DID THE E.C.J BUTCHER RELIGIOUS FREEDOM AND ANIMAL WELFARE? A RESPONSE TO ROVINSKY

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1 INTRODUCTION

The member states of the European Union are not the first and will not be the last to grapple with the prickly issue of balancing animal welfare against religious freedom.[1] Given the significant constitutional protections enjoyed by the latter across the world, the Court of Justice for the European Union ("CJEU") is also unlikely to be the last court to have to untangle the knots created by the conflict. The decision of the CJEU in *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering* ("*Centraal"*) is thus but the latest episode in the global saga that is unfolding.[2]

The role of a court in this conflict, however, is necessarily limited. Unlike the legislature or the executive, the court's judicial and moral reach is circumscribed by the facts of any particular dispute. In a recent article, Jeremy Rovinsky contended that the CJEU in *Centraal* was deficient on both counts, that is to say, both in its judicial analysis and in its moral principles.[3] Rovinsky argued that by concurring with the decision of the Flemish Parliament to ban non-stunned ritual slaughter and in deciding that it would not be discriminatory to not apply the same rules to cultural and sporting events, the CJEU struck a disproportionate (or to use Rovinsky's words, 'no balance') balance between religious freedom and animal welfare and undercut its own moral high ground vis-à-vis animal welfare.[4] Instead, he argues, it would have been far more appropriate for the court to reject the ban and counter-propose a labelling initiative that would help consumers distinguish between stunned and non-stunned meat.[5]

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[1] See generally, Joe Willis, *The Legal Regulation of Non-stun Slaughter: Balancing Religious Freedom, Non-discrimination and Animal Welfare*, 41 LIVERP. L. REV. 145 (2020); see also Elien Verniers and Geert Van Hoorick, "Het mijlpaalarrest van het Hof van Justitie over het ritueel slachten' 440 NjW 470.

[2] Case C-336/19, *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, ECLI:EU:C:2020:1031 (Dec. 17, 2020) (Judgment of the Grand Chamber);

[3] See Jeremy A. Rovinsky, *A Stunning Decision: How The E.C.J. Butchered Both Religious Freedom And Animal Welfare*, 29 TUL. J. INT'L & COMP. L. (2021).

[4] *Id.*

[5] *Id.*

It is my contention in this short response, however, that Rovinsky's basis for finding fault with the CJEU was unjustified and that his alternative proposal sidesteps the issue altogether. In particular, and first, I will argue that Rovinsky offers no legal grounds for finding fault with the CJEU's balancing exercise, and that in any case, the decision stands up to scrutiny. Second, that the CJEU did not err on the facts or act morally inconsistently contrary to what Rovinsky's suggests. Third, that a labelling requirement does not serve the aim of animal welfare and is, therefore, not a viable alternative to a ban on non-stunned ritual slaughter.

To these ends, this article is divided into three parts; each of which corresponds with one of the three central arguments I take Rovinsky to be making. Since the facts of the case have already been adequately explained by Rovinsky, I have chosen to limit my discussion of the facts to instances in which it is necessary to provide a factual background to further my argument.

2 NO BALANCING

The pivotal question in *Centraal* was whether the obligation to stun animals prior to ritual slaughter unjustifiably limited the right of Jewish and Muslim believers to freely manifest their religion.[6] In other words, there was no doubt that the obligation constituted an interference with the freedom contained in Article 10(1) of the European Charter of Fundamental Rights ("the Charter") that needed to be closely scrutinized.

Scrutiny under the Charter requires a step-by-step approach taking into consideration the conditions listed under Articles 52(1) and (3) of the Charter and Article 9(2) of the European Convention for Human Rights ("ECHR").[7] These broadly require that the limitation be prescribed for by law, be necessary in a democratic society in pursuance of a legitimate objective and satisfy the test of proportionality.[8]

Thus, for Rovinsky to argue that an unfair balance was struck between the fundamental interests, he must show where and how the court erred in its scrutiny process. To further contend as he does that "no balance whatsoever" was struck between animal welfare and

[6] Case C-336/19, at ¶¶ 39 - 81.
[7] *Id.*
[8] *Id.*

religious freedom, he must go even further and demonstrate that egregious errors were made by the court in its proportionality analysis.

In this regard, and although he does not explicitly say so, Rovinsky's primary criticism appears to be that the ban on non-stunned slaughter cannot be regarded as necessary in a democratic society and that it is not proportional in the strict sense, i.e. the disadvantages are disproportionate to the aims proposed. He also suggests that a labelling requirement, that would allow consumers to differentiate between meat sourced from an animal stunned prior to slaughter and one which was not, would be a less restrictive alternative to meet the same aim.[9] I deal with this second argument in section four below.

In support of his contention that the balance struck was disproportionate in the strict sense, Rovinsky relies on sentiments expressed by two religious authorities, the President of the Conference of European Rabbis and the Director of Public Affairs for the European Jewish Association.[10] They argue that first, the ban would cause supply shortages of Kosher meat.[11] Second, that the true intention may be to target religious minorities.[12] Third, that the impacts of the ban would be felt by Jewish communities across the continent.[13] Fourth, that this dilutes the integral role that religious freedom holds in the European Union.[14] And finally, that this places religious rights and freedoms behind animal welfare and that this is morally reprehensible.[15]

The second objection may be dealt with most easily, for after all, it is nothing more than an unsubstantiated allegation. It also contradicts the significant amount of evidence demonstrating that the Flemish parliament took seriously both the concern for animal welfare and religious freedoms. Preparatory documents behind the Flemish law, for example, show numerous instances of negotiations held between religious authorities and parliamentarians with a view towards reconciling differences and understanding concerns.[16] To this end, the Flemish

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[9] Rovinsky, *supra* note 3 at 11.
[10] *Id.*, at 7.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Verslag van de Gedachtewisseling over het Rapport met Betrekking tot het Onverdoofd Ritueel Slachten* [Report of the Exchange of Views on the Report on Ritual Slaughter without Stunning], Commissie voor Leefmilieu, Natuur, Ruimtelijke Ordening, Energie en Dierenwelzijn 1134 (2016-2017).

government even appointed a mediator to try and achieve maximum reconciliation.[17] Indeed, the emphasis placed on the need to enter into dialogue and take seriously the needs of religious communities is stark. To argue in such circumstances that the ban was a thinly veiled attempt to in fact suppress minority religions is plainly unfair.

The third objection is equally unsubstantiated. Precisely what impacts will be felt by Jewish communities across the continent and at what point in time? How significant will these impacts be? How should they be viewed in the context of the debate between religious freedom and animal welfare? These are all questions that are left begging. This objection, therefore, must be taken to fail on the basis of its vagueness.

The fourth and fifth objections raise, however, a more pertinent issue: What is the appropriate relationship between freedom of religion and animal welfare? On this front, these objections argue that preferring animal welfare to freedom of religious expression is both morally and politically unacceptable. However, aside from raising an issue that the court already extensively deals with, these arguments do nothing more than beg the question by asserting rather than justifying the truth of their moral convictions. In this respect, the court does far more to justify its balancing of values. In particular, it takes note of the strong scientific evidence supporting the use of stunning prior to slaughter, the increasing importance attached to animal welfare in European society, the availability of ritually slaughtered meat from the Single Market and outside, and the extensive preparatory steps taken by the Flemish government to ensure that all concerns were accounted for.

A more principled opposition would perhaps have taken issue with the wide margin of appreciation. Gerhard Schyff, for example, has argued that although there is no consensus in Europe on the appropriateness of religious exemptions to rules on slaughter, there are more states that allow it than do not.[18] This, he argues, points to an emerging standard that should lead to a narrower margin of appreciation.[19] Moreover, he argues, a narrower margin would

[17] *Id.* at 9.
[18] Gerhard 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 76 (2013), 94 – 95.
[19] *Id.*

also reflect the Court's general stance that discretion is narrower when interference with the right is greater.[20]

Although Schyff is arguably right on the second point, it is doubtful that there is an emerging standard in support of religious exemption. On the contrary, and if anything, the standard appears to be growing weaker with numerous states across Europe hotly debating what was once an insignificant issue.[21] Besides the above, it would be questionable jurisprudence if what is an exception according to the wording of Article 13 of the TFEU were to be given greater weight than the norm. Finally, even granted that a narrower margin should have been adopted following acceptance of Schyff's second point, there is no reason to think that the Flemish legislature would have exceeded this margin given the procedures it followed, and the justifications it offered.

The strongest objection is the first. In both *Cha'are Shalom Ve Tsedek v. France*, a case decided by the European Court of Human Rights, and *Centraal*, the courts considered the availability of ritually slaughtered meat from other countries as being a factor that contributed to a national or regional ban being held proportionate.[22] Thus, if it could be factually demonstrated that importation of meat would not be sufficient to reasonably offset the hardships created by the absence of locally slaughtered meat, a convincing case could be made to argue that the balance struck is unfair. Little evidence, however, is provided apart from the assertion made by the President of the Conference of European Rabbis cited above. On the contrary, there is evidence to suggest that communities are able to adequately source kosher meat from across the Single Market.[23] In any case, to establish a case on this ground, further empirical data analysing the availability of ritually slaughtered meat is required. The situation is also likely to be affected by market responses to the ban. In this respect, it is not inconceivable that supply shortfalls will be met through a further increase in imports.

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[20] *Id.*
[21] *Nine out of 10 EU Citizens Oppose Animal Slaughter Without Stunning, Poll Finds*, THE GUARDIAN (2020) <https://www.theguardian.com/environment/2020/oct/09/nine-out-of-10-eu-citizens-oppose-animal-slaughter-without-stunning-poll-finds> (last visited Jul 27, 2021).
[22] App no 27417/95 (ECtHR, Jun 27 2020).
[23] Belgium's Ban on Kosher Slaughter Begins in Flanders and Will Widen Later This Year, THEJC.COM (2019), https://www.thejc.com/news/world/flanders-belgium-ban-on-kosher-slaughter-begins-1.477865 (last visited Jul 27, 2021).

In concluding this section, it will perhaps be useful to say a few words on the 'fair balancing' exercise itself. As Gerards notes, the balancing metaphor is a powerful rhetorical device that paints the image of a judge placing two sets of seemingly incompatible values onto a pre-calibrated scale that then tips in the right direction.[24] This, however, is nothing more than an illusion. Behind the plethora of tests and conditions devised to operationalise the principle, no convincing theory has been presented so far explaining how a judge is to compare and weigh values that are not on the same scale.[25] Thus, for instance, we may know that society places a high value on animal welfare but also on the need for religious tolerance, but what follows? The answer becomes even more elusive when stakeholders embrace conflicting first principles. Certainly, it is no surprise then that so many disagree on what is a 'fair balance'.

Notwithstanding the above, however, there are still good arguments and bad. Ultimately, it is apparent based on the discussion above that the objections presented by Rovinsky do little to support his contention that the CJEU struck no balance whatsoever. Rovinsky may, however, be on stronger ground when he asserts that the court failed to choose the least restrictive means and in arguing that it was discriminatory to not bring other activities such as cultural and sporting activities within the ambit of the regulation.

3 DID THE CJEU UNDERCUT ITS OWN MORALITY?

Another question in *Centraal* was whether the EU legislature infringed the principle of non-discrimination by not requiring prior stunning for animals killed during hunting and recreational fishing, or cultural and sporting activities.[26] The court held that the EU did not, on the ground that these activities resulted in a marginal and economically insignificant production of meat or animal products and because these were non-comparable situations that warranted differential treatment.[27]

Rovinsky argues, however, that this decision undermines the court's entire premise of animal welfare. He states, "Whether something is moral or not should not – and does not – depend on whether it is 'economically significant' in the aggregate".[28] He continues by launching a further

[24] Janneke Gerards, *The Age of Balancing Revisited?*, 6 European Data Protection Law Review 13 (2020).
[25] Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 The Yale Law Journal 943 (1987).
[26] Case C-336/19, at ¶ 82.
[27] *Id.*, at ¶¶ 82 – 95.
[28] Rovinsky, *supra* note 3, at 7 – 10.

assault on the court's moral compass and states, "If a person believes that slaughtering animals for consumption purposes without pre-stunning is cruel, logic dictates that every such act is cruel…".[29] This raises the moral question: Is it morally inconsistent for a person who believes that slaughtering animals without pre-stunning is cruel to reject its extension to all acts of killing that result in animal produce?

The answer to this must be in the negative. There is a significant factual difference between the slaughter of animals that are reared commercially and those killed in the context of hunting or other sporting activities. Whereas in the former case, the requirement to pre-stun is a rational method of preventing suffering, the same cannot be said of the latter. This is because requiring pre-stunning during hunting or recreational fishing would be tantamount to banning the activity (one cannot stun from a range). If this is the objective, it would be far more rational to simply ban the activity. An individual who believes that suffering in animals should be prevented would thus be acting perfectly consistently in rejecting a proposal that does not in fact rationally serve that principle. This is precisely the argument that the court makes as well when it emphasizes the differences between the conditions of killing in the activities that fall within the scope of the regulation and those that do not.[30] It moreover takes great pains to emphasise that non-discrimination requires different situations not to be treated alike.[31]

What, however, do we make of the court's reference to the economic insignificance of the meat generated from cultural and sporting activities? Rovinsky argues that the court uses economic significance per se as a morally relevant differentiating factor.[32] This, however, is not the case. Its references to the numerics were part of an attempt to demonstrate that cultural and sporting activities that do not generate economically significant amounts of meat are essentially different in kind and, therefore, that they require their own tailored approach to animal welfare.[33] Put differently, if the amount of meat that is generated from a cultural or sporting activity is insignificant, then it follows that the essence of the activity is not to produce meat. In such a scenario, it would be preferable to regulate the activity, including whatever killing occurs, through a policy that captures the essence of the activity This is quite different from

[29] *Id*.
[30] Case C-336/19, at ¶¶ 82 – 95.
[31] *Id.*
[32] Rovinsky,supra note 3, at 7 – 10.
[33] Case C-336/19, at ¶ 88.

asserting that the suffering of animals killed during these activities is morally irrelevant or should be ignored.

At this point, Rovinsky would argue that the court got its facts wrong. He states that the market for game meat is far from insignificant and backs this up with a set of statistics.[34] The statistics, however, are irrelevant in this case. The meat that is produced from cultural or sporting events is not referred to as 'game meat'. This is a term that is reserved for meat generated from hunting activities. Thus, Rovinsky does not in fact prove that the production of meat from cultural and sporting activities is economically significant. He only proves that the production of meat from hunting is economically significant.

However, in so far as hunting and recreational fishing are concerned, the court makes no reference at all to the economic justification. Indeed, it would make no sense to either. In contrast to the animals that are reared for cultural or sporting activities, animals killed during hunting or recreational fishing are not reared or kept. Thus, regardless of the number of animals killed, it would be imprudent to apply a regulation designed to improve the welfare standards of animals that are reared or kept for meat production. Rightly choosing to ignore the economics on this front, the court goes on to directly state that it is irrational to extend the requirement of pre-stunning to meat produced from activities that are not amenable to a stunning procedure, such as hunting or recreational fishing.

In conclusion, therefore, Rovinsky's first argument is nothing but a straw man. The court never suggested that economic factors per se were morally relevant in determining which animals should be protected via a law that requires pre-stunning. Instead, it was part of a legal argument in which it used the numerics as a proxy for measuring the unlikeness of the different activities. The court's proposed solution, therefore, is not to ignore the suffering of the animals that are killed during cultural or sporting activities, but to regulate it through an instrument more appropriately tailored to the circumstances within which these activities take place. His second argument, on the other hand, fails in itself to be morally consistent. A person acting morally is not required to treat different situations the same way and this is a fact that the court recognizes.

[34] Rovinsky,supra note 3, at 8 – 10.

4 THE LABELLING FALLACY

For Rovinsky, a real and fair balance could be struck by preferring a labelling requirement.[35] This presumably is the least restrictive option in Rovinsky's book. This also happens to be the course favoured by the Advocate General in his submission to the court.[36] The idea is simple. All meat products should be labelled so that consumers can know with certainty whether the animal was stunned before slaughter or whether it was not and is kosher or halal compliant. Such an approach, the Advocate General argues, "is neutral and non-discriminatory" and will "advance the case of animal welfare by reducing the suffering of animals at the time of killing while at the same time also protecting freedom of religion".[37]

This, however, is a truly extraordinary argument. Effectively, the argument is that the suffering of an animal will be reduced at the time of killing by putting a label on its corpse or parts of it to indicate that it was subject to a method of slaughter that has been demonstrated to result in suffering.[38] The CJEU in the *Biolabel* case has too noted the inconsistency between ritual slaughter without stunning and high animal welfare standards.[39] It is apparent then that this proposal serves only to deflect attention from the real issue; one that cannot be reconciled as easily as this proposal would seem to do. This, of course, is not to say that the interest of a consumer in knowing how his meat has been slaughtered is unimportant. Only that it is a separate issue that ought not to be conflated with the real issue at hand.

In another similarly distracting argument, Rovinsky argues that a true advocate for animal welfare should argue that human beings can survive without consuming meat and make efforts to dismantle the current system of industrialised animal cruelty.[40] Few animal rights activists would disagree with Rovinsky on this point, but many would probably question the need for

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[35] *Id*., at 11 – 12.
[36] Case C-336/19, *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, ECLI:EU:C:2020:695 (Sept. 10, 2020) (Opinion of Advocate General Hogan).
[37] *Id., at* ¶¶ 62 – 63.
[38] See for a brief non-technical overview of the science, Alex Bruce, *Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of Religious Slaughter of Animals*, ANU COLLEGE OF LAW RESEARCH PAPER NO. 12-29 351 (2011), 368 – 371.
[39] Case C-497/17, Œuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation (Maa) et al, ECLI:EU:C:2019:137 (February. 26, 2019) (Judgement of the Grand Chamber).
[40] Rovinsky,supra note 3, at 10 – 11.

such a statement in the context of evaluating a CJEU decision that could not have possibly broached such ground.

In all this, it is regrettable that Rovinsky does not narrow in on some of the choices that could more plausibly be argued to be less restrictive. One possibility sourced from Spanish practice is to allow for ritual slaughter in select cases where equivalence of suffering with a method that involves stunning can be proved.[41] Yet another may be to permit ritual slaughter but to increase scrutiny on the methods used to ensure that there is in fact equivalence as claimed. The essential difference between the two proposals suggested here is the bearer of the burden of proof. Given Rovinsky's conviction that there exists uncertainty in the science on this topic, he may be inclined towards the second alternative. I would, however, argue in concurrence with Alex Bruce and in line with the precautionary principle that there is a sufficient body of evidence in support of the view that religious slaughter methods cause more pain and suffering and, therefore, that any burden of proof must lie with those who oppose this.[42]

5 CONCLUSION

Did the CJEU in *Centraal* butcher both religious freedom and animal welfare? Did it in the process undercut its own morality? Should proponents of animal welfare lament on what could have been? This article has argued that Rovinsky fails to establish any such case. Perhaps more disconcertingly, however, his arguments misrepresent the nature of the CJEU's judgment, obfuscate crucial distinctions in fact and law, and deflect attention from the real issue at hand. If Rovinsky fails to make a convincing case in support of his proposition, what then should we make of the CJEU's decision?

A good starting point would be to acknowledge the intractability of the issue and recognise the limitations of the balancing exercise performed by the court. As noted above, such an exercise invariably involves weighing up conflicting interests on a common scale that many will simply not accept on account of differing first principles. To recognise this is not to veer towards absolute moral relativism but to grant that even the most well-reasoned decision will provide grounds for disagreement. Within these confines, however, there are good arguments and bad. In this response, I have attempted to show precisely this. That there are good reasons one can

[41] Schyff, *supra* note 12, at 99.
[42] Bruce, *supra* note 38, at 371.

utilise to question the CJEU's decision, such as, for example, to question whether a complete ban is the least restrictive option or if the ban effectively renders impossible the exercise of religious liberties. But also that there are bad arguments, such as, for instance, the argument that recreational fishers should stun their fish before they catch them or that labelling meat can possibly improve the welfare of an animal during slaughter. It now remains to be seen how the ECHR, which has a case concerning the same set of facts pending before it, responds to the challenge.[43]

[43] App No 16760/22 *Executif Van De Moslims Van Belgie Et Autres c. Belgique* (July. 4, 2022) (Communicated Case)