COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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COMMON MARKET LAW REVIEW

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Ritual slaughter and religious freedom: *Liga van Moskeeën*

Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VWZ and others* v. *Vlaams Gewest*, Judgment of the Court of Justice of 29 May 2018, EU:C:2018:335.

1. Introduction

This case concerns the lack of approved slaughterhouses in the Flemish region of Belgium (Flanders) to meet the demand for the ritual slaughter of animals during the Muslim Feast of Sacrifice and whether this is a violation of the right to freedom of religion as recognized by Article 10 of the Charter of Fundamental Rights of the European Union (hereafter: the Charter). The Muslim Feast of Sacrifice is a yearly celebration organized by practising Muslims who consider it their duty to slaughter an animal, or to have an animal slaughtered, preferably on the first day of the Feast. The meat is eaten by the family and the remainder is given to the poor and needy, to neighbours, and to more distant family relatives. Because of the increase in demand during the Feast, the approved slaughterhouses in some of the Flemish regions do not have enough capacity. Article 10 of the Charter declares that everyone has the right to freedom of thought, conscience and religion and this includes the freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief, in worship, teaching, practice and observance. This right corresponds to Article 9 ECHR. And, as Advocate General Wahl points out, "ritual slaughtering has long been recognized in EU legislation governing the killing of animals as a corollary of religious freedom".[1] In other words, the slaughter of animals according to religious rites can be seen as a manifestation of religion, and thus is protected by Article 10 of the Charter. This can also be deduced from Regulation 1099/2009, the Regulation central to this case, on the protection of animals at the time of killing.[2] Article 4(1) determines that animals shall only be killed after stunning; however, Article 4(4) then contains an exemption for ritual slaughter in the following terms: "In the case of animals subject to particular methods of

1. Opinion of A.G. Wahl, in Case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen*, EU:C:2017:926, para 1.

2. Council Regulation (EC) 1099/2009 of 24 Sept. 2009 on the protection of animals at the time of killing, O.J. 2009, L 303/1.

slaughter prescribed by religious rites, the requirements of paragraph 1 shall not apply provided that the slaughter takes place in a slaughterhouse".

The Court of First Instance in Brussels[3] asked the ECJ whether, in the circumstances of the case, Article 4(4) of Regulation 1099/2009 was invalid because it infringed Article 9 ECHR and Article 10 of the Charter, both guaranteeing the freedom to manifest one's religion, and/or Article 13 TFEU, which contains a duty on the Union and the Member States to mainstream animal welfare. Therefore, the referring court raised two main issues which could be in conflict with each other: freedom of religion and animal welfare. On the one hand, there is the freedom of Muslims in Flanders to manifest their religion by slaughtering an animal according to religious rites on the first day of the Feast of Sacrifice, who were hindered in doing so, which could amount to a violation of their right to freedom of religion. On the other hand, there is the change in Flemish regulations in relation to ritual slaughter which led to a lack of capacity in approved slaughterhouses during the Feast of Sacrifice. Ritual slaughter involves slaughter without stunning the animal first and this raises animal welfare issues.

The case must be seen against the background of debates in Belgium regarding the slaughter of animals without stunning. In fact, since 1 January 2019, such slaughter is prohibited in Flanders and a ban in the Walloon region is set to follow from September 2019. The ban was originally proposed by the right wing Flemish nationalist minister for animal welfare, Ben Weyts, and both the Flemish and the Walloon Parliaments unanimously passed a resolution outlawing such slaughter in 2017. The ban was supported by both animal welfare advocates and right-wing nationalists and has led religious minorities in Belgium and other countries to fear that they are the target of bigotry under the guise of animal protection.[4] Belgium has a population of about 11 million and is home to about 500,000 Muslims and 30,000 Jews, the groups affected by the ban.[5] Both Advocate General Wahl and the referring court saw the decision of the Flemish regional minister as aiming at animal welfare. However, Advocate General Wahl appeared to be slightly sceptical about whether this was the real reason. He commented that "as has been stressed in discussions at national level, behind the specific question of ritual slaughtering the spectre of stigmatization very swiftly appears. It is

3. The Nederlandstalige Rechtbank van Eerste Aanleg in Brussels (Court of First Instance (Dutch-speaking), Brussels, Belgium).

4. See Schreuer, "Belgium bans religious slaughtering practices, drawing praise and protest", *The New York Times,* 5 Jan. 2019: <www.nytimes.com/2019/01/05/world/europe/belgium-ban-jewish-muslim-animal-slaughter.html> (last accessed 28 Feb. 2019).

5. Ibid.

historically prevalent and care must be taken not to encourage it".[6] Therefore, the bans on slaughter without stunning and the issues in this case must be seen in this political context.

This case comment analyses the case in relation to a number of important issues: animal welfare; freedom of religion and the relationship between Article 10 of the Charter and Article 9 ECHR; and, whether a claim of discrimination on the grounds of religion would have been more successful. Part of the latter analysis will be the justification and proportionality test applied in cases of discrimination and to restrictions on the right to freedom of religion. It is argued that the applicants should have claimed discrimination on the grounds of religion and the referring court should have asked a question in relation to such discrimination; this might have led to a different outcome and, even if it had not led to a different outcome, it might have been more satisfactory for the applicants as their rights would have been more clearly taken into account and balanced against the issue of animal welfare. In the conclusion, the meaning of the case for future cases is addressed.

2. Factual and legal background

Muslims in Flanders complained that the number of approved slaughterhouses in their region was not sufficient to meet the demand for the ritual slaughter of animals during the Muslim Feast of Sacrifice. This is a celebration organized each year for three days by practising Muslims who consider it their duty to slaughter an animal, or to have an animal slaughtered, according to their religious rites, preferably on the first day of the Feast. The meat of the slaughtered animal is then eaten by the family, with the remainder being given to the poor and needy, and to neighbours, and more distant family relatives. There is a consensus among the majority of Muslims in Belgium that the slaughter must be done without stunning the animal first, in observance with religious requirements. At the time of the case and until 1 January 2019, ritual slaughter normally took place in approved slaughterhouses, but these did not have the capacity to meet the increased demand for ritual slaughter during the Feast of Sacrifice. Since 1998, the legislation in Belgium determined that the minister responsible could approve temporary slaughterhouses each year to cater for this increase in demand and this had been done. However, in 2014, the competence in matters of animal welfare was transferred to the regions and, following this, the Flemish regional minister responsible for animal welfare announced in a circular that, from 2015 onwards, he would no longer approve temporary slaughterhouses because these were contrary to EU Regulation

6. Opinion, para 106.

1099/2009, especially Article 4(4), read together with Article 2(k), according to which animals subject to particular methods of slaughter prescribed by religious rites may be slaughtered without stunning only in slaughterhouses which satisfy the requirements of Regulation 853/2004.[7] Article 2(k) of Regulation 1099/2009 determines that the term "slaughterhouse" means "any establishment used for slaughtering terrestrial animals which falls within the scope of Regulation (EC) No 853/2004". Regulation 853/2004 lays down specific rules for the hygiene of foodstuffs.

The Flemish regional minister referred, in particular, to the final report on Belgium from the Directorate-General for Health and Food Safety of the European Commission which stated that the "killing of animals without stunning for religious rites outside a slaughterhouse does not comply with Regulation 1099/2009".[8] The practical effect of the ministerial circular was that, during the Feast of Sacrifice, there was not enough capacity in the approved slaughterhouses in some areas of Flanders to meet the demands for ritual slaughter.

The applicants (various Muslim organizations and an organization of mosques) brought an action against the Flemish region, challenging the validity of Article 4(4) of Regulation 1099/2009, read together with Article 2(k), because it clashed with their freedom of religion as guaranteed by Article 9 ECHR and Article 10 of the Charter and with Article 13 TFEU. Article 13 TFEU reads: "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." EU Member States are thus under a duty to pay full regard to animal welfare, but should respect religious rites in relation to animal welfare.

The referring court observed that ritual slaughter carried out in the context of the Muslim Feast of Sacrifice falls within the scope of Regulation 1099/2009 because the practice is covered by the concept of "religious ritual" within the meaning of Article 2(g) and is thus subject to the rule in Article 4(4). Article 2(g) determines that "religious rite" means "a series of acts related to the slaughter of animals and prescribed by a religion". The referring

7. Regulation (EC) 853/2004, laying down specific hygiene rules for food of animal origin, O.J. 2004, L 139/55.

8. European Commission, Directorate-General for Health and Food Safety, Final report from an audit carried out in Belgium from 24 Nov. to 3 Dec. 2014 in order to evaluate the animal welfare controls in place at slaughter and during related operations, DG(SANTE) 2014-7059 –MR, 2015, para 49.

court considered that the implementation of Article 4(4), read together with Article 2(k), places a restriction on the right to freedom of religion. It suggested that the restriction was neither relevant nor proportionate with regard to the legitimate objectives of protection of animal welfare and public health it pursues, because, first, between 1998 and 2014, the approved temporary slaughterhouses succeeded in ensuring that animal suffering was reduced to a sufficient extent and to comply with public health requirements; and, second, the conversion of these temporary slaughterhouses into slaughterhouses which complied with the requirements of Regulation 1099/2009 would require very high levels of investment which would be disproportionate in relation to the temporary nature of the ritual slaughter carried out there.[9] Based on this, the referring court expressed its doubts about the validity of Article 4(4) read together with Article 2(k) of the Regulation and, therefore, it asked the ECJ whether these articles were invalid because they infringed Article 9 ECHR and Article 10 of the Charter and/or Article 13 TFEU.[10]

3. Opinion of the Advocate General

Advocate General Wahl started by pointing out that the issue in this case was not that of a total ban on the killing of animals without stunning, which was a current topic of debate in several Member States,[11] but rather what material conditions must accompany such slaughtering in order to comply with the relevant EU rules. The question was thus whether requiring that slaughtering is carried out in a slaughterhouse as defined in Article 2(k) of Regulation 1099/2009 is a constraint on religious freedom.[12]

The Advocate General expressed his opinion that none of the arguments brought forward in the present case impinged on the validity of Regulation 1099/2009. The rule that animals can only be slaughtered in approved slaughterhouses is a perfectly neutral rule that applies regardless of the

9. Judgment, paras. 22–25.

10. Ibid., para 26.

11. Opinion, para 4. The A.G. writes in a footnote (6) that some EU Member States (Denmark, Slovenia and Sweden) do not permit ritual slaughter. He also mentions that political agreement seems to have been reached in the "Flemish and Wallonian [sic] Regions" to prohibit the slaughtering of animals without stunning from 2019. For a discussion of a proposal for a law prohibiting animal slaughter without stunning in the Netherlands, see Van Der Schyff, "Ritual slaughter and religious freedom in a multilevel Europe: The wider importance of the Dutch case", 3 *Oxford Journal of Law and Religion* (2014), 76–102; Vellenga, "Ritual slaughter, animal welfare and the freedom of religion: A critical discourse of a fierce debate in the Dutch lower house", 8 *Journal of Religion in Europe* (2015), 210–234.

12. Opinion, para 4.

circumstances and the type of slaughtering chosen. He continued that the problem here is more a temporary difficulty with the capacity of slaughterhouses in certain areas during the Muslim Feast of Sacrifice, rather than the requirements arising from EU rules, which strike a fair balance between, on the one hand, the right to freedom of religion and, on the other hand, the requirements which flow from the protection of human health, animal welfare and food safety.[13]

Advocate General Wahl remarked that the ECJ should avoid engaging in a theological debate concerning the scope of the religious obligation to slaughter an animal during the Muslim Feast of Sacrifice.[14] The Court should be permitted to restrict its assessment to Article 10 of the Charter;[15] and it should accept, as the referring court had done, that the slaughtering of animals without stunning on the occasion of the Feast of Sacrifice is indeed a religious precept or rite that is an expression of religion and that benefits from the protection of religious freedom.[16]

Advocate General Wahl then examined whether there was a limitation on the right to freedom of religion under Article 10 of the Charter. He expressed his opinion that Article 4(4) of Regulation 1099/2009 could be declared invalid on account of the protection of religious freedom only if it were established that the very use of established slaughterhouses was contrary to certain religious precepts, or if it were demonstrated that the conditions set by that provision made it objectively more difficult to slaughter animals in accordance with certain religious rites.[17] He concluded that the obligation to ensure that all slaughter locations are approved was perfectly neutral and applied to any party that organized slaughtering. Legislation which applied in a neutral manner, with no connection to religious convictions, could not in principle be regarded as a limitation on freedom of religion.[18]

According to the Advocate General, the applicants were ultimately seeking to rely not only on the derogation for ritual slaughtering, but also on an additional derogation from the obligation to carry out such slaughter in approved slaughterhouses.[19] He concluded that any problems of capacity were not caused by Article 4(4) of the Regulation, but were the consequence of a combination of several specific circumstances entirely independent of the scope of the provision and arising mainly from a great concentration of the

13. Ibid., para 5.
14. Ibid., para 44.
15. The relationship between Art. 9 ECHR and Art. 10 of the EU Charter will be discussed below.
16. Opinion, paras. 46 and 58.
17. Ibid., para 75.
18. Ibid., para 78.
19. Ibid., para 82.

demand for ritual slaughtering at a very precise time of the year and in a very short period of time. The validity of a provision of EU law should be assessed according to the characteristics of that provision itself and may not depend on the particular circumstances of a given case.[20] Based on this, the Advocate General proposed that the ECJ answer the referred question by stating that the examination of this question has revealed nothing that could affect the validity of Article 4(4) read together with Article 2(k) of Regulation 1099/2009 in the light of the right to freedom of religion enshrined in Article 10 of the Charter and taking into consideration Article 13 TFEU.[21]

Advocate General Wahl discussed the justification for a possible limitation on religious freedom in case the ECJ should find that there was such a limitation.[22] This will be discussed in the analysis of the case below.

4. Judgment of the ECJ

The ECJ pointed out that "Regulation 1099/2009 lays down the common rules for the protection of animal welfare at the time of slaughter or killing in the European Union".[23] It stated that it would examine the validity of Articles 4(4) and 2(k) of Regulation 1099/2009 under Article 10 of the Charter, as the ECHR does not constitute, as long as the EU has not acceded to it, a legal instrument which has been formally incorporated in EU law.[24] The Court then held that the specific methods of slaughter prescribed by religious rituals within the meaning of Article 4(4) did fall within the scope of Article 10(1) of the Charter, and that the ritual slaughter at issue here was a rite celebrated by Muslims to comply with a specific religious precept and was thus covered by "religious rite" within the meaning of Article 4(4) of the Regulation and fell within the scope of the Charter.[25]

The ECJ specified that Regulation 1099/2009 makes clear that in the EU, ritual slaughter of animals without stunning is authorized by way of derogation and that this derogation is made in order to ensure effective observance of the freedom of religion, in particular of practising Muslims, during the Feast of Sacrifice. By determining that such slaughter needs to take place in approved slaughterhouses, the Regulation simply aims to manage, from a technical point of view, the freedom to carry out slaughter without stunning for religious purposes; this technical framework is not in itself of

20. Ibid., paras. 87–88.
21. Ibid., para 141.
22. Ibid., paras. 90–138.
23. Judgment, para 5.
24. Ibid., para 40–41, with reference to earlier ECJ cases, see below.
25. Ibid., paras. 45–49.

such a nature as to place a restriction on the right to freedom of religion of practising Muslims.[26] These technical conditions are the same for any animal slaughter, whether it is ritual slaughter or not, and the rule that this needs to be done in approved slaughterhouses applies in a general and neutral manner to everyone who organizes the slaughtering of animals, as the Advocate General had also observed. This rule thus concerned all producers of meat in the EU in a non-discriminatory manner. The ECJ also considered that, by laying down these technical specifications, the EU legislature reconciled compliance with the requirements of ritual slaughter with those laid down in Regulations 1099/2009 and 853/2004 with regard to the protection of the well-being of animals at the time of killing, and the health of all consumers of meat.[27] Therefore, the rule laid down in Article 4(4), read together with Article 2(k) of Regulation 1099/2009, did not in itself give rise to any restriction on the right to freedom of religion, as protected in Article 10 of the Charter, of practising Muslims during the Feast of Sacrifice.[28]

The ECJ then mentioned that the referring court took the view that the rule may hinder the practice of ritual slaughter for many practising Muslims in Flanders and thus limits their right to freedom of religion. This is because there is insufficient slaughter capacity to satisfy the demand during the Feast of Sacrifice. The referring court suggested that this appears disproportionate in relation to the added value in respect of animal welfare and public health.[29] The ECJ pointed out that the validity of an EU measure must be assessed on the basis of facts and the law as they stood at the time when the measure was adopted. And, this assessment could not depend on the particular circumstances of a given case but must take the situation in the entire EU into account. In this case, the issue concerned only a limited number of municipalities in Flanders and, thus, it could not be regarded as inherently related to the application of Regulation 1099/2009 throughout the EU and it could not affect the validity of that Regulation. The ECJ concluded that the EU rule does not in itself create any restriction on the right to freedom of religion of Muslims as guaranteed by Article 10 of the Charter.[30]

The ECJ then briefly examined the validity of Article 4(4), read together with Article 2(k) of Regulation 1099/2009, with regard to Article 13 TFEU and concluded, based on the same considerations as applied to Article 10 of

26. Ibid., paras. 55–59.
27. Ibid., paras. 60–62. This is elaborated on in paras. 63–67.
28. Ibid., para 68.
29. Ibid., paras. 69–70.
30. Ibid., paras. 71–80.

the Charter, that nothing had been submitted to the Court that would lead to the conclusion that this rule was invalid with regard to Article 13 TFEU.[31]

5. Comments

The ECJ followed Advocate General Wahl in finding that there was no restriction on the right to freedom of religion for Muslims in Flanders during the Muslim Feast of Sacrifice; both based this on the fact that the rules on the slaughtering of animals are general and neutral rules, applicable to everyone who wants to organize such slaughtering, whether this is through ritually prescribed methods or not. And, again following the Opinion of the Advocate General, the ECJ held that the validity of an EU law measure could not depend on the particular circumstances in a given Member State, such as, in this case, the lack of capacity of slaughterhouses in some municipalities in Flanders. It is submitted that this finding is correct. However, a number of points can be made about this case in relation to: animal welfare; freedom of religion and the relationship between Article 10 of the Charter and Article 9 ECHR; and a, possibly more successful, claim for discrimination and the issue of justification of discrimination or of restrictions on the freedom of religion.

5.1. *Animal welfare*

Apart from questioning the validity of Article 4(4) read together with Article 2(k) of Regulation 1099/2009 in relation to the right to freely manifest one's religion, the referring court also asked whether the Regulation was invalid because it infringed Article 13 TFEU. Article 13, cited above, declares that animals are sentient beings and that Member States have a duty to pay full regard to animal welfare in a number of areas. Although both the Advocate General and the ECJ agreed that the purpose of Regulation 1099/2009 was the protection of animal welfare at the time of slaughter, neither found it necessary to examine the issue under Article 13 TFEU in any detail because the same considerations which applied to Article 10 of the Charter also applied to Article 13 TFEU.[32] In other words, both concluded that discussion of this issue was unnecessary given the other arguments.

However, it can be asked whether more attention should have been given to animal welfare issues. As Ryland and Nurse point out, "the fact that the promotion of animal welfare is incorporated in the 'constitutional' provisions of the EU Treaties signifies an elevation of animal welfare as a priority issue

31. Ibid., paras. 81–84.
32. Opinion, paras. 49–50, Judgment, paras. 81–83.

in the EU, alongside other key objectives".[33] On the other hand, the second part of Article 13 which determines that "the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage" must be respected, "makes one doubt the actual effect of the provision".[34] Sowery confirms this where she writes, "it is clear that Article 13 TFEU does not bind the Union to prioritize animal welfare per se".[35]

Therefore, should the ECJ and the Advocate General have paid more attention to animal welfare and Article 13 TFEU in this case? It is submitted that they did not need to do so. Although the question referred specifically mentioned Article 13, animal welfare did not appear to play a significant role in the decision no longer to approve temporary slaughterhouses. From the facts in this case, the Flemish minister based his decision to stop approving temporary slaughterhouses on the report by the Commission that such slaughterhouses did not comply with Regulation 1099/2009, and there was no indication that his decision was linked to concerns about animal welfare in these temporary slaughterhouses. In fact, in its report, the Commission held that although "the killing of animals without stunning for religious rites outside a slaughterhouse does not comply with the Regulation, the CCA [Central Competent Authority] has made a big effort to produce the same animal welfare conditions during religious festivals in regulated sites".[36] This also indicates that animal welfare in the temporary slaughterhouses was not the main reason for no longer approving such slaughterhouses. Animal welfare, thus, did not appear to be a major issue in this case.

Although slaughter without stunning does raise animal welfare issues, as is clear from the fact that the ECJ recently held that such slaughter does not meet the highest standard of animal welfare,[37] it is submitted that the main reason for not giving more attention to this issue was that both the Advocate General and the ECJ were of the opinion that Regulation 1099/2009, by making an exemption for ritual slaughter, had already struck, as the Advocate General pointed out, "a balance between freedom of religion, on the one hand, and the requirements which flow from the protection of human health, animal welfare

33. Ryland and Nurse, "Mainstreaming after Lisbon: Advancing animal welfare in the EU internal market", 22 *European Energy and Environmental Law Review* (2013), 101–115, 109. See, in the same vein, Zoethout, "Ritual slaughter and the freedom of religion: Some reflections on a stunning matter", 35 *Human Rights Quarterly* (2013), 651–672, 662. For a good discussion of what Art. 13 TFEU means, see Sowery, "Sentient beings and tradable products: the curious constitutional status of animals under Union law", 55 CML Rev. (2018), 55–100.

34. Zoethout, "Animals as sentient beings: on animal welfare, public morality and ritual slaughter", 7 *Vienna Journal of International Constitutional Law* (2013), 308–326, 313.

35. Sowery, op. cit. *supra* note 33, 70.

36. European Commission, report cited *supra* note 8, para 49.

37. See Case 497/17, *Oeuvre d'Assistance aux Bêtes d'Abattoirs*, EU:C:2019:13, para 50.

and food safety on the other".[38] Both also referred to Recital 18 of the Regulation, which confirms this where it states that "this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union".[39] Therefore, the Advocate General and the ECJ did not need to pay extensive attention to animal welfare issues or balance this with the right to freedom of religion because this balancing had already been done by the EU legislature itself.

Another reason why the ECJ and the Advocate General did not need to address animal welfare in more detail is that both held that the validity of an EU measure could not be affected by the particular circumstances of a given case. This meant that the particular circumstances in the Flemish region of Belgium at a specific time could not affect the validity of Regulation 1099/2009. As this held for both Article 10 of the Charter and Article 13 TFEU, the Advocate General and the ECJ were right not to pay more attention to Article 13 and to issues of animal welfare.

5.2. *Relationship between Article 10 of the Charter and Article 9 ECHR*

Advocate General Wahl and the ECJ agreed that the validity of Regulation 1099/2009 needed to be carried out in relation to Article 10 of the Charter and not in relation to Article 9 ECHR. This was based on the fact that:

> "whilst, as Article 6(3) TEU confirms, fundamental rights recognized by the ECHR constitute general principles of EU law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law."[40]

According to the Explanations relating to the Charter, the reference to the meaning and the scope of the ECHR rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human

38. Opinion, paras. 5 and 94. See also judgment, paras. 56–57.
39. Opinion, para 73; judgment, para 57.
40. Judgment, para 40; see also Opinion, para 47. Both refer to the following: Case 617/10, *Åkerberg Fransson,* EU:C:2013:105 para 44; Case 398/13P, *Inuit Tapiriit Kanatami and Others* v. *Commission*, EU:C:2015:535, para 45; Case 601/15 PPU, *J.N.* v. *Staatssecretaris van Veiligheid en Justitie,* EU:C:2016:84, para 45.

Rights (ECtHR) and the ECJ.[41] This suggests that the ECJ should assess fundamental rights issues in relation to the Charter and not in relation to the ECHR, but that it should take the corresponding rights in the ECHR and the case law of the ECtHR on these rights into account as an aid to interpretation. Both the ECJ and Advocate General Wahl used this method in this case. It is suggested that the ECJ felt it necessary to make the statement in the passage quoted so as to formally separate the two legal systems and to make clear that EU law and the ECJ are autonomous and that this continues to be the case as long as the EU has not acceded to the ECHR. This is also clear from *J.N.* v. *Staatssecretaris van Veiligheid en Justitie,* where the ECJ followed a similar statement with the explanation that Article 52(3) of the Charter "is intended to ensure the necessary consistency between the Charter and the ECHR without thereby adversely affecting the autonomy of Union law and . . . that of the Court of Justice of the European Union".[42] The ECJ, in *Liga van Moskeeen,* was thus careful to protect this autonomy, but it also followed Article 52(3) and the Explanations to the Charter by using the ECHR and the ECtHR case law in interpreting a number of issues in this case. Therefore, the substantive influence of the ECHR and the case law under the Convention can be clearly seen in both the Opinion and the judgment.

It is submitted that using the ECHR and the case law of the ECtHR can be especially useful in relation to the right to freedom of religion, because of the extensive case law of the ECtHR in this area, such as the case law on the definition of the terms "religion" and "belief"; the explanation of the term "manifestation"; and, the justification of restrictions on the right to freely manifest one's religion. For example, the ECJ observed that the Charter uses the word "religion" in a broad sense, covering both the forum internum, that is the fact of having a belief, and the forum externum, that is the manifestation of religious faith in public.[43] The ECJ referred to two of its own cases here,[44] but in those two cases the ECJ had mentioned the ECHR and the terminology is clearly derived from the ECtHR and wider international human rights law.[45]

41. Explanations relating to the Charter of fundamental rights, O.J. 2007, C 303/17–35, 33. See also Case 205/15, *Direcţia Generală Regională a Finanţelor Publice Braşov (DGRFP)* v. *Vasile Toma and Biroul Executorului Judecătoresc Horaţiu-Vasile Cruduleci,* EU:C:2016:499, para 41.

42. Case 601/15 PPU, *J.N.,* paras. 45–47.

43. Judgment, para 44.

44. Case 157/15, *Achbita and Centrum for Gelijkheid van Kansen and voor Racismebestrijding* v. *G4S Secure Solutions NV,* EU:C:2017:203, para 28; Case 188/15, *Bougnaoui, Association de Défense des Droits de l'Homme (ADDH)* v. *Micropole Univers SA,* EU:C:2017:204, para 30.

45. See European Commission of Human Rights, *Vereniging van Rechtswinkels Utrecht* v. *the Netherlands,* Appl. 11308/84, Admissibility Decision, 13 March 1986; id., *Van Den Dungen* v. *the Netherlands,* Appl. 22838/93, Admissibility Decision, 22 Feb. 1995. See also, on the

Advocate General Wahl and the ECJ also readily accepted that the slaughter of animals without stunning in order to produce *halal* meat is a religious rite for Muslims and thus a manifestation of their religion, which attracts the protection of Article 10 of the Charter. As the Advocate General pointed out, this accords "fully with the case law of the ECtHR, in which ritual slaughter is regarded as a religious practice".[46] The ECJ came to the same conclusion.[47] Both referred to *Cha'are Shalom Ve Tsedek* v. *France,* where the ECtHR held that "ritual slaughter must be considered to be covered by a right guaranteed by the Convention, namely the right to manifest one's religion in observance, within the meaning of Article 9".[48]

Furthermore, neither the Advocate General nor the ECJ found it necessary to engage with Muslim religious doctrine about the need for slaughter without stunning.[49] It is submitted that this is the correct way for a court to deal with issues of religion: it is not for a court to rule on the question whether the stunning of animals prior to slaughter is actually prohibited by the Muslim faith or whether all Muslims believe this. This, again, conforms to settled case law of the ECtHR, which has held that "the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate".[50]

Therefore, although both Advocate General Wahl and the ECJ formally separated the legal system of the EU from that under the ECHR and assessed the validity of Regulation 1099/2009 only in relation to Article 10 of the Charter, the substantive influence of Article 9 ECHR and its interpretation by the ECtHR can be seen clearly in both the Opinion and the judgment. This influence on the interpretation of Article 10 of the Charter is to be welcomed

ECHR, Evans, *Manual on the Wearing of Religious Symbols in Public Areas* (Council of Europe Publishing, 2009), 8–9; Murdoch, *Freedom of Conscience, Thought and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights* (Council of Europe Publishing, 2012), 18–23; see, on the global human rights instruments, Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief, An International Law Commentary* (OUP, 2016), pp. 82–85.

46. Opinion, para 60.

47. Judgment, para 45.

48. ECtHR, *Cha're Shalom Ve Tsedek* v. *France,* Appl. 27417/95, Judgment 27 June 1995, para 74.

49. Opinion, paras. 51–59; judgment, paras. 50–51 (referring to paras. 51–58 of the Opinion).

50. See e.g. ECtHR, *Manousakis* v. *Greece*, Appl. 18748/91, Judgment 29 Sept. 1996, para 47; ECtHR, *Hasan and Chaush* v. *Bulgaria,* Appl. 30985/96, Judgment 26 Oct. 2000, para 78; ECtHR, *Metropolitan Church of Bessarabia* v. *Moldova*, Appl. 45701/99, Judgment 13 Dec. 2001, para 117; ECtHR, *Eweida and Others* v. *the United Kingdom,* Appl. 48420/10, 59842/10, 51671/10, 36516/10, Judgment 15 Jan. 2013, para 81; *Vartic* v. *Romania No 2,* Appl. 14150/08, Judgment 17 Dec. 2013, para 34.

because it broadens the reach of the right to freedom of religion and because it has wider application for the Charter – for example, for the interpretation of "religion" and "belief" in Article 21 – and beyond. In its first two cases regarding discrimination on the grounds of religion and belief under Directive 2000/78/EC,[51] the ECJ also used the broad definition of these terms given by the ECtHR and this expands the protection against discrimination as well.[52]

5.3. *Non-discrimination*

The argument that Regulation 1099/2009 was not valid based on Article 10 of the Charter and Article 13 TFEU, was unsuccessful in this case. But it is argued here that the applicants could and should have claimed that the requirement of slaughtering only in approved slaughterhouses constituted discrimination against Muslims, because such a claim might have been more successful. The referring court could also have asked a different question: whether the circular of the Flemish regional minister and Regulation 1099/2009 constituted discrimination on the grounds of religion under Article 21 of the Charter against Muslims in certain areas in Flanders, who were thus prevented from slaughtering an animal during the Feast of Sacrifice due to insufficient capacity in approved slaughterhouses. The difference between these two claims is that a claim for discrimination would not question the general validity of an EU Regulation, but would concern its application to a specific group. Article 21 of the Charter determines that "any discrimination based on any ground such as . . . religion or belief . . . shall be prohibited".

Article 52(1) of the Charter prescribes that restrictions on the rights and freedoms in the Charter "must be provided for by law and respect the essence of those rights and freedoms". Restrictions are "subject to the principle of proportionality" and "may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others". The proportionality and necessity test means that a balancing needs to take place between all the interests involved. Article 52(1) applies to both Article 10 and Article 21 of the Charter.

Does (the application of) Regulation 1099/2009 and the circular of the Flemish regional minister discriminate against Muslims? In relation to discrimination, a distinction must be made between direct and indirect discrimination. Direct religious discrimination occurs where a person is treated less favourably than another is, has been or would be treated in a

51. Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.

52. Case 157/15, *Achbita*; Case 188/15, *Bougnaoui.*

comparable situation, on the grounds of religion or belief.[53] Indirect religious discrimination occurs where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, at a particular disadvantage compared with other persons.[54]

Regulation 1099/2009 and the circular from the Flemish regional minister prescribed that the slaughtering of animals could only take place in an approved slaughterhouse. This rule is a neutral rule which applies to any form of slaughter, whether this is done according to religious rites or not, as both the Advocate General and the ECJ pointed out.[55] The rule can thus not be seen as directly discriminating against Muslims or others who want to slaughter animals according to religious rites. However, it is submitted that the Regulation can be seen as indirect religious discrimination because it is a neutral provision applying to everyone equally but which puts Muslims, who want to ritually slaughter or have ritually slaughtered an animal at the time of the Feast of Sacrifice, at a particular disadvantage. Indirect discrimination is, however, not unlawful if it is objectively justified by a legitimate aim and the means to achieve this aim, are proportionate and necessary.[56] This is the same justification and proportionality test which applies under Article 52(1) of the Charter.

The referring court considered that the circular of the Flemish regional minister was a restriction on the freedom of religion because it prevented many practising Muslims from complying with their religious duty to slaughter or to have an animal slaughtered on the first day of the Feast of Sacrifice according to their religious precepts.[57] According to the referring court, this "restriction was neither relevant nor proportionate with regard to the legitimate objectives of protecting animal welfare and public health that it pursues".[58] The reasons for this were set out above: the temporary slaughterhouses offered enough assurance that animal suffering was reduced to comply with health requirements; and, the high levels of investment required to convert temporary slaughterhouses into approved ones was disproportionate to the temporary nature of the demand for slaughter.[59] Therefore, the referring court was clearly of the opinion that the interference was not justified.

Although Advocate General Wahl was of the opinion that there was no restriction on the right to freedom of religion, he discussed the issue of

53. This definition can be found in Directive 2000/78/EC, cited *supra* note 51, Art. 2(2)(a).
54. Ibid., Art.2(2)(b).
55. Opinion, para 78; judgment, paras. 60–61.
56. Directive 2000/78/EC, cited *supra* note 51, Art. 2(2)(b)(i).
57. Judgment, para 23.
58. Ibid., para 24.
59. Ibid.

justification in case the ECJ did find a restriction and concluded that there would be no legitimate objective in the public interest to justify a limitation.[60] It is useful to examine the Advocate General's reasoning here as not only can it be applied to decide on the justification of the indirect discrimination identified in this case, but it could also assist in future cases where competing provisions in primary law need to be balanced. It is argued that there were issues in this case which were not taken into account by the referring court or the Advocate General and which, if they had been taken into account, might have led to the conclusion that if there was a restriction, this was justified.

As mentioned, Article 52(1) of the Charter contains three conditions that have to be met before restrictions on a right or freedom guaranteed in the Charter can be justified. The first condition is that a limitation must be provided for by law. This condition does not lead to any problems: as the Advocate General writes, the limitation in this case, which arises from the obligation laid down in Article 4(4) of Regulation 1099/2009, undeniably arises from the law.[61]

The other conditions in Article 52(1) are that the restriction must fulfil a proportionality test and it must be necessary to meet general interests recognized by the EU or to protect the rights of others. According to settled case law of the ECJ, as referred to by Advocate General Wahl, the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question,[62] it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[63]

Advocate General Wahl pointed out that the obligation to use approved slaughterhouses pursued the legitimate aims of public policy and public health objectives, namely animal welfare, public health and food safety.[64] These are general interests recognized by the EU or to protect the rights of others: animal welfare is a general interest or value recognized by the EU in Article 13 TFEU, as mentioned, while public health and food safety can be seen as safeguarding public health, another general interest recognized by the EU. It could also be seen as protecting the rights of others to appropriate standards of health and food safety.

60. Opinion, paras. 90–91.

61. Ibid., para 121.

62. See e.g. Joined Cases 293 & 594/12, *Digital Rights Ireland and Others*, EU:C:2014:238, para 46; Case 601/15 PPU, *J.N.*, para 54.

63. See e.g. Case 101/12, *Herbert Schaible* v. *Land Baden-Württemberg,* EU:C:2013:661, para 29; Case 78/16, *Pesce and others,* EU:C:2016:428, para 48.

64. Opinion, paras. 93–94. The referring court mentioned the same aims.

The next question is whether the means used are appropriate and necessary and no more than necessary. This requires a balancing between the rights of Muslims in certain areas in the Flemish region of Belgium to manifest their religion during the Feast of Sacrifice (the problem only exists during that time) by being able to ritually slaughter or have an animal ritually slaughtered, and the interests of animal welfare, public health and food safety. Advocate General Wahl argued that the obligation to slaughter animals only in approved slaughterhouses "may go beyond what is strictly necessary to attain the objective of protecting animal welfare pursued when it is a case of slaughtering an animal in the performance of a religious rite at a very precise time of the year".[65] He referred to Regulation 853/2004, which lays down requirements which slaughterhouses must satisfy in order to be approved, and questioned whether compliance with all those requirements was "necessary in the very particular context of the momentary increase in the demand for slaughtering during the Islamic Feast of the Sacrifice".[66] He also stated that some of these rules seemed superfluous to meeting the peak in demand during that Feast, as the slaughterhouses in question would be used only once a year and the meat from the slaughtered animals would, in principle, be given directly to the final consumer.[67] Advocate General Wahl thus appears to suggest that not all rules laid down in Regulation 853/2004 need to be applied in these circumstances if this is required to avoid a restriction on the freedom of religion. He concluded that there certainly exists a less onerous solution than the obligation to use approved slaughterhouses during the Muslim Feast of Sacrifice.[68] From the previous considerations of the Advocate General, it is clear that he sees the temporary slaughterhouses which were in place until 2015 as a less onerous solution.[69] Therefore, in his view, the means used here are more than is necessary to achieve the aim pursued and thus the restriction on freedom of religion is not justified.

However, Advocate General Wahl only considers one alternative – the approval of temporary slaughterhouses during the Feast of Sacrifice – and appears to ignore the finding from the Commission that slaughter without stunning outside approved slaughterhouses does not comply with Regulation 1099/2009. This raises the question whether temporary slaughterhouses are a viable alternative even if they do fulfil a legitimate aim, and, even if the Commission found that the relevant authorities had made a big effort to produce the same animal welfare conditions during religious festivals in

65. Ibid., para 124.
66. Ibid., paras. 125–126.
67. Ibid., para 127.
68. Ibid., para 128.
69. Ibid., para 116. The A.G. referred to the 2015 audit report by the Commission (cited *supra* note 8) which "stated that such plants offered sufficient guarantees".

regulated sites,[70] they do not comply with the Regulation, and converting them into permanent, approved slaughterhouses would require a high level of investment. Requiring the State to do so to deal with a very temporary lack in capacity could be seen as disproportionate, because they are only needed for a very short period of time once a year.

Moreover, it is submitted that, in assessing whether a limitation on the right to freedom of religion goes no further than necessary, other alternative ways of preventing the possible limitation on the freedom of religion of Muslims in Flanders during the Feast of Sacrifice should have been considered. This is all the more so as the lack of capacity only arises during three days per year and, even then, it concerns only a limited number of municipalities in the Flemish Region.[71] Both the Advocate General and the ECJ referred to the ECtHR case of *Cha'are Shalom Ve Tsedek* v. *France,* but neither mentioned the fact that in that case it was held sufficient that the Jewish people in France, who, for religious reasons, wanted to eat only *glatt* meat, could obtain this from Belgium.[72] In that case, the ECtHR held that the availability of meat from Belgium meant that there was no interference with the applicants' freedom to manifest their religion and thus the ECtHR rejected the application based on Article 9(1) ECHR.[73] It is argued here, as Van Der Schijff does, that it would have been better if the ECtHR had dealt with this issue when deciding on justification under Article 9(2),[74] but even if the ECtHR had done so, the outcome would have been the same as the ECtHR explained that any interference would have been justified under the circumstances.[75] However, the requirement in the case annotated here is to slaughter an animal or have an animal slaughtered without stunning, rather than just to eat *halal* meat. Nevertheless, what was held in *Cha'are Shalom Ve Tsedek* v. *France* can be applied in this case – and, as mentioned, the case law of the ECtHR must be taken into account when interpreting the Charter – and this would then raise the question whether Muslims could have an animal slaughtered in approved slaughterhouses in other, neighbouring municipalities of Flanders or of Wallonia, or even in the Netherlands. The circular of the Flemish regional minister and the recently introduced ban on slaughtering animals without stunning do not prohibit importing meat from animals slaughtered without stunning from other countries. It is submitted that this should have played a role in assessing whether the limitation was justified, whether it was necessary and proportionate. Approving temporary slaughterhouses was not

70. European Commission, report cited *supra* note 8, para 49.
71. Judgment, para 73.
72. ECtHR, *Cha're Shalom,* cited *supra* note 48, paras. 80–83.
73. Ibid.
74. Van Der Schijff, op. cit. *supra* note 11, 91.
75. ECtHR, *Cha're Shalom,* cited *supra* note 48, para 84.

the only alternative way of ensuring that the Muslim Community in Flanders could slaughter an animal or have one slaughtered according to religious rites during the Feast of Sacrifice and these other ways should have been taken into account as well.

This is relevant for a claim that Regulation 1099/2009 is indirectly discriminatory for Muslims who want to slaughter or have slaughtered an animal on the first day of the Feast of Sacrifice in accordance with their religion, because the test for objective justification of indirect discrimination also requires a legitimate aim and proportionate and necessary means to achieve that aim. The same legitimate aims as above can be brought forward in an indirect discrimination claim as well. In *Achbita* v. *G4S,*[76] a case concerning religious discrimination under Directive 2000/78/EC, the ECJ provided guidance on the requirements for justification of indirect discrimination. It held that the policy in question must be properly applied in a consistent and systematic manner; that the policy must be no more than strictly necessary; and, that an effort should be made to accommodate the religious manifestation in another way within the company.[77] As was already pointed out, Regulation 1099/2009 is applied in a consistent and systematic manner to any form of slaughter. Whether a rule or policy is no more than strictly necessary involves a consideration of alternative, less discriminatory ways to achieve the legitimate aim(s). These alternatives were also already discussed.

The ECJ, in *Achbita,* also suggested that at least some effort should be made to accommodate the religious manifestation in another way. It can also be argued that considering alternative, less discriminatory ways of reaching the same legitimate aim includes at least a consideration of accommodating a request for religious exemptions from certain rules.[78] Support for this can also be found in the case law of the ECtHR. Article 14 ECHR contains a prohibition of discrimination on a large number of grounds, including religion, in the enjoyment of the rights in the Convention. The ECtHR has held that Article 14 is violated if the discrimination – the distinction made – has no objective and reasonable justification. To be objectively justified, a difference in treatment must not only pursue a legitimate aim, there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.[79] This test is thus similar to the justification test

76. Case 157/15, *Achbita.*

77. Case 157/15, *Achbita,* paras. 40–43.

78. See on this Howard, "Reasonable accommodation of religion and other discrimination grounds in EU law", 38 EL Rev. (2013), 360–375.

79. ECtHR, Case *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* v. *Belgium,* Appls. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) (1979–1980) 1 EHRR 252, under THE LAW, B, para 10.

in Article 52(1) of the Charter and that for indirect discrimination. The ECtHR applied this test in *Thlimmenos* v. *Greece,* which concerned a Jehovah's Witness who, based on his religious beliefs, conscientiously objected to military service and who was then convicted for his refusal to wear a military uniform. When he later passed his chartered accountant exams, he was refused entry into this profession because he had a criminal conviction. The ECtHR held that Greece's failure to treat the applicant differently, its failure to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants, violated his right under Article 14 ECHR.[80] From this it can be deduced that, if no attempt is made to accommodate a religious manifestation, the means used to achieve a legitimate aim cannot be considered appropriate and thus there is no justification for the violation of Article 14 ECHR.

Applying this to the *Liga van Moskeeën* case, a claim of discrimination or a referring question regarding whether the circular and Regulation 1099/2009 constituted discrimination against Article 21 of the Charter, would have had the advantage that the ECJ would have been obliged to examine the justification here, including balancing all interests involved and taking into account whether Regulation 1099/2009 and the circular of the Flemish regional minister was no more than necessary, and whether there were alternative ways which were less discriminatory to achieve the legitimate aims of animal welfare, public health and food safety. This might have led to a different outcome. But even if this were not the case, the outcome might have been more satisfactory for the Muslim community in Flanders as their interests in exercising their freedom of religion would have been considered in more detail in the justification and proportionality test.

It has been argued that the applicants, rather than contesting the validity of an EU measure, should have claimed that this measure constituted indirect discrimination against them on the grounds of their religion, and that the referring court should have asked whether the application of Regulation 1099/2009 and of the Flemish minister's circular constituted discrimination against Muslims in violation of Article 21 of the Charter. However, this leaves the question whether the ECJ could be expected to solve the gap in the pleading or should have reframed the question adding a reference to discrimination. In *Costa* v. *ENEL,* the ECJ held that it could extract the right question even if a question was imperfectly formulated.[81] However, it is suggested that the gap between the two questions was so wide, the two questions were so different, that it would not have been reasonable to expect

80. Ibid., para 48.
81. Case 6/64, *Costa* v. *ENEL,* EU:C:1964:66, 593.

the ECJ to reformulate the question as a completely different question from the one asked.

6. Concluding remarks

In *Liga van Moskeeën,* both Advocate General Wahl and the ECJ concluded that the right to freedom of religion of Muslims in Flanders during the Feast of Sacrifice was not restricted, because the rules on the slaughtering of animals were general and neutral rules, applicable to everyone who wants to organize such slaughtering, whether this is through ritually prescribed methods or not. Both also concluded that the validity of an EU law measure cannot depend on the particular circumstances of a given Member State, such as, in this case, the lack of capacity of slaughterhouses in some municipalities in Flanders, but that it needs to take the situation in the whole of the EU into account. Both concluded that Regulation 1099/2009 infringed neither Article 10 of the Charter nor Article 13 TFEU. It is submitted that this is the correct decision. Neither the Advocate General nor the ECJ discussed any issues of animal welfare in detail because of the finding they made on the validity of the Regulation, and it is argued that they did not need to do so to come to the conclusion they reached.

The referring court had questioned the validity of Regulation 1099/2009 in relation to both Article 10 of the Charter and Article 9 ECHR, but Advocate General Wahl and the ECJ concluded, based on previous ECJ case law, that Article 9 ECHR did not have to be applied. On the other hand, Article 9 ECHR and the interpretation of this article by the ECtHR did clearly influence the interpretation given by the Advocate General and the ECJ to Article 10 of the Charter and this is, it is argued, a positive development.

It was submitted that it might have been better to argue that Regulation 1099/2009 discriminated against Muslims in particular municipalities in the Flemish region on the grounds of their religion in violation of Article 21 of the Charter. Such a claim would not concern the validity of the Regulation, but would instead challenge its application to a certain group of people because of their religion. It is argued that Regulation 1099/2009 and the circular from the Flemish regional minister can be seen as indirectly discriminatory on the grounds of religion because it is a neutral provision applying to everyone equally but which puts Muslims in certain municipalities in Flanders, who want to slaughter or have slaughtered an animal according to their religious rites at the time of the Feast of Sacrifice, at a particular disadvantage. If indirect religious discrimination had been claimed, the ECJ would have had to address the question of justification and proportionality as this applies to both

Articles 10 and 21 of the Charter. Although Advocate General Wahl did examine justification, he only considered one alternative way – the approval of temporary slaughterhouses during the Muslim Feast of Sacrifice – of achieving the legitimate aim pursued. It was submitted that this ignored the Commission's finding that stunning outside approved slaughterhouses was against Regulation 1099/2009, and that he should also have considered possible other ways of dealing with the increased demand for slaughter capacity, including whether the Muslims affected could have an animal ritually slaughtered in approved slaughterhouses in other municipalities of Flanders or Wallonia or in the Netherlands, following the ECtHR's findings in *Cha'are Shalom Ve Tsedek* v. *France*.

A claim for indirect discrimination or a preliminary question regarding such discrimination would have entailed the ECJ having to assess the question whether a fair balance had been struck between all the interests involved: the interests of animal welfare, public health and food safety; the availability of alternative ways of dealing with the lack of capacity in approved slaughterhouses during the Muslim Feast of Sacrifice; the importance of manifesting their belief through slaughter without stunning for the Muslim population in Flanders; and the costs of providing possible alternatives. The test would have involved taking into account whether the circular of the Flemish regional minister was no more than necessary and whether there were alternative ways which were less discriminatory to achieve the legitimate aims. Whether the ECJ would have come to the conclusion that the indirect discrimination was justified or not, this way of dealing with the issue would most likely have been more satisfactory for the Muslims involved as it meant that their right to freedom of religion would have been taken into account in the balancing test required. So maybe the applicants should have claimed discrimination on the grounds of religion against Article 21 of the Charter.

The case shows that a challenge that the new laws against slaughter in Belgium without stunning, or such laws in other countries, are invalid under Article 10 of the Charter and/or Article 13 TFEU will not be successful, but that a challenge that this is discrimination against those people who want to slaughter animals without stunning for religious reasons, might be. Even then, the ECJ might well find, after balancing all the interests involved, that the discrimination is justified and proportionate.

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