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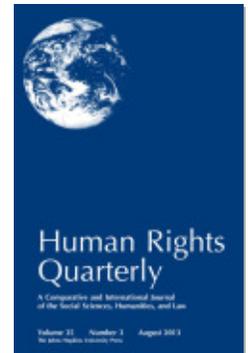
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Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter

Carla M. Zoethout*

ABSTRACT

This article deals with ritual slaughter and the consequences of a possible ban on un-stunned slaughter for the freedom to manifest one's religion. Following a discussion of the religious origins of ritual slaughter, the article examines the general consequences of the practice on animal welfare. The practice is also reviewed in light of the freedom to manifest one's religion, as protected by Article 9 of the European Convention of Human Rights. As will be made clear, invoking one's right to the freedom to manifest one's religion is not sufficient to withstand possible limitations on this freedom.

I. INTRODUCTION

In the summer of 2011, a legislative proposal in the Netherlands regarding a highly charged topic gained international attention.¹ The proposal, presented by the Party for the Animals,² would prohibit the practice of un-stunned ritual

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1. See *Dutch MPs Effectively Ban Ritual Slaughter of Animals*, BBC NEWS EUROPE (28 June 2011), available at <http://www.bbc.co.uk/news/world-europe-13947163>. The text went as follows: "The Dutch lower house of parliament has passed a law effectively banning the ritual slaughter of animals, in a move condemned by Muslim and Jewish groups. The legislation states that all animals must be stunned before being killed. But the Islamic *dhabihah* and Jewish *shechitah* methods of ritual slaughter require them to be fully conscious."
2. Partij voor de Dieren (Party for the Animals), available at <https://www.partijvoordedieren.nl/>. The Party for the Animals is a political party that has two seats in the lower house of the Dutch Parliament, which has 150 seats in total. See *Parliamentary Parties*,

slaughter in the Netherlands.³ The new law would require that animals be stunned prior to all forms of slaughter.⁴

In the lower house of the Dutch Parliament, the majority of members voted in favor of the proposal after a heated debate. But only a few months later, the Dutch Senate decided to table its vote for the proposal following campaigns mounted by several Jewish and Muslim groups.⁵ The groups claimed that there is no evidence that animals suffer more from ritual slaughter than from stunned slaughter. Moreover, they claimed that a prescription of stunning before slaughter would compromise the freedom of religion.

While the discussion in the Netherlands has come to a halt for the time being, the dice have nevertheless been cast. It is very likely this discussion will be re-opened, not only in the Netherlands, but also in other countries where animal welfare is a cause for increasing public concern. The practice of un-stunned ritual slaughter is therefore an important topic that deserves wider attention as to both the ethical and legal aspects. What is actually at stake when animals are being ritually slaughtered? What does this mean for the welfare of animals? How do European countries and the United States balance the diverging interests of religious freedom and care for animals?

These topics will be dealt with in this article. First, ritual slaughter and the religious background of the practice are examined. The consequences of un-stunned slaughter for the welfare of animals are then studied, as well as legislation on the issue in Europe and the United States. Subsequently, a possible ban on un-stunned ritual slaughter will be reviewed in light of freedom of religion, as protected by Article 9 European Convention of Human Rights (ECHR). As will be made clear, invoking freedom of religion is not sufficient to withstand every limitation on the practice of ritual slaughter. Some measures that will enhance the welfare of animals during ritual slaughter may be prescribed in the near future in spite of the freedom to manifest one's religion.

II. KOSHER AND HALAL SLAUGHTER: ITS ORIGINS⁶

Religious or ritual slaughter is a procedure carried out according to rules that originated in ancient religious laws. In general, religious slaughter is

Tweede Kamer der Staten-Generaal (The Dutch House of Representatives), available at http://www.houseofrepresentatives.nl/members_of_parliament/parliamentary_parties.

3. *Dutch MPs Effectively Ban Ritual Slaughter of Animals*, *supra* note 1.

4. Kamerstuk Tweede Kamer der Staten-Generaal, 31 571, Voorstel van wet van het lid Thieme tot wijziging van de Gezondheids- en welzijnswet voor dieren in verband met het invoeren van een verplichte voorafgaande bedwelming bij ritueel slachten, available at, <https://zoek.officielebekendmakingen.nl/dossier/31571/kst-31571-2?resultIndex=101&sorttype=1&sortorder=4>

5. See *infra* concerning the contents of the proposal.

6. For more in general on kosher and halal food laws, see J.M. Regenstein, M.M. Chaudry, & C.E. Regenstein, *The Kosher and Halal Food Laws*, 2 COMPREHENSIVE REV.

primarily associated with the Jewish and Muslim faiths. Both kosher and halal slaughters are performed without stunning.⁷ The prescriptions on ritual slaughter are to be found—according to some believers—in the Torah and the Qur'an and other sources of Islamic law, all of which describe the types of food which may be consumed and the way in which animals must be slaughtered and bled in order to prepare the animal for consumption. According to both rites, only living and healthy animals may be slaughtered. The animals may not suffer during slaughter. For that reason, both religions underline the necessity of humane treatment of animals and indicate that the slaughter of animals is a major responsibility.⁸

In their elaborate article on kosher and halal slaughtering and the freedom of religion, Pablo Lerner and Alfredo Mordechai Rabello write that the relevant precept on religious slaughter for Jews originates from Scripture:

If the place where the Lord your God will choose to put his name is too far from you, and you slaughter as I have commanded you any of your herd or flock that the Lord has given you, then you may eat within your towns whenever you desire.⁹

In their view, Scripture does not give details of the technique of slaughtering—rather, they are expounded by (what they call) “Oral law.”¹⁰ This sentence is part of a larger passage of Deuteronomy however, and deserves to be quoted as a whole:

20 When the Lord your God enlarges your territory, as he has promised you, and you say: “I am going to eat some meat”, because you wish to eat meat, you may eat meat whenever you have the desire. 21 If the place where the Lord your God will choose to put his name is too far from you, and you slaughter as I have commanded you any of your herd or flock that the Lord has given you, then you may eat within your towns whenever you desire. 22 Indeed, just as gazelle or deer is eaten, so you may eat it; the unclean and the clean alike may eat it. 23 Only be sure that you do not eat the blood; for the blood is the life,

FOOD SCIENCE & FOOD SAFETY 111 (2003), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1541-4337.2003.tb00018.x/pdf>. Tetty Havinga, *On the Borderline Between State Law and Religious Law: Regulatory Arrangements Connected to Kosher and Halal Foods in the Netherlands and the United States*, in PRIVATE FOOD LAW, GOVERNING FOOD CHAINS THROUGH CONTRACT LAW, SELF-REGULATION, PRIVATE STANDARDS, AUDITS AND CERTIFICATION SCHEMES 265 (Bernd van der Meulen ed., 2011) available at http://www.wageningenacademic.com/_clientFiles/download/EIFL-06-e.pdf.

7. Pablo Lerner & Alfredo Mordechai Rabello, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, 22 J. L. & RELIGION 1, 9 (2006/2007).
8. According to the explanatory memorandum of the bill on the obligatory, pre-slaughter stunning which refers to the Royal Dutch Society for Animal Medicine. Kamerstuk Tweede Kamer der Staten-Generaal, 31 571, *supra* note 4, at nr. 1–3.
9. *Deuteronomy* 12:21 (The New Oxford Annotated Bible 3d ed. 2007).
10. Lerner & Rabello, *supra* note 7, at 10. It is unclear what the authors mean by this. Can “oral law” be considered as law at all?

and you shall not eat the life with the meat. 24 Do not eat it; you shall pour it out on the ground like water.¹¹

As the text shows, eating meat is permitted only because God allows it. Besides that, passage 23 explicitly prohibits the eating of blood, whereas passage 24 seems to be the basis of the Jewish prescript to have animals bled out or exsanguinated before consumption. Apart from these prescriptions, the text cannot be interpreted to include any other limitations, including the prohibition of eating meat from animals that are stunned before slaughter. That is to say, this central text, according to Lerner and Rabello, does not mention pre-slaughter stunning at all. One may wonder what are the origins of this supposed prescription not to stun.

In his study *Ritual Slaughter among Jews (Schechita), Muslims (Dhabihā) and Sikhs (Jhatkā)*,¹² Roni Ozari writes that the prescriptions on the slaughter of animals in the Jewish religion are derived from the Torah and the Talmud. As Ozari puts it, the Torah does include the prescription of ritual slaughter, but does not enlighten the art and method of its practice.¹³ The prohibition not to eat meat from a “live animal”¹⁴ nor an animal that has been taken from the field¹⁵ and the prescription to slaughter the animal according to specific rules (“as I have ordered you”¹⁶) are, according to the Jewish religion, the basis for the prescriptions on slaughter.¹⁷ Ozari continues that the religious prescriptions on slaughter in the Jewish religion consist of dogmas and directives. As Ozari puts it: “the dogmas include: the choice of the animals that are to be slaughtered, the qualifications of the slaughterer, the quality of the instruments that should be used for the slaughter and the five basic rules for the execution of the throat cut.”¹⁸ Additionally, according to Ozari, “[a]ll dealings before and after the slaughter should be considered to be of peripheral importance” because they are not explicitly included in the Torah and Talmud.¹⁹ This is a remarkable observation. The least one can

11. *Deuteronomy* 12:20–12:24.

12. RONI OZARI, *RITUELLES SCHLACHTEN BEI JUDEN (SCHECHITA), MUSLIME (DHABH) UND SIKHS (JHATKĀ) (RITUAL SLAUGHTER AMONG JEWS (SCHECHITA), MUSLIMS (DHABH) AND SIKHS (JHATKĀ))* (Dr. J. Boessneck ed., Hieronymus Buchreproduktions GmbH 1984).

13. *Id.* at 15.

14. *Genesis* 9:4 (“Only, you shall not eat flesh with its life, that is, its blood.”).

15. Maybe OZARI, *supra* note 12, at 15, refers to the wrong passage, here, because the text of *Exodus* 22:30 states something different: *Exodus* 22:29: “The firstborn of your sons you shall give to me.” *Exodus* 22:30: “You shall do the same with your oxen and with your sheep; seven days it shall remain with its mother; on the eighth day you shall give it to me.”

16. *Deuteronomy* 12:21.

17. OZARI, *supra* note 12, at 15.

18. *Id.* at 19

19. *Id.*

Die religionsgesetzlichen Schlachtvorschriften setzen sich aus Dogmen und Begleitvorschriften zusammen. Zu den Dogmen zählen; die Auswahl der Schlachttiere, die Qualifikation des Schlachtenden, die Beschaffenheit der Schlachtinstrumente sowie die 5 Grundregeln zur Ausführung des Halsschnittes. Dagegen ist allen Handlungen vor und nach dem Schlachten nur periphere Bedeutung zuzumessen, denn sie sind in den o.a. Vorschriften nicht direkt verankert.

conclude from Ozari's study is that under the Jewish religion, stunning the animal before slaughter is not obviously in contradiction with prescriptions. Rather, the question is whether there are any prescriptions on this matter at all.

As far as the Islamic tradition is concerned, Ozari believes that Muslim prescriptions on food have been deeply influenced by the Jewish and Christian religions.²⁰ According to Islamic tradition, the basis for the slaughter prescriptions has been laid down in the Qur'an.²¹ The only indication for the necessity of inspection whether the animal to be slaughtered is alive, is to be found in Surat Al-Mā'idah (The Table Spread), which says:

Prohibited to you are dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah, and [those animals] killed by strangling or by a violent blow or by a head-long fall or by the goring of horns, and those from which a wild animal has eaten, except what you [are able to] slaughter [before its death], and those which are sacrificed on stone altars, and [prohibited is] that you seek decision through divining arrows. That is grave disobedience. This day those who disbelieve have despaired of [defeating] your religion; so fear them not, but fear Me. This day I have perfected for you your religion and completed My favor upon you and have approved for you Islam as religion. But whoever is forced by severe hunger with no inclination to sin—then indeed, Allah is Forgiving and Merciful.²²

In the Islamic tradition too, the question whether or not animals that are slaughtered may be stunned beforehand remains unanswered. The text only includes an explicit prohibition to eat dead animals. Since pre-slaughter stunning (which might be considered as including a "violent blow") does not actually kill the animal, this may explain the somewhat more compliant stance of some Muslims toward stunning.

This brief analysis of religious texts on the slaughtering of animals thus leads to the conclusion that the textual religious sources of ritual slaughter are rather vague. It is now time to focus on what is really at stake when discussing un-stunned slaughter of animals.

III. THE PRACTICE OF RITUAL SLAUGHTER

The act of ritual slaughter is performed by cutting the animal's throat with a sharp knife, causing the blood to drain out. The procedure is carried out

20. *Id.* at 48.

21. *Id.* at 72; Sura 2:67, 5:3, 37: 107, 108:2 (*Qur'an*), available at <http://quran.com>.

22. Sura 5:3. In TARIF KHALIDI, *THE QUR'AN: A NEW TRANSLATION* 83 (Viking Penguin 2008), the passage is translated as follows:

Forbidden to you are: carrion, blood, the flesh of swine, and that which is consecrated to other than God; also the flesh of animals strangled, killed violently, killed by a fall, gored to death, mangled by wild beasts—except what you can ritually sacrifice—or sacrificed to idols. Forbidden to you is resort to divination by arrows. This is an inquiry. . . . If anyone is forced by famine and is not deliberately sinning, then God is All-Forgiving, Compassionate to each.

without anesthesia. After the cut, the animal does not immediately lose consciousness. The period between the cut and unconsciousness can vary in length, depending on the animal, the practice of cutting, and the way of bleeding out.²³ When it comes to cattle and sheep, this period can generally last between two and fifteen minutes.²⁴ With cattle, the *arteria vertebralis* (the vessel which transports part of the blood to the brains) is not also cut during the throat cut.²⁵ For that reason, the period between the cut and loss of consciousness can take considerably longer with cattle than with other animals slaughtered without stunning.

Kosher slaughter and halal slaughter are largely similar methods. The following aspects in the slaughtering process need attention:

- the fixation of the animal;
- the requirements for the knives used;
- the method of cutting;
- the actions needed to stimulate the bleeding out; and
- the possibility of (reversible) interruption of consciousness prior to or directly after the cut.²⁶

The selection, shifting, and fixation of animals take more time during un-stunned ritual slaughter.

Methods of Slaughter

Both Jewish and Islamic slaughterers use a sharp knife to cut the throat of animals in order for the animal to bleed out entirely. During Islamic slaughters, the slaughterer must be a Muslim, whereas Jewish law merely requires the slaughterer be accredited by a religious authority. According to some interpreters of Jewish law, stunning may impair the perfection of the animal and is therefore not allowed. However, recent research has developed methods such as reversible electric stunning. This method does not lead to injuries and may therefore meet this objection.²⁷ Besides this, there are certain voices in Jewish circles that do accept post-slaughter stunning.

23. Temple Grandin & Joe M. Regenstein, *Religious Slaughter and Animal Welfare: A Discussion for Meat Scientists*, in *MEAT FOCUS INT'L* 115 (Mar. 1994), available at <http://www.grandin.com/ritual/kosher.slaugh.html>.

24. See Royal Dutch Society for Veterinary Medicine, Position Paper, *Standpoint on Un-Stunned Slaughter of Animals* (24 Feb. 2011) (Standpunt KNMvD over het onbedwelmd slachten van dieren), available at <http://www.knmvd.nl/cms/streambin.aspx?requestid=04BAAD2C-87A9-4296-AFC6-9EFF6AC3E261>.

25. *Id.*

26. *Id.*

27. In a recent article on this topic, however, Joel Silver writes that if an animal is pre-stunned, then slaughtered, the cause of death becomes uncertain and therefore problematic. Joel Silver, *Understanding Freedom of Religion in a Religious Industry: Kosher Slaughter (Shechita) and Animal Welfare*, 42 *VICTORIA UNIV. WELLINGTON L. REV.* 671, 677 (2011).

For example, Rabbi Mayer Rabinowitz, in his article “A Stunning Matter,” seemed willing to accept this method. The Committee on Jewish Law and Standards of the Rabbinical Assembly adopted his paper on 13 March 2001.²⁸

Some authors claim that Muslim law is not as strict with regard to the prohibition of prior stunning as Jewish law. For Muslims, there are four sources of Muslim law concerning *halal* meat (which means permitted, as opposed to *haram* meaning prohibited): the Qur’an, the *hadith* (instructions by the prophet Muhammed), the *sunnah* (religious tradition) and *fiqh* (a Summary of Islamic learning). The position adopted by Islamic law regarding the prohibition of prior stunning (or “reversible electric stunning” from which the animal could potentially recover) is somewhat different from that of Jewish law. There are *fatwas* that accept stunning because under Islamic law it is enough that the animal remains alive.²⁹ Furthermore, a non-penetrating concussion stunning prior to slaughter has received approval from some Muslim authorities. In addition, many New Zealand Muslim cattle slaughter plants use electric stunning of cattle, and the practice is spreading to Australia. Meat from electrically stunned cattle and sheep is exported to Middle Eastern countries with stringent religious requirements.³⁰

IV. SLAUGHTER WITHOUT STUNNING AND THE CONSEQUENCES FOR ANIMAL WELFARE

The major reason for the legislative proposal was that every year approximately two million animals were ritually slaughtered in the Netherlands.³¹

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28. MAYER RABINOWITZ, A STUNNING MATTER (2001), available at http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/19912000/rabinowitz_stunning.pdf. I owe the subtitle of my article to this article, which addresses the question “Is it permitted to stun/bolt an animal after *shechita*?”. The conclusion of the article is that post-*shechita* stunning (rather than pre-cut stunning) is permitted.
 29. Lerner & Rabello, *supra* note 7, at 11. In this respect, the initial German stance is also worth mentioning. According to the German authorities an exception permit under Section 4a (2)(2) of the Tierschutzgesetz could be granted only to members of religious associations whose mandatory, and above all, undisputed rules required ritual slaughter. In contrast to the homogeneous Jewish community, there are no uniform prescriptions concerning ritual slaughter in Islam, since there are groups within Islam that dispute the mandatory character of this rule. See Christine Langenfeld, *Germany*, 1 INT’L J. CONSTITUTIONAL L. (2003). For the decision of the German Federal Administrative Court of 1 Nov. 2001, see *id.* at 141–47. This was the practice until 2002, when the German Constitutional Court put an end to it and ruled, in light of the freedom of profession and the freedom of religion, that a Muslim butcher may obtain an exception permit. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 15 Jan. 2001, BvR 1783/99, 55 NEUE JURISTISCHE WOCHENSCHRIFT 663 (2002) (Ger.). For a comparative analysis of this case, see Claudia E. Haupt, *Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter*, 39 GEO. WASH. INT’L L. REV. 839, 857 (2007).
 30. Grandin & Regenstein, *supra* note 23.
 31. Royal Dutch Society for Veterinary Medicine, *supra* note 24.

Scientific research has demonstrated that un-stunned ritual slaughters cause animal welfare problems, such as stress, pain, and suffering in advance of and during slaughtering. The Federation of Veterinarians of Europe (FVE) is of the opinion that from an animal welfare point of view and out of respect for an animal as a sentient being, the practice of slaughtering animals without prior stunning is unacceptable:

Slaughter without stunning increases the time to loss of consciousness, sometimes up to several minutes. During this period of consciousness the animal can be exposed to unnecessary pain and suffering due to:

- exposed wound surfaces;
- the possible aspiration of blood and, in the case of ruminants, rumen content;
- the possible suffering from asphyxia . . .

Slaughter without prior stunning requires in most cases additional restraint, which may cause additional stress to an animal that is almost certainly already frightened.³²

For these reasons, the FVE concluded in a report dated March 2009, that “the practice of slaughtering animals without prior stunning is unacceptable under *any* circumstances.”³³ Prior to this, the British Farm Animal Welfare Council concluded in a 2003 report that it considered slaughter without pre-stunning unacceptable and that the government should repeal the current exception for ritual slaughter in the United Kingdom.³⁴ The largest research group in the field of ritual slaughter is DIALREL. This EU-funded project aims to gather information relating to slaughter techniques as well as product range, consumer expectations, market share, and socioeconomic issues. By doing so, it hopes to encourage a constructive dialogue between interested parties.³⁵ In their report on religious slaughter dated February 2010, the researchers of DIALREL conclude that throat cutting without anesthetic carries the highest risk of animal suffering, as “pain, suffering and distress during the cut and during bleeding are highly likely.”³⁶ Sedating methods are admittedly not entirely without risks for animal wellbeing, but they are considerably smaller, the researchers claimed. They cited about 260 scientific articles and based their view on observations by veterinary researchers

32. Federation of Veterinarians of Europe (FVE), *Slaughter of Animals without Prior Stunning* (FVE/02/104) (10 Mar. 2009), available at http://www.fve.org/news/position_papers/animal_welfare/fve_02_104_slaughter_prior_stunning.pdf http://www.fve.org/news/position_papers/animal_welfare/fve_02_104_slaughter_prior_stunning.pdf.

33. *Id.* (Emphasis added).

34. FARM ANIMAL WELFARE COUNCIL (FAWC), *REPORT ON THE WELFARE OF FARMED ANIMALS AT SLAUGHTER OR KILLING, PART 1, RED MEAT ANIMALS*, at Rec. 201 (2003), available at <http://www.fawc.org.uk/reports/pb8347.pdf>.

35. K. VON HOLLEBEN ET AL., DIALREL, *REPORT ON GOOD AND ADVERSE PRACTICES: ANIMAL WELFARE CONCERNS IN RELATION TO SLAUGHTER PRACTICES FROM THE VIEWPOINT OF VETERINARY SCIENCES* (2010), available at <http://www.dialrel.eu/images/veterinary-concerns.pdf>.

36. *Id.* at 60.

in slaughterhouses in Germany, Spain, England, France, Belgium, Italy, the Netherlands, Israel, and Australia.³⁷

In line with its program of improving the welfare of animals, the Party for the Animals in the Netherlands proposed its general prohibition of un-stunned ritual slaughter in June 2011.³⁸ The existing exception clause for ritual slaughter would thereby expire. But during the debate in the lower house, the Party had to confront the argument of the opposition that the bill infringed on the religious freedom of certain Muslims and Jews. An amendment to the bill was added, allowing Muslim and Jewish communities to provide evidence that animals slaughtered by traditional methods do not experience greater pains than those that are stunned before they are killed. In that case these religious communities would obtain an exemption from the prescription that animals must be stunned before being slaughtered. The amended bill was adopted by a majority of the votes in the lower house.³⁹

There is another incongruity, however, which led to the initial proposal. As it is observed in the explanatory memorandum to the bill, the production of ritually slaughtered meat in the Netherlands exceeds the demands of Dutch religious groups. Ritually slaughtered meat has therefore become an export-product.⁴⁰ Obviously, this practice is not in conformity with the original meaning of the exception clause, which was to meet the wishes of religious groups and their practices. Apart from this, because there is no obligation to inform consumers about this matter, Dutch consumers are unable to make a proper choice between ritually slaughtered meat or meat which is not the result of ritual slaughter. As the researcher Florence Bergeaud-Blackler puts it, this may be regarded as an infringement of the rights of consumers—they cannot know the origins of the meat they are buying and are thus unaware of the form of slaughter that has taken place.⁴¹ In fact she is quite correct when she remarks that, particularly in times of heightened attention for safe food and the traceability of food and food production, governments should focus their attention on these topics.

37. *Id.* at 4, 61–77.

38. Kamerstuk Tweede Kamer der Staten-Generaal, 31 571, *supra* note 4, nr. 1–3.

39. One hundred sixteen Members of Parliament voted in favor of the proposal, whereas thirty voted against. The lower house contains 150 seats in all. Before being promulgated, the bill had to pass the Senate, or the upper house of parliament (seventy-five seats). Kamerstuk Tweede Kamer der Staten-Generaal, Stemmingen, available at <https://zoek.officielebekendmakingen.nl/dossier/31571/h-tk-20102011-98-25?resultIndex=60&sorttype=1&sortorder=4>.

40. Kamerstuk Tweede Kamer der Staten-Generaal, 31 571, *supra* note 4, nr. 3 ¶ 6, available at https://zoek.officielebekendmakingen.nl/kst-31571-3.html?zoekcriteria=%3fzkt%3dEenvoudig%26pst%3d%26vrt%3dmemorie%2bvan%2btoelichting%2britueel%2bslachten%26zkd%3dInDeGeheleText%26dpr%3dAfgelopenDag%26spd%3d20130506%26epd%3d20130507%26sdt%3dDatumBrief%26ap%3d%26pnr%3d5%26rpp%3d10%26_page%3d4%26sorttype%3d1%26sortorder%3d4&resultIndex=37&sorttype=1&sortorder=4.

41. Florence Bergeaud-Blackler, *New Challenges for Islamic Ritual Slaughter: A European Perspective*, 33 J. ETHNIC & MIGRATION STUD. 965, 977 (2007).

V. LEGISLATION ON RITUAL SLAUGHTER IN EUROPE AND THE UNITED STATES⁴²

Despite improved slaughter technologies and techniques, experts in Europe have failed to reach agreement on the question of whether, and to what degree animal suffering is acceptable, with the result of differing regulations on this matter. Four European countries actually prohibit ritual slaughter—Switzerland (1893), Norway (1930), Sweden (1938), and Luxembourg more recently.⁴³ In many other countries, the law is adapted to the special needs of minority groups—this is commonly regarded as the most suitable way to balance both religious freedom and animal welfare.⁴⁴ France, the United Kingdom, Belgium, Denmark, Italy, Ireland, Portugal, Spain, and the Netherlands all accept un-stunned ritual slaughter.⁴⁵ In Germany, the Nazi-period led to the total prohibition of ritual slaughter in Western countries occupied by the Nazis. After World War II, ritual slaughter was introduced gradually, but would only be legally recognized in 1986.⁴⁶ Interestingly, Germany became the first country in the European Union to include animal protection in its Basic Law. As a result of an amendment adding the words “and the animals,” Article 20(a) of German Basic Law now reads: “The state . . . in its responsibility for future generations, protects the natural foundations of life and the animals in the framework of the constitutional order, by legislation and, according to law and justice, by executive and judiciary.”⁴⁷

The government of the Netherlands met the requests of the Jewish community in 1920 by a royal decree, exempting the Jewish rite from pre-stunning regulations. As has been said before, the present situation in the Netherlands has been particularly interesting since the June 2011 bill was introduced. In order to meet the objections of Jewish and Islamic circles, an exemption was added to the bill whereby the ban would not be upheld in case independent proof demonstrated that ritually slaughtered animals

42. See Jeff Welty, *Humane Slaughter Laws*, 70 L. & CONTEMP. PROB. 175 (2007); A.R. Miller, *Humane-Slaughter Legislation*, 14 FOOD, DRUG, COSMETIC L. J. 685 (1959); Jennifer L. Mariucci, *The Humane Methods of Slaughter Act: Deficiencies and Proposed Amendments*, IV J. ANIMAL L. 149 (2008).

42. See Haupt, *supra* note 29, at 839.

43. Bergeaud-Blackler, *supra* note 41, at 967.

44. Lerner & Rabello, *supra* note 7, at 12–13.

45. *Id.* It was only in 1975 that the prohibition of halal slaughtering was abolished. In Germany this lasted until 2002. Langenfeld, *supra* note 29, at 142.

46. *Id.*

47. Ger. Const. art. 20(a). The addition to the constitutional provision is the result of the *Schächten* case, *supra* note 29. According to Claudia Haupt, the constitutional amendment adds weight to animal protection by creating a new constitutional provision to weigh religious freedom against; it does not, however, dictate the outcome of the weighing process that has to be performed on a case-by-case basis. Haupt, *supra* note 29, at 872.

would not suffer more at ritual slaughter than at regular slaughter.⁴⁸ The Senate, however, has rejected the bill with a view to the freedom of religion of Islamic and Jewish people.

The Council of Europe's European Convention for the Protection of Animals for Slaughter is also worth considering. The Convention says that: "In the case of the ritual slaughter of animals of the bovine species, they shall be restrained before slaughter by mechanical means designed to spare them all avoidable pain, suffering, agitation, injury or contusions."⁴⁹ It furthermore lays down the following prescription:

No means of restraint causing avoidable suffering shall be used; animals' hind legs shall not be tied nor shall they be suspended before stunning or, in the case of ritual slaughter, before the end of bleeding. Poultry and rabbits may, however, be suspended for slaughtering provided that stunning takes place directly after suspension.⁵⁰

As far as the European Union is concerned, Article 5, paragraph 1(c) of the Directive needs closer attention. It deals with the Protection of Animals at the Time of Slaughtering or Killing and defines stunning as the proper method of killing animals with the possibility of an exemption for religious slaughter.⁵¹ In contrast to what has been suggested elsewhere, the new Council regulation on the protection of animals at the time of killing will replace Council Directive 93/119, meaning that the present situation will not significantly change in the near future.⁵² What is even more important is the following. With the Treaty of Lisbon (or the Treaty on the Functioning of the European Union) which entered into force in 2009,⁵³ an article was

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48. Health and Welfare Law for Animals (Voorstel van wet tot wijziging van de Gezondheids- en welzijnswet voor dieren), art. 4, ¶ 3; Kamerstuk Tweede Kamer der Staten-Generaal, 31 571, *supra* note 4, at nr. 19, available at <https://zoek.officielebekendmakingen.nl/dossier/31571/kst-31571-19?resultIndex=62&sorttype=1&sortorder=4>.
 49. Convention for the Protection of Animals for Slaughter, signed 10 May 1979, art. 13, Official Journal L 137, 27 (effective 11 June 1982), available at http://ec.europa.eu/food/animal/welfare/references_en.htm.
 50. *Id.* art. 14.
 51. Council Directive 93/119, art. 5, ¶¶ 1(c), 2, 1993 (EC).
 52. Council Regulation 1099/2009, On the Protection of Animals at the Time of Killing O. J (L 303) 1. In this respect the following needs attention. In 2008, the European Parliament issued a "Legislative resolution on the proposal for a Council regulation on the protection of animals at the time of killing." This resolution included an Amendment to the Council regulation, which proposed to eliminate the possibility for the Member States to establish stricter national rules applicable to ritual slaughter. This would entail a major modification compared to the current situation, where member states have the possibility to adopt stricter national rules in many aspects of the regulation. However, the Commission rejected the Amendment (28). See "Commission communication on the action taken on opinions and resolutions adopted by Parliament at the May 2009 part-session."
 53. The Treaty of Lisbon amends the current founding treaties, i.e. the Treaty on European Union (EU Treaty), which will retain its name, and the Treaty Establishing the European

adopted by the Member States of the European Union which recognizes animals as “sentient beings,”⁵⁴ and calls for attention to animal welfare as well as respect for national provisions on account of religious and cultural rites. It lists some of the key principles the Union should respect. The Treaty of Lisbon states that:

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.⁵⁵

Animal welfare is thus put “on equal footing with other key principles mentioned in the same title i.e. to promote gender equality, guarantee social protection, protect human health, combat discrimination, promote sustainable development, ensure consumer protection, protect personal data.”⁵⁶

In the United States, the Humane Methods of Slaughter Act⁵⁷ recognizes religious slaughtering as humane in general, but requires pre-slaughter stunning.⁵⁸ In fact, US law uses the method of kosher slaughtering as a model

Community (EC Treaty), which will be renamed as the Treaty on the Functioning of the European Union (TFEU) (*entered into force* 1 Dec. 2009). Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

54. The term “sentient being” originates from JOHN STUART MILL, *THREE ESSAYS ON RELIGION*, (Broad View Editions, Louis J. Matz ed., 2007) (1874).
55. Treaty of Lisbon, *supra* note 53, art. 13.
56. “It needs, however, to be noted that the European Union operates under the principles of conferred competences and subsidiarity. That means to say that competences not conferred upon the Union in the Treaties remain with the member states. Under the principle of subsidiarity, in areas that do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives cannot be sufficiently achieved by the Member States (EU Treaty, arts. 1, 4, 5). As a consequence certain topics of animal protection remain under the responsibility of the member states (e.g. the use of animals in competitions, shows, cultural or sporting events and the management of stray dogs).” European Commission, *The EU and Animal Welfare: Policy Objectives*, available at http://ec.europa.eu/food/animal/welfare/policy/index_en.htm.
57. *Humane Methods of Slaughter Act* 7 U.S.C. § 1901 (1958). *Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y. 1974) (Court held exemption constitutional. Plaintiffs advocated that the trial court declare the ritual slaughter provisions unconstitutional under the establishment and the free exercise clauses of the first amendment to the US Constitution. While the court rejected the argument, it recognized that the plaintiffs were airing a legitimate concern—they claimed that the practice of selling on the general market made it impossible to know whether the meat they were buying was slaughtered by humane methods and that this caused injury to their ‘moral principles’ and ‘aesthetic sensibilities. Ultimately, however, the court noted that the “proper forum for plaintiffs is the Congress and not the courts.”)
58. The 1978 amendment to the Humane Methods of Slaughter Act did not change the definition of humane methods, but it made the use of such methods mandatory for all federally inspected slaughterhouses, that is, for all slaughterhouses engaged in interstate commerce. See *Welty*, *supra* note 42, at 186.

for religious slaughter, and other religions using a similar method are permitted to engage in ritual slaughter. Furthermore, courts have recognized that avoiding animal cruelty is an established public policy of the United States.⁵⁹ Other countries with laws protecting the welfare of animals during kosher slaughter include Canada, where no “food animals” other than birds and domesticated rabbits, may be shackled and hoisted while still conscious. Interestingly, Australian law requires immediate post-cut stunning.⁶⁰

VI. DOES THE FREEDOM OF RELIGION OPPOSE A BAN ON RITUAL SLAUGHTER?

One of the objections which—particularly in the Dutch debate on the legislative proposal—was put forward rather vigorously was that by banning ritual slaughter, the rights of animals are in fact given preference to the rights of humans. Those who are most affected by a possible ban are Jews and Muslims, for whom ritual slaughter is an integral part of their religion. The Dutch proposal requires that the freedom of religion must yield to the welfare of animals, opponents claimed.

Furthermore, critics regard the ban on ritual slaughter as an intolerable infringement of the freedom of religion, as guaranteed by Article 9 of the European Convention of Human Rights and Article 18 of the International Covenant on Civil and Political Rights.⁶¹ The freedom of religion not only

59. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 723 F. Supp. 1467, 1486 (S.D. Fla. 1989). For more on this case: Tali H. Shaddow, *Religious Ritual Exemptions: Sacrificing Animal Rights for Ideology*, 24 *LOYOLA LA L. REV.* 1367, 1386–390 (1991).

60. Slaughter standards in commercial abattoirs are dictated by the AUSTRALIAN AND NEW ZEALAND FOOD REGULATION MINISTERIAL COUNCIL, AUSTRALIAN STANDARD FOR THE HYGIENIC PRODUCTION AND TRANSPORTATION OF MEAT AND MEAT PRODUCTS FOR HUMAN CONSUMPTION, § 7 (2007), available at <http://www.publish.csiro.au/Books/download.cfm?ID=5553>, which requires that:

7.09: Animals are slaughtered in a way that prevents unnecessary injury, pain and suffering to them and causes them the least practicable disturbance.

7.10: Before sticking commences animals are stunned in a way that ensures that the animals are unconscious and insensible to pain before sticking occurs and do not regain consciousness or sensibility before dying.

Ritual Slaughter

7.12:

(1) This provision only applies to animals killed under an approved arrangement that provides for ritual slaughter involving sticking without prior stunning; (2) An animal that is stuck without first being stunned and is not rendered unconscious as part of its ritual slaughter is stunned without delay after it is stuck to ensure that it is rendered unconscious.

61. Both articles are largely similar. But since the European Convention on Human Rights is the most important human rights system in Europe, having an authoritative Court whose decisions are binding on the member states, the compatibility of ritual slaughter will be reviewed only in the light of European Convention on Human Rights, art. 9, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Eur. T.S. No. 5 (*entered into force* 3 Sept. 1953) [hereinafter ECHR].

includes the freedom to have a religion, conscience or belief (the so-called *forum internum*), but also the freedom to act according to the prescriptions of one's religion (the *forum externum*), albeit not unconditionally.⁶² Unlike the *forum internum* or the inner core of conscience, the *forum externum* or external manifestations of religious freedom may be subject to limitations. National constitutions may prescribe the range of permissible limitations of religious freedom more narrowly than is defined in the European Convention on Human Rights (ECHR).⁶³ According to the opponents of limitations on ritual slaughter, this practice belongs to the core of the freedom of religion and the limitation is therefore unacceptable.

What about these arguments: are animal rights really being given preference to human rights when stunned slaughter is prescribed? Is the limitation an intolerable infringement of the freedom of religion? It is time to confront these claims and test them in the light of Article 9 ECHR. The freedom of religion is phrased in the following way:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.⁶⁴

A. The Freedom to Manifest One's Religion and Ritual Slaughter

The question of whether ritual slaughter can be considered as a practice, which is protected under the heading of Article 9, section 1, ECHR, has only once been dealt with by the European Court of Human Rights.⁶⁵ The case of *Cha'are Shalom Ve Tsedek v. France*⁶⁶ concerned the refusal of the French authorities to permit an orthodox Jewish community to assign their own *abattoirs*. This community wanted to be given the official approval it needed in order to be able to perform ritual slaughter in accordance with the very strict religious prescriptions of its members, for whom meat is not kosher unless it is *glatt*.⁶⁷ Meat from slaughtered animals cannot be *glatt* if an examination of its lungs reveals the slightest blemish.⁶⁸

In response, the Court first lists a number of forms the manifestation of one's religion or belief may take, namely worship, teaching, practice, and

62. *Id.*

63. *Id.* at § 2; RENÁTA UITZ, FREEDOM OF RELIGION 31 (2007).

64. ECHR, *supra* note 61, art. 9, § 1.

65. *Cha'are Shalom Ve Tsedek v. France*, App. No. 27417/95, 2000–VII Eur. Ct. H.R. The case does not concern the question of stunning of animals.

66. *Id.* ¶ 2.

67. *Id.* ¶ 31.

68. *Id.* ¶ 32.

observance. It continues by stating that: “[i]t is not contested that ritual slaughter, as indeed its name indicates, constitutes a rite . . . whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion.”⁶⁹

Subsequently, the question is whether the refusal of the French authorities to give a permit was an infringement of the freedom to manifest one’s religion. In the Court’s opinion, the refusal would have been an infringement of the freedom of religion if (because of the refusal) ultra-orthodox Jews would no longer be able to eat meat from animals slaughtered in accordance with their religious prescriptions. But, it was not contested that the applicant association could easily obtain supplies of *glatt* meat from Belgium.⁷⁰ The Court then concluded that there was no infringement of the freedom of religion in this particular case.

Two conclusions may be drawn from the case of *Cha’are*. One is that the practice of ritual slaughter is indeed being regarded as a manifestation of the freedom of religion, and with that, as a practice which—in principle—deserves the protection of Article 9 ECHR. All the same, the Court does accept limitations on ritual slaughter on the condition that the religious people concerned are not refrained from consuming ritually slaughtered meat. Second, one may conclude from the above reasoning that Article 9 both includes ritual slaughter and the possibility to consume ritually slaughtered meat. The possibility to consume ritually slaughtered meat, however, is more part of the core of the freedom than the possibility to assign one’s own slaughterers. That means that the margin for the authorities to limit ritual slaughter may be wider than as far as the consumption of ritually slaughtered meat is concerned. In short: a prohibition of ritual slaughter still leaves open the opportunity to consume imported meat from abroad. The core of the practice, that of the consumption of ritually slaughtered meat therefore remains unaffected. The peripheral right of ritual slaughter may be subject to limitations.

B. Is Pre-Stunning a Limitation of Religious Slaughter?

Even if ritual slaughter is considered a manifestation of religion and thus falls under the protection of Article 9 ECHR, the question still remains whether a prescription to stun animals before slaughter should be considered a limitation of the freedom to manifest one’s religion.

69. *Id.* ¶ 73.

70. *Id.* ¶ ¶ 81–83.

As was explained above, present-day research enables the use of methods of stunning which are reversible. That is to say, it is now possible to bring the animals back to consciousness after stunning within five minutes—a method which enables demonstrating that the animal was not killed by the stunning itself, but by the act of slaughtering. This method may have important consequences: if reversible stunning is indeed an option, might not that practice be acceptable for religious people too? Put differently, it is not at all clear from the outset that reversible methods of stunning are indeed an infringement of the religious practice of slaughter—the animal is still alive (though unconscious) while the slaughtering takes place. Among the believers there is no uniform view on this matter—not only in historical perspective but in the contemporary world. Believers (even those from the same religion) differ considerably about what belongs to religion and what does not.

This is also pertinent to the matter of ritual slaughter. Lerner and Rabello in their elaborate treatment of stances on ritual slaughter refer to a *fatwa* accepting stunning.⁷¹ The Mufti of Delhi stated in a *fatwa* in 1935 that stunning would not violate any religious prescript because stunning does not kill the animal (which would clearly contradict the Islamic prescriptions regarding slaughter), but only “stuns” the animal. The Mufti stated that it is permissible to stun the animal as long as the animal does not die in the process of stunning. A second authoritative Islamic declaration regarding ritual slaughter is that of the Rector of the Al-Azhar University of Cairo from 1982, according to whom stunning would not make the practice un-Islamic.⁷²

These stances are, as one may expect, contested by other sources. The question is therefore: which interpretation of religion or religious practice is correct? Of course Lerner and Rabello are correct that a ban on the practice of un-stunned ritual slaughter “may be seen by Muslims or Jews as being at odds with their faith,” but at the same time there are believers who regard stunning as being in harmony with their faith.⁷³ In short, pre-slaughter stunning, and more specifically, reversible pre-slaughter stunning cannot be said to be an infringement of the freedom of religion, by definition. That is an important point to keep in mind.

C. The “Protection of Morals” and Animal Welfare

Whatever may be the outcome of the foregoing question, we may conclude that ritual slaughter itself is indeed a practice that is protected under ECHR,

71. Lerner & Rabello, *supra* note 7, at 11. Their source of information is INSTITUT SUISSE DE DROIT COMPARE, AVIS: SUR L'ÉTOURDISSEMENT DES ANIMAUX AVANT LEUR ABBATAGE 4 (2001).

72. Lerner & Rabello, *supra* note 7, at 11.

73. *Id.* at 12.

Article 9, Section 1. We must then proceed with ECHR, Article 9, Section 2:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

So, first, the law should prescribe a possible ban on ritual slaughter. If at all, a ban will certainly be based on the law. One does not have to dwell on that any longer.

But then, what about its "legitimate aim?" Could a limitation of ritual slaughter be brought under the heading of the "protection of morals," as required by the freedom of religion? Is the protection of animal welfare to be considered as belonging to present-day morality and therefore as a legitimate aim to limit the freedom of religion?

It is obvious that those in favor of a ban on ritual slaughter intend to improve the wellbeing of animals. As it appears from scientific reports (paragraph 2, above), the suffering of animals during ritual slaughter is evident. European organizations of veterinarians regard these practices as unacceptable according to contemporary standards. Over the years, protests against these practices have led to improvements both in methods of slaughtering⁷⁴ and in legal measures.

Care for the welfare of animals may be a seemingly recent development, but it in fact can boast a historical tradition that goes back at least as far as 1789. In that revolutionary year, the British philosopher Jeremy Bentham already phrased the crucial question in a forceful and inescapable way:

The day *may* come when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized, that the number of legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than any infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? The question is not, Can they *reason*? Nor, Can they *talk*?, but Can they *suffer*?⁷⁵

74. See Grandin & Regenstein, *supra* note 23.

75. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, 311 available at http://files.libertyfund.org/files/278/0175_Bk.pdf. On the question whether animals can suffer, see VON HOLLEBEN ET AL., *supra* note 35, ch. 2.1.1.

The modern animal rights movement starts from the fundamental principle that many non-human animals have basic instincts that deserve recognition, consideration, and protection. In the view of animal rights advocates, these basic interests give animals both moral and legal rights. Two of the most influential philosophers must be mentioned here. The Australian philosopher Peter Singer and the American philosopher Tom Regan represent two major currents of philosophical thought regarding the moral rights of animals.

Peter Singer's book *Animal Liberation* is considered one of the movement's foundational documents. In his view, the interests of animals and those of humans should be given equal consideration. Being a utilitarian, Singer holds that actions are morally right to the extent that they maximize pleasure or minimize pain. The main question is whether an animal is a sentient being and can therefore suffer pain or experience pleasure. Thus the capacity of an animal for suffering is the standard for determining whether a being has rights.⁷⁶

Regan is of the opinion that at least some animals must have basic moral rights because they possess the same advanced cognitive abilities that justify the attribution of basic moral rights to humans. By virtue of these abilities, these animals have not just instrumental but inherent value—they are the subject of a life. A key insight in this respect comes from the veterinary ethicist Rollin, who makes the following telling observation:

Clearly there are no differences between people and animals that can conceivably bear the weight of excluding animals from the scope of moral concern and from the full application to them of our moral notions. Not only are there no morally relevant differences, there are clear-cut relevant similarities.⁷⁷

Over the years the ideas about what is morally acceptable and what is not have changed considerably. Today, the viewpoint that certain animals at least have consciousness is part of a commonly accepted view of the world.⁷⁸ In light of the present discussion, one may justly say that in contemporary society the care for the well being of animals is regarded as part of morality. Apart from that, the fact that a certain practice is part of a religious belief is no longer by definition a reason for exception clauses to limiting measures. One only has to think of the practice of genital circumcision of girls, which is prohibited in many Western countries even though it is part of a religious practice; the corporal protection of girls and women has been considered more important than the freedom of religion.

76. "Animal Rights," ENCYCLOPAEDIA BRITANNICA, available at <http://www.britannica.com/EB-checked/topic/25760/animal-rights>; PAUL WALDAU, ANIMAL RIGHTS, WHAT EVERYONE NEEDS TO KNOW 56–73 (2011).

77. *Id.* at 69.

78. Shaddow, *supra* note 59, at 1392.

As views on morality evolve, minority views on morality can be overruled by majority views despite the protection of human rights, which principally aim at protecting the minority against the majority—the individual against the collective. This does not hold true on all conditions, however, as was made apparent in the text above.

D. Article 9, Section 2: Is the Limitation “Necessary in a Democratic Society?”

In order to be justified under ECHR, Article 9, Section 2, the possible limitation of ritual slaughter must also be necessary in a democratic society. On the basis of the case-law of the ECHR, the common method of interpretation of this clause is usually two-fold: in order to be necessary in a democratic society, the interference must correspond to “a pressing social need” and be “proportionate to the legitimate aim pursued.”⁷⁹ “These tests,” Sandberg writes, “require courts to examine the merits of the claims weighed against societal concerns and pressures.”⁸⁰

Frequently, the Court concludes that the question at hand is to be decided on the level of the national authorities, who are “[b]y reason of their direct and continuous contact with the vital forces of their countries . . . in principle in a better position than the international judge to give an opinion on the exact content of these requirements”⁸¹ This phrase was to become the prelude to the often-used “margin of appreciation” that left relevant cases primarily for the state to decide, while triggering a more marginal supervisory role for the Court.⁸² In applying the doctrine of the margin of appreciation, the Court generally utilizes two methods. First, the Court balances the importance of the right in question with the necessity of the restriction or interference posed by the state. Second, the Court seeks to find whether there is a European consensus regarding the matter at issue. Lack of consensus among European states usually results in recognition of a wider margin of appreciation, while a substantial consensus usually results in application of a narrow margin.

In regards to ritual slaughter and the possibility to limit the freedom of religion in light of animal welfare, European states make different assessments—there is clearly no European consensus on this matter. Moreover, EU-legislation on the slaughter of animals prescribes slaughter methods that are humane and do not cause needless stress and pain to the animals,

79. RUSSELL SANDBERG, *LAW AND RELIGION* 86 (2011).

80. *Id.*

81. *Case of Handyside v. United Kingdom*, Judgment 7 Dec. 1976, App. No. 5493/72, ¶ 48.

82. *Id.* ¶ 48, 49.

but at the same time leaves open the possibility of exemptions for religious slaughter. Most likely, therefore, the Court would leave the matter for the national authorities to decide.

But even so, the proportionality test must be met—whether the limitation of the freedom of religion is to be considered proportionate to the legitimate aim pursued. A number of different aspects may be brought up here. First of all, it is relevant to determine how many believers in the Netherlands are really affected by the disputed law. “According to a rough estimate of the Chief Rabbinate of Holland, only 300–400 households keep a kosher kitchen nowadays.”⁸³ The domestic market for halal foods in the Netherlands is more sizeable than the kosher market. In the Netherlands, the influx of immigrants has resulted in a growing number of Muslims. It is estimated that almost 6 percent of the population in the Netherlands is Muslim (950,000 persons in 2006).⁸⁴ One cannot escape the conclusion that it is a relatively small minority that will be affected by possible measures in this respect. At the same time one may wonder whether this would be a fair balance to be struck—after all, the point of human rights is to protect minorities against the majority. We need to go further in our weighing of interests.

A second important aspect to consider is the ideas on the acceptability of ritual slaughter by specialists in the field. Again, attention should be drawn to the differences between regular and ritual slaughter for the welfare of animals. European veterinarians advocate obligatory stunning prior to slaughter. In their view, slaughter without prior stunning causes unnecessary pain and suffering for the animals. The Federation of Veterinarians of Europe regards “the practice of slaughtering animals without prior stunning unacceptable under any circumstances.”⁸⁵ Dutch veterinarians have pointed to an ethical dilemma for veterinarians who have to supervise religious slaughter. They see religious beliefs as dynamic and as allowing change in order to improve animal welfare. As long as slaughter without prior stunning is allowed under national or European legislation, the veterinarians recommend stipulating specific minimum requirements.⁸⁶

Third, in the light of the proportionality test, it also seems relevant to know how far the infringement of the freedom of religion actually goes. Again, the possibility of reversible stunning (and the fact that it is possible to prove that the animals have not died because of the stunning) may be brought up here. Would the method of reversible stunning not be an acceptable limitation of the freedom of religion (if it is to be considered a limitation at all)?⁸⁷ Let us consider a different method again. Some European

83. Havinga, *supra* note 6, at 269.

84. W.B.H.J. VAN DE DONK ET AL., WETENSCHAPPELIJKE RAAD VOOR HET REGERINGSBELEID, GELOVEN IN HET PUBLIEKE DOMEIN, 90 ¶ 4.1.2, (2006).

85. FVE, *supra* note 32; VON HOLLEBEN ET AL., *supra* note 35, at 60.

86. See FVE, *supra* note 32, ¶ 2.

87. See the reasoning above when considering the compatibility of reversible stunning with ritual slaughter.

countries do allow the killing of un-stunned animals but require immediate post-cut stunning.⁸⁸ It seems more options to limit the suffering of animals during slaughter are possible and the latter two methods of stunned ritual slaughter indicate that a ban on un-stunned slaughter cannot be considered to be disproportionate by definition.

In its case law, the Court sometimes also refers to the requirement of subsidiarity. The important question to consider is whether a less far-reaching measure than a general prohibition of un-stunned slaughter could be a viable option. The answer again depends on the result of the balancing of interests. The above reasoning seems to lead to the conclusion that there is substantial evidence in favor of stunning animals before ritual slaughter, despite the freedom of religion. However, the question remains whether religious authorities have seriously considered and thought through the different methods discussed above. In both Jewish and Muslim organizations in the Netherlands, the discussion of ritual slaughter has led to suggestions to improve the welfare of animals during slaughter.⁸⁹ Finally, the above-mentioned improvements and options must be considered and discussed, given the conclusion that limitations on ritual slaughter do indeed seem justifiable.

VII. CONCLUSION

Scientific evidence about the consequences of un-stunned slaughter for the welfare of animals is considerable. As has been shown, organizations of veterinarians reject the practice of un-stunned slaughter *unisono*—the animals are exposed to unnecessary pain, suffering, and stress.

The claim that animal rights are given preference to human rights when a ban on ritual slaughter is adopted and the appeal to the freedom of religion can be combated with other claims. For example, the religious origins of ritual slaughter are rather vague. The question whether or not pre-cut stunning is really prohibited in religious texts remains unanswered. Additionally, it has been argued that pre-cut stunning is not per se a limitation on the

88. Havinga, *supra* note 6, at 272 n.432. A drawback of this solution, however, is that the animals still suffer from stress before being slaughtered.

89. Contactorgaan Moslims en Overheid, Position Paper: Bescherming van dierenwelzijn vergt geen inbreuk op de vrijheid van godsdienst! [Protection of Animal Welfare Does Not Require Infringing on the Freedom of Religion!] (2011), available at http://www.groenemoslims.nl/wp-content/uploads/Position_Paper_Ritueel_Slachten_Islam.pdf; Nederlands-Israëlitisch Kerkgenootschap, Position Paper Religieuze Slacht Volgens Israëlitische Ritus [Religious Slaughter According to Jewish Rite] (2011), available at <http://www.nik.nl/wp-content/uploads/2011/06/Position-Paper-Kosjer-slachten-juni-2011.pdf>.

freedom of religion, since using this method keeps the animals alive. Thirdly, the protection of morals—as one of the legitimate aims of limitations under Article 9, paragraph 2 of the European Convention on Human Rights—can arguably be said to encompass animal welfare protections. Put differently, in contemporary society the care for the well-being of animals is regarded as part of morality. Finally, reviewing the possible ban in the light of Article 9, paragraph 2 ECHR leads to the outcome that a ban seems an acceptable limitation, given the suffering of animals during ritual slaughter. The question of how far the said infringement of the freedom of religion actually goes, and the fact that a ban on un-stunned ritual slaughter still leaves open other options to limit the suffering of animals during slaughter.

Further discussion of these and other matters is to be encouraged, but whatever the result may be, the claim that ritual slaughter is part of the freedom of religion, and is thus untouchable, is an incorrect one. In the name of the welfare of the slaughtered animals, ritual slaughter (and improvements in the methods) must be openly discussed. In the end, the statement of a legislative assistant, made during the debate in the US Congress in 1958 on the Humane Slaughter Act, is still impressive and convincing:

Time and again people cry “sentimentality,” and say in the time of world upheaval there are more important things to think about. But what kind of a civilization is it which does not recognize any values besides the materialistic ones? I think the qualities of a civilization are evident in the treatment of the weak and the powerless.⁹⁰

Whether or not the ban will be adopted in the near future is hard to predict, but the information provided in this article supports the conclusion that the prescription of stunning may become inevitable. Then, the time may have come when religious practices must indeed yield to the welfare of non-human animals.

90. Shaddow, *supra* note 59, at 1367.