation in the Pan-European Courts, *Emory Law Journal* 70 (2020): 587-660.

travel from Italy to the Netherlands, from Portugal to Germany, without border crossings or passport checks. For all intents and purposes, The EU seemed to be a victim of its own success: -- having reunited a European economy, society, and culture so badly-broken after the two world wars.

The EU sought to repurpose itself by taking on the language of rights. The Charter of Fundamental Rights of the European Union was thus born in 2000 and ratified in 2010. It aimed to strengthen the legal integration of Europe, to ground it more fundamentally in familiar political terms, and to provide member-states and their citizens with new responsibilities and freedoms. The Charter included protection for religious freedom (Article 10), prohibitions on religious discrimination (Article 21), and protection of religious diversity (Article 22). These and other fundamental rights provisions were still focused by the EU's principal economic mandates -- with labour law, economic regulation, data protection, and business competition the most familiar setting for fundamental rights litigation. But expectations for a new season of EU rights were high.

EU law is enforced by the Court of Justice of the European Union (CJEU). Its judgments are binding law in all 27 EU member states. Domestic judges from any member state can halt their local proceedings to ask the Court to deliver a "preliminary ruling" on EU law matters that are relevant to their local case. The Court's ruling will be binding on them and on all other states. Such a quick, effective, and reasonably cheap judicial forum soon attracted many controversies concerning fundamental rights.

It is no surprise, then, that since 2017, the Court's religious freedom case law has grown exponentially, spanning labour law issues, tax exemptions, religious divorces, refugees, privacy, proselytism, and ritual slaughtering.

Higher Disappointments

Most of these cases have had decidedly mixed results for religious freedom. But especially in a trio of recent religious slaughtering cases, the Court of Justice has demonstrated an especially narrow, weak, and troubling understanding of religious freedom. In all three cases, the Court rejected the religious freedom and equality arguments against local regulations that limited *halal* and *kosher* ritual slaughtering. All three cases feature rather blunt dismissal of the claims of discrete religious minorities whose central religious practices were targeted and subordinated to state concerns for animal welfare.

EU laws require that animals be slaughtered only after stunning them as a way of mitigating the animal's stress, suffering, and pain. However, since *halal* and *kosher* religious rules require that the animal be awake during slaughtering, EU law carves out an exception, allowing such religious ritual slaughtering so long as it is performed in licensed slaughterhouses. In all three cases local authorities put further limits on these EU slaughtering laws that triggered religious freedom challenges. None succeeded.

Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others (2018) started in Belgian Flanders. On the few days of the Feast of the Sacrifice, a major Islamic holiday, Islamic ritual slaughtering normally peaked. Until 2015, the Flemish authorities accommodated the extra demand for *halal* meat in preparation for the festival by licensing local temporary Islamic slaughterhouses. In 2015 they suspended this accommodation on the ground that such licenses violated EU rules on the structural and hygiene requirements for all slaughterhouses.

Flemish Muslim communities sued, arguing that the only way to meet the peak demand for *halal* meat and comply with the new rule would be to build a series of permanent slaughterhouses that would be of no use for the rest of the year. The local judge requested a preliminary ruling from the CJEU as to whether the EU regulation on ritual slaughtering, as implemented by national legislation, violated the EU Charter's protection of religious freedom and its prohibition of religious discrimination, as well as Article 9 of the European Convention on Human Rights that also protects religious freedom.

The CJEU's opinions (first by its Advocate General and then the full court) acknowledged that slaughtering an animal without stunning was "indeed a religious precept that benefits from the protection of religious freedom." The EU's general law on slaughtering, however, was "perfectly *neutral* and applies to any party that organises slaughtering;" it did not target religious practices. EU laws had already carved out a religious freedom exception to accommodate religious ritual slaughtering. By requiring that religious slaughtering be performed in proper slaughterhouses, the Court said, EU law had done enough "to ensure effective observance of the freedom of religion, in particular of practicing Muslims during the Feast of Sacrifice." The EU's general slaughtering laws, and the Flemish application of them, thus did not violate any Charter rights or the ECHR. The real challenge, the Court noted, was not to religious freedom but to the financial cost for a local Islamic community in Belgium that might have to set up permanent slaughterhouses for only a few days of their use.

The 2019 case of *Œuvre d'assistance aux bêtes d'abattoirs* also involved *halal* slaughtering practices. EU law reserved the "organic" label for food that had been produced in accordance with high animal welfare standards. The issue was whether *halal* meat could be labeled "organic," since such ritual slaughtering was performed without previous stunning, thus causing pain to the animals. The Court ruled that *halal* slaughtering practices and organic food labeling were irreconcilable. Albeit permitted under EU law to protect the religious freedom of Muslims, *halal* slaughtering was "insufficient to remove all of the animal's pain." It thus did not meet the high requirements of animal welfare that were among the core goals of organic food production. *Halal* meat could not be labelled "organic" meat in the EU.

It was the 2020 case of *Centraal Israëltisch Consistorie van België and Others* that struck the fatal blow to the right to religious slaughtering. This case involved a new Flemish regulation that required Jewish and Muslim butchers to stun animals before butchering them according to their rituals. A consortium of Jewish and Muslim litigants --

a joint venture that tells a lot of the gravity of the matter, given the escalating tensions within and among these religious groups in Belgium – challenged the new law. They argued that it specially burdened their core religious practices; introduced a secular requirement that violated ancient religious laws; obstructed religious butchers from practicing their traditional faith; deprived religious consumers from proper food in the niche market of *kosher* and *halal* meat; and discriminatorily targeted the small communities of Jews and Muslims while leaving hunters, fishers, and other sportsmen to kill their captured animals without prior stunning. If this regulation targeting the heart of a religion's core ritual life could pass muster under EU laws and the EU Charter, the claimants further argued, even firmer measures against minority religious practices would likely follow in Belgium and other EU lands.

Upon request for a preliminary ruling on EU law from the Belgian constitutional court, the Grand Chamber of the CJEU upheld the Flemish regulation. The Court found leverage in the EU provision that empowered Belgian authorities to issue "additional rules designed to ensure greater protection for animals." The Court recognized that the added rule about stunning did impose "a limitation on the exercise of the right of Jewish and Muslim believers to the freedom to manifest their religion." But this limitation was "permissible," the Court argued. It was properly "prescribed by law," not arbitrarily imposed. It required use of the "most up-to-date method of killing" animals humanely. It had a "legitimate objective of general interest . . . to avoid all avoidable animal suffering." This new rule, moreover, was "appropriate and necessary," prescribing "the least onerous" way of harmonizing state interests in protecting animal welfare and the butchers' interest in protecting their religious freedom.

Invoking Article 9 cases of the European Court of Human Rights, the Luxembourg Court now said that Belgium "deserved a wide margin of appreciation in deciding whether, and to what extent, a limitation of the right to manifest religion or beliefs is 'necessary.'" Similarly, the Court cited EU law that called for "a 'certain flexibility' and 'a certain degree of subsidiarity' to Member States" in how to balance EU laws and local standards of health, morality, and culture.

The CJEU also dismissed quickly the Jewish and Muslim litigants' arguments that this new rule was both religiously discriminatory and disrespected religious diversity in open violation of Articles 21 and 22 of the EU Charter. The comparison with sport activities was ill-founded, the Court continued, as this regulation focused on licensed slaughtering houses, and not on hunting, fishing, or licensed sports activities which are subject to their own relevant EU and local laws. Moreover, hunting and fishing are recreational; they are not primarily about producing meats, hides, and other animal products that are sold to consumers. Even if they were, it would be "meaningless" to require hunters and fishers to pursue only animals that were previously stunned.

The Fate of Religious Freedom

These three cases, particularly *Liga van Moskeeen* and *Centraal Israëltisch Consistorie,* while narrow in their immediate reach, signal trouble for religious freedom

in the EU. The *Liga van Moskeeen* Court stated clearly that, in principle, neutral laws do not infringe upon religious freedom, whatever their impact on religious practices. In its words, "the obligation to use an approved slaughterhouse . . . applies in a general and neutral manner to any party that organises slaughtering of animals and applies irrespective of any connection with a particular religion and thereby concerns in a non-discriminatory manner all producers of meat in the European Union." But in application, neutral laws like this can and do impose a substantial burden on religious practices, particularly those of minority or disfavored religions who sometimes need exceptions and exemptions from neutral laws in order to practice their faith.

Centraal Israëltisch Consistorie is even more worrisome. It upholds a non-neutral local law that specifically and discriminatorily targets a central religious practice of ritual slaughtering that EU law had earlier accommodated on grounds of religious freedom. The new Flemish law is not neutral: Jews and Muslims cannot butcher animals for consumption according to their faith, but sportsmen who kill downed animals or landed fish, or private farmers who kill their animals for food or when they are injured, need not stun those animals first. Religious freedom, religious equality, and religious diversity are all fundamental rights explicitly protected by the EU Charter. Animal rights and animal welfare are only mentioned in the earlier Annex to the European Community Treaty (1997); they are not part of the EU Charter. But here animal rights have trumped religious freedom.

Make No Mistake: These three cases are not just about small Jewish or (not so) small Islamic minorities living in Flanders. And they are not just about the right to religious slaughtering, which is an important feature of religious freedom for these religious communities but not for many other faiths. These cases are part of a larger sea change in EU case law that subordinates religious freedom to other rights and interests. This is surprising, as EU law has developed a quite sophisticated culture against direct and indirect discrimination alike. The devil is in the details, as usual. Borrowing from the European Court of Human Rights' lexicon, *Centraal Israëltisch Consistorie* stated that the EU Charter of Fundamental Rights was a "living instrument," which had to be understood in light of the changing circumstances and social priorities: the new Flemish provision resonated with the wider sensitivity for animal welfare and therefore deserved strong EU protection. The Court has thus signaled that religious freedom is not so much the hot new concern of EU law but more of a relic of the past and a refuge of the eccentric that must be subordinated -- if not sacrificed -- to new priorities.

American First Amendment scholars will also know well the dangers of reducing religious freedom to a mere guarantee of neutrality, and leaving religious freedom protections in the hands of local legislatures. The United States Supreme Court adopted this local neutrality approach in the 1990 free exercise case of *Employment Division v. Smith.* The case held that a "neutral and generally applicable law" is not a violation of the right to free exercise of religion, no matter how great a burden that law casts on a particular religion or religious practice. The *Smith* case itself deprived a Native American Indian from receiving an unemployment benefit that other religious minorities had received in four prior Supreme Court cases. The *Smith* Court's neutrality approach soon

led local legislatures to turn on religious minorities, targeting their ritual slaughtering and other religious practices that were deemed eccentric. Congress and many states responded by passing religious freedom restoration acts that provided stronger statutory protections and remedies for religious minorities. And in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993), the Supreme Court stepped in and struck down a new local slaughtering law that was similarly pitched as a neutral law protecting safety, hygiene, and animal welfare, but similarly targeted a core religious ritual of a minority community of Santerians. The *Smith* Court had made clear that laws that are not neutral and/or not generally applicable can be justified only if they serve a compelling state interest and follow the least restrictive alternative of achieving that interest. That provides a judicial safety net for religious freedom against bald prejudice, just as statutes have provided a stronger legislative safety net for religious minorities against "the tyranny of the legislative majority." It can only be hoped that both Luxembourg Court and the European Parliament will take lessons from this American experience. Among the European integration's early promises was peace for the Continent, not a cemetery for freedoms.