

# Animal Welfare v Religious Freedom: Reflecting on the ECtHR's Decision in *Executief van de Moslims van België and Others v Belgium*

ECtHR 13 February 2024, No. 16760/22 and others, *Executief van de Moslims van België and Others v Belgium*

Harriet Ní Chinnéide\* and Cathérine Van de Graaf\*\*

\*Hasselt University, Belgium, email: harriet.nichinneide@uhasselt.be (corresponding author)

\*\*Ghent University, Belgium and University of Cologne, Germany, email: catherine.vandegraaf@uni-koeln.de

## INTRODUCTION

On 13 February 2024, the second section of the European Court of Human Rights (the Court, the Strasbourg Court) delivered its Chamber judgment in *Executief van de Moslims van België and Others v Belgium*. In this case, the Court examined the compatibility of decrees adopted in Flanders and Wallonia – banning the slaughter of animals without prior stunning – with the European Convention on Human Rights (ECHR).<sup>1</sup> The bans allowed for such stunning to be reversible (non-lethal) in the case of ritual slaughter. The applicants argued that these bans were discriminatory and incompatible with the right to freedom of religion as they would render it difficult, if not impossible, for observant Jews and Muslims who eat Halal or Kosher meat to slaughter animals in accordance with their religious precepts or to obtain meat from animals

<sup>1</sup>ECtHR 13 February 2024, No. 16760/22 et al., *Executief van de Moslims van België and Others v Belgium*.

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slaughtered in this manner. In its Chamber judgment, the Court rejected their arguments and found that the bans did not violate Article 9 and 14 ECHR. In June 2024, this judgment became final after the Grand Chamber panel rejected the request that the case be referred for assessment by a Grand Chamber composition.<sup>2</sup>

In the discussion that follows, we argue that while the protection of animal welfare is a laudable aim, its elevation over the right to freedom of religion in this case can be considered problematic. This judgment raises significant questions about the Court's attitude towards the right to freedom of religion and its approach when assessing general restrictions thereof. This case note will focus on three specific aspects of the judgment that we find particularly concerning. First, we criticise the limited (or rather non-existent) protection of minority rights resulting from the Court's application of process-based review. Second, we question the Court's flexible introduction of (new) legitimate aims and the heavy weight accorded thereto when justifying interferences with religious freedom. Finally, we discuss the extent of the comparability between the applicants and other groups for which an exception to the rule was foreseen in the legislation. Before delving into this discussion, a summary of the facts of the case and the Court's judgment will be provided.

## FACTS

The case concerned decrees prohibiting the slaughter of animals without prior stunning in Flanders and Wallonia (two of the three regions in Belgium).<sup>3</sup> The applicants were seven organisations representing Muslims in Belgium and fourteen Belgian nationals of Muslim and Jewish faith. They argue that although the bans allow for reversible stunning in the case of ritual slaughter, they render it hard, if not impossible, for them to slaughter or to obtain meat from animals slaughtered in accordance with religious dietary instructions. The bans were introduced in 2014 after a state reform in Belgium turned animal welfare from a federal into a regional competence.

In 2018 and 2019, the applicants challenged the constitutionality of the decrees. The Belgian Constitutional Court made a preliminary reference to the ECJ concerning the Flemish Region's decree.<sup>4</sup> In 2020, the Grand Chamber of the ECJ found that EU law did not preclude a member state from adopting

<sup>2</sup>ECtHR Grand Chamber Panel's decisions – June 2024, ECHR 163 (2024).

<sup>3</sup>Note that at the time of publication the Brussels-Capital region has not legislated on this matter.

<sup>4</sup>The Constitutional Court checks whether laws, decrees or ordonnances are in line with the Belgian Constitution. It does not matter for the Constitutional Court's assignment whether the

legislation requiring a reversible non-lethal stunning process in the context of ritual slaughter.<sup>5</sup> Such a requirement was compatible with the right to freedom of thought, conscience and religion set out in Article 10.1 of the European Charter of Fundamental Rights. Following this, in 2021, the Constitutional Court dismissed the applicants' complaints regarding the decrees.

In considering the Constitutional Court's ruling, it should be borne in mind that the ECJ does not have the same human rights focus as the Strasbourg Court and that animal welfare has been recognised as a general objective of EU law.<sup>6</sup> Before the Strasbourg Court, the applicants complained that the bans constitute an unjustified interference with their right to freedom of religion under Article 9 and are discriminatory and thus in violation of Article 14 in conjunction with Article 9 ECHR.

## JUDGMENT

The Court first rejected two additional applications that were lodged by individuals living in the Brussels-Capital region, as religious slaughter was not prohibited in that region. The Court then turned to examining the remaining complaints from applicants based in the abovementioned regions of Flanders and Wallonia.

### *Article 9*

With regard to the complaint under Article 9, the Court noted that it is not its role to engage in a debate on the nature and importance of individual convictions.<sup>7</sup> Thus, it is not for it to decide whether prior stunning before slaughter is in accordance with the dietary precepts of Muslim and Jewish believers.<sup>8</sup> It was clear from the parliamentary debates on the decrees that the

competence leading to the adoption of a particular piece of legislation is with the Federal State or with the Communities or Regions.

<sup>5</sup>ECJ 29 January 2020, Case C-336/19, *Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering* (GC).

<sup>6</sup>Art. 13 TEU. See in particular, Art. 4 and Art. 26 of Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, O.J. 2009, L 303, p. 1. For a discussion of the ECJ's decision, see S. Wattier, 'Ritual Slaughter Case: The Court of Justice and the Belgian Constitutional Court Put Animal Welfare First', 18 *EuConst* (2022) p. 264.

<sup>7</sup>*Executief van de Muslims van België and Others v Belgium*, *supra* n. 1, para. 85.

<sup>8</sup>*Ibid.*, para. 86. Note that this was criticised by Judge Yüksel in her dissenting opinion. She criticised the fact that the Court seems to venture out to determine which aspects of ritual slaughter are indispensable and which are not and refers to the case of *Abdullah Yalçın v Turkey* (No. 2), where the Court states: 'It is not the Court's task to evaluate the legitimacy of religious claims or to question

absence of prior stunning before slaughter is an important aspect of the religious rite for certain members of the Jewish and Muslim faiths.<sup>9</sup> In these circumstances, the Court accepted that there was an interference with the right to freedom of religion.<sup>10</sup> This interference was expressly provided for by legislation. Its lawfulness was not disputed by the applicants and was accepted by the Court.<sup>11</sup> What remained to be determined was whether this interference pursued a legitimate aim and was necessary in a democratic society.

The Government submitted that the measure aimed to prevent any avoidable suffering to animals intended for human consumption. It fell to the Court to assess for the first time whether animal welfare could be linked to one of the legitimate aims under Article 9.2.<sup>12</sup> The Court recognised that the ECHR is not intended to protect animal welfare as such. This is in contrast with EU law, which establishes the protection of animal welfare as a general objective, as mentioned in the introduction.<sup>13</sup> Highlighting its previous case law, the Court noted that the protection of animals had been previously recognised as a matter of general interest protected by Article 10 ECHR<sup>14</sup> and linked to the protection of public morals under Article 11.<sup>15</sup> In the context of Article 9, the Court emphasised that the protection of public morals cannot be understood as aiming solely at the protection of human dignity in relationships between individuals.<sup>16</sup> Emphasising the constantly evolving nature of the concept of morality and the 'living instrument' doctrine, the Court found that animal welfare could be linked to the concept of public morals, a legitimate aim under Article 9.2.

The Court then addressed the necessity of the measure. On this point, it first considered the margin of appreciation available to the state.<sup>17</sup> It highlighted the

the validity or relative merits of interpretation of particular aspects of beliefs or practices': ECtHR 14 June 2022, No. 34417/10, *Abdullah Yalçın v Turkey* (No. 2), para. 27.

<sup>9</sup>Ibid., para. 87.

<sup>10</sup>Ibid., para. 88.

<sup>11</sup>Ibid., para. 89.

<sup>12</sup>Ibid., para. 92.

<sup>13</sup>Ibid., para. 93. See Art. 13 TFEU, which provides as follows: 'In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.'

<sup>14</sup>ECtHR 8 November 2012, No. 43481/09, *PETA Deutschland v Germany*, para. 47, and ECtHR 16 January 2014, No. 45192/09, *Tierbefreier e.V. v Germany*, para. 59.

<sup>15</sup>ECtHR 24 November 2009, No. 16072/06, *Friend and Others v the United Kingdom* (dec.), para. 50.

<sup>16</sup>*Exécutief van de Muslims van België and Others v Belgium*, *supra* n. 1, para. 95.

<sup>17</sup>Ibid., para. 104.

particular importance to be given to the role of the national decision-maker in cases concerning general policy issues, on which profound disagreements can reasonably exist in democratic society.<sup>18</sup> The Court found that in cases like this, which concern the relationship between religion and the state and where there is no clear consensus among member states but a progressive evolution towards the increased protection of animal welfare, the national authorities must be granted a margin of appreciation which is not narrow.<sup>19</sup> Here, the Court also highlighted that the measure at issue was a result of a deliberate choice made by the legislature following a carefully considered parliamentary process. Thus, it needed to ‘exercise restraint in its review of the conventionality of a choice made democratically within the society in question’.<sup>20,21</sup> Having established this, the Court turned to consider the necessity of the measure in democratic society. Once again, it distinguished between the status accorded to the protection of animal welfare under EU law and the ECHR.<sup>22</sup> This case did not require the Court to balance two rights of equal weight under the ECHR but to determine whether the interference was justified.<sup>23</sup> To this end, it focused first on the quality of the parliamentary and judicial review of the measure.<sup>24</sup>

The Court reiterated that the quality of parliamentary scrutiny is particularly important when a general rule is at issue.<sup>25</sup> It observed that the decrees were adopted following extensive consultation with members of various religious groups, veterinarians and animal protection associations and that considerable efforts were made over a long period of time by successive legislators in both Flanders and Wallonia, to reconcile the objectives of promoting animal welfare and protecting freedom of religion. The preparatory works showed that measures were discussed in light of freedom of religion and that the domestic legislators had examined their impact thereon and conducted a thorough proportionality analysis.<sup>26</sup>

As for the judicial review of the measure, the Court noted that a ‘double review’ preceded it as the Belgian Constitutional Court had referred the issue to the ECJ for a preliminary ruling.<sup>27</sup> Both the ECJ and the Belgian Constitutional

<sup>18</sup>Ibid., para. 105.

<sup>19</sup>Ibid., para. 106.

<sup>20</sup>Ibid., para. 105 (authors’ own translation).

<sup>21</sup>Note that this judgment has only been published in French. All quotes included in the article have been translated using the online translation tool DeepL (<https://www.deepl.com/en/translator>).

<sup>22</sup>*Executief van de Muslims van België and Others v Belgium*, *supra* n. 1, para. 107.

<sup>23</sup>Ibid., para. 107.

<sup>24</sup>Ibid., para. 108.

<sup>25</sup>Ibid., para. 109.

<sup>26</sup>Ibid., paras. 109-110.

<sup>27</sup>Ibid., paras. 111-113.

Court had taken the requirements of Article 9 into account in a detailed manner.<sup>28</sup> The Strasbourg Court emphasised that this double review was in line with the spirit of subsidiarity that permeates the ECHR, and whose importance was reaffirmed by Protocol No. 15.<sup>29</sup> It could not 'disregard these prior reviews in the context of its own review'<sup>30</sup> even though animal welfare is an objective of general interest under EU law. The ECJ had found that the decree was compatible with the right to freedom of religion under EU law and the Constitutional Court had issued a reasoned decision on the constitutionality of the two degrees. The Strasbourg Court saw no serious reason to challenge the other courts' findings.<sup>31</sup>

Citing one of its recent advisory opinions, the Strasbourg Court stated that for a measure to be proportionate, it must not restrict an individual's Article 9 rights more than necessary to achieve the legitimate aims pursued.<sup>32</sup> On the basis of scientific studies and extensive consultation with interested parties, the regional parliaments had concluded that no less restrictive measure than a complete ban on ritual slaughter *without* prior stunning could achieve the aim of protecting animal welfare.<sup>33</sup> Accepting the parliaments' assessments, the Court noted that it was not for it to determine whether the exception allowing for the prior stunning to be reversible in cases of ritual slaughter fulfilled the requirements of the applicant's religious precepts.<sup>34</sup> However, fact that the measures included allowed for the stunning to be reversible in cases on religious slaughter convinced the Court that the authorities had sought to weigh up the competing rights and interests at issue. Thus, the ban fell within the state's margin of appreciation.<sup>35</sup> The Court also noted that the applicants could still obtain meat produced in other countries or in the Brussels-Capital Region, lessening the impact of the ban.<sup>36</sup>

### *Article 14 in conjunction with Article 9*

The applicants advanced several reasons why the bans were discriminatory.<sup>37</sup> The Court noted that Article 14 only prohibits treating individuals differently when

<sup>28</sup>Ibid., para. 115.

<sup>29</sup>Ibid., para. 115.

<sup>30</sup>Ibid., para. 115.

<sup>31</sup>Ibid., para. 116.

<sup>32</sup>Ibid., para. 117. ECtHR 14 December 2023, No. P16-2023-001, Advisory opinion as to whether an individual may be denied authorisation to work as a security guard or officer on account of being close to or belonging to a religious movement.

<sup>33</sup>Ibid., para. 118.

<sup>34</sup>Ibid., para. 119.

<sup>35</sup>Ibid.

<sup>36</sup>Ibid., para. 120.

<sup>37</sup>Ibid., paras. 132-136.

they are in comparable situations and where there is no objective and reasonable justification for doing so. The applicants complained that they were treated differently to hunters and fishermen who are excluded from the scope of the relevant legislation and that there was no objective justification for this.<sup>38</sup> The Court argued that the methods of killing are different. Ritual slaughter involves animals raised in captivity and therefore, their slaughter takes place in a distinct context. Thus, the situation of the two groups is not comparable and there was no need to examine whether there was an objective justification for the difference in treatment.<sup>39</sup> As regards the applicants' complaint that they were treated the same as the general population who are not subject to religious dietary precepts, the Court found that this was not the case, as the decrees allow for non-lethal stunning in the case of religious slaughter.<sup>40</sup> Finally, as regards the situation of the Jewish applicants compared to those who were Muslim, the Court found that the mere fact that the religious dietary requirements of the two communities were different was not enough to establish that they were in relevantly different situations.<sup>41</sup> The decrees therefore do not violate Article 14 taken together with Article 9.<sup>42</sup>

#### SEPARATE OPINIONS

There are two concurring opinions to the case.

##### *Concurring Opinion of Judge Koskelo, joined by Judge Kūris*

Judge Koskelo had one point of disagreement with the judgment: namely, that it suggests that a measure can only satisfy the proportionality test under the ECHR if the legitimate aim pursued cannot be achieved by less restrictive means. She noted that this statement is problematic as it is inconsistent with the fundamental concepts of margin of appreciation and subsidiarity, particularly in the context of legislative measures.<sup>43</sup> In addition, it contradicts the Court's previous case law, in particular a series of Grand Chamber judgments concerning legislative measures. Judge Koskelo argued that the Grand Chambers judgments in *Animal Defenders v United Kingdom*, *Vavříčka v Czech Republic* and *L.B. v Hungary* established that in

<sup>38</sup>Ibid., para. 145.

<sup>39</sup>Ibid., paras. 145-146.

<sup>40</sup>Ibid., paras. 147-149.

<sup>41</sup>Ibid., para. 150.

<sup>42</sup>Ibid., para. 151.

<sup>43</sup>*Executief van de Muslims van België and Others v Belgium*, *supra* n. 1, Concurring opinion Judge Koskelo, joined by Judge Kūris, para. 2.

assessing the proportionality of ‘general measures’ the question is not whether less restrictive means could have been adopted but whether the state stayed within its margin of appreciation.<sup>44</sup> She noted that this was also emphasised in *Gaughran v the United Kingdom*<sup>45</sup> and opined that a clear and coherent position on this topic has emerged in the Court’s case law.

Judge Koskelo argued that it would seriously undermine the margin of appreciation and the principle of subsidiarity if the Court were to adopt as a general principle and approach that a measure could only be deemed proportionate where the legitimate aim pursued could not have been achieved by less restrictive means. While an examination from this angle might be justified where the margin of appreciation is narrow, it cannot be seen as the standard to be applied generally – to do so would be tantamount to disregarding any margin of appreciation granted to the state.<sup>46</sup> In the present case, the majority found that the state enjoyed a margin of appreciation which could not be narrow.<sup>47</sup> Therefore, there was no reason to follow a different and stricter approach to proportionality in this case which concerned Article 9, than that which had been followed in respect of other non-absolute rights like those enshrined under Articles 8 and 10.<sup>48</sup> As a concluding point, Judge Koskelo noted that this is separate from the fact that it could help the Court to determine that the respondent state has remained within its margin of appreciation if the domestic authorities have themselves conducted an assessment where they considered other measures and determined whether less restrictive or intrusive ones could achieve the aims pursued. This was something she could agree with.<sup>49</sup>

While fully endorsing Judge Koskelo’s opinion, Judge Küris reiterated the objections he raised in his concurring opinion in *L.B. v Hungary* regarding the Court’s limitation of its review to the procedure by which the contested measure was adopted.

### *Concurring Opinion of Judge Yüksel*

While concurring with the majority’s finding of no violation of Article 9, Judge Yüksel added some additional remarks on the reasoning and approach adopted in the judgment. She opined that there were two questions at the heart of this case. First, whether considerations relating to animal welfare could constitute a

<sup>44</sup>Ibid., paras. 3-5.

<sup>45</sup>Ibid., para. 6.

<sup>46</sup>Ibid., para. 7.

<sup>47</sup>Ibid., para. 10.

<sup>48</sup>Ibid., para. 10.

<sup>49</sup>Ibid., para. 11.



legitimate aim under Article 9.2 and second, whether the contested measure did in fact exceed what was necessary in a democratic society.

Regarding the legitimacy of the aim pursued, Judge Yüksel agreed that the ECHR could be interpreted in such a way that animal welfare constitutes a legitimate aim under Article 9.2.<sup>50</sup> Concerning the proportionality of the measure, she observed that both the ECJ and the Constitutional Court had focused their assessment on whether the decrees constituted the best or the least radical measure to achieve the desired aim. She suggested that this approach was not surprising, as the protection of animal welfare has a legal basis in EU law.<sup>51</sup> However, as the protection of animal welfare did not have an explicit legal basis in the ECHR, the Strasbourg Court's proportionality assessment had to focus on different points.<sup>52</sup>

Therefore, Judge Yüksel agreed with Judge Koskelo that the question for the Court was not whether less restrictive measures should have been adopted, but whether the legislature had acted within its margin of appreciation when adopting the measure in question and balancing the interests at stake.<sup>53</sup> Determining this required an examination of the quality of the parliamentary and judicial controls carried out as to the necessity of the measure.<sup>54</sup> In light of this, Judge Yüksel disagreed with the importance the majority granted to the question of whether the contested measure was the least restrictive measure for achieving the stated aim.<sup>55</sup> She was concerned that, with this approach, the Court seemed to venture into determining which aspects of ritual slaughter were indispensable and which were not, while the question of whether pre-slaughter stunning could be admitted in the context of Muslim or Jewish ritual slaughter was still debated.<sup>56</sup> In doing so, the Court could be seen as ruling on a matter which should be left to believers and theologians.<sup>57</sup>

Judge Yüksel concluded that the Court should have focused on the balance struck between the competing interests. While she was satisfied that the authorities struck a fair balance between the applicant's right to manifest a religious belief and the protection of public morals and that they had acted within their margin of appreciation, she stressed the need to focus the analysis more on

<sup>50</sup>*Executief van de Muslims van België and Others v Belgium*, *supra* n. 1, Concurring Opinion Judge Yüksel, para. 3.

<sup>51</sup>*Ibid.*, para. 4.

<sup>52</sup>*Ibid.*

<sup>53</sup>*Ibid.*, para. 5.

<sup>54</sup>*Ibid.*

<sup>55</sup>*Ibid.*, para. 6.

<sup>56</sup>*Ibid.*, para. 7.

<sup>57</sup>*Ibid.*, para. 7.

the ‘balancing act’ carried out by the domestic authorities.<sup>58</sup> She was convinced that this should have been the starting point and central element of the Court’s examination of the question of proportionality. Taking such an approach would have been in line with the Court’s established case law.<sup>59</sup>

## COMMENTARY

Before delving into a further discussion of the Court’s decision, it is important to acknowledge the delicacy of the case at hand – both in light of the ever-increasing inclination towards the greater protection of animal welfare in European society and the ECJ’s 2020 ruling, affirming the compatibility of these specific decrees with EU law and the right to freedom of religion.<sup>60</sup> As clearly established by Protocol 15 (which entered into force August 2021) and emphasised in many of the Court’s judgments,<sup>61</sup> the Strasbourg Court is subsidiary to the national authorities. They have the ‘primary responsibility to secure the rights and freedoms’ defined in the ECHR, with the Court playing a supervisory role.<sup>62</sup> In recent years an increasing emphasis on the principle of subsidiarity and the margin of appreciation to be awarded to domestic authorities in complex cases involving sensitive issues of domestic social policy has been apparent in the Court’s case law.<sup>63</sup>

While the right to freedom of religion has long been enshrined in international human rights law and the ECHR, there is growing social consensus in Europe as to the importance of animal welfare.<sup>64</sup> Animal welfare advocates argue that banning ritual slaughter without prior stunning is a more humane approach, however, religious groups affected by such prohibitions tend to believe that they

<sup>58</sup>Ibid., para. 10.

<sup>59</sup>Ibid.

<sup>60</sup>*Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering* (GC), *supra* n. 5.

<sup>61</sup>Convention for the Protection of Human Rights (Protocol No. 15) CETS 213 (adopted 24 August 2013, entry into force 1 August 2021), Art. 1.

<sup>62</sup>Ibid., Art. 1.

<sup>63</sup>For instance, former President of the Court, Róbert Spanó, has suggested that the ECtHR has entered into an ‘age of subsidiarity’: see R. Spanó, ‘Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity?’, 14 *Human Rights Law Review* (2014) p. 487; R. Spanó, ‘The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law’, 18 *Human Rights Law Review* (2018) p. 485.

<sup>64</sup>European Commission Representation in Malta, ‘Eurobarometer Shows How Important Animal Welfare Is for Europeans’, 19 October 2023, [https://malta.representation.ec.europa.eu/news/euro-barometer-shows-how-important-animal-welfare-europeans-2023-10-19\\_en](https://malta.representation.ec.europa.eu/news/euro-barometer-shows-how-important-animal-welfare-europeans-2023-10-19_en), visited 6 January 2025.

are largely based on underlying discriminatory motives.<sup>65</sup> According to Wattier, the decision of whether to ban ritual slaughter without prior stunning is one which has ‘vexed most European policy makers’ in recent years<sup>66</sup> and bans similar to those in Flanders and Wallonia have been adopted in other Council of Europe states including Cyprus, Denmark, Iceland, Norway and Sweden.<sup>67</sup>

In assessing the Strasbourg Court’s ruling, it is necessary to bear the sensitivity of the issue in mind, as well as the fact that the Belgian decrees had already been subject to a ‘double review’ (at the ECJ<sup>68</sup> and by the Belgian Constitutional Court<sup>69</sup>) ever before coming to Strasbourg. In its preliminary ruling, the ECJ determined that although the decrees interfered with the right to freedom of religion, as protected by the EU Charter of Fundamental Rights, this interference was lawful and proportionate to the objectives pursued. In addition, the ECJ highlighted that the decrees were limited to imposing prior stunning without prohibiting the ritual act as such. Thus, they met an ‘objective of general interest’ recognised by the Union and complied with the requirement of proportionality.

Moreover, as regards the proportionality requirement, the ECJ referred to the Strasbourg Court’s ruling in *S.A.S. v France*, which stated ‘[t]he State should thus, in principle, be afforded, within the scope of Article 9 of the ECHR, a wide

<sup>65</sup>J.A. Rovinsky, ‘The Cutting Edge: The Debate over Regulation of Ritual Slaughter in the Western World’, 45 *California Western International Law Journal* (2014) p. 79. In the context of the bans in Belgium, Maram Stern, executive vice president of the World Jewish Congress, remarked that the ECtHR’s ‘ill-advised decision that perpetuates discrimination against Belgian Jews and Muslims is deplorable. This ruling is a backwards step, not a matter of animal welfare but a clear suppression of religious freedom and liberty. We cannot stand idly by as instances of religious persecution unfold’: see World Jewish Congress, ‘European Court’s Decision on Ritual Slaughter Ban in Belgium’, 14 February 2024, <https://www.worldjewishcongress.org/en/news/world-jewish-congress-executive-vice-president-maram-stern-condemns-european-courts-decision-on-ritual-slaughter-ban-in-belgium>, visited 6 January 2025. See also Islamic Research & Information Center, ‘European Court of Human Rights Upholds Belgium’s Halal Slaughter Ban’, *IRIC*, 3 July 2024, <https://iric.org/european-court-of-human-rights-upholds-belgiums-halal-slaughter-ban/>, visited 6 January 2025: ‘Many Muslims in Belgium believe that the ban is not just a matter of animal welfare but also an infringement on their religious freedom and a reflection of broader societal prejudices against Muslims.’

<sup>66</sup>Wattier, *supra* n. 6, p. 264.

<sup>67</sup>Such measures have also been adopted in Finland (province of Åland), Germany (with temporary exceptions and under strict conditions), Slovenia (with an exception for the slaughter of poultry, rabbits and hares by private individuals) and Switzerland (with the exception of poultry). Furthermore, in Estonia, Finland (other provinces), Lithuania and Slovakia, the practice of post-cut stunning, whereby the animal is stunned at the moment of or just after slaughter, has been made compulsory for ritual slaughter. See *Executief van de Muslims van België and Others v Belgium*, *supra* n. 1, para. 39.

<sup>68</sup>*Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering* (GC), *supra* n. 5.

<sup>69</sup>C.C., n° 117/2021, 30 September 2021 and C.C., n° 118/2021, 30 September 2021, available at <https://www.const-court.be/en>, visited 6 January 2025.

margin of appreciation in deciding whether, and to what extent, a limitation of the right to manifest religion or beliefs is “necessary”.<sup>70</sup> The ECJ also considered whether it was discriminatory to ban ritual slaughter while allowing for the killing of animals without prior stunning during cultural and sporting activities.<sup>71</sup> It found that the two activities were incomparable, as the latter could not be reasonably understood as a food production activity.<sup>72</sup> Moreover, hunting and recreational fishing cannot be carried out in respect of animals which have been stunned beforehand.<sup>73</sup>

When a national court submits a preliminary ruling to the ECJ, it is bound by the interpretation of EU law it receives from that court.<sup>74</sup> Thus, Wattier explains that in light of the ECJ’s opinion it ‘was predictable that the [Belgian] Constitutional Court would rule that the Flemish and Walloon decrees do not violate the Constitution read in combination with EU law’.<sup>75</sup> Moreover, while it would have been possible for the Belgian Constitutional Court to find that the decrees violated the Belgian Constitution, it ‘is more accustomed to following the teachings of the supreme courts, especially because it considers, in matters of fundamental rights, that the articles of the Belgian Constitution form an “indissociable whole” with the rights protected in an identical way by international conventions and treaties (here religious freedom)’.<sup>76</sup>

As the discriminatory nature of the ban, as well as the interference it created with the right to freedom of religion, was addressed not only by the Belgian Constitutional Court but also the ECJ, it is clear that on the basis of subsidiarity and in light of the judicial dialogue between courts it would have been difficult for Strasbourg to adopt a different position. However, as recognised by the majority judges themselves, while the protection of animal welfare is recognised as a general objective of EU law, this is not the case under the ECHR. Thus, the interests to be balanced could have been weighed up differently: just as the Belgian Court *could have* found a violation of the Belgian Constitution, the Strasbourg Court *could have* found a violation of the ECHR. The discussion that follows explains why we believe that a different balance should have been struck in this case. It highlights three key issues with the Chamber judgment: the process-based approach adopted by the Court; the (seemingly) hyperflexible introduction of new legitimate aims;

<sup>70</sup>*Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering* (GC), *supra* n. 5, para. 67; ECtHR 1 July 2014, No. 43835/11, *S.A.S. v France* (GC), para. 129.

<sup>71</sup>*S.A.S. v France* (GC), paras. 82-95.

<sup>72</sup>*Ibid.*, para. 90.

<sup>73</sup>*Ibid.*, para. 91.

<sup>74</sup>ECJ 3 February 1977, Case 52-76, *Luigi Benedetti v Munari F.lli s.a.s.*, para. 27; *Centraal Israëlitisch Consistorie van België and Others v Vlaamse Regering* (GC), *supra* n. 5.

<sup>75</sup>Wattier, *supra* n. 6, p. 277.

<sup>76</sup>*Ibid.*, p. 278.

and the comparability of the applicants with other groups for whom an exception was made.

*Process-based review of parliamentary measures and minority rights*

Over the last 10–15 years, especially since the adoption of the Brighton Declaration in 2012, scholars have detected a ‘procedural turn’ in the Court’s jurisprudence.<sup>77</sup> Generally speaking, this refers to a shift in the Court’s approach towards a process-based style of review, whereby it focuses more on the quality of domestic processes in its adjudication of substantive rights cases.<sup>78</sup> A particularly novel aspect of the ‘procedural turn’ is the use of process-based review for parliamentary measures under the ‘general measures doctrine’, as seen in *Executief van de Moslims van België*.<sup>79</sup> Famously applied in the seminal case *Animal Defenders International v the United Kingdom*, the general measures doctrine means that when assessing the proportionality of a general measure ‘the Court must primarily assess the legislative choices underlying it’.<sup>80</sup> In this context, ‘the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance . . . including to the operation of the relevant margin of appreciation’.<sup>81</sup>

This approach, referred to as procedural rationality review by Popelier, has long been controversial as it enables the Court to refrain from ruling on issues of principle.<sup>82</sup> Indeed, in his concurring opinion in *L.B. v Hungary*, Judge Kūris complained that this line of reasoning had become a ‘lifebelt for the Court’ in cases where it was not ready to harshly criticise a measure itself.<sup>83</sup> While the circumstances of *L.B. v Hungary* and *Executief van de Moslims van België* are

<sup>77</sup>O.M. Arnardóttir, ‘The “Procedural Turn” under the European Convention on Human Rights and Presumptions of Convention Compliance’, 15 *International Journal of Constitutional Law* (2017) p. 9.

<sup>78</sup>See generally J. Gerards, ‘Procedural Review by the ECtHR – A Typology’, in J. Gerards and E. Brems (eds.), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) p. 127.

<sup>79</sup>*Executief van de Moslims van België and Others v Belgium*, *supra* n. 1.

<sup>80</sup>ECtHR 22 April 2013, No. 48876/08, *Animal Defenders International v the United Kingdom* (GC), paras. 108–109.

<sup>81</sup>*Ibid.*

<sup>82</sup>P. Popelier, ‘Procedural Rationality Review after *Animal Defenders International*: A Constructively Critical Approach’, 2 *EuConst* (2019), p. 272.

<sup>83</sup>ECtHR 9 March 2023, No. 36345/14, *L.B. v Hungary* (GC), concurring opinion Judge Kūris, para. 17. See generally H. Ní Chinnéide, ‘Balancing Privacy and the Public Interest: The Application of the “General Measures” Doctrine in *L.B. v Hungary* in the Absence of Any Substantive Proportionality Assessment: ECtHR 9 March 2023, No. 36345/14, *L.B. v Hungary*’, 20 *EuConst* (2024) p. 146.

entirely different,<sup>84</sup> in both cases the application of process-based review enables the Court to effectively sidestep a sensitive issue. In the former case, flaws in the domestic parliamentary review of measures that mandated the publication of taxpayer data led the Court to find a violation of Article 8. In the latter, a positive assessment of the judicial and parliamentary review of a measure restricting the rights of a religious minority led the Court to accept that the ECHR had not been violated, as previously seen in *S.A.S. v France*<sup>85</sup> and *Belcacemi and Oussar v Belgium*<sup>86</sup> which concerned bans on the Islamic face-veil.

The Court's rulings in the face-veil cases have been subject to extensive analysis and both the bans themselves and the processes by which they were adopted have been subject to intense criticism. In particular, Ouald Chaib and Brems have described the bans as 'extreme examples of legislative processes taking part over the heads of those concerned'.<sup>87</sup> Based on an extensive examination of the process leading to the adoption of the bans in both states, they explain that the 'voice of the women concerned was missing from debates and ... a discussion of the ban's human rights impact was nearly non-existent'.<sup>88</sup> And yet, the Court readily accepted the quality of the domestic review and as a consequence, the proportionality of the face-veil bans. It should be noted that while Ouald Chaib and Brems comments were made in relation to another case concerning Article 9, they could equally be applied in the context of measures restraining the rights of minorities under other Convention provisions.

The case of *Executief van de Moslims van België* points to another issue with the application of process-based review in the context of parliaments – namely, the imperfect nature of the process-efficacy rationale.<sup>89</sup> As recognised by Nußberger, former Judge at the Court, there is no guarantee that good processes will lead to good outcomes: an ECHR-compliant process may lead to the adoption of a measure which is incompatible with the rights enshrined therein.<sup>90</sup> The inherently majoritarian nature of the democratic legislative process renders the application of process-based review necessarily problematic in the context of minority rights. While it is commendable that the Flemish and Walloon parliaments

<sup>84</sup>Note that in *L.B. v Hungary* (ibid.), the Grand Chamber found a violation of Art. 8.

<sup>85</sup>ECtHR 1 July 2014, No. 43835/11, *S.A.S. v France* (GC).

<sup>86</sup>ECtHR 11 July 2017, No. 37798/13, *Belcacemi et Oussar v Belgium*.

<sup>87</sup>S. Ouald-Chaib and E. Brems, 'Doing Minority Justice through Procedural Fairness: Face Veil Bans in Europe', 2 *Journal of Muslims in Europe* (2013) p. 2.

<sup>88</sup>Ibid.

<sup>89</sup>For a discussion of process-efficacy rationale see E. Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights', in J. Gerards and E. Brems (eds.), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) p. 19.

<sup>90</sup>A. Nussberger, 'Procedural Review by the European Court of Human Rights – View from the Court', in Gerards and Brems, *supra* n. 89, p. 167.

commissioned various expert reports and consulted with representatives of affected groups, this does not mean that the rights of observant Muslims and Jews were properly protected in the resulting decrees. Giving voice to members of minority groups in the parliamentary process may amount to an empty procedural guarantee if their voices ultimately remain unheard. In the ritual slaughter case, the Court explicitly stated that it was not in a position to assess the nature and importance of individual convictions. However, by finding that the measure was proportionate as it allowed for non-lethal slaughter in the cases of religious slaughter, the Court effectively did just that – it interpreted the exception made in the legislation as a valid way of accommodating the applicants' belief despite their explanation that it was not.

Setting this to one side, however, if we accept the outcome of the Court's assessment and its choice to adopt a process-based approach, another question arises concerning the weight it accorded to the argument that no less restrictive means could have been employed to achieve the aims pursued. As noted by Judge Yüksel, this became central to its assessment. In her concurring opinion, Judge Koskelo explained that in three previous Grand Chamber judgments (*Animal Defenders*, *Vavříčka and Others v Czech Republic*, *L.B. v Hungary*)<sup>91</sup> as well as in *Gaughran v the United Kingdom*,<sup>92</sup> the Court explicitly found that the proportionality of a general measure does not turn on the question of whether less restrictive means could have been adopted, but on whether the state overstepped its margin of appreciation. In determining this, the quality of the domestic review becomes important. Thus, the Court's approach in *Excutief van de Moslims van België* introduces a degree of inconsistency into the application of already controversial and ill-defined doctrine, exacerbating existing confusion in the jurisprudence.

### *Hyper-flexible introduction of legitimate aims*

The identification of the 'pursued legitimate aim' behind an interference is an important aspect of the Court's investigation.<sup>93</sup> During this check, the Court investigates whether the proposed aims are legitimate in the sense of the ECHR.<sup>94</sup> When the Court investigates the legitimacy of aims it does so in light of the aims mentioned in the article that is interfered with from the ECHR. For Article 9, these are: 'the interests of public safety, for the protection of public order, health or

<sup>91</sup>*Animal Defenders v the United Kingdom* (GC), *supra* n. 80; ECtHR 8 April 2021, No. 47621/13 and others, *Vavříčka and Others v Czech Republic* (GC); *L.B. v Hungary* (GC), *supra* n. 83.

<sup>92</sup>ECtHR 13 February 2020, No. 45245/15, *Gaughran v the United Kingdom*.

<sup>93</sup>N.U. Orcan, 'Legitimate Aims, Illegitimate Aims and the E.Ct.HR: Changing Attitudes and Selective Strictness', 7 *University of Bologna Law Review* (2022) p. 7 at p. 12.

<sup>94</sup>*Ibid.*, p. 12.



morals, or for the protection of the rights and freedoms of others'.<sup>95</sup> A member state cannot limit the freedom to manifest one's religion or belief unless it is necessary for one of these interests but the Court has given itself some flexibility by dynamically interpreting certain novel aims into the exhaustive list of stated legitimate aims.

We first want to mention that when the EU identifies something as a policy objective, this does not mean it automatically has the status of a legitimate aim or interest under the ECHR. This means that the ECtHR can only take policy objectives considered by the ECJ into account when they align with the ones in the ECHR. For instance, in the *Achbita* case, the ECJ referred to freedom to conduct a business as recognised by Article 16 of the Charter as a legitimate aim for which to limit individual freedom of religion.<sup>96</sup> Yet, this is not a right protected under the ECHR and thus could not be read into the 'protection of the rights and freedoms of others' by the ECtHR. In *Eweida and Others v the United Kingdom*, however, the ECtHR did take 'the employer's wish to project a certain corporate image' into account as an 'undoubtedly' legitimate aim but argued that the national courts gave too much weight to it when balancing it against the individual's right to manifest one's religion.<sup>97</sup> So, the weight of this 'interest' as compared to other ECHR rights was limited there.

Second, we want to present our observations about the ease with which the Court accepts 'new' legitimate aims that are proposed by contracting states, especially where they are used to justify interferences with the rights of marginalised minorities. Previously, in another religious slaughter case, *Cha'are Shalom Ve Tsedek v France*,<sup>98</sup> the Court accepted the legitimate aims of public order and public health that were put forward by France to justify its refusal to grant the Jewish liturgical association the approval necessary for access to slaughterhouses with a view to performing ritual slaughter. In another French case, mentioned above, *S.A.S. v France*, the Grand Chamber brought the need to ensure 'living together' under the legitimate aim 'protection of the rights and freedoms of others' that is included in the text of the ECHR.<sup>99</sup> In the *S.A.S.* case, the majority seemed to have been aware of the risks of such an approach as it stressed that 'the flexibility of the notion of "living together" and the resulting risk of abuse' would have to trigger a careful examination of the necessity of the interference. Two judges, Nußberger and Jäderblom, appear to disagree with the

<sup>95</sup>Art. 9 ECHR.

<sup>96</sup>ECJ 15 March 2017, Case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, paras. 38-39.

<sup>97</sup>ECtHR 15 January 2013, Nos. 48420/10, 59842/10, *Eweida and Others v the United Kingdom*, para. 94.

<sup>98</sup>ECtHR 27 June 2000, No. 27417/95, *Cha'are Shalom Ve Tsedek v France* (GC).

<sup>99</sup>ECtHR 1 July 2014, No. 43835/11, *S.A.S. v France* (GC).



introduction of this ‘new aim’ entirely and described it as ‘far-fetched’ and ‘vague’.<sup>100</sup> Following the judgment, various scholars pointed out the majoritarian morality that is present in the notion of ‘living together’. Under such a morality, members of a minority group need to adapt to the preferences of majoritarian cultural norms or preferences.<sup>101</sup> In a similar vein, Judges Spanó and Karakaş rightly stressed in a concurring opinion in *Belcacemi and Oussar v Belgium*,<sup>102</sup> that ‘an aim which is invoked as a basis for restricting human rights and which is in fact based on an ephemeral majority conception of what is proper and good, without the majority being required to define concretely the harm or evils which clearly need to be remedied, cannot in principle form the basis for justifiable restrictions on the rights guaranteed by the ECHR in a democratic society’ (authors’ translation). We can see a similar approach being accepted in the judgment at hand; animal welfare surfaces as a new majoritarian legitimate aim that is introduced to the detriment of the ever-targeted minority groups.

The abovementioned judges proposed within their separate opinion in the *Belcacemi* case a ‘religious intolerance test’.<sup>103</sup> This would entail that when the Court is confronted with a translation of majoritarian sentiments into legislation with a detrimental impact on vulnerable groups, it has ‘a duty to investigate and detect, as far as possible, whether the imposition of measures which have nevertheless been largely endorsed by the legislative sphere is motivated by hostility or intolerance towards a particular idea, opinion or religious denomination’.<sup>104</sup> Such a disadvantage test was also proposed by Van de Graaf in the case of *Georgian Muslim Relations and Others v Georgia*, in which the Court had to deal with the motivation behind protests against a Muslim boarding school in Georgia.<sup>105</sup> Had the majority completed such a test in the present case, it might have reached a different conclusion in its deliberations. Of course, ingraining such a ‘test’ into the Court’s case law would impose a huge evidentiary burden on the applicant. In a recent study of political deliberations in the Dutch religious slaughter debate, Jung was able to unmask a racialising dynamic with appeals to

<sup>100</sup>Ibid., joint partly dissenting opinion of Judges Nußberger and Jäderblom, para 5.

<sup>101</sup>H. Yusuf, ‘SAS v France: Supporting “Living Together” or Forced Assimilation?’, 3 *International Human Rights Law Review* (2014) p. 277; E. Daly, ‘Fraternalism as a Limitation on Religious Freedom: The Case of SAS v. France’, 11 *Religion & Human Rights* (2016) p. 140.

<sup>102</sup>ECtHR 11 July 2017, No. 37798/13, *Belcacemi and Oussar v Belgium* (concurring opinion Judges Spano and Karakaş).

<sup>103</sup>Ibid., para. 9.

<sup>104</sup>Ibid.

<sup>105</sup>C. Van de Graaf, ‘Georgian Muslim Relations and Others v. Georgia – A Bleeding Pig’s head and Other Expressions of Religious Hatred with No Police Intervention’, *Strasbourg Observers*, 23 April 2024, <https://strasbourgobservers.com/2024/04/23/georgian-muslim-relations-and-others-v-georgia-a-bleeding-pigs-head-and-other-expressions-of-religious-hatred-with-no-police-intervention/>, visited 6 January 2025.

civilisation, accusations of barbarism and dystopian warnings against Islamisation as frequent discursive elements.<sup>106</sup> Yet, for the Court, it would be quite a difficult task to assess such material if it were to be submitted as part of an application. Overall, the complete absence of any reflection on whether ulterior motives played a role in deciding on this particular measure to improve animal welfare is surprising.

Nußberger and Jäderblom referred in their separate opinion in *S.A.S. v France* to other examples of face coverings ‘perfectly rooted in European culture’ such as skiing or the wearing of costumes during carnival, which nobody would claim go against the newly proposed legitimate aim of ‘living together’. With this, they suggest there is indeed something else underlying the imposition of the measure. Earlier, they argued that also for practices that are further removed ‘from the traditional French and European lifestyle’, there exists no right not to be shocked or provoked by different models of cultural or religious identity. The presence of an ulterior motivation has been pointed out with regard to prohibitions of religious slaughter.<sup>107</sup> Andrew Brown has signalled the hypocrisy or – in his words – ‘monstrous absurdity’ of complaining about the halal or kosher slaughter of ‘battery chicken or factory farmed veal’.<sup>108</sup> While it is difficult to dismiss the importance of striving for a higher level of animal welfare, to focus on ‘animals’ final minutes instead of their lifetime of quotidian suffering in factory farms seems highly suspicious’.<sup>109</sup> Especially considering that, even within these final minutes, for approximately 10 million animals each year, pre-slaughter stunning fails on the first try. Such a failure then causes the animal to suffer extremely.<sup>110</sup> Yet, to the detriment of animal welfare, factory farming is ‘perfectly rooted in European culture’.

<sup>106</sup>M. Jung, ‘Religion, Animals, and Racialization: Articulating Islamophobia through Animal Ethics in the Netherlands’, 13 *Religions* (2022) p. 955.

<sup>107</sup>H. Ní Chinnéide and C. Van de Graaf, ‘Prohibition of Religious Slaughter in Executief van de Moslims van België v. Belgium: Process-based Review and a New Legitimate Aim’, *Strasbourg Observers*, 26 April 2024, <https://strasbourgobservers.com/2024/04/26/prohibition-of-religious-slaughter-in-executief-van-de-moslims-van-belgie-and-others-v-belgium-process-based-review-and-a-new-legitimate-aim/>, visited 6 January 2025.

<sup>108</sup>A. Brown, ‘Denmark’s Ritual Slaughter Ban Says More about Human Hypocrisy than Animal Welfare’, *Guardian*, 20 February 2014, <https://www.theguardian.com/commentisfree/andrewbrown/2014/feb/20/denmark-halal-kosha-slaughter-hypocrisy-animal-welfare>, visited 6 January 2025.

<sup>109</sup>Ní Chinnéide and Van de Graaf, *supra* n. 107.

<sup>110</sup>Opinion of the Scientific Panel on Animal Health and Welfare on a request from the Commission related to welfare aspects of the main systems of stunning and killing the main commercial species of animals (Question N° EFSA-Q-2003-093) adopted on the 15th of June 2004, 45 *The EFSA Journal* (2004) p. 1, <https://efsa.onlinelibrary.wiley.com/doi/epdf/10.2903/j.efsa.2004.45>, visited 6 January 2025.

The Court needs to exercise caution when dynamically reading ‘new’ legitimate aims into the exhaustive list included in Article 9(2) and clear boundaries need to be drawn up to avoid arbitrariness.<sup>111</sup> While it is not common for the Court to imply that an interference violated the ECHR because it did not pursue a ‘legitimate aim’, this step in the analysis should be done more critically and at least carry some weight in on the proportionality analysis.<sup>112</sup>

*Comparability of the applicants with groups for which exception was made*

In the last part of the judgment, the Court deals with the question of whether the applicants had suffered discrimination in the exercise of their freedom of religion. Although concise, the Court undertakes three comparator tests to identify whether discrimination took place in the case at hand. Our commentary will only go into the first comparison executed by the Court. Especially, when one compares the situation of hunters and anglers and practising Jews and Muslims, it is quite difficult to justify interfering with an individual’s ECHR right over interfering with an individual’s recreational activity. Yet, the Court sidesteps the need to examine whether an objective and reasonable justification exists for the disputed difference in treatment because it does not find the two groups to be in an analogous or comparable situation.

The Court correctly acknowledges that it is beyond its role to assess the compatibility of hunting and fishing with animal welfare.<sup>113</sup> However, it subsequently asserts that the circumstances surrounding the killing of farmed animals differ from those in which wild animals are killed. This assertion is not entirely accurate. In Belgium, for instance, fishing clubs frequently stock ponds with fish bred on fish farms to enhance the fishing experience for their members. Additionally, the release of farm-reared animals into the wild for hunting purposes is allowed in several Council of Europe member states. Hunters and anglers are looking to experience hunting or fishing as a natural or wild experience.

<sup>111</sup>For instance, the Polish Constitutional Tribunal has investigated a similar case on religious slaughter and came to the conclusion that animal welfare was not a value within its constitutional order of rights and freedoms that could be relied on as a legitimate aim to restrict freedom of religion: Polish Constitutional Tribunal of 10 December 2014, K 52/13 (2014) ZU OTK-A 11. This was mentioned in A. Młynarska-Sobaczewska et al., ‘Public Morality as a Legitimate Aim to Limit Rights and Freedoms in the National and International Legal Order’, 1 *Contemporary Central & East European Law* (2019) p. 14.

<sup>112</sup>R. Perrone, ‘Public Morals and the European Convention on Human Rights’, 47 *Israel Law Review* (2014) p. 365.

<sup>113</sup>In this judgment, the Court was tasked with judging the interference with the applicants’ rights *in concreto* and is not asked to present a general reflection on which specific interventions may be needed to improve animal welfare across the Council of Europe States *in abstracto*. We do not want to claim that it is what the Court is meant to do in its reasoning either.

Previously, the Court has held that eliminating the ‘hunting and killing of animals for sport in a manner which the legislature judged to cause suffering and to be morally and ethically objectionable’ actually did serve the legitimate aim of the protection of public morals.<sup>114</sup> So, it is unclear why – in this case – that desire warrants special protection, while adhering to a religious requirement to consume meat that is slaughtered in a specific manner does not. Harpaz and Reich note, for example, that Jewish law prohibits hunting animals for sport or entertainment due to its inhumane nature.<sup>115</sup> They suggest that this demonstrates a concern for animal welfare that predates its consideration by Western legislators.

A rule that disproportionately impacts two religious minorities while allowing exceptions for hobby groups should prompt strict scrutiny and a test for substantial justification. The issue is not whether the applicants’ situation is identical to that of hobby group members, but rather that they are in a comparable situation to others who are treated differently.<sup>116</sup> For both groups, prior sedation of an animal is not feasible – due to religious mandates for one group and the nature of the hobby for the other. Both groups seek an exception to protect their method of killing animals, and the effect on the legitimate aim of animal welfare is similar. However, one group was granted an exception while the other was not.

## CONCLUSION

While recognising the sensitive nature of this case and the significance of animal welfare, we have some reservations about both the approach adopted by the Court and the conclusion reached. In the discussion above, we have highlighted three of these.

First, the Court’s reliance on process-based review aligns with the principle of subsidiarity and the procedural turn apparent in its jurisprudence in recent years. The judgment starkly illustrates the risks of this approach when applied in cases concerning minority rights. While robust consideration of conflicting positions during the legislative process is desirable there is no guarantee that that this will lead to an ECHR-compliant outcome. In cases concerning minority rights in particular, the Court should exercise extreme caution in applying a process-based approach and avoid sidestepping any substantive issues raised. Furthermore, the Court’s actual application of process-based review and its focus on whether

<sup>114</sup>ECtHR 24 November 2009, Nos. 16072/06 and 27809/08, *Friend v United Kingdom*, para. 50.

<sup>115</sup>G. Harpaz and A. Reich, ‘Kosher and Halal Slaughtering Before the Court of Justice: A Case of Religious Intolerance’, 28 *European Public Law* (2022) p. 35.

<sup>116</sup>ECtHR 13 July 2010, No. 7205/07, *Clift v the United Kingdom*.

less-restrictive measures were feasible in this context, adds additional complexity and an unwelcome degree of inconsistency to the case law.

Second, the Court's ready acceptance of a new legitimate aim justifying the restriction of the rights of religious minorities under Article 9 seems to confirm a trend towards accepting novel majoritarian aims advanced by contracting states to justify interferences with minority, religious rights. Such an approach was seen in *Cha'are Shalom Ve Tsedek v France* and *S.A.S. v France*, where the aims of public order, public health, and the broader notion of 'living together' were readily embraced by the Court at the expense of minority protection. Although the protection of animal welfare is important, in cases concerning religious minority rights strict scrutiny should be applied to any novel legitimate aim introduced and possible ulterior motives behind the legislation considered. The religious intolerance test proposed by dissenting judges in the *Belcacemi* case could provide a more rigorous framework for evaluating whether measures, despite being endorsed by legislative bodies, are driven by underlying hostility towards specific religious practices. Such a test might reveal hidden biases that skew the legislative process against minority groups. The absence of such an examination in this case is unfortunate, especially given the history of controversial and discriminatory rhetoric surrounding religious slaughter practices in Belgium.

Finally, in evaluating whether the applicants faced discrimination in the exercise of their religious freedoms, the Court fails to adequately justify why recreational activities like hunting and fishing are not comparable to ritual slaughter and why the former merits special protection. By choosing not to assess whether the difference in treatment between these groups is objectively and reasonably justified, the Court sidesteps a crucial aspect of equality and non-discrimination.

**Harriet Ni Chinnéide**, PhD, is a Researcher, Hasselt University, Belgium. IBOF Project: Future Proofing Human Rights: Developing Thicker Forms of Accountability (<https://futureproofinghumanrights.org/>).

**Cathérine Van de Graaf** is a Postdoctoral researcher at Ghent University, Belgium. She is also leading an investigation into the trajectory of discrimination complaints within the joint project 'Who is the Court for? Bringing the Human (back) into Human Rights' Research at the Academy for European Human Rights Protection (University of Cologne).

