

PERSPECTIVES

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A Stunning Decision

Did the European Court of Justice signal the end of Kosher butchering across the Continent?

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In late October this year, Greece's supreme court decided to ban kosher (and *halal*) butchering. The decision, criticized by Jewish organizations in harsh language, relied on a much anticipated ruling given by the European Court of Justice in December 2020, which declared that the proposed Belgian ban on Kosher slaughter was an "appropriate" measure in relation to protecting animal welfare and the infringement this posed on religious minorities' freedom to manifest their religion.

What is the legal framework behind this decision, and does the ruling represent a significant change from the status quo in Europe regarding religious ritual slaughter?

Since the 1970s, protecting animal welfare has been a concern for the European Union (then the European Community). The EU's first directive – the "Council Directive on Stunning Animals Before Slaughter" – was enacted in 1974 and required member states (and members of the European Economic Area) to stun animals so that they are unconscious before they are slaughtered.

The directive also exempted religious ritual slaughter, stating that it did "not affect national provisions related to special methods of slaughter which are required for particular religious rites" (Article 4).

In 1993, a broader directive on the protection of animals during slaughter added additional minimum standards. It specified permissible stunning methods, including

electronarcosis (i.e., electrical volts to the animal's head), captive bolt pistol (i.e., striking the animal with a bolt to the head), and carbon dioxide exposure. The 1993 directive also included the religious exemption.

In 2009, new regulations were introduced (effective beginning in 2013), maintaining the stunning requirement for all member states. The regulations exempted religious ritual slaughter. However, they also allowed member states to enact “stricter national rules” to ensure “more extensive protection of animals at the time of killing” (Article 26).

These regulations have arguably opened the door to some of the changes witnessed over the past decade. Indeed, since 2010 there has been a marked shift across Europe regarding the right to perform religious ritual slaughter (i.e., *shechita* and *halal*). Several European states have enacted so-called “bans” on ritual slaughter, which are, in fact, legal requirements to pre-stun or post-stun animals intended for slaughter.

Prior to the enactment of these bans, a certain status quo had existed across Europe in which most states adhered to the EU directives, mandating stunning for all slaughterhouses but exempting ritual slaughter.

Yet, even then, a handful of states still did not allow ritual slaughter, some of them non-EU states but within the European Economic Area. Switzerland has maintained a ban on ritual slaughter since 1893, Norway since 1930, and Sweden since 1936. Poland outlawed ritual slaughter in 2002, but its law was overturned in 2014. Austria has required post-cut stunning since 2004, essentially banning *shechita* and most *halal* slaughter (post-cut stunning is only allowed by some conservative rabbis but has been growing in acceptance among Islamic religious authorities).

Despite these relatively few exceptions, there still existed, until a decade ago, a certain broad agreement in Europe on allowing religious ritual slaughter as part of religious minorities' right to manifest their religion freely. That broad agreement has undoubtedly shifted during the past decade.

In 2013, Iceland, Slovenia, and Estonia banned ritual slaughter. Denmark did so in 2014. The Netherlands temporarily banned ritual slaughter in 2011, and now limits the production of kosher meat to local consumption only and also requires post-cut stunning.

In 2017, the Flemish and Wallonia Regions in Belgium enacted decrees requiring the reversible stunning of animals intended for religious ritual slaughter (which is the subject of the European Court of Justice ruling presented next), in effect banning the practice. Most recently, in late October 2021, Greece's courts banned ritual slaughter. Poland is still attempting to ban exporting kosher and *halal* meat; these efforts are still pending.

Within the above context, the Flemish decree and European Court of Justice ruling is better understood.

In 2017, the Flemish Region enacted a decree requiring stunning be administered to animals in all slaughterhouses, except for those undergoing religious ritual slaughter – for which a “reversible stunning” be applied. To be clear, reversible stunning is not

permitted under *shechita* precepts or generally under *halal* slaughter (although some Islamic religious authorities have come to accept the method).

The decree, in essence, canceled the former exemption given to ritual slaughter and created a ban on all religious ritual slaughter. Jewish and Muslim groups subsequently filed lawsuits before the Belgian Constitutional Court in 2018, alleging violations of their right to freedom of religion.

The Constitutional Court (*Grondwettelijke Hof*) asked the European Court of Justice for a preliminary ruling on whether the reversible stunning requirement was permissible per EU regulations given the alleged infringement of the right to freely manifest one's religion.

The European Court of Justice delivered its ruling in December 2020 and declared that:

*“The application of reversible, non-lethal stunning during the practice of ritual slaughter **constitutes a proportionate measure** which respects the spirit of ritual slaughter in the framework of freedom of religion and takes maximum account of the welfare of the animals concerned.”*

How did the court arrive at this conclusion? First, the main question concerned the limitation posed by the Flemish decree on the right to manifest one's religion freely. As is the case with other human rights (e.g., freedom of expression, freedom of assembly), there is no such thing as an “absolute” right that cannot be limited or infringed upon under certain conditions.

The question is whether such conditions exist and whether any limitations are enacted in a “proportionate manner”; that is, if they are deemed necessary and genuinely meet objectives of general interest (in this case, objectives recognized by the EU) or enacted to protect the rights and freedoms of others.

This is always the balancing act when considering a situation of infringement of rights. The restriction imposed must be shown to have been enacted in a way that, at the very least, regarded the freedom to manifest religion.

Indeed, most of the ruling by the European Court of Justice focused on this very point of whether the reversible stunning requirement was proportionate and done to meet a general interest of the EU and whether the Flemish Parliament considered the right to freedom of religion when it formulated the decree.

To answer these questions, the court considered the scientific research relied upon by the Flemish Parliament that had demonstrated, in the eyes of the court, that:

“Scientific consensus has emerged that prior stunning is the optimal means of reducing the animal's suffering at the time of killing.”

The court argued that the limitation was necessary in order to uphold the EU value of animal welfare. Moreover, it appeared the Flemish Parliament had attempted to mitigate the limitation on the right to freedom of religion by not banning ritual slaughter outright but rather offering the “solution” of reversible stunning, which did

not cause the animal's death. This was deemed to prove that the restriction was made in a manner that considered the right to freedom of religion.

However, it appears that the court went a step further than concluding the reversible stunning requirement had been necessary to uphold a value of interest and had been done in a proportionate manner. The ruling appeared to interpret whether reversible slaughter should affect the kosher or *halal* status of the meat by suggesting that “the fear that stunning would adversely affect bleeding out is unfounded.”

It also suggested that stunning, or electronarcosis, “is a non-lethal, reversible method of stunning, with the result that if the animal's throat is cut immediately after stunning, its death will be solely due to bleeding,” which is one of the requirements of both kosher and *halal* slaughter. That is to say, stunning does not result in the animal's death, and, therefore, religious authorities could accept it within their religious rituals.

In this sense, it seems the judges waded into waters reserved for religious authorities, interpreting religious rather than secular law, and suggesting whether a new method could (or should) be congruent with age-old religious precepts. However, bleeding out and cause of death are not the only requirements of *shechita* or *halal* slaughter.

In deciding on the proportionality of the limitation to freedom of religion, the court could have merely ruled that the limitation was necessary since it met one of the EU's declared objective values – animal welfare.

Moreover, the court could have emphasized, instead of only noted, that the Flemish Decree made this requirement in a manner that ostensibly minimized the infringement on freedom of religion by requiring the reverse stunning option rather than an outright ban (although that is also problematic since the decree does essentially produce that same result).

Would not religious authorities be the appropriate arbiters to answer such questions? This overstepping into religious interpretation could be viewed as hubris or bias, the subtext of which clear: “We can easily navigate and interpret these relatively simple religious precepts and then be able to implement the latest science on them. Problem solved.”

This is not to say that religious establishments should not also change in order to reduce animal suffering. However, it is unlikely that any change will come from a ruling handed down by secular judges opining on religious laws beyond their purview.

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