

Ritual Animal Slaughter and Public Morality: a Comment on the Decision of the Polish Constitutional Tribunal

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A landmark case of a constitutional court can be told by its impact on consecutive judgments and our understanding of constitutional law and practice. Yet, in the jurisprudence of the Polish Constitutional Tribunal (further as CT or the Tribunal), there are a handful of cases considered as landmark decisions not because of their outcome or the way they are decided, but because the Tribunal got them wrong. In this sense, the Polish ritual animal slaughter case is a landmark decision.^[1]

In this case, the CT had to decide whether the Act on animal protection,^[2] which mandated that vertebrate animals are killed after being stunned subject to criminal sanctions, violates constitutional freedom of religion of members of a Jewish community. Although the constitutional review was initiated on an abstract motion of the Union of Jewish religious communities, the Tribunal went far beyond the scope of this motion. The Tribunal, in a 9-to-5 decision, held that the law is unconstitutional, insofar as it did not allow ritual slaughter. The Tribunal did not specify that the law should recognize rights of a particular religious community and its members who wish to observe religious dietary rules. Instead the Tribunal found that ritual slaughter as a method of killing animals is constitutional regardless of whether it is performed by a pious slaughterer as a form of a religious practice intended to provide *kosher (halal)* meat for local consumption or by an employee of a slaughter house producing tons of *kosher (halal)* meat for export, and for profit. Surprisingly, in this case, the Tribunal indirectly balanced the public interest of animal protection against economic freedom, and decided in favour of the latter.

Such decision of the Polish Tribunal was not necessary because the claim of the Jewish religious community was based solely on religious grounds, and did not allege an infringement of freedom of economic activity. Thus, the Tribunal had to examine whether the lack of a religious exemption from generally binding law on animal protection served a legitimate interest, and was suitable, necessary and proportionate in the strict sense. The first hurdle in this analysis concerned the identification of a legitimate aim. Like the German Basic Law before the 2002 amendment, the Polish Constitution did not enumerate animal protection among worthy purposes in the general limitation clause. Yet, the Tribunal accepted that non-stun slaughter could be legitimately justified by reasons of public morality as the moral imperative requires that all humans treat other beings in a humane manner. However, the elaboration of public morality as a premise in the limitation clause revealed a number of pitfalls.

For the Tribunal, public morality shall not denote the morality of the majority, but a set of rules, norms, values, views and models of conduct, which are generally acceptable in a democratic society. Thus, public morality may justify only such limitations of constitutional rights and freedoms that would be considered as generally harmful, rather than harmful in the perception of the majority. In addition to the individual discomfort of a particular group in the society, a conduct prohibited for the reason of the protection of public morality needs to have a negative impact on the society as such.

In this case, involving such politically and historically delicate issues like religious practices of Jews, it was obvious that the Tribunal would try to avoid the impression of imposing the majority (Christian) view on a minority recognized not only as a religious community, but also as a national minority. Currently, there are only 8000 Jews who officially live in Poland, while only some of them follow orthodox dietary prescriptions. It was also expected that the Tribunal would emphasize the fundamental role of freedom of religion and include analogous practices of Muslims (*Dabiḥah*). Yet, it was not expected that the Tribunal will indirectly grant religious exemption to meat producers.

Crucially, this is the first case when the Polish Tribunal has struck down a limitation of a fundamental right that was justified exclusively by reasons of public morality. In practice, public morality appears to be the weakest justification, which is frequently encompassed by other grounds – public security, public order and rights of others. Thus, it could be argued that in the constitutional practice in Poland, public morality does not have an

autonomous strength, but serves to complement justification of limitations imposed on constitutional rights primarily aimed at the protection of other public interests or conflicting rights. In this context, it is pertinent to ask why the European Court of Human Rights relies on this premise more often.^[3] One could expect that the common denominator of public morality among members of the Council of Europe is lower than the standard accepted at the domestic level in such country as Poland.

One reason why public morality is not a weighty argument in the constitutional review is related to the constitutional interpretation of constitutional rights and freedoms, according to which there is an inherent hierarchy of constitutional rights and freedoms. In result, not every public interest may suffice to justify certain limitations of constitutional rights or freedoms, in particular when they belong to the most protected category such as right to life, right to personal liberty, freedom of speech or freedom of religion. In result, the existence of the hierarchy of constitutional rights and freedoms, coupled with the hierarchy of constitutionally protected public interests, may render the proportionality analysis superfluous. Yet, it is not the case, because the Polish Tribunal actually combines the categorical interpretation of constitutional rights and freedoms with the proportionality test, adopting a different level of deference to limitations of different categories of constitutional rights (personal, political, or economic, social, and cultural).

A total ban on ritual slaughter is blatantly excessive when it is viewed from the perspective of freedom of religion. Yet, the outcome of balancing between freedom of economic activity, unsupported by religious considerations, and public morality (animal protection) is less evident,^[4] given that economic freedom does not belong to the most protected category in the hierarchy of constitutional rights and freedoms. The Tribunal's finding was even more confusing because the majority and dissent did not agree on whether *shechita* is humane or not. Thus, the lack of consensus between judges as to wrongfulness of killing animals without prior stunning shows that there is no overwhelming consensus in this matter in the society as well. However, according to the majority opinion in this case, the prohibition of *shechita* was not necessary to protect public morals. Holding this view, the majority acted as if there was no legitimate ground justifying the total ban on ritual slaughter that was strong enough to prevail over religious freedom.

Thus, one way to look at the Tribunal's decision is to notice that it presumed that public morality cannot compete with freedom to practice one's religion without involving into proportionality analysis. Had the Tribunal decided on Satanist or Santeria animal sacrifice, the conflict between the alleged freedom of religion and public morality would be perhaps more sharp and meaningful. Interestingly, the arguments of animal defenders were not heard when the legislator exempted hunting from the prohibition of non-stun killing of animals, while remaining silent on religious slaughter. ^[5]

What the Tribunal could do in this case was to recognize that the legislator did not fulfil its positive obligation to protect religious freedom, which is particularly important for minority communities. Yet, this exercise would then require involving into the proportionality analysis of a legal gap. As it is eloquently noticed by Aharon Barak, 'avoiding a positive constitutional duty – much like imposing a limitation on a negative right – does not automatically render the omission unconstitutional'.^[6] The examination of a legislative gap also requires the proportionality test. In result of this test, the Tribunal should have constructed a 'missing' norm that is not only responsive to the demands of Jews and Muslims living in Poland, but also to animal defenders. Therefore, the missing religious exemption should comply with the requirements of suitability, necessity and proportionality in the strict sense. Otherwise, reasons of public morality, or precisely the constitutionally protected animal welfare, are not taken seriously.

Summing up, in the ritual slaughter case, the Constitutional Tribunal rightly found that the law, which totally excludes the possibility of conducting an important religious practice of a minority religion is excessive, and thus unnecessary for the protection of animal welfare. In this case, the legislative omission was not partial, but total, thus in this scenario the judicial discretion should not necessarily be extremely narrow.^[7] Yet, the Polish Tribunal wrongly reconstructed the motion of the Union of Jewish Communities. While finding that the lack of an religious exemption is unconstitutional, it filled out a normative lacuna with a new norm, which is disproportionate as it grants an extensive protection to ritual practices unrelated to the aim of proving meat for local consumption of members of a religious community. In consequence of this judgment, meat producers may carry out mass ritual slaughter as long as the legislator does not decide to act and have the last word on this matter. At least, in this

round.[8]

The Author is a national expert in the "Proportionality in Public Policy Project" conducted at the Israel Democracy Institute and funded by the European Research Council (ERC).

[1] Judgement of 10.12.2014, Case no. K 52/13. See also Anna Śledzińska-Simon, A "Stunning" Decision of the Polish Constitutional Tribunal: The Ritual Slaughter Case, Int'l J. Const. L. Blog, Jan. 19, 2015, at: <http://www.iconnectblog.com/2015/01/a-stunning-decision-of-the-polish-constitutional-tribunal-the-ritual-slaughter-case/>

[2] Official Journal of 2003, No. 106, Item 1002.

[3] Roberto Perrone, Public Morals and the ECHR, University of Leicester School of Law Research Paper No. 14-02 (2014).

[4] Tade Matthias Spranger, Die Figur der „Schutzbereichsverstärkung“, NJW 2002, 2074-2076 ("Die apostrophierte Vermischung verschiedener Schutzbereiche berührt also das Spezialitätsverhältnis der Grundrechte. Indem die Möglichkeit geschaffen wird, die Schutzwirkung einzelner Freiheitsrechte durch eine Gesamtbetrachtung mit anderen, tatbestandlich nicht einschlägigen Grundrechten zu erweitern, entfällt zugleich die Notwendigkeit einer klaren Zuordnung bestimmter Lebensbereiche und menschlicher Handlungen zu einzelnen Berechtigungen.")

[5] See Brian Leonard Friend and the Countryside Alliance and Others v. the United Kingdom, Application nos. 16072/06 and 27809/08, decision of 24.11.2009 (inadm.).

[6] Aharon Barak, Proportionality. Constitutional rights and their limitations, Cambridge University Press 2012, p. 429.

[7] Ibidem, p. 431.

[8] Note that the CT already struck down a regulation of the Minister of Agriculture which permitted ritual slaughter without a specific statutory delegation. Judgment of 27 27.11.2012, Case no. U 4/12.

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