De-humanisation? CJEU, Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen on Religious Slaughter

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Anne Peters

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Introduction

In Case C-426/16, *Liga van Moskeeën en islamitische Organisaties Provincie Antwerpen et al v. Vlaams Gewest*, the Court of Justice of the European Union (Grand Chamber) in its judgment of 29th May 2018 decided that the EU law provision allowing religious slaughter without stunning the animal only in slaughterhouses (Art. 4(4) of Regulation No 1099/2009) is valid. It does not violate primary law: neither the freedom of religion as guaranteed in Art. 10 of the European Charter of Fundamental Rights, nor the animal welfare mainstreaming clause of Art. 13 TFEU.

Two weeks earlier, US President Donald Trump spoke about migrants:

> We have people coming into the country, or trying to come in — and we're stopping a lot of them — but we're taking people out of the country. You wouldn't believe how bad these people are. *These aren't people. These are animals*. And we're taking them out of the country at a level and at a rate that's never happened before. And because of the weak laws, they come in fast, we get them, we release them, we get them again, we bring them out. It's crazy. (The White House, Remarks by President Trump at a California Sanctuary State Roundtable , May 16, 2018 (emphasis added)).

Do both incidents have something in common? Both concern migrants, directly or at least indirectly. While President Trump's statement is openly humiliating and racist, the EU regulation and its strict application by Flemish authorities that led to the CJEU judgment is not. Still, we might ask (what the Court did not) whether the Flemish case involves indirect discrimination against Muslims. I find that neither EU law nor its application violate fundamental rights. However, we need to remain vigilant because, speaking with Theodor Adorno, vilifying human and non-human animals might, in psychological and ethical terms, be related and even intertwined.

Background, Facts, and Procedure

The Dutch speaking court of first instance of Brussels had requested a preliminary ruling under Art. 267 TFEU. It was triggered by a change in the practice of the Flemish authorities on the issuance of permits for ritual slaughtering in 2015. While the authorities had since 1998 allowed slaughter in temporary slaughterhouses during the peak time of the Muslim feast of sacrifice, the Flemish regional minister stopped issuing such approvals, relying on the strict requirement of Art 4(4) of Regulation No. 1099/2009 in conjunction with Art. 2(k) of the Regulation. The Flemish minister argued that the temporary slaughterhouses did not satisfy the hygienic requirements of EU law (laid down in Regulation 853/2004), and he referred to a document from DG Santé 2014-7059 – MR).

The background is that a 2012 Belgian constitutional reform had transferred animal protection into the competence of the regions. In 2014, the new government of the Flemish region was elected, and it comprises a minister for animal protection. The minister is a member of the Nieuw-Vlaamse Allantie, an alliance which is not openly xenophobic but right-wing conservative.

The applicants in the original proceedings are a group of Muslim organisations in the Flemish region. They had argued that Art. 4(4) of Regulation no. 1099/2009, in conjunction with Art. 2(k) infringes freedom of religion. The referring court had doubts as to the validity of the regulation.

Article 4 of Regulation No 1099/2009, entitled 'stunning methods', provides:

> 1. Animals shall *only be killed after stunning* in accordance with the methods and specific requirements related to the application of those methods set out in Annex I. The loss of consciousness and sensibility shall be maintained until the death of the animal. (…)
>
> 4. In the case of animals subject to particular methods of slaughter prescribed by religious rites, the *requirements of paragraph 1 shall not apply provided that the slaughter takes place in a slaughterhouse*." (emphases added).

Art. 2(k) of the same Regulation provides: ''Art. 2 (k) 'slaughterhouse' means any establishment used for slaughtering terrestrial animals which falls within the scope of Regulation (EC) No 853/2004".

Compatibility of the EU Regulation with EU Primary Law

One benchmark for the regulation is Art. 13 TFEU, the EU animal mainstreaming clause. Because it did not play a big role in the case, I will only mention it for the sake of completeness (see paras 81-83 of the judgment).

Art. 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.

This mainstreaming clause addresses both the Union and the member states, but it does not relate to all Union policies (notably not to trade policy). The interesting questions are what "paying full regard" exactly means, and also what "animal welfare" is. But these questions were not at issue in this case. The proceedings were only about the second part of the clause, the exception ("… while respecting …"). The referring court opined that the EU Regulation 1099/2009 did not sufficiently accommodate the relevant Belgian laws. However, it was not clear which Belgian laws "relating in particular to religious rites, cultural traditions and regional heritage" were concerned with the application of the controversial Regulation 1099/2009. Therefore, the CJEU did not find any invalidity of the regulation due to disrespect of Belgian laws on religious slaughter.

The Court also completely left aside the guarantee of freedom of religion under Art. 9 ECHR, because the Convention is not binding on the EU as long as the EU has not acceded it (judgment, para. 40).

Art. 10 ECFR: Freedom of Religion

The centrepiece of the judgment is the examination of the validity of the regulation in light of Art. 10 of the ECFR (paras 38-80 of the judgment). Regulation 1099/2009 interferes with freedom of religion by relegating ritual slaughter to approved slaughterhouses. Such a requirement constitutes interference because ritual slaughter is a manifestation of religion ("*forum externum*"). Notably, during the Muslim feast of sacrifice, one of the highest holidays in the religious calendar, slaughter is an important (maybe not compulsory) component of the feast. This means that a law which regulates the place for performing religious slaughter falls within the scope of Art. 10(1) ECFR (judgment, para. 45).

The next question was whether the regulation actually restricts the freedom of religion. The Court said that the rule *in itself* does not give rise to any restriction because religious slaughter is not prohibited (judgment, paras 52-68). On the contrary, it contains an express derogation from the requirement of stunning, specifically for the purposes of ensuring respect for the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance (judgment para. 57; citing recital 18 of the preamble of Regulation 1099/2009).

The obligation to use an approved slaughterhouse is neutral, and it applies to any party irrespective of any connection with a particular religion. It "concerns in a non-discriminatory manner all producers of meat in Europe", says the Court (judgment, para. 61). The EU legislature has sought to reconcile three objectives: food safety, animal welfare, and respect for religious rites (judgment, para. 62).

It could however be argued that the regulation, because it does in fact hinder the practice of religious slaughter, (unduly) limits the freedom of religious practice of Muslims. This was the view of the referring court (see the judgment, para. 69). The CJEU answered that it is a mere question of capacity. It is only during the four days of the feast that the approved slaughterhouses in the Flemish region do not have sufficient slaughter capacity. Additional slaughterhouses would require huge financial investment but would only be needed for four days per year and so, would not be viable. The validity of an EU law cannot depend on what the court called "retrospective assessments of its efficacy" (judgment, para. 71). The capacity problem arises only in a limited number of municipalities in the Flemish region, and is not inherently related to the application of the regulation throughout the EU. However, the validity of a regulation must be examined taking into account the situation in the entire EU (judgment, paras 73- 74). The CJEU concluded that the EU-rule as such "does not in itself create any restriction" on freedom of religion (judgment, para. 79).

A *different* question is whether the application of the regulation in the concrete situation ─ during the Muslim feast of sacrifice ─ constitutes a restriction and possibly a violation of the freedom of religion. This is the real question, but it was not asked by the referring court. The first instance court of Brussels had only posed the question of *validity* of the Regulation. Under Art. 267 TFEU, it could have asked a different question, namely how the

regulation must be *interpreted.* Must we read an unwritten exception leading to non-application during the feast of sacrifice into this regulation for reasons of freedom of religion? The strict and across-the board application, also during these four days, constitutes an interference with a religious practice. However, I would deem it justified for the reasons which I shall explain below (and which are relevant, *mutatis mutandis*, both for freedom of religion and for non-discrimination).

Art. 21 ECFR: Indirect Discrimination?

Rather than being a pure question of liberty, the case raises the spectre of de facto, indirect discrimination of Muslims through the Regulation's disproportionate impact on this specific group. This aspect was not discussed by the Court. It concerns the non-discrimination clause of Art. 21(1) ECFR.

The requirement of slaughter in official, authorised slaughterhouses does not target any religious group. The regulation is neutral, both in its wording and in its application. However, it might deploy a disproportionate negative impact on Muslims, because this is the only group which needs or wants to slaughter during a feast and for which this act forms part of their belief. Only this group has the increased demand during four days of the year.

The inattention to this specific demand of the Muslim community could in extremis even constitute so-called passive discrimination. There might be an affirmative duty to provide for additional slaughter facilities so as to avoid discrimination. But ─ however we conceptualise the issue (as a potential indirect discrimination through inflexible and strict application, or as a potential passive discrimination through lack of extra funding) ─, it remains the case that such a verdict cannot be easily pronounced. On the contrary, the standard of justification for facially neutral rules or practices with disproportionate impact is fairly lenient.

The non-attention to specific Muslim demands during those four days would only then violate the prohibition of indirect discrimination if it did not have any objective and reasonable ground. It makes sense to apply here the usual three-pronged test: legal basis, legitimate aim, and proportionality (broadly conceived). It would seem as if all three requirements are satisfied. The obligation to use authorised slaughterhouses has its formal basis in the EU regulations; and it pursues the legitimate aim of food safety in the interest of public health. The de facto obstacle to the temporary unusually high demand for religious slaughter during the days of the feast also seems proportionate.

Importantly, we cannot simply transfer the reasoning of most other judgments on religious slaughter which regularly highlight that barriers to slaughtering are acceptable as long as meat can be procured from elsewhere. The case at hand is notably distinct from ECtHR, *Cha'are Shalom* of 2000. That judgment was about everyday religious slaughter following particularly strict rituals by a group of ultraorthodox Jews in France. The group had not been admitted to slaughterhouses, because the state did not consider the group to be sufficiently representative. The ECtHR then even had denied any interference with Art. 10 ECHR (alone and in conjunction with Art. 14 ECHR), with the argument that there is no religious obligation to eat kosher meat, and because such meat could be imported from Belgium. Independently of the soundness of that argument, *Liga van Moskeeën* is not about *eating* the meat but about performing the act of slaughter, specifically as a

component of the high religious feast (judgment, para. 45). Although this feature forecloses the simple referral of the believers to buying the meat elsewhere, there are good arguments for denying an indirect discrimination of Muslims in the region.

First, religious opinion diverges on whether slaughter is compulsory during the feast or not (cf. judgment, para. 50). Also, the religious rule or custom provides that meat should be shared with neighbours (which could be understood as implying that the neighbours themselves do not slaughter). Or, maybe believers could travel to other parts of Belgium where the slaughter facilities are not overcrowded.

These considerations are of course not compelling, but it must be borne in mind that Regulation 1099/2009 already accommodates religious slaughter. Unlike other EU member states, for example Slovenia (see the Slovenian constitutional court's judgment (U-I-140/14) of 25 April 2018), Belgium does allow slaughter without stunning.

The outcome of the case at hand does *not* depend on the question of which type of slaughter, with conventional stunning or without stunning, is per se worse for animals. It is hotly debated whether unstunned slaughter causes more suffering and anxiety to the animal than the conventional industrial slaughter. In both cases, much depends on proper procedures. In European slaughterhouses, frequent mishaps in shooting of cattle is reported, and the asphyxiation of pigs and the electrocution of poultry are not totally quick and painless either.

Exactly because the European regulation seeks to assure proper and professional religious slaughter by relegating it to authorised slaughterhouses which offer more guarantees for using the right equipment (such as sufficiently long and sharp knives), and trained personnel rather than non-authorised facilities, it offers a sufficiently reasonable justification for tolerating the adverse impact on the Muslim population of the region during the four days of the feast.

Conclusion

In *Liga van Moskeeën,* Advocate General Nils Wahl duly noted that in debates about religious slaughter "the spectre of stigmatisation very swiftly appears. It is historically prevalent and care must be taken not to encourage it." (Opinion of Advocate General Wahl of 30 Nov. 2017, para. 106).

Indeed, concern for animal welfare should not be played out against respect for human dignity and defence of religious and cultural pluralism. There is no necessary contradiction between both agendas. Quite to the contrary, they can even be seen as aligned. The reason is that the de-humanisation of humans which can foreshadow discrimination, stigmatisation, and even extermination, finds its model and training-ground in the debasement of non-human animals. When extreme violence against animals, as the prototypical "Other", is tolerated, condoned, and entrenched, it becomes difficult to uphold the cultural ban on violence against humans, especially against those groups that are likened to animals.

In that sense, Theodor Adorno wrote that the recurring stance about savages, blacks, or Japanese (or migrants ─ we might add with Donald Trump) resembling animals already contains the key to the pogrom. The defiance with whom the perpetrator says: “It is only an animal” repeats itself in his cruelty towards humans, in which the perpetrator constantly has to confirm “… only an animal” ─ because he could not fully believe it with regard to the animal either (Theodor W. Adorno, Aphorismus 68: Menschen sehen dich an).

Awareness of the danger of demeaning and debasing humans, first by comparing them to animals, and second by condemning “their” cruelty towards animals can be employed as a positive force for sharpening our consciousness and improving our consideration for the “other”. Along that line, the way forward seems to be the inter-cultural and inter-religious dialogue, also on matters of slaughter ─ and an overall reduction or even abandonment of the consumption of animal meat where healthy and ethical alternatives exist.