

7 Animal Welfare and the Right to Freedom of Religion before the CJEU

The Case of Stunning and Ritual Slaughter

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Abstract

This chapter discusses the issue of abolishing religious exemptions from the obligation to stun animals before slaughter in the interest of animal welfare. The chapter focuses on the ruling of the Court of Justice of the European Union in the matter of *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*. It concludes that Member States are in principle allowed to require stunning in the context of ritual slaughter but that the margin of appreciation in this case was probably too wide. For this reason, the possible effects of a narrower margin are investigated. The chapter also argues that the cumulative effect of abolishing religious exemptions across the European Union should be considered when deciding whether the right to freedom of religion was limited in a proportionate manner.

Keywords

animal welfare; ritual slaughter; religious slaughter; stunning of animals; fundamental rights; freedom of religion; limitation of rights; Belgium; Flanders Court of Justice of the European Union; European Court of Human Rights; Constitutional Court of Belgium; Charter of Fundamental Rights of the European Union; European Convention on Human Rights; Treaty on European Union; Treaty on the Functioning of the European Union; EU law; ECHR law

7.1 Setting the Scene

A question that continues to vex policymakers, lawyers, and judges across Europe today is that of the legal regulation of ritual or religious slaughter, as required by many adherents of Judaism and Islam. According to this practice, animals may not be stunned when they are slaughtered, as this would

contradict religious tenets and render such meat unfit for human consumption. While many jurisdictions across Europe allow religious exemptions from stunning animals, such exemptions have become controversial in some states in the cause of animal welfare. In the past few years, Denmark amended its legislation to require blanket stunning, while the Netherlands nearly scrapped its religious exemptions.¹ Other states, such as Sweden, have required blanket stunning for decades.²

In light of recent developments in that country, Belgium provides fertile ground for examining the legal regulation of ritual slaughter. This is especially true given the European Union (EU) law dimension of the case and its significance for other jurisdictions facing similar issues. Belgium has always recognised religious exemptions to the stunning of animals.³ However, in 2017, Flanders and Wallonia, two of Belgium's three federal regions, each adopted decrees which scrapped such religious exemptions.⁴ The Flemish and Walloon decrees were challenged before the country's Constitutional Court. In 2019, the Constitutional Court submitted three references for preliminary rulings to the Court of Justice of the European Union (CJEU) regarding the Flemish decree, which was essentially the same as the Walloon decree.⁵ In his opinion in 2020, Advocate General Hogan proposed that scrapping the exemptions did not accord with EU law.⁶ The CJEU did not follow the Advocate General's opinion and ruled in *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering* in 2020 that scrapping the religious exemptions was not precluded by EU law.⁷ This ruling was duly copied by the Constitutional Court in 2021 in two judgements concerning the Flemish and Walloon decrees, respectively.⁸ To

1 See J. Janssen, "Dierenwelzijnargumenten tegen en godsdienstige argumenten voor deze slachtmethode" *Tijdschrift voor Religie, Recht en Beleid*, no. 5 (2015): 34.

2 See G. van der Schyff, "Ritual Slaughter and Religious Freedom in a Multilevel Europe: The Wider Importance of the Dutch Case" *Oxford Journal on Law and Religion* 3 (2014): 76, 78.

3 See S. Wattier, "Ritual Slaughter Case: The Court of Justice and the Belgian Constitutional Court Put Animal Welfare First" *European Constitutional Law Review*, vol. 18 (2022): 264, 267.

4 S. Wattier, "Ritual Slaughter Case" 267–268.

5 Belgian Constitutional Court's case No. 53/2019 [2019], §§ A63.3, B.28. <https://www.const-court.be/public/e/2019/2019-053e.pdf>. Accessed June 25, 2024.

6 Opinion of AG Hogan in case C-336/19 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering* [2020] § 88, ECLI:EU:C:2020:695.

7 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 96, ECLI:EU:C:2020:1031.

8 Belgian Constitutional Court's case No. 117/2021 [2021]. <https://www.const-court.be/public/e/2021/2021-117e.pdf>. Accessed June 25, 2024, and Belgian Constitutional Court's case No. 118/2021 [2021]. <https://www.const-court.be/public/e/2021/2021-118e.pdf>. Accessed June 25, 2024.

date, the Brussels Capital Region is the only Belgian region to still allow religious exemptions to the stunning of animals.⁹

The CJEU's judgement in *Centraal Israëlitisch Consistorie van België and Others* is of particular importance, as it is the first on the European plane to consider whether religious exemptions to stunning can be removed without violating the right to freedom of religion. Although the topic of ritual slaughter featured in its case law in the past, this basic question was never before addressed by the CJEU. For instance, in *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v. Vlaams Gewest* the CJEU in 2018 confirmed the validity of an EU rule that ritual slaughter without stunning the animal first must always take place in approved slaughterhouses.¹⁰ The place of slaughter was thus the main issue before the Court and not ritual slaughter as such. As for the European Court of Human Rights (ECtHR), in 2000 the question before the bench in *Cha'are Shalom Ve Tsedek v. France* was not whether the ritual slaughter of animals without stunning them could be banned but whether the organisation in question could be denied permission for such slaughter while another organisation was allowed to do so.¹¹ The ECtHR only ruled on the question in 2024, when in *Executief van de Moslims van België v. Belgium* it decided that the Flemish and Walloon decrees did not violate the ECHR's guarantees on freedom of religion or the prohibition of discrimination, thereby reaching a similar conclusion to that of the CJEU four year years earlier.¹²

Given the significance of the legal issue, the purpose of this contribution is to critically analyse the CJEU's judgement in *Centraal Israëlitisch Consistorie van België and Others* as the first of its kind. The importance of this judgement is reinforced by the fact that it is relevant not only to the Belgian situation, but also to EU law and to each of the 27 Member States when they comply with such law. Where relevant, reference will be made to the ECHR and ECtHR case law regarding ritual slaughter. Although this contribution was largely completed before the ruling in *Executief van de Moslims van België*, some preliminary observations will be included in the light of the judgement.

9 S. Wattier, "Ritual Slaughter Case" 269. See also G. van der Schyff, S. Sottiaux, "Debating Ritual Slaughter in Belgium: A Multilevel Fundamental Rights Perspective". In: K. Lemmens, S. Parmentier, L. Reyntjens (eds.), *Human Rights with a Human Touch: Liber Amicorum Paul Lemmens* (Cambridge: Intersentia, 2019): 715, 720.

10 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others v. Vlaams Gewest*, C-426/16 [2018], ECLI:EU:C:2018:335; see also *Oeuvre d'assistance aux bêtes d'abattoirs v. Ministre de l'Agriculture et de l'Alimentation and Others*, C-497/17 [2019], ECLI:EU:C:2019:137 on labelling products resulting from ritual slaughter without stunning animals as organic.

11 *Cha'are Shalom Ve Tsedek v. France*, No. 27417/95 [2000], ECLI:CE:ECHR:2000:0627JUD002741795.

12 *Executief van de Moslims van België v. Belgium*, Nos. 16760/22 and 10 others [2024], ECLI:CE:ECHR:2024:0213JUD001676022.

In studying the CJEU's ruling in *Centraal Israëlitisch Consistorie van België and Others*, the attention turns first to explaining what is meant by ritual slaughter and stunning in the context of animal welfare (Section 7.2). After this the case of ritual slaughter in Belgium is outlined with particular reference to the Flemish decree (Section 7.3)¹³, followed by the applicable EU law framework in Council Regulation (EC) no. 1099/2009 on the Protection of Animals at the Time of Killing of September 24, 2009¹⁴ (Section 7.4). This is followed by a brief summary of the preliminary references made by the Belgian Constitutional Court to the CJEU (Section 7.5) and an explanation of the CJEU judgement and opinion by the Advocate General (Section 7.6). The judgement and the opinion are then analysed, paying particular attention to whether the abolition of the religious exemptions from the stunning of animals violated the right to freedom of religion under Article 10(1) of the Charter of Fundamental Rights of the European Union¹⁵ (CFREU) (Section 7.7), before concluding the discussion (Section 8).

7.2 Ritual Slaughter, Stunning, and Animal Welfare

As various religions do, authorities in Judaism and Islam prescribe dietary laws for their adherents. These laws cover issues ranging from the types of food that may be eaten by their followers to the methods used for its preparation.¹⁶ When dietary laws are met, food is considered *kosher* in Judaism and *halal* in Islam.¹⁷ With regard to the preparation and consumption of meat, various religious laws can be distinguished in these religions.¹⁸ Importantly, both these religions prohibit their followers from consuming certain types of animals, as well as blood.¹⁹ And when an animal fit for human consumption is slaughtered, particular rites are prescribed by each religion. In Judaism, the practice of such slaughter is known as *shechita* and in Islam *dhabibah*. The act of slaughtering an animal in accordance with religious rites or precepts is generally described as ritual slaughter or religious slaughter. The terms 'ritual slaughter'

13 Flemish Decree of 7 July 2017 amending the Law of August 14, 1986, on the protection and welfare of animals, regarding permitted methods of slaughtering animals [Decreet houdende wijziging van de wet van 14 augustus 1986 betreffende de bescherming en het welzijn der dieren, wat de toegelaten methodes voor het slachten van dieren betreft] [2017], <https://www.ejustice.just.fgov.be/eli/decreet/2017/07/07/2017030639/staatsblad>. Accessed October 25, 2024.

14 Council Regulation (EC) No 1099/2009 of September 24, 2009, on the protection of animals at the time of killing (Text with EEA relevance) [2009] OJ L 303.

15 Charter of Fundamental Rights of the European Union [2007] OJ C 303.

16 *Cha'are Shalom Ve Tsedek*. No. 27417/95 [2000] § 13.

17 S. Wattier, "Ritual Slaughter Case" 266.

18 See further P. Lerner, A.M. Rabello, "The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities", *Journal of Law and Religion*, vol. 22, no. 1 (2007): 9–12.

19 See C.M. Zoethout, "Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter", *Human Rights Quarterly*, vol. 35 (2013): 651, 653–655.

and ‘religious slaughter’ can be considered synonyms.²⁰ This contribution uses the term ‘ritual slaughter’ because it is prevalent in the academic debate on the subject and is commonly used both in the Belgian context and in the judgments of the CJEU and the ECtHR.

Where the religious conventions or rules governing ritual slaughter in Judaism and Islam are not observed, the meat may be rejected and considered unfit for human consumption. The regulations regarding ritual slaughter in these two religions know various facets. These regulations may pertain among others issues to the knife and method used for cutting, the person permitted to slaughter the animal, the saying of a prayer over the animal, or the inspection of the animal’s meat once it has been slaughtered.²¹ It suffices to note that while there are commonalities between the two religions, there are also differences between them in this respect.²² Differences may also exist within each religion, as evidenced in the *Cha’are Shalom Ve Tsedek* case decided by the ECtHR. The case concerned a Jewish association in France which did not recognise the meat as slaughtered by another such association, as they preferred a stricter adherence to the rules about the inspection of the slaughtered animal in determining whether its meat was “perfectly pure, or *glatt*”.²³ Moreover, it goes without saying that not all followers of these religions may agree with or subscribe to the practice of ritual slaughter either.

Various interfaces can be distinguished when it comes to the present-day legal regulation of ritual slaughter, as alluded to in the introduction. These can relate to the state restricting such slaughter to slaughterhouses, such as in *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others* to who is permitted to carry it out, such as in *Cha’are Shalom Ve Tsedek*. The most debated interface across Europe today probably concerns the relationship between ritual slaughter and the legal requirement of stunning animals. The purpose of stunning is to render an animal immediately unconscious during the process of slaughter through a variety of techniques.²⁴

20 See G. van der Schyff, S. Sottiaux, “Debating Ritual Slaughter in Belgium” 717; C.M. Zoethout, “Ritual Slaughter and the Freedom of Religion” 652; P. Lerner, A.M. Rabello, “The Prohibition of Ritual Slaughtering” 9.

21 See C.M. Zoethout, “Ritual Slaughter and the Freedom of Religion” 656. See also A.Z. Zivotofsky, *Religious Rules and Requirements – Judaism* (Cardiff: Dialrel, 2010). <https://www.dialrel.net/dialrel/images/dialrel-wp1-final.pdf>. Accessed December 18, 2023; H. Anil, M. Miele, K. von Holleben, F. Bergeaud-Blackler, A. Velarde, *Religious Rules and Requirements – Halal Slaughter* (Cardiff: Dialrel, 2010). https://www.dialrel.net/dialrel/images/dialrel_report_halal.pdf. Accessed December 18, 2023.

22 P. Lerner, A.M. Rabello, “The Prohibition of Ritual Slaughtering” 11.

23 *Cha’are Shalom Ve Tsedek*. No. 27417/95 [2000] §§ 31–33, 60.

24 See G. van der Schyff, “Ritual Slaughter and Religious Freedom in a Multilevel Europe” 79; K. von Holleben, M. von Wenzlawowicz, N. Gregory, H. Anil, A. Velarde, P. Rodriguez, B. Cenci Goga, B. Catanese, B. Lambooi, *Report on Good and Adverse Practices – Animal Welfare Concerns in Relation to Slaughter Practices from the Viewpoint of Veterinary Sciences* (Cardiff: Dialrel, 2010) 79–80. <https://www.dialrel.net/dialrel/images/veterinary-concerns.pdf>. Accessed December 18, 2023.

This can involve gassing, mechanical, or electrical methods.²⁵ A distinction is also made between so-called pre-cut and post-cut methods.²⁶ This refers to whether the animal is stunned before its throat is cut or immediately thereafter. An additional distinction is drawn between reversible and non-reversible methods.²⁷ Reversible methods mean that the animal can be revived and regain conscious after stunning, such as some electrical methods allow, whereas non-reversible methods exclude this by resulting in the animal's death. Stunning today is usually advanced in the cause of animal welfare as a way to prevent animals from suffering unnecessary pain when slaughtered. This is especially so regarding pre-cut stunning. In this regard, the EU-funded DIALREL report on the comparative ranking of risks from a veterinary sciences perspective concluded that "pain and suffering during the cut" was "high" during "neck cutting without stunning" and "stunning post neck cutting", but "low" when "stunning prior to neck cutting" was practised.²⁸ Also, for "pain and suffering during the post-cut period", the rating was "low" for pre-cut stunning, "intermediate" for post-cut stunning and "high" when there was no stunning.²⁹

Many legal jurisdictions today require that animals be stunned in some manner to reduce their distress, pain and suffering when slaughtered.³⁰ Whether stunning is compatible with ritual slaughter rites in Judaism and Islam is controversial though. While some religious authorities, such as the position taken by the Islamic rector of Al-Azhar University in Cairo in 1982, accept the practice provided it does not result in the death of the animal, others argue that it violates the regulations on ritual slaughter under all circumstances.³¹ When stunning is rejected, meat that has not been properly slaughtered may not be consumed for fear of violating religious law. Against this background, the opposition between those in favour of blanket stunning for the benefit of animal welfare and those who would make or maintain an exemption for Jewish and Islamic ritual slaughter on religious grounds is evident. It is this tension that underlies the CJEU's judgement in *Centraal Israëlitisch Consistorie van België and Others* and which will be investigated in the following sections. The purpose in this regard is not to engage in or settle a religious or theological debate, but to focus on the legal questions involved, especially from the perspective of freedom of religion.

25 G. van der Schyff, "Ritual Slaughter and Religious Freedom in a Multilevel Europe" 79.

26 G. van der Schyff, "Ritual Slaughter and Religious Freedom in a Multilevel Europe" 79.

27 G. van der Schyff, "Ritual Slaughter and Religious Freedom in a Multilevel Europe" 79.

28 K. Von Holleben et al, *Report on Good and Adverse Practices* 70.

29 K. Von Holleben et al, *Report on Good and Adverse Practices* 70.

30 See S. Ferrari, R. Botton, *Legislation Regarding Religious Slaughter in the EU Member, Candidate and Associated Countries* (Cardiff: Dialrel, 2010). <https://www.dialrel.net/dialrel/images/report-legislation.pdf>. Accessed December 18, 2023.

31 See G. van der Schyff, "Ritual Slaughter and Religious Freedom in a Multilevel Europe" 79; P. Lerner, A.M. Rabello, "The Prohibition of Ritual Slaughtering" 11–12.

7.3 The Case of Ritual Slaughter in Belgium

Before the sixth state reform in Belgium, animal welfare was a federal competence. Since July 1, 2014, the subject has become a regional competence. This means that each region can decide to amend the Law of August 14, 1986, on the Protection and Welfare of Animals for itself. The default position under the 1986 Law, as expressed in Articles 15 and 16, was that vertebrate animals could only be killed after stunning. Mindful of the right to freedom of religion, it was decided to exempt ritual slaughter from this requirement in Article 16(1).³² Each of the three regions saw attempts to scrap the exemption after the topic became a regional competence. With exemption of the Brussels Capital Region, where a bill to that effect was rejected on June 17, 2022, Flanders and Wallonia each adopted decrees which scrapped the exemption from stunning for ritual slaughter.³³ In this regard, Article 15(2) of the Flemish decree, adopted on July 7, 2017, departs from the Law of 1986 by providing that

[i]f the animals are slaughtered according to special methods required for religious rites, the stunning must be reversible and the animal's death must not be caused by stunning.³⁴

Electronarcosis was deemed the most effective stunning method as it is non-lethal and allows an animal to regain consciousness without any negative effect.³⁵ Wallonia adopted two decrees, both of which were similar to that in Flanders by requiring that reversible stunning be practised in the case of ritual slaughter.³⁶

32 Belgian Law of 14 August 1986 on the protection and welfare of animals [Wet van 14 augustus 1986 betreffende de bescherming en het welzijn der dieren] [1986]]; *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 11; G. van der Schyff, S. Sottiaux, "Debating Ritual Slaughter in Belgium" 719.

33 See S. Wattier, "Ritual Slaughter Case" 269; G. van der Schyff, S. Sottiaux, "Debating Ritual Slaughter in Belgium" 718–720.

34 Flemish Decree of 7 July 2017 amending the Law of August 14, 1986, on the protection and welfare of animals, regarding permitted methods of slaughtering animals (Decreet houdende wijziging van de wet van 14 augustus 1986 betreffende de bescherming en het welzijn der dieren, wat de toegelaten methodes voor het slachten van dieren betreft [2017]). The translated quote is taken from *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 12.

35 Flemish Decree of 7 July 2017 amending the Law of August 14, 1986, on the protection and welfare of animals, regarding permitted methods of slaughtering animals (Decreet houdende wijziging van de wet van 14 augustus 1986 betreffende de bescherming en het welzijn der dieren, wat de toegelaten methodes voor het slachten van dieren betreft [2017]). The translated quote is taken from *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020], § 13. Initially, an exemption was made for bovine animals to be stunned using post-cut stunning, as the practice of electronarcosis was not yet as advanced in their case.

36 See in particular Art. D.57(1) of the Walloon Decree of 4 October 2018 on the Walloon animal welfare code [Décret relatif au Code wallon du Bien-être des animaux] [2018]. The first was the Walloon Decree of 18 May 2017 amending Articles 3, 15 and 16 and inserting an Article 45ter into the law of 14 August 1986 on the protection and welfare of animals [Décret modifiant les articles 3, 15 et 16 et insérant un article 45ter dans la loi du 14 août 1986 relative à la protection et au bien-être des animaux] [2017].

The provision in the Flemish decree is based on the report commissioned by the Flemish minister responsible for animal welfare in which an independent party entered into a dialogue with various stakeholders on ritual slaughter and stunning.³⁷ The report concluded that reversible stunning took maximum account of animal welfare while also respecting the spirit of ritual slaughter by not causing an animal's death but allowing it to die by bleeding out as required in ritual Jewish and Islamic slaughter.³⁸ According to the report, the balance struck was proportionate within the framework of religious freedom, whilst noting that this was acceptable to at least part of the Muslim community and only to a limited or no extent for the Jewish community.³⁹ The report met with agreement in the decree's preparatory documents, which stressed the importance of stunning "to eliminate all avoidable animal suffering in Flanders".⁴⁰

Following the adoption of the Flemish and Walloon decrees, the official representations of the Jewish and Muslim communities in Belgium, as well as a number of non-governmental organisations and individuals, approached the country's Constitutional Court in 2019 to annul them.⁴¹ It is important to note that the Constitutional Court rules on constitutional norms, however this remit is interpreted widely allowing the Court in many cases to take note of international law and EU law.⁴² Consequently, a range of legal arguments based on various instruments were put to the Court, the essence of which alleged that the decrees violated EU secondary law, freedom of religion, the separation of church and state, freedom of occupation and the principle of equality and non-discrimination.⁴³ As the two decrees are similar in wording and the Court's ultimate decision in both cases confirmed the constitutionality of the decrees, this discussion will only focus on the Flemish case. This is primarily because the Flemish decree formed the basis for the preliminary references the Court made to the CJEU. As questions of EU law were raised, the

37 P. Vanthemsche, Rapport over de dialoog met de geloofsgemeenschappen met het oog op een significante verbetering van het dierenwelzijn bij de praktijk van ritueel slachten en de overgang naar een algemeen verbod op onbedwelmd slachten of 2017. [https://www.friscris.be/nl/publications/rapport-over-de-dialoog-met-de-geloofsgemeenschappen-met-het-oog-op-een-significante-verbetering-van-het-dierenwelzijn-bij-de-praktijk-van-ritueel-slachten-en-de-overgang-naar-een-algemeen-verbod-op-onbedwelmd-slachten\(6d92edab-4998-4e76-a25d-e4a8e2034229\).html](https://www.friscris.be/nl/publications/rapport-over-de-dialoog-met-de-geloofsgemeenschappen-met-het-oog-op-een-significante-verbetering-van-het-dierenwelzijn-bij-de-praktijk-van-ritueel-slachten-en-de-overgang-naar-een-algemeen-verbod-op-onbedwelmd-slachten(6d92edab-4998-4e76-a25d-e4a8e2034229).html). Accessed December 18, 2023.

38 P. Vanthemsche, Rapport, 57.

39 P. Vanthemsche, Rapport.

40 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 13.

41 Belgian Constitutional Court's case No. 52/2019 [2019]. <https://www.const-court.be/public/e/2019/2019-052e.pdf>. Accessed December 18, 2023; regarding the Flemish decree; and case No 53/2019 [2019] regarding the Walloon decree.

42 See S. Wattier, "Ritual Slaughter Case" 278; Stefan Sottiaux, *Grondwettelijk recht* (Cambridge: Intersentia, 2016): 454–455.

43 Belgian Constitutional Court's case No 52/2019 § B.15.

Constitutional Court decided to make three references to the CJEU. The applicable EU law framework will be outlined first and then the references.

7.4 The EU Law Framework on Ritual Slaughter and Animal Welfare

On the topic of ritual slaughter, Regulation no. 1099/2009 on the Protection of Animals at the Time of Killing is now the standard piece of EU legislation and has replaced Directive 93/119/EC on the Protection of Animals at the Time of Slaughter or Killing of December 22, 1993.⁴⁴ The Regulation reflects the duty in Protocol no. 33 on Protection and Welfare of Animals attached to the Treaty of Amsterdam of 1997 to pay full regard to the welfare of animals in a number of policy areas.⁴⁵ This duty of the EU and the Member States was recast in Article 13 of the Treaty on the Functioning of the European Union (TFEU)⁴⁶ by the Treaty of Lisbon in 2009. Today, the provision recognises animals as ‘sentient beings’ and retains the earlier qualification that Member States’ legal provisions and practices relating to religious rites, cultural traditions, and regional heritage must be respected when taking full regard of animal welfare.⁴⁷

As its predecessor, Regulation no. 1099/2009 provides a number of minimum animal welfare requirements that Member States need to follow in the process of slaughtering animals for a variety of purposes, including the ‘production of food’ according to Article 1(1).⁴⁸ In this regard, the Regulation stipulates that animals must be spared “any avoidable pain, distress or suffering during their killing”.⁴⁹ The Regulation does not apply to a number of situations, such as the animals killed in the process of “scientific experiments”, “during hunting or recreational fishing activities” and “during cultural or sporting events”.⁵⁰ Although the term ‘slaughter’ is sometimes used, the Regulation speaks more generally of the ‘killing’ of ‘animals’. Where ‘killing’ is

44 Council Directive 93/119/EC on the Protection of Animals at the Time of Slaughter or Killing of December 22, 1993 [1993] OJ L 340/21; Council Regulation no. 1099/2009 (EC) on the Protection of Animals at the Time of Killing of September 24, 2009 [2009] OJ L 303/1.

45 See recitals 4 and 15 of Regulation no. 1099/2009. Protocol no. 33 was derived from Declaration no. 24 on the Protection of Animals attached to the Treaty of Maastricht of 1992.

46 Treaty on the Functioning of the European Union (consolidated version) [2016] OJ C 202.

47 See generally S. Mangiameli, “Article 13 [Animal Protection]”. In H.-J. Blanke, S. Mangiameli (eds.), *Treaty on the Functioning of the European Union: A Commentary* (Cham: Springer, 2021): 331–346; M. Klamert, “Article 13 TFEU”. In: M. Kellerbauer, M. Klamert, J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: Oxford University Press, 2019): 389–390.

48 See recitals 34, 35, 57 on minimum welfare requirements.

49 Art. 3(1) of Regulation no. 1099/2009.

50 To which is added the slaughter of “poultry, rabbits and hares” for their owners’ private domestic consumption. See Art. 1(3)(a)(i)–(iii) of Regulation no. 1099/2009.

defined as “any intentionally induced process which causes the death of an animal”, the latter being defined as “any vertebrate animal, excluding reptiles and amphibians”.⁵¹

In Article 4(1) of the Regulation, one of its central rules is explained, namely that animals may only be killed after stunning, thereby providing for pre-cut stunning.⁵² The effects of stunning – namely, the loss of consciousness and sensibility – must last until the death of the animal.⁵³ In Annex I, the Regulation also contains a list of stunning methods, including their specifications.⁵⁴ However, the requirement in Article 4(1) of the Regulation that animals be stunned before they are slaughtered is not a blanket requirement. This is because Article 4(4) of the Regulation provides for an exemption from pre-cut stunning and states the following:

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.⁵⁵

The practice of ritual slaughter is thereby exempted from stunning, provided it takes place in a slaughterhouse as regulated in Article 2(k) of the Regulation. By ‘religious rite’, the Regulation refers to “a series of acts related to the slaughter of animals and prescribed by a religion”, according to Article 2(g). Although the Regulation does not mention any religion by name, it should be clear that both ritual Jewish and Islamic slaughter, as described earlier, fall under the exemption. In order to have a clear picture of the exemption for ritual slaughter, it is important to mention Article 26 of the Regulation on stricter national rules. Apart from allowing existing stricter national rules, Article 26(2) allows Member States to adopt stricter rules in a number of areas laid down by the Regulation.⁵⁶ In this context, Article 26(2)(c) states that stricter national rules may be adopted for the “slaughtering and related operations of animals in accordance with Article 4(4)”. While ritual slaughter is exempted from the requirement in Article 4(1) that animals always be stunned, the exemption itself may be subject to stricter national rules. In

51 To which is added the slaughter of “poultry, rabbits and hares” for their owners’ private domestic consumption. See Art. 2(a), (c) of Regulation no. 1099/2009.

52 Stunning is defined as “any intentionally induced process which causes loss of consciousness and sensibility without pain, including any process resulting in instantaneous death”.

53 Art. 4(1) of Regulation no. 1099/2009.

54 These are stunning by mechanical, electrical and gassing methods, as well as by lethal injection.

55 In this regard, the position in Regulation no1099/2009 is the same as in Directive 93/119/EC, which provided for an exemption in Art. 5(2).

56 Apart from stricter national rules, Art. 26(1) of Regulation no. 1099/2009 does not prevent Member States from maintaining existing national rules aimed at ensuring a more extensive protection of animals when they are killed. In this way, Member States are not required to scale back their protection of animal welfare in meeting the requirements set by the Regulation.

setting stricter rules, a Member State may not “prohibit or impede the putting into circulation within its territory of products of animal origin” from other Member States on account that those products do not meet its own stricter rules.⁵⁷

7.5 Three References for Preliminary Rulings

The interplay between the adoption of stricter national rules by a Member State, under Article 26(2)(c) of Regulation no. 1099/2009, versus the exemption for ritual slaughter in Article 4(4) from the requirement that animals must always be stunned played a central role in the CJEU’s ruling in *Centraal Israëlitisch Consistorie van België and Others*. In this regard, the Belgian Constitutional Court raised three questions.⁵⁸ The CJEU only sought the opinion of Advocate General Hogan on the first two questions, and in its judgement, the Court also examined these questions together.⁵⁹

The CJEU reformulated the first *two questions* as essentially referring to whether Article 26(2)(c) of the Regulation, “read in light of Article 13 TFEU and Article 10(1) of the Charter, must be interpreted as precluding the legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal’s death”.⁶⁰ The *third* question asked whether the Regulation would violate Articles 20, 21, and 22 CFREU, on equality and respect for religious diversity, if it allowed Member States to require stunning in all cases of slaughter, while the killing of animals in the context of cultural, sporting, hunting, and recreational events does not require stunning.⁶¹ On the first two questions, the CJEU ruled that the Regulation did not preclude national legislation which required reversible stunning in the context of ritual slaughter, which was at odds with the Advocate General’s opinion that the religious exemption from stunning in Article 4(4) had to be respected. As to the third question, the CJEU ruled

57 Art. 26(4) of Regulation no. 1099/2009.

58 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 32.

59 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 32. Read separately, the *first* question concerned whether the Flemish decree could, under Art. 26(2)(c) of Regulation no. 1099/2009, derogate from the religious exemption from stunning under Art. 4(4) by requiring stunning in all cases, including ritual slaughter. And if this was possible, the *second* question was whether the possibility of derogating from the religious exemption violated the right to freedom of religion under Art. 10(1) CFREU.

60 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 39.

61 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 32.

that there was no violation of the mentioned CFREU articles.⁶² The rest of this contribution will focus on the first two questions, as they formed the basis of the ruling, especially from the perspective of religious freedom. The third question relates primarily to the issue of equality rights and requires a study of its own.⁶³ In what follows, the judgement and the opinion will be outlined and then analysed.

7.6 Explaining the CJEU Judgement and the Advocate General's Opinion

The main difference between the Court and the Advocate General related to the nature of the legislative framework created by Regulation no. 1099/2009 in the context of the religious exemption from stunning in Article 4(4).⁶⁴ The Court's interpretation was arrived at based on a reading of recitals 15 and 18 of the Regulation. The exemption, the Court explained by referring to recital 15, reflected the wording of Article 13 TFEU, which refers to the need to protect animal welfare, but in a way, that takes into account the different approaches in the Member States, particularly with regard to religious rites.⁶⁵ The Court also referred to recital 18 that under the exemption "a certain level of subsidiarity" must be left to each Member State.⁶⁶ On this basis, the Court held that while the Regulation provides a framework for reconciling the right to freedom of religion and animal welfare, this balance is not established by the

62 See too S. Wattier, "Ritual Slaughter Case" 273. This was, briefly, because cultural and sporting events could not be understood as food production activities in the sense of Art. 1(1) of Regulation no. 1099/2009, while 'hunting' and 'recreational fishing' would be rendered meaningless if animals had to be stunned first (*Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] §§ 88–91). Taken together, the CJEU ruled that the Regulation "did not disregard the cultural, religious and linguistic diversity guaranteed" under Art. 22 CFREU (§ 93).

63 See G. Harpaz, A. Reich, "Kosher and Halal Slaughtering Before the Court of Justice: A Case of Religious Intolerance?", *European Public Law*, vol. 28, no. 1 (2022): 35, 49–50. Consider also E. Howard, "Ritual Slaughter and Religious Freedom: Liga van Moskeeën" *Common Market Law Review*, vol. 56, no. 3 (2019): 803, 805, 816–624; A. Peters, "Religious Slaughter and Animal Welfare Revisited: CJEU, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen", *Canadian Journal of Comparative and Contemporary Law*, no. 5 (2019): 269, 281–295 on addressing the regulation of ritual slaughter on non-discrimination grounds. See also S. Wattier, "Ritual Slaughter Case" 281–282 and regarding the ECHR the ruling in *Executief van de Moslims van België v. Belgium*, Nos. 16760/22 and 10 others [2024], §§ 125–151.

64 Y. Nakanishi, "Case C-336/19 Centraal Israëlitisch Consistorie van België: Animal Welfare and Freedom of Religion", *Maastricht Journal of European and Comparative Law*, vol. 28, no. 2 (2021): 687, 691–694. <https://doi.org/10.1177/1023263X211027497> lists the differences between the judgement and opinion.

65 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 44.

66 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 45.

Regulation itself, but must be found by the Member States.⁶⁷ This meant that Member States could in principle derogate from the exemption, under Article 26(2)(c) of the Regulation, even to the extent of requiring stunning in the case of ritual slaughter.⁶⁸ When adopting stricter rules, Member States though had to respect the right to freedom of religion in Article 10(1) CFREU.⁶⁹

Advocate General Hogan came to a different conclusion about the taking of stricter national rules under Article 26(2)(c). The adoption of such rules could only “take place within the context of and with full regard to the nature of the derogation provided for by Article 4(4)” of the Regulation.⁷⁰ This did not include the “elimination or quasi-elimination” of the religious exemption from stunning, but did allow for the adoption of additional “technical conditions or specifications” aimed at minimising the suffering of the slaughtered animals.⁷¹ This reading was also based on recital 18 but stressed the need to maintain the religious exemption in combination with Member States only having “a certain level of subsidiarity” when derogating.⁷² Any other interpretation of the Regulation, he opined, would interfere with the right to freedom of religion in Article 10(1) CFREU and had to be justified under the Charter’s limitation provision under Article 52(1).⁷³

However, as explained, the Court disagreed and held that when derogating from Article 4(4) of the Regulation, a Member State may in principle require stunning in the case of ritual slaughter. The Court noted that the word ‘religion’ had to be understood in a broad sense and that ritual slaughter fell within the scope of the right to manifest religion in Article 10(1) CFREU, as previously decided in *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen, VZW and Others*.⁷⁴ In this regard, it recognised that the Flemish decree interfered with the right by requiring stunning, which resulted in an examination of the decree under Article 52(1) CFREU.⁷⁵

In this regard, the Flemish decree clearly met the requirement that the interference had to be provided by law.⁷⁶ The judgement then found that the

67 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 47.

68 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 48.

69 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] §§ 48–49.

70 Opinion of AG Hogan in case C-336/19, § 70.

71 Opinion of AG Hogan in case C-336/19, §§ 69, 75.

72 Opinion of AG Hogan in case C-336/19, § 71. See also § 72.

73 Opinion of AG Hogan in case C-336/19, § 73. Such justification was deemed difficult, if not impossible, to achieve (§ 73).

74 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 52.

75 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] §§ 53–55.

76 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 60.

‘essence’ of the right to freedom of religion was respected. This was because the decree only addressed one aspect of ritual slaughter by requiring reversible stunning, without prohibiting such slaughter in its entirety.⁷⁷ This opened the door to reviewing the legitimate aim and proportionality of the interference. It was also clear that by pursuing stricter national rules in the interest of animal welfare, as required under Article 13 TFEU, the decree met a “general interest objective” recognised by the EU.⁷⁸ The judgement then focused in some detail on the proportionality of the interference. The limitation analysis was conducted with special reference to the ECtHR case law on the right to freedom of religion in Article 9(1) ECHR. This is because Article 10(1) CFREU ‘corresponds’ to that right according to Article 52(3) CFREU, which provides that

[i]n so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]. This provision shall not prevent [EU] law providing more extensive protection.

In this regard, the Court copied the notion of a “wide margin of appreciation” for the state from the case law of the ECtHR.⁷⁹ This margin was caused by the “absence of consensus at EU level”, which the Court derived from Regulation no. 1099/2009, as it allowed religious exemptions from stunning on the one hand but also allowed stricter national rules on the subject on the other.⁸⁰ As a consequence of the margin, ‘special weight’ had to be given to the role of the ‘domestic policymaker’ when reviewing the necessity of the interference with the right to freedom of religion, which in this case meant the Flemish legislature.⁸¹ It was pointed out that the decree was in line with the scientific consensus emerging from the opinions of the European Food Safety Authority that pre-cut stunning reduces animal suffering at slaughter.⁸² In view of this, the Court found that the Flemish legislature did not exceed its margin of appreciation when it adopted this position in the decree.⁸³ Moreover, in accordance

77 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 61.

78 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] §§ 62–63.

79 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 67.

80 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 69. This was also deduced from recitals 18 and 57 of Regulation no. 1099/2009.

81 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 67.

82 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 72. Reference was also made to recital 6 of Regulation no. 1099/2009.

83 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] §§ 73–74.

with Article 26(4) of the Regulation, the decree did not prohibit or impede the putting into circulation of animal products from Member States which still observe the religious exemption in Article 4(4).⁸⁴ These facts and arguments led the CJEU to answer the Belgian Constitutional Court that the Flemish decree did not violate the right to freedom of religion in Article 10(1) CFREU when it required that reversible pre-cut stunning also be practised in the context of ritual slaughter.⁸⁵ Based on these answers and after considering the other arguments advanced by the parties, the Constitutional Court upheld both the Flemish and Walloon decrees.⁸⁶

7.7 Analysing the CJEU Judgement and the Advocate General's Opinion

In evaluating the CJEU's ruling, the attention will turn to (i) the CJEU's interpretation of Regulation no. 1099/2009 in the light of Article 13 TFEU, (ii) the interference with the right to freedom of religion in Article 10(1) CFREU, and (iii) the justification of the interference according to the limitation provision in Article 52(1) CFREU.

7.7.1 Article 13 TFEU and Regulation no 1099/2009

The Court and the Advocate General, as explained, differed fundamentally as to whether Article 26(2)(c) of Regulation no. 1099/2009 precludes, by definition, a derogation from the religious exemption in Article 4(4) which requires pre-cut stunning in the case of ritual slaughter. The Court's view that stunning is not excluded is preferable to that of the Advocate General because it is more in line with the logic of Article 13 TFEU.

Article 13 TFEU is a horizontal provision on animal welfare which sets relevant standards for the interpretation of EU primary and secondary law, such as the Regulation.⁸⁷ This provision, it may be recalled, demands 'full regard' for animal welfare regarding a number of EU policy fields, while also requiring respect for the different approaches in the Member States, particularly with regard to religious rites. The effect is that the duty in Article 13 TFEU to protect animal welfare is counterbalanced and even restrained by

84 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 78. This included such products from non-EU Member States.

85 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] §§ 81, 96.

86 Belgian Constitutional Court's case Nos. 117/2021 and 118/2021 [2021]. See S. Wattier, "Ritual Slaughter Case" 277–282.

87 See M. Klamert, "Title II Provisions Having General Application". In: M. Kellerbauer, M. Klamert J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: Oxford University Press, 2019): 377, 378. This must be distinguished from the question whether the provision is justiciable.

the approaches in the Member States.⁸⁸ The Advocate General's reading of the religious exemption to ritual slaughter in Article 4(4) of the Regulation strikes this balance for the Member States in the spirit of maximising harmonisation. The opinion effectively interprets Article 4(4) as a standstill provision of sorts. Member States *with* existing religious exemptions from stunning *must* maintain them in line with Article 4(4). On the other hand, only Member States *without* such exemptions, such as Sweden, *may* continue to require stunning in the case of ritual slaughter. This is because Article 26(1) of the Regulation allows such Member States to maintain their more extensive protection of animal welfare at the time of the Regulation's coming into force.

The standstill approach is arguably at odds with the idea underlying Article 13 TFEU, namely that of respecting national diversity among the Member States and allowing each state to express and develop its own legal provisions and customs in this regard.⁸⁹ Article 13 TFEU could also be viewed in light of a provision such as Article 4(2) of the Treaty on European Union (TEU),⁹⁰ which requires that the EU respect the national identities of the Member States to the extent such identity inheres in their "fundamental structures, political and constitutional, inclusive of regional and local self-government".⁹¹ This provision calls on the EU to respect the 'core' of the Member States' constitutional orders, which according to the German Constitutional Court means that "sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions".⁹² It would, therefore, be all the more remarkable if the Regulation were to strike a balance as definitive between the values of religious freedom and animal welfare for the Member States as that contemplated by the Advocate General. Instead, it makes more sense, as the Court also ruled, to understand the Regulation as establishing a framework on the basis of which Member States themselves can reconcile freedom of religion and animal welfare.⁹³

88 See S. Mangiameli, "Article 13 [Animal Protection]" 339.

89 S. Mangiameli, "Article 13 [Animal Protection]" 342 critically on the provision leaving "ample room to discretion as to its enforcement" in Member States.

90 Treaty on European Union (consolidated version) [2016] OJ C 202.

91 See generally G. van der Schyff, "The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2)", *European Law Review*, vol. 37 (2012): 563.

92 German Federal Constitutional Court, 2 BvE 2/08 (*Lissabon*) [2009] § 249, ECLI:DE:BVerfG:2009:es20090630.2bve000208. The Court highlighted that in its opinion "[t]hese important areas [...] include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology".

93 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 47.

7.7.2 *Interfering with the Scope of Freedom of Religion*

On the basis of the foregoing and in the context of Article 51(1) CFREU, according to which the Charter is to be observed by the EU and its Member States when they implement EU law, the main question is not whether the EU legislature respected the right to freedom of religion when it adopted the Regulation but whether the Flemish legislature did so when it exercised the power to derogate under Article 26(2)(c) of the Regulation.⁹⁴ This is because the Regulation itself does not interfere with the right to freedom of religion under Article 10(1) CFREU, obviating the need for a limitation analysis under Article 52(1) CFREU, but protects this right by exempting ritual slaughter from stunning under Article 4(4).⁹⁵ Only when a Member State, such as the Flemish decree in the case of Belgium, derogates on the basis of Article 26(2)(c) of the Regulation from the exemption in Article 4(4), does a limitation analysis become possible.

Although the CJEU did not elaborate on this point, the judgement was noteworthy in how it established that the right to freedom of religion had been interfered with.⁹⁶ As required under Article 52(3) CFREU, the ruling used the “meaning and scope” of the right to freedom of religion in Article 9(1) ECHR as a benchmark for interpreting and applying the corresponding right in Article 10(1) CFREU. A close reading and comparison of the judgement with the legal situation under the ECHR, as it applied then, shows that the CJEU protected freedom of religion more comprehensively than did the ECtHR in the case of ritual slaughter. While the CJEU followed the ECtHR in giving a broad meaning to ‘religion’ and finding that ritual slaughter fell within the scope of the right to freedom of religion, it arguably set the threshold *lower* than the ECtHR in finding an interference with the right.⁹⁷

In *Cha’are Shalom Ve Tsedek*, the ECtHR held that there would be an interference with “the freedom to manifest one’s religion only if the illegality of performing ritual slaughter made it impossible” for religious adherents “to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable”.⁹⁸ In that case, the applicant organisation in France could ‘easily obtain’ meat that fit its requirements from Belgium, meaning there was no interference.⁹⁹ The same could be said in *Centraal Israëlitisch Consistorie van België and Others* of religious adherents in Flanders, as they

94 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 49.

95 The CJEU (*Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 44) referred to Art. 4(4) of Regulation no. 1099/2009 as a “positive commitment of the EU legislature” to protecting Art. 10(1) CFREU.

96 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 55.

97 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 52.

98 *Cha’are Shalom Ve Tsedek*. No. 27417/95 [2000] § 80.

99 *Cha’are Shalom Ve Tsedek*. No. 27417/95 [2000] § 81.

could still obtain qualifying meat from the Brussels Capital Region, as well as from other Member States and beyond. Also, in accordance with Article 26(4) of the Regulation, Flanders did not refuse animal products from other Member States because they do not comply with its own stricter national rules.¹⁰⁰

According to the ECHR threshold, as set in *Cha'are Shalom Ve Tsedek*, there would have been no interference with the right to freedom of religion in Article 10(1) CFREU.¹⁰¹ Yet the CJEU departed from this high threshold, as a simple *de facto* interference with ritual slaughter through the requirement of reversible pre-stunning was sufficient to invoke the limitation provision in Article 52(1) CFREU. Although the CJEU did not reference this, the judgement could be considered an example of EU law providing “more extensive protection” to a corresponding Charter right under Article 52(3) CFREU. The level of protection set under the ECHR, it should be recalled, is only a floor, which EU law may exceed but not derogate from.¹⁰² By setting the threshold lower in finding an interference with the right, the CJEU made it easier for the applicants to claim its protection, while placing the onus on the state to prove that the interference was indeed justified. This, it has been argued, is the proper way for a right with a limitation clause to operate.¹⁰³ The effect is that the bearers of a right are also free to exercise that right, instead of imposing a high burden of proof on them before they can rely on that right’s protection before the state.

Interestingly, in *Executief van de Moslims van België*, decided four years after *Centraal Israëlitisch Consistorie van België and Others*, the ECtHR applied a lower threshold similar to the one used by the CJEU in finding that removing religious exemptions to stunning was sufficient to interfere with the right to freedom of religion.¹⁰⁴ To reach this conclusion, the ECtHR distinguished the facts from those in *Cha'are Shalom Ve Tsedek* where the question was whether one organisation could be denied permission to conduct ritual slaughter, while another organisation had been granted permission.¹⁰⁵ Why this factual difference should lead to a different finding as to interference

100 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 78.

101 The opinion of AG Hogan in case C-336/19, §§ 85–86 noticed the same but argued that Arts. 4(4) and 26 of Regulation no. 1099/2009 provided a more ‘specific protection’ to freedom of religion than was required under Art. 9 ECHR. The CJEU (*Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 18) did not address the matter explicitly and only referenced the ECHR threshold in relation to the applicant’s arguments.

102 See S. Peers, S. Prechal, “Article 52”. In: S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing, 2021) 1611, 1651–52.

103 See G. van der Schyff, “Ritual Slaughter and Religious Freedom in a Multilevel Europe” 90–92.

104 *Executief van de Moslims van België v. Belgium*, Nos. 16760/22 and 10 others [2024] § 88.

105 *Executief van de Moslims van België v. Belgium*, Nos. 16760/22 and 10 others [2024] §§ 82–83.

remains unclear. It seems that the ECtHR has developed its case law on this point, perhaps given the difficulties caused by its stance in *Cha'are Shalom Ve Tsedek* and also to align itself more closely with the CJEU on this topic.

7.7.3 Justifying the Interference with Freedom of Religion

When evaluating the limitation under Article 52(1) CFREU, attention will also be paid to the effect of Article 9(2) ECHR, the limitation provision applicable to the right to freedom of religion in Article 9(1) ECHR. This is because the CJEU referred to this provision and the applicable ECtHR case law in its analysis.¹⁰⁶ This seems to be in recognition of the Explanations to the Charter with regard to Article 52(3) CFREU, which indicate that where corresponding rights such as Article 10(1) CFREU on freedom of religion are involved, the ‘authorised limitations’ under the ECHR also apply.¹⁰⁷ In what follows, particular attention will be paid to the ‘essence’ rule in Article 52(1) CFREU, the margin of appreciation doctrine, and the proportionality of the interference with religious freedom.¹⁰⁸ The question of whether the interference was provided for by law and pursued a legitimate aim or general EU interest was not open to real doubt and will therefore not be treated as such.¹⁰⁹

7.7.3.1 Essence Rule

The CJEU, it may be recalled, found no violation of the essence of Article 10(1) CFREU, as the Flemish decree did not prohibit ritual slaughter as such but only restricted an aspect of it by requiring reversible and pre-cut stunning.¹¹⁰ This finding is in line with earlier CJEU case law that the essence of a right is only violated upon that right being extinguished.¹¹¹ This does not entail a proportionality exercise but an objective test of whether all aspects of a right have been restricted. The question remains how the application of this

106 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] §§ 57–58.

107 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 33.

108 Art. 52(1) CFREU mentions both proportionality and necessity, these limitations grounds are closely related and are treated together. See also S. Peers, S. Prechal, “Article 52” 1633–1634.

109 Although a legitimate aim, it is important to recall the words of Peters (n 59) 296 that “we must pay attention that concern for animal welfare is not played out against respect for human dignity and against religious and cultural pluralism”.

110 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 61.

111 See S. Peers, S. Prechal, “Article 52” 1632; K. Lenaerts, “Limits on Limitations: The Essence of Fundamental Rights in the EU” *German Law Journal*, vol. 20 (2019): 779, 792–793 on this approach. See also the criticism of G. Harpaz, A. Reich, “Kosher and Halal Slaughtering Before the Court of Justice” 45; M. de Blois, “Centraal Israëlitisch Consistorie van België vs Vlaamse Regering: Is het Hof van Justitie van de EU “koosjer” als het om de vrijheid van godsdienst gaat?”, *Tijdschrift voor Recht, Religie en Beleid*, vol. 12 (2021): 99, 105.

limitation requirement is to be understood in the context of Article 52(3) CFREU. A textual comparison of the two limitation provisions shows that whereas Article 52(1) CFREU requires that a limitation of a right respects its ‘essence’, a similar requirement is not found in Article 9(2) ECHR. Both provisions though require that a limitation (i) must be provided by law, (ii) serve a legitimate aim, and (iii) be proportional.¹¹² Although Article 9(2) ECHR does not contain a similar requirement on essence, this difference with Article 52(1) CFREU is not likely to lead to any difficulties in applying Article 52(3) CFREU on corresponding rights. This is because a finding under Article 52(1) CFREU that a right was *extinguished* would most likely also correspond to its violation under a limitation provision such as Article 9(2) ECHR. In other words, it is difficult to imagine the extinction of an ECHR right not resulting in its violation and hence its ‘essence’, as understood in accordance with Article 52(1) CFREU.

7.7.3.2 *Margin of Appreciation*

This brings the discussion to the margin of appreciation given its important role in finding that Article 10(1) CFREU had not been violated by the Flemish decree. The effect of a margin in EU law is to allow the Member State, in this case the Flemish legislature, partial or full latitude in deciding an issue such as the proportionality of an interference.¹¹³ Whereas under the former the CJEU leaves the decision to the Member State but stipulates how it is to be made, under the latter, it exercises “only superficial control of the relevant national measure, leaving substantive leeway for the Member State legislature”.¹¹⁴ When the distinction is applied to *Centraal Israëlitisch Consistorie van België and Others*, it can be put that the legislature was given a full margin. The CJEU observed, for instance, that Member States had a ‘broad discretion’ to each preserve their “specific social context” in terms of the Regulation.¹¹⁵ This raises the question of whether the margin of appreciation was justified.

It is submitted that Regulation no. 1099/2009 implies a margin of appreciation for Member States. This is because, in light of Article 13 TFEU as explained, the Regulation only creates a framework for Member States with

112 Compare J. Kühling, “Fundamental Rights”. In A. von Bogdandy, J. Bast (eds.), *Principles of European Constitutional Law* (Oxford: Hart Publishing, CH Beck, 2009): 479, 503; W.A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015): 420.

113 J. Zgliniski, “The Rise of Deference: The Margin of Appreciation and Decentralised Judicial Review in EU Free Movement Law” *Common Market Law Review*, vol. 55, no. 5 (2018): 1341, 1344–1347.

114 J. Zgliniski, “The Rise of Deference: The Margin of Appreciation and Decentralised Judicial Review in EU Free Movement Law” *Common Market Law Review*, vol. 55, no. 5 (2018), 1347.

115 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 71.

which to reconcile freedom of religion and animal welfare.¹¹⁶ However, the applicable margin is arguably narrower than that adopted by the CJEU in this case.¹¹⁷ The CJEU, it may be recalled, noted that ECtHR case law grants Member States a “wide margin of appreciation” in respect of Article 9 ECHR and referred to the “absence of consensus at EU level” to support a similar margin in EU law.¹¹⁸ However, in the context of ritual slaughter in *Cha’are Shalom Ve Tsedek*, there was no reference to a ‘wide margin’ but only to a ‘margin’.¹¹⁹ Also, that case concerned a particular association which was denied the right to carry out such slaughter.¹²⁰ *Centraal Israëlitisch Consistorie van België and Others*, on the other hand, constitutes a more far-reaching interference with the right to freedom of religion by removing the religious exemption as such, which pleads for a narrower margin given the range of the interference.¹²¹ While the Regulation may show a lack of consensus at EU level, as the CJEU noted, the nature of the interference arguably limits the discretion of states in the absence of a common position on ritual slaughter. On this basis, there could also be grounds to question the width of the margin granted Belgium by the ECtHR in *Executief van de Moslims van België*, where a narrower margin was not accepted.¹²²

7.7.3.3 Proportionality

As a consequence of the margin of appreciation implied in Regulation no. 1099/2009, it can be argued that the Flemish legislature was entitled to decide whether to allow the religious exemption under Article 4(4) or to require stunning under Article 26(2)(c). To interpret the margin otherwise would be to undo the margin. In this regard, the CJEU’s approach was consistent with a wide or full margin of appreciation, as it essentially limited its role to examining whether the Flemish decision-making process was proper.¹²³ However, based on

116 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 47.

117 See also A. Reich, G. Harpaz, “Kosher and Halal Slaughtering Before the European Court of Justice: Voting with Your Trolley Instead of an Outright Ban?”, *Texas International Law Journal*, vol. 57 (2021): 39, 55.

118 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 67.

119 *Cha’are Shalom Ve Tsedek*. No. 27417/95 [2000] § 84.

120 *Cha’are Shalom Ve Tsedek*. No. 27417/95 [2000] § 2.

121 Compare A. Reich, G. Harpaz, “Kosher and Halal Slaughtering Before the European Court of Justice” 55; G. van der Schyff, “Ritual Slaughter and Religious Freedom in a Multilevel Europe” 96.

122 *Executief van de Moslims van België v. Belgium*, Nos. 16760/22 and 10 others [2024], §§ 105–106.

123 For instance, the CJEU referred to the decree’s preparatory documents (*Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 73) and noted that the legislature relied on the scientific consensus that pre-cut stunning is “the optimal means of reducing the animal’s suffering at the time of killing” (§§ 72, 75).

the argument for a narrower margin, more care may have been warranted to ensure that the aim of the interference was achieved by less restrictive measures, thereby better protecting the right to freedom of religion in Article 10(1) CFREU.¹²⁴ For instance, the CJEU could have required that the decision to derogate from the religious exemption in Article 4(4) be revisited after a period of time.¹²⁵ In this way, the legislature would have to weigh the competing values of animal welfare and freedom of religion afresh in deciding whether the limitation of ritual slaughter was still proportional given current societal views and scientific evidence. The far-reaching limitation of the right to freedom of religion would thus still be allowed, but on a conditional basis. However, while acknowledging that the Flemish legislature had considered less restrictive measures in its decision-making process, the CJEU stopped short of investigating such measures more closely.¹²⁶ A comparable position was followed four years later by the ECtHR in *Executief van de Moslims van België*.¹²⁷

A narrower margin of appreciation may also require a closer inspection into *how* the decree established that ritual slaughter was no longer exempted from the stunning of animals required by Article 4(1) of the Regulation. The relevant Flemish provision, which was quoted in full earlier, reads that in the event of ritual slaughter, stunning *must* be reversible and *must* not cause the death of the animal. The idea was that such a procedure would be compatible with religious requirements.¹²⁸ Although this was undoubtedly not the intention of the legislature, the impression or effect may be that the wording of the decree defines or codifies a religious practice and thus goes beyond the simple

124 See G. van der Schyff, “Ritual Slaughter and Religious Freedom in a Multilevel Europe” 97; A. Reich, G. Harpaz, “Kosher and Halal Slaughtering Before the European Court of Justice” 52 and compare J. Zginski, “The Rise of Deference” 1346 in general.

125 Cf. G. van der Schyff, “Considering the Relationship Between Law and Religion in the Netherlands: The Case of Ritual Slaughter”. In J.W. Sap, C. M. Zoethout, G. van der Schyff, *Ritual Slaughter, Animal Welfare and the Freedom of Religion* (Amsterdam, VU University Press: 2017) 75, 87; G. van der Schyff, “Ritual Slaughter and Religious Freedom in a Multilevel Europe” 102. A. Reich, G. Harpaz, “Kosher and Halal Slaughtering Before the European Court of Justice” 53–55 propose the labelling of meat instead of abolishing the religious exemption in the context of a narrow margin and refer to the *Cassis de Dijon* judgment (*Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 120/78 [1979], ECLI:EU:C:1979:42. According to J. Zginski, “The Rise of Deference” 1344, there was no margin in the latter case, leading to doubts whether their proposal factors in the margin sufficiently. Arguably, the absence of a margin precludes stunning being required, as opposed to a margin which would allow stunning in principle.

126 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] §§ 62, 72–73.

127 *Executief van de Moslims van België v. Belgium*, Nos. 16760/22 and 10 others [2024], § 117. As to the role of the less restrictive test as such, see the concurring opinions of judges Koskelo and Küris and that of judge Yüksel.

128 P. Vanthemsche, Rapport 57.

abolition of the exemption.¹²⁹ The ECHR system, like the EU, does not dictate to Member States how they should structure their relationship with religion, but Article 9(1) ECHR requires that such a relationship must respect freedom of religion.¹³⁰ In this context, doubts are warranted as to whether the Flemish decree was indeed proportionate to achieve its aim and whether the margin of appreciation covers a situation under Article 10(1) CFREU where a legislature in effect prescribes the form of religious rites. The CJEU did not address this question. However, it probably fell within the remit of the reference made by the Belgian Constitutional Court, as it asked not only whether the decree could derogate from Article 4(4) of the Regulation but also whether its “alternative stunning procedure” for ritual slaughter was permissible.¹³¹ In these circumstances, it might have been prudent for the CJEU to have ruled that while derogation under the decree could extend stunning to all animals in line with the Flemish legislature’s wish, it precluded the specific “alternative stunning procedure” for religious rites.¹³²

Apart from these remarks on the Flemish decree as such, it is appropriate to briefly address another dimension of the proportionality analysis in order to provide a complete picture. In its ruling, the CJEU noted that the CFREU, like the ECHR, is a ‘living instrument’ that needs to be interpreted in the light of ‘present-day conditions’.¹³³ This meant that the increased importance of animal welfare in many democratic societies may ‘be taken into account to a greater extent in the context of ritual slaughter and thus help to justify the proportionality of legislation’.¹³⁴ This position implies that any of the 27 EU Member States or their regions may decide to derogate from the religious exemption in Article 4(4) of the Regulation. This seems to be far from reality at present, as most states still adhere to the exemption.¹³⁵

129 G. van der Schyff, “Recent Legislation on Ritual Slaughter in Flanders Evaluated: Perspectives from the Separation of State and Religion and Freedom of Religion”, *Religie en Samenleving*, no. 1 (2017): 5, 13, 15.

130 Consider the implications of European Commission of Human Rights, *Darby v. Sweden*, No 11581/85 [1989] § 45, for the case at hand. The Commission explained that a state church system as in Sweden at the time in itself did not violate Art. 9 ECHR but that it had to be operated in a manner that protected the right to freedom of religion.

131 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 32.

132 A similar question was raised before the Belgian Constitutional Court’s case Nos 117/2021 and 118/2021 [2021] §§ B.31.4, B.34. The Court issued an interpretative guidance, holding that the provision could not be read as defining a religious practice, as that would violate state neutrality in religious affairs. Instead, it had to be read as offering the possibility of reversible stunning in the context of ritual slaughter. The question is whether this is sufficient. Preferable would have been a reformulation of the decree to align with state neutrality.

133 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 77.

134 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 77.

135 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering*, C-336/19 [2020] § 78.

Suppose though that all Member States or even the majority were to follow the Flemish example. While each individual derogation might be proportionate, it is questionable whether the cumulative effect of all of them would also constitute a proportionate interference with the right to freedom of religion under Article 10(1) CFREU. In other words, the effect of an EU-wide derogation could mean that each individual derogation would represent a much greater interference with the right than if it were the only derogation in the EU. This is because an EU-wide derogation would lead to the *de facto* impossibility of ritual slaughter without the stunning of animals throughout the EU.¹³⁶ A related consequence could very well be that it becomes prohibitively expensive or almost impossible in practice for religious adherents in the EU to access meat that suits their requirements, including from third countries.¹³⁷ The equation changes when this happens, as the limitation of a religious *practice* turns into a *de facto* limitation of what may be *consumed* based on religious conviction. In this regard, the CJEU could take inspiration from *Cha'are Shalom Ve Tsedek* in which the ECtHR opined that Article 9(1) ECHR would be interfered with if that happens.¹³⁸ Instead of finding an interference this way, an approach which was rejected earlier, the CJEU could use this test to determine whether the right to freedom of religion in Article 10(1) CFREU was violated, in which event, the relevant Member State might have to consider means less restrictive of the right when protecting animal welfare.¹³⁹ The ECtHR, in *Executief van de Moslims van België*, considered such an approach, as the question whether religious adherents had access to meat satisfying their requirements was examined as part of the necessity test.¹⁴⁰ In this case, however, the ECtHR found that the applicants had not established that the contested decrees made it more difficult for them to have access to such meat.¹⁴¹

7.8 To Conclude

The CJEU judgement in *Centraal Israëlitisch Consistorie van België and Others* illustrates the complexity of balancing the right to freedom of religion and animal welfare in a multi-level context that includes EU law and Member

136 This would be irrespective of whether such meat would still be available according to Art. 26(4) of Regulation no. 1099/2009.

137 See also L. Hehemann, “Religious Slaughtering, a Stunning Matter: Centraal Israëlitisch Consistorie van België and Others”, *European Papers*, no. 6 (2021): 111, 117; G. Harpaz, A. Reich, “Kosher and Halal Slaughtering Before the Court of Justice” 47; G. van der Schyff, “Ritual Slaughter and Religious Freedom in a Multilevel Europe” 101 speaks of ‘reasonable access’ to such meat. Consider also A. Reich, G. Harpaz, “Kosher and Halal Slaughtering Before the European Court of Justice” 48–51 on the functioning of the internal market in this respect.

138 *Cha'are Shalom Ve Tsedek*. No. 27417/95 [2000] §§ 80–81.

139 See again §§ 69 and 75 of the opinion of AG Hogan in case C-336/19 which arguably mention such measures.

140 *Executief van de Moslims van België v. Belgium*, Nos. 16760/22 and 10 others [2024] § 122.

141 *Executief van de Moslims van België v. Belgium*, Nos. 16760/22 and 10 others [2024] § 122.

State law and in which not only the CFREU plays a role but also the ECHR. In many respects, the Court's judgement can serve an example on how this sometimes-difficult balance can be achieved. As outlined, however, while recognising that Member States may in principle require stunning in the context of ritual slaughter, it would have been prudent to allow the Flemish legislature a narrower margin of appreciation than was the case. On a general note, it would be incorrect to view the judgement as the last word on the topic of ritual slaughter and stunning. The very nature of the EU legal framework in this regard means that the topic is to be debated in the Member States while respecting the right to freedom of religion in Article 10(1) CFREU. The margin of appreciation entails that Member States are to take primary responsibility for their decision-making on whether to derogate from the religious exemption in Article 4(4) of Regulation no. 1099/2009.¹⁴² This leaves them room for manoeuvre, taking into account the requirements of their own separation of powers and constitutional sources, while respecting the possibilities and limits of EU law, in particular regarding the CFREU.

142 See also J. Kühling, "Fundamental Rights" 507, who recommends an EU margin of appreciation doctrine to make the case law on fundamental rights more dynamic so that rights do "not lose their framework character for the entire legal order".