Reviewing the recent Ban on Ritual Slaughter in Flanders

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The question whether to limit or prohibit ritual slaughter or not is one that has been vexing decision-makers in both politics and law in Europe in recent years. More correctly, the debate is not about banning the practice for its own sake, but rather the extent to which animal welfare can be advanced without unduly limiting the right to freedom of religion. Animal welfare in this regard takes the form of stunning animals, thereby attempting to lessen their suffering while being slaughtered. The cause of tension becomes clear when one considers that many adherents of Islam and Judaism follow interpretations that question whether the act of stunning is compatible with religious precepts on how animals ought to be slaughtered.

The Belgian federal region of Flanders is the latest territory where religious exemptions from stunning animals before slaughter have been scrapped. On 28 June 2017 the Flemish Parliament accepted a regional decree which provides that all animals must be stunned when slaughtered from 1 January 2019. According to the decree all such animals must be stunned by means of electrical current. A temporary exemption was made for bovine animals and calves until such time as electrical means prove to be equally effective in stunning these animals, too. In passing the decree Flanders follows the Walloon region whose parliament required the blanket stunning of animals earlier in the year, a decree that will take effect starting in September 2019. This leaves the Brussels Capitol Region where stunning animals is still exempted for religious reasons. Should the Brussels region accept a ban too, religious slaughter without stunning will be impossible throughout Belgium.

In analysing the Flemish decree, three critical remarks need to be made in putting the new law into the right legal perspective. Firstly, the explanatory memorandum accompanying the draft decree argued that scrapping religious exemptions did not necessarily interfere with the right to freedom of religion in article 9(1) ECHR, as such meat was still accessible in Flanders and not prohibited by the decree. The effect is to obviate the need for any limitation analysis in terms of article 9(2) ECHR. This argument was taken from the 2000 judgment of the European Court of Human Rights in *Cha'are Shalom Ve Tsedek v. France*. In this matter no interference was found, as the applicants could still access meat in France considered suitable by them, incidentally by importing such meat from Belgium at the time.

This type of reasoning makes for bad law and should consequently be rejected. This is because an excessive burden is placed on the bearer of article 9(1) ECHR in claiming even elementary protection from state interference with ritual slaughter practices. Yet, the bearer of the right to freedom of religion should be afforded maximum protection under the scope of the right, leaving any factual interference with the scope of the right to be justified by the state in terms of the limitation provision in article 9(2) ECHR. The Court's reasoning, and by implication the explanatory memorandum, neutralises the protection of religious freedom with little difficulty. This negates article 9 ECHR as a real protection mechanism by granting the state a wide field by default. Also, requiring such a high threshold is not very common in Strasbourg case law, raising the unanswered question why freedom of religion, and in particular ritual slaughter, is singled out in this manner. The Court's silence is probably telling of the awkwardness of its reasoning.

Secondly, the explanatory memorandum does not pay sufficient attention to the severity of the decree's interference with article 9(1) ECHR. While in *Cha'are Shalom Ve Tsedek* the issue concerned the recognition of one organisation over another in conducting ritual slaughter, the Flemish decree aims to make slaughter without stunning impossible as such. The effect is to limit a right totally, rather than to limit it partially. A simple reliance on access to ritually slaughtered meat might not be sufficient enough in justifying such a far-reaching interference with article 9(1) ECHR. It could be argued that such access should be reasonable, as opposed to merely formal. In other words, the interference with article 9(1) ECHR would be unjustified to the extent that access becomes unreasonable. This would be the case for instance if the Brussels region would copy the Flemish and Walloon decrees, or the price of importing meat to Belgium would become excessive. Not only would a reasonableness requirement improve the protection of freedom of religion, but it would also help to

ensure the equal protection of religious adherents affected by the decree in a material fashion. A less restrictive avenue could also have been to only allow a religious exemption for meat to be consumed nationally, as opposed to meat destined for export. Shifting the focus from the Strasbourg Court to the Luxembourg Court for a moment, the severity of the decree's interference could very well also raise questions under the requirement in article 52(1) of the Charter of Fundamental Rights of the EU that the 'essence' of a right, such as that to freedom of religion in article 10, may not be limited.

Thirdly, curiously the decree stipulates that if an animal is slaughtered in terms of religious rites, any stunning must be reversible and may not lead to the animal's death. The effect is for a secular decree to codify a religious practice. This oversteps the separation between the state and religion, which is a principle of the Belgian state and by implication of the Flemish region. While the Flemish Parliament may in principle legislate on whether animals should be stunned or not when slaughtered, with possible implications for freedom of religion, it may not prescribe the form a religious practice should take.

The purpose of the Flemish decree, namely the advancement of animal welfare, is without doubt legitimate and laudable. Yet, the extent and manner to which the decree pursues this aim is not entirely beyond legal doubt when measured against the right to freedom of religion and the separation of state and religion. These doubts expose a well-meaning decree to legal challenge and unnecessary uncertainty.

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