Prohibition of religious slaughter in Executief van de Moslims van België and others v. Belgium: Process-based review and a new legitimate aim

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/

April 26, 2024

Harriet Ní Chinnéide & Dr. Cathérine Van de Graaf

In *Executief van de Moslims van België and others v Belgium* the European Court of Human Rights (the ECtHR, the Court) assessed the compatibility of decrees adopted in Flanders and Wallonia banning the slaughter of animals without prior stunning, as practiced by observant Muslims and Jews who eat Halal or Kosher meat. While these bans exceptionally allow such stunning to be reversible/non-lethal in the context of religious slaughter, the applicants alleged that they were discriminatory and incompatible with the right to freedom of religion. Echoing the previous findings of the European Court of Justice (CJEU), the ECtHR found that this was not the case.

The complex and sensitive nature of this case can hardly be overstated, particularly in light of the CJEU's previous consideration and acceptance of the ban and the value which should rightly be accorded to the protection of animal welfare. However, this judgment raises serious questions about the Court's attitude to the right to freedom of religion under Article 9 and its approach to evaluating general restrictions thereof.

In this blogpost, we will focus on three issues in particular: the limited/non-existent protection of minority rights resulting from the Court's application of process-based review; the flexible introduction of (new) legitimate aims and the heavy weight accorded thereto; and the comparability of the applicants with groups for which an exception was made.

Facts

The case concerns decrees prohibiting the slaughter of animals without prior stunning in Flanders and Wallonia. The applicants are seven organisations, representing Muslims in Belgium and thirteen 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 or impossible, for them to slaughter or to obtain meat from animals slaughtered according to their religious beliefs.

The bans were introduced after a state reform made animal welfare 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 Court of Justice of the European Union (CJEU) concerning the Flemish Region's decree. In 2020, the Grand Chamber of the CJEU found that EU law did not preclude a Member State

from adopting legislation requiring a reversible non-lethal stunning process in the context of ritual slaughter. 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 (CFR). Following this, in 2021, the Constitutional Court dismissed the applicants' complaints regarding the decrees.

Before the ECtHR, the applicants complained that the bans violate Article 9, alone and in conjunction with Article 14.

Judgment

Concerning the alleged violation of Article 9, the Court found that there had been a lawful interference with the applicants' rights. What remained to be established was whether this pursued a legitimate aim and was necessary in a democratic society. The Court was therefore called on to assess for the first time whether animal welfare could be linked to one of the legitimate aims set out in Article 9.2. On this point, it began by acknowledging that unlike EU law which establishes the protection of animal welfare as a general objective, the ECHR is not intended to protect animal welfare per se. However, the protection of public morals to which Article 9.2 refers cannot be understood as aiming solely at the protection of human dignity in relationships between individuals. Emphasizing the inherently evolutive nature of morality and the "living instrument" doctrine, the Court found that animal welfare could be linked to the conception of public morals, constituting a legitimate aim under Article 9.2.

The Court then addressed the necessity of the measure. As the case concerned relations between the State and religions and an issue upon which there was no clear consensus between member states but a discernible, gradual, evolution towards greater protection of animal welfare, the Court found that the State's margin of appreciation 'could not be a narrow one.' The prohibition at issue was the result of a deliberate choice made by the federal legislature following a carefully considered parliamentary process. The Court needed to 'exercise restraint in its review of the conventionality of a choice made democratically within the society in question' (para 105). In this context, the quality of the domestic parliamentary and judicial scrutiny of the measure was of particular importance.

As to the parliamentary review of the measure, the Court noted that the decrees were adopted following extensive consultation with representatives of various religious groups, veterinary surgeons and animal protection associations and that considerable efforts had been made by the federal legislatures to reconcile as far as possible the objectives of promoting animal welfare and freedom of religion. The preparatory works showed that measures were discussed in light of freedom of religion. The domestic legislators had examined their impact and conducted a lengthy proportionality analysis.

On the judicial review of the measure, the Court was very conscious of the fact that the bans had been examined by both the Belgian Constitutional Court and the CJEU and that both of them had taken detailed account of the requirements of Article 9 ECHR. The CJEU had found that the imposition of a reversible and non-lethal stunning requirement

was compatible with the CFR and the Constitutional Court had delivered a well-reasoned decision upholding the constitutionality of the bans. Further, both courts had found that the decrees were based on a scientific consensus that stunning animals before they are killed is the best way to reduce their suffering. The ECtHR saw no serious reason to call their findings into question.

Citing one of its recent advisory opinions, the ECtHR stated that for a measure to be proportionate it must not restrict an individual's Article 9 rights any more than necessary to achieve the legitimate aims pursued. The decrees at issue allowed a reversible stunning method to be used in cases of religious slaughter. On the basis of scientific studies and extensive consultation with interested parties, the parliaments had concluded that no less restrictive measure could achieve this aim. The Court accepted their assessment. While it was not for the Court to say whether this alternative fulfilled the requirements of the religious precepts referred to by the applicants, the existence thereof convinced it that the authorities had sought to weigh up competing rights and interests. Thus, the ban fell within the State's margin of appreciation and was compatible with Article 9. As regards the applicants' complaints that the bans would render it difficult if not impossible for them to obtain meat in conformity with their religious beliefs, the Court noted that the decrees did not prohibit consumption of meat from other countries or meat produced in the Bruxelles-Capitale region.

The applicants claimed that the decrees were discriminatory for several reasons. As regards the applicants' complaint that they were treated differently from hunters or fishermen who were excluded from the scope of the legislation, the Court found that the two groups were not in an analogous or comparable situation. Therefore, the State did not have to provide an objective justification for the alleged difference in treatment. As regards the applicants' situation compared to that of the general population who were not subject to religious dietary precepts, the Court highlighted the fact that the decrees allowed for non-lethal or reversible stunning in the case of religious slaughter. In this way, it distinguished between different situations and did not treat them in the same way. Finally, as to the situation of the applicants who were Jewish compared to Muslims, 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. The decrees did not violate Article 14 taken together with Article 9.

Judge Koskelo joined by Judge Kūris, expressed a concurring opinion, as did Judge Yüksel.

Commentary

1. Procedural Proportionality Review of Parliamentary Measures & Minority Rights

In assessing the proportionality of the measure under Article 9.2, the Court had recourse once again to procedural proportionality review. The Court focused more on the quality of the domestic judicial and parliamentary review of the measure than their substantive

impact on the rights of those affected. Initially applied in the seminal 2012 *Animal Defenders* ruling, this approach has long been controversial as it enables the Court to refrain from ruling on issues of principle. Recently, in his concurring opinion in *L.B. v Hungary*, Judge Kūris complained that this line of reasoning has become a 'lifebelt for the Court' in cases where it is not ready to harshly criticise a measure itself. While the circumstances of these two cases are entirely different, arguably, the procedural approach adopted serves the same purpose: enabling the Court to effectively sidestep a sensitive issue. Here, as in *S.A.S. v France*, a positive review of the domestic process helps the Court to justify its acceptance of a very problematic measure.

The issue at hand is quite sensitive due to the widespread support for the protection of animal welfare in Europe and the CJEU's 2020 ruling. The ECtHR has a subsidiary role and it must strike a careful balance between advocating for the rights of the applicants who come before it and respecting the role of domestic authorities within the Convention system. In light of this, perhaps we should not be too surprised by the outcome of the case or the procedural approach adopted. And yet, on the level of principle, there were very valid reasons for the Court to go against the ruling of the CJEU – not least, as while the protection of animal welfare is recognized as a general objective of EU law, this is not the case under the ECHR. Pursuant to Article 1, the Court's very *raison d'etre* is to secure the rights enshrined in the Convention to those in its jurisdiction. Article 9 guarantees a substantive right to freedom of religion and Article 9.2 promises that any restrictions thereof will be proportionate… not that they will be subject to adequate review at a parliamentary or a judicial level.

The application of procedural proportionality review of parliamentary measures in the context of minority rights is problematic given the inherently majoritarian nature of the democratic legislative process. While it is commendable that the Flemish and Walloon parliaments commissioned expert reports and consulted with representatives of affected groups, it 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. The application of procedural proportionality review in the earlier face-veil cases (see here and here) already illustrated the danger of applying this approach in cases concerning minority groups. In paragraph 85 of the judgment, the Court notes that it is not equipped to rule on the nature and importance of individual convictions. And yet, the Court does just that by accepting the measure as a valid alternative for religious minorities, despite the applicant's explanation that the "non-lethal" stunning option in the Belgian legislation doesn't meet their religious requirements. No amount of legislative debate or well-reasoned judicial decisions can obviate the fact that on a substantive level this measure constitutes a significant interference with the rights of those affected – members of marginalised religious minorities.

However, even if we accept the Court's process-based approach another question arises concerning the weight it accords to the argument that no less restrictive means could have been employed to achieve the aims pursued. As noted by Judge Yüksel in her

concurring opinion, this question becomes central to its assessment. Furthermore, in her concurring opinion, Judge Koskelo explains in three previous Grand Chamber judgments (*Animal Defenders*, *Vavřička and Others v. Czech Republic*, *L.B. v Hungary*) as well as in *Gaughran v UK*, 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 this case introduces a degree of inconsistency into the jurisprudence, creating greater confusion about a doctrine which is already controversial and ill-defined.

2. Hyper-flexible introduction of legitimate aims

We recognise that the Court has to judge the interference with the applicants' rights *in concreto* and is thus not tasked with a general reflection on which interventions are desperately needed to improve animal welfare across the Council of Europe. Yet, what needs to be noted is the ease with which the Court accepts novel legitimate aims as justification to interfere with minority rights in this case.

In the other religious slaughter case before the Court, *Cha'are Shalom Ve Tsedek v. France*, the legitimate aims of public order and public health were put forward and accepted by the Court. In the Grand Chamber judgment *S.A.S. v. France*, the Court brought the need to ensure 'living together' under the legitimate aim 'protection of the rights and freedoms of others'. The majority did stress 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. Certain judges disagreed with the introduction of this new aim entirely. Judges Nußberger and Jäderblom called it 'far-fetched' and 'vague'. After this judgment, several scholars argued that the foundation of the notion of "living together" can again be found in a majoritarian morality, where the minority needs to adapt to the preferences of a majority or majoritaran cultural norms. Later, in a concurring opinion in *Belcacemi and Oussar v. Belgium*, Judges Spano and Karakaş rightly stressed 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 Convention in a democratic society" (own translation). In the judgment at hand, animal welfare surfaces as a new majoritarian legitimate aim to the detriment of – once again – minority groups.

What the two judges mentioned above propose, is some form of 'religious intolerance test' (see also the discussion in this blogpost). When confronted with a translation of majoritarian sentiments into legislation to the detriment of vulnerable groups, the Court 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" (par. 9). Had the majority completed such a test in the present case, it

would have certainly detected intolerance towards a religious denomination as a motivation behind the proposed bans. Yet, there is no reflection on whether any ulterior motives played a role in deciding on this particular measure to improve animal welfare.

What is interesting to note is that Nußberger and Jäderblom in *S.A.S. v France* mention that for other examples of face coverings "perfectly rooted in European culture" such as skiing or the wearing of costumes during carnival, nobody would claim that they would go against the newly invented legitimate aim of "living together". Thereby signaling that there is something else at play here. Earlier in the judgment, they suggest that even when the distance "from the traditional French and European lifestyle" is bigger, there is no right not to be shocked or provoked by different models of cultural or religious identity. The same hypocrisy can be and has been pointed out with regards to prohibitions of religious slaughter. In a Guardian article, Andrew Brown signals the "monstrous absurdity" of complaining about the halal or kosher slaughter of "battery chicken or factory farmed veal". While nobody can claim that a higher level of animal welfare is not a noble goal, focusing on animals' final minutes instead of their lifetime of quotidian suffering in factory farms seems highly suspicious. Even within these final minutes, for about 10 million animals annually, pre-slaughter stunning fails at the first attempt, causing severe suffering to the animal. Yet, sadly enough, factory farming is "perfectly rooted in European culture".

3. Comparability of the applicants with groups for which an exception was made

The final part of the judgment is devoted to the question of whether the applicants had suffered discrimination in the exercise of their freedom of religion. The Court undertakes three separate – although limited – comparator tests to identify whether discrimination took place *in casu*. Especially, regarding the comparison between hunters and anglers and practising Jews and Muslims, it is clear that there cannot be an acceptable justification for interfering with an individual's Convention right over interfering with an individual's recreational activity. By not finding an analogous or comparable situation, the Court sidesteps the need to examine whether the disputed difference in treatment is based on an objective and reasonable justification.

The Court rightly states that it exceeds its task to rule on the compatibility of hunting and fishing with animal welfare. Yet, it then goes on to state that the conditions of killing farmed animals are different from those in which wild animals are killed. First, this is not entirely true. When it comes to fishing in clubs in Belgium, it regularly happens that ponds are stocked with fish that is produced on fish farms to improve the fishing experience for the members of those clubs. The practice of releasing farm-reared animals into nature for the during hunting season is also permitted in several CoE member states. People who hunt or fish want to experience it as a sort of natural or wild experience. It is not clear how that desire deserves exceptional protection but following a religious prescription to consume meat that is slaughtered in a certain way does not. Harpaz and Reich, for instance, mention that the activity of hunting animals for entertainment or sport is prohibited for being inhumane in Jewish Law. They argue that this reflects a concern for animal welfare before this became of interest to legislators in the Western world. A rule

that disproportionately affects two religious minorities but allows exceptions for hobby groups, should trigger strict scrutiny and a weighty reasons test. Second, the issue is not whether the applicants' situation is analogous to the members of both hobby groups but that they are in a relevantly similar situation to the others treated differently. For both groups, the prior sedation of an animal is not possible, for the one group this is due to a religious precept and for the other because of the nature of a hobby. Both groups ask for an exception that allows for the protection of their manner of killing animals. The impact on the legitimate aim of animal welfare is comparable. Yet, for one group no exception was made.

Conclusion

While acknowledging the sensitive nature of the case and the importance of animal welfare, we have some reservations about both the approach adopted by the Court in this case as well as the outcome reached. In particular, we are skeptical about the Court's application of process based review, hyper-flexible introduction of a new legitimate aim and the comparison made between the applicants and other groups for whom an exception was made.