Why Europe needs a more post-liberal theory of religious liberty

Examining a European court ruling on ritual slaughter Hans-Martien ten Napel¹

Abstract

What is the attitude of European courts toward institutional religious autonomy? Their case law shows a mixed picture, with the right to freedom of thought, conscience, and religion sometimes weighing less heavily than other interests. One illustrative example is the recent ruling of the Court of Justice of the European Union on ritual slaughter. The decision reflects the liberal-egalitarian approach that arguably characterizes European case law. That approach can be traced to a firm belief in ongoing secularization, which can lead to intolerance of religious convictions. The future of institutional religious autonomy in Europe is therefore uncertain.

Keywords Court of Justice of the European Union, institutional religious autonomy, freedom of religion, ritual slaughter, liberal egalitarianism, secularization, intolerance.

1. Introduction

On 17 December 2020, the Court of Justice of the European Union (CJEU) issued its ruling in a preliminary ruling procedure initiated by the Constitutional Court of Belgium.² According to the verdict, Flanders did not exceed its margin of discretion in applying EU law when it banned ritual slaughter, even though this practice is related to how many Jews and Muslims manifest their faith. Since the ruling also concerns the method used to slaughter the animals, institutional religious autonomy is at stake. Accordingly, the question of how the CJEU arrived at this decision is significant to religious freedom advocates. In this article, I seek to clarify the basis for the CJEU's judgment, combining insights from multiple bodies of literature. My explanation will demonstrate that secularization, albeit indirectly, played an important role in the ruling.

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² ECLI:EU:C:2020:1031. The case in question is Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering.

According to Article 52, paragraph 3 of the EU Charter of Fundamental Rights, the CJEU is supposed to follow the case law of the European Court of Human Rights (ECtHR) when interpreting corresponding freedoms contained in the Charter. The latter court publishes overviews of its jurisprudence on various human rights issues. In 2020, one such guidance statement discussed the right to thought, conscience, and religion as enshrined in Article 9 of the European Convention on Human Rights.³ As the guidance document indicates, the ECtHR recognizes the existence of a collective dimension of religious freedom. That is important for institutional religious autonomy. Nevertheless, the guide does not provide a sharp picture of the Court's general approach in this area of its jurisprudence. As a result, it cannot fully explain the reason for the CJEU's decision.

This article starts by discussing the constitutional or fundamental rights model in general, as it has taken shape in practice in Europe during the last few decades (section 2). This model provides a clear contrast to American thinking on constitutional rights, as I demonstrate by reference to the work of legal scholar Kai Möller. I then consider whether and, if so, to what extent this model is also more specifically applicable to the issue of religious institutional autonomy (section 3). To do so, I draw on Joel Harrison's book *Post-Liberal Religious Liberty*. Harrison does not address Möller's book directly; however, the global constitutional rights model fits with the liberal-egalitarian approach to fundamental rights that he criticizes. Harrison shows, in turn, how a strong belief in ongoing secularization underpins this approach. That feature gives it, paradoxically, a theological component.

The CJEU's ruling with regard to the ban on ritual slaughter in the Flanders region of Belgium illustrates the fragile balance in Europe regarding constitutional support for institutional religious autonomy (section 4). However, it is not self-evident that continuing secularization, or a belief in it, leads to increasing intolerance. After all, the prevailing thinking attributes such intolerance to those with strong religious views. Since secularization is widely viewed as inevitable, its supporters should expect tolerance to increase. Nevertheless, recent research demonstrates that both these assumptions — growing secularization and the consequence of increasing tolerance — are not necessarily correct. That makes the nature of the belief in secularization, as described by Harrison, even more relevant in explaining how the Court of Justice's ruling on ritual slaughter should be interpreted (section 5). Section 6 provides concluding thoughts.

³ Guide on Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion, updated 30 April 2021. Available at: https://www.echr.coe.int/Documents/Guide_ Art_9_ENG.pdf.

2. The European model of constitutional rights in general

In *The Global Model of Constitutional Rights*, Kai Möller (2012: ch. 1) paints a fascinating picture of the evolution of constitutional rights protection in the postwar period. First, the scope of these rights has been inflated. The word "inflated" was initially used in a critical sense, but Möller, in contrast, uses it neutrally to describe the high rate of increase in the number of constitutional rights. Second, these rights have acquired a horizontal effect; thus, they apply not only to the vertical relationship between government and citizens but also to associations among citizens and their organizations. Third, it has been recognized that human rights can also entail positive obligations for states, which are obliged to guarantee these rights actively. Increasingly, this includes socio-economic rights. Fourth and finally, the doctrines of balancing and proportionality have gained weight. After all, as more and more rights have come into being and their scope has widened, a balancing act between these rights and other interests increasingly must occur. The principle of proportionality, or reasonableness as usually called in common law countries, can serve us well in this respect.

Why does Möller speak of a global model? The above developments started in Europe, notably at the German Constitutional Court and the ECtHR. From there, they have spread to Central and Eastern European countries, Canada, and South Africa. Globally, the United States is the exception that, as always, confirms the rule. That country has thus far retained the characteristics of what might be called the philosophical model of constitutional rights. This model was dominant until the protection of constitutional rights became internationally codified in the postwar period. According to this traditional model, only particular "natural rights" qualify as constitutional rights. These rights apply exclusively to the relationship between government and citizens and predominantly lead to negative obligations for the state — i.e., indications of what the state may not do. Finally, as a rule, they have an elevated status over other, "ordinary" interests, so there is no need to address questions of balancing weighing and proportionality, or at least less so.

Unlike the philosophical model of constitutional rights, the contemporary model was not designed on the drawing board. Möller distills it, as it were, from established constitutional practice. He explains his observation — namely, that constitutional rights have developed into a general justification for government intervention in citizens' sphere of freedom — without criticism.⁴ According to Möller, a theoretical and moral underpinning is needed for this development of constitutional rights into a general justification for government intervention. After all, it has implications for both democracy and the separation of powers. It will increase the courts' role in

⁴ For such critiques (both recent and less recent), see Glendon (1993) and Biggar (2020).

the constitutional order. Apart from the fact that such a tendency may lead to concerns about "juristocracy" (Hirschl 2004), a "culture of justification" ultimately leads to the question of whether constitutional rights should exist as a separate category of interests (Kumm 2007).

This last observation indicates how far-reaching the development of the European model of constitutional rights has been. It can be appropriately characterized using the notion of "conceptual overreach" (Tasioulas 2021). First, the category of human rights is stretched to the point of encompassing almost every conceivable moral and legal interest. Next, the weight of the interests protected initially by human rights diminishes so much that they enjoy hardly any additional protection relative to other legitimate interests. As a result, citizens become entirely dependent on the balancing of interests, in which officials and judges engage while seeking to protect the people's constitutional rights. In this respect, the only consolation is that academic lawyers can help to determine how this balancing of interests can best be carried out based on the proportionality principle.

3. Religious institutional autonomy in Europe

To Möller's credit, in his book (ch. 4), he attempts to formulate such a theoretical and moral underpinning of the European model of constitutional rights as he believes is required. This underpinning has clear liberal and egalitarian traits. The liberal element emerges in that a strong emphasis is placed on freedom and individual autonomy. The egalitarian feature is evident because it emphasizes citizens' equality and the consequent need for the state's neutrality. Mainly when applied to religious institutional autonomy, such a liberal-egalitarian approach paradoxically quickly acquires a theological character.

As Joel Harrison argues in *Post-Liberal Religious Liberty* (2020), liberal egalitarianism is anything but neutral. Rather, it is rooted in a distinct secularization vision. Harrison proposes a post-liberal alternative to the liberal-egalitarian approach to religious institutional autonomy. I will come back to that topic later in this article. For our present purposes, his perspective on the extent to which European jurisprudence reflects the liberal-egalitarian approach is relevant. This case law shows a mixed picture, which somewhat nuances Möller's general thesis.

On one hand, the theological slant of the liberal-egalitarian approach observed by Harrison can also be observed in the case law of the ECtHR. For instance, he notes, in such a way as to confirm the European model of constitutional rights,

According to Harrison, this secularization vision breaks down into the following components, among others: "differentiation between a religious and political sphere; casting politics as directed towards self-respect or the pursuit of authenticity; a view on what religion is; and an understanding of the relationship between the individual and the group, and the group and political authority" (2020:54).

"When faced with conflicts between individuals claiming a liberty interest against the religious group, the European Court has considered that states must 'balance' the various interests at stake" (Harrison 2020:49). In this balancing, individual claims may prevail, partly due to the proportionality test.

On the other hand, the same court has "at times adopted a more institutional focus for religious liberty" (87) and "strongly emphasized the autonomy of the religious group" (50). Harrison believes that "European law also contains significant recognition of religious groups" and "points implicitly towards a vision of group or social pluralism as fundamental to civil society" (174). His implicit message is that the deeper motivation of this stream of case law remains unclear.

Harrison's mixed picture of European jurisprudence regarding religious institutional autonomy is consistent with a conclusion I reached in my latest book. I argue that the West's cup of collective religious freedom is half full or half empty, depending on how one wants to see it (Ten Napel 2017: ch. 1; see also Rivers 2010). This finding is not a trivial one. It would be a bit of a stretch to argue that the future of constitutional support for religious institutional autonomy lies in Europe; on the contrary, the collective dimension of religious freedom still appears to receive more protection in the American than in the European context. The prejudicial 2020 CJEU ruling on ritual slaughter in Flanders is an illustration of this tendency.

Obviously, the concept of institutional religious autonomy concerns many subjects other than ritual slaughter. In my book, for example, I address the issue of faith-based schools, demonstrating the root of liberalism's problems with religious organizations and practices. Liberalism thinks in terms of the state and the autonomous individual. All citizen organizations situated between the individual and the state detract from the emancipatory influence that liberalism wishes to exert over individual citizens. Of course, in doing so, it is initially not as inclined as socialism to exercise that influence through the state.

Nevertheless, liberalism does not shy away from using the state for this purpose if necessary, especially now that it increasingly wishes to achieve radical equality. Education offers an example of this. Few matters are, understandably, as crucial to liberalism as the education of citizens. That is why liberalism considers public education preferable to private or faith-based education. Where such schools or universities exist, liberalism will not rest until it has increased its control over these institutions with the state's help, e.g., requiring Christian schools to admit non-Christian applicants or pursuing extensive control of curriculum.

Witte and Pin (2021:659) point out that the CJEU appears to be adopting the controversial Smith doctrine of the US Supreme Court at a time when the US court appears to be abandoning it. According to this doctrine, dating back to 1990, neutral and general laws do not violate religious freedom since they do not discriminate against religious practices specifically.

4. The recent ruling on ritual slaughter

On 17 December 2020, the Grand Chamber of the CJEU issued a judgment in a preliminary ruling procedure initiated by the Belgian Constitutional Court. In the portion of the judgment that is relevant to this article, the court ruled that it was permissible for the Flemish legislature to adopt a decree banning ritual slaughter without exceeding the margin of appreciation (i.e., range of autonomy) granted to EU member states by EU law (paras. 74, 79). The Flemish decree, which entered into force on 1 January 2019, ended the exception to the ban on slaughter without prior stunning as part of religious rites.

Previously, the Advocate General had advised that the decree was contrary to EU law. This EU law stipulates on one hand that, from an animal welfare point of view, it is mandatory to stun animals before slaughter, but on the other hand it also allows member states to impose further technical requirements on unstunned slaughter. By prohibiting the latter entirely, or at most by allowing it only in an alternative way that could not meet with the Jewish and Muslim communities' approval, Flanders had (in the Advocate General's view) acted contrary to the compromise between religious freedom and animal welfare that the EU legislature had reached. This compromise was in the interest of a tolerant, pluralistic society, in which it is necessary for people to learn to live with differences (para. 57).

There is much more to be said about this judgment than I can cover in this brief article. Here I will limit myself to the observation that religious groups' freedom to arrange their affairs as they see fit is the core issue. In the case law of the ECtHR, to which the CJEU has historically attributed "special significance," ritual slaughter is included under the freedom "to manifest [one's] religion or belief, in ... practice and observance." Accordingly, this matter also touches on institutional religious freedom.⁹

Nevertheless, traditional, unstunned ritual slaughter is prohibited in Belgium, Denmark, Germany, Norway, Iceland, Sweden, and Switzerland. Moreover, the CJEU ruling could revive the debate in other countries. For example, in the Netherlands, a legislative initiative aiming to remove a statutory exception to the ban on unstunned slaughter was adopted in the Lower House but failed in the Senate (Vellenga 2015). Meanwhile, the Party for the Animals has brought forward a new initiative bill, even though Jewish and Muslim organizations have committed themselves by covenant to paying extra attention to animal welfare.

⁷ ECLI:EU:C:2020:695.

European Parliament, Briefing: EU accession to the European Convention on Human Rights, July 2017. Available at: https://bit.ly/3mHqiJu, p. 3.

⁹ According to W. Cole Durham Jr., a scholar on law and religion, this has three dimensions, the first of which is substantive, which applies here (cited in Shah 2020:30).

The CJEU ruling can be understood against the background provided in the two previous sections. The applicability of the European model of constitutional rights is evident from the fact that religious institutional autonomy is placed on a par with the importance of animal welfare. In the context of the necessary "balancing," as part of its dynamic interpretation of EU law, the court gives the latter interest greater weight than previously, partly due to its use of the proportionality test. ¹⁰ The picture worsens further when we consider that the CJEU seems more reticent about granting religious institutional autonomy than the ECtHR. This, whereas the latter court tends to issue "soft law," the CJEU jurisprudence represents "hard law" (Witte and Pin 2021:590, 592).

However, it would not be correct to look exclusively to the highest European courts. As this article was written, the Belgian Constitutional Court decision, taking into account the preliminary ruling of the CJEU, was still awaited. It is understandable and desirable that the CJEU grants the member states a broad margin of appreciation concerning church-state relations, on which opinions across Europe diverge considerably. Also, the decree in question originated with a regional legislature. This fact reminds us that constitutional support for religious institutional autonomy cannot and should not come only from the courts, European or national, but should also emanate from the European and member states' representative bodies.

Although, as indicated above, the ban on unstunned ritual slaughter is not the only example of the curtailment of institutional religious autonomy and probably not the most important one, it clearly illustrates that Christianity is not the only faith whose institutional autonomy is at risk. Judaism and Islam are also affected. There is no distinction between religions in liberalism's difficulty with citizen organizations that stand between the individual and state. Alternatively, and stated more positively, in the struggle against ideological liberalism that wants to go beyond simply managing diversity in society and exert greater control over religious worldviews, Christianity, Judaism, and Islam stand side by side.

Liberalism began as a state conception that assumed that religious truth existed, but also that it was not up to the state to determine exactly what that religious truth consisted of. Subsequently, the notion of religious truth weakened, but the notion of tolerance has remained. Now tolerance is also coming under pressure, and the state may even consider the opposite position — namely, that religious truth does not exist — to be a new orthodoxy (cf. Paulsen 2013).

In two earlier, recent cases on ritual slaughter, the court reached similar outcomes. These cases were ECLI:EU:C:2018:335 (*Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others v. Vlaams Gewest*, 29 May 2018) and ECLI:EU:C:2019:137 (*Oeuvre d'assistance aux bêtes d'abattoirs [OABA] v. Ministre de l'Agriculture et de l'Alimentation, Bionoor SARL, Ecocert France SAS, Institut national de l'origine et de la qualité (INAO)*, 26 February 2019. See Pin and Witte (2021).

5. Secularization and tolerance

The preceding discussion should provoke some wonder. Traditionally, the idea has prevailed that calls for tolerance arose in the early modern era. Religious disputes characterized this period. Therefore, at first, the concern was to achieve greater tolerance between religions. Also, at that time, the need for tolerance was primarily between different streams within Christianity — mainly between Catholics and Protestants. However, there were also disputes between more liberal and more precise forms of Protestantism. The source from which tolerance would arise was primarily external. The ideas of the Enlightenment were the main sources of tolerance. If reason prevailed, however religiously inspired, social peace was within reach.

When secularization set in, however, a new variant of this theory emerged. Now the idea was that, from the perspective of tolerance, secularization could not progress fast enough. After all, if people began to use their secular reason, tolerance would become even stronger. The consequence of this way of thinking is that the noose around religion's neck keeps tightening. For example, although Christianity has become significantly weakened in Europe, Islam now looms as a new threat to Western tolerance. The state is just called on to avert this danger as well. However, as required by the principle of equality, measures against Islam must also apply to Christianity and other faiths. The result is a government that acts repressively against all religions — in the name of tolerance!

This may seem to be a caricature, but it is not. The central thesis of a recently published book (Karpov and Svensson 2020: ch. 1) is that the theory that if people began to use their secular reason, tolerance would become even stronger does not hold. Taking a position against this still-dominant theory is then done in two ways. First, the secularization process that supposedly set in around 1900 is relativized. I consider this first step sufficiently well known that it does not need to be explained further here. The second step is more interesting than the first one. After all, if secularization is not an inevitable, linear development, then there can be no automatic relationship with increasing tolerance either. In combination, both steps lead to a more open, unbiased view of the relationship between secularization and tolerance. To the extent that tolerance is deemed desirable, it is essential to look for sources within secularity and the various religions.

In this light, the case law on religious groups and ritual slaughter becomes significant. Insofar as it stems from a liberal-egalitarian framework of thought, which is in turn grounded in an expectation of ongoing secularization, it appears that such a secular belief does not necessarily lead to greater tolerance. Admittedly, ritual slaughter is not a simple, black-and-white issue. Animal welfare is also a genuine concern, as EU law rightly recognizes. Still, from the perspective of tolerance, it appears evident that ending Jews' and Muslims' religious accommodation with regard to unstunned slaughter for a central ritual is an unfavorable development.

However, it is necessary to go one step further. As Harrison argues, egalitarian liberalism itself has certain theological traits. This same observation has been made within the Roman Catholic variant of post-liberalism, namely integralism (Foccroulle Menard and Su 2021). In combination, both currents provide a clear picture of how liberalism has constrained religion. Modern humans may still practice religion in the private sphere, but they must conform to the idea that God is irrelevant in the public sphere.

A post-liberal alternative to this way of thinking begins by recognizing that although ecclesiastical and secular authority exist side by side, both are in the service of man's eternal salvation. Therefore, the secular authority will align itself with ecclesiastical authority on the most fundamental points in practice. This does not imply that religious freedom cannot exist, but it does mean that religious freedom will also be at the service of this higher goal. That this goal also has collective elements is beyond dispute, as Harrison recognizes; indeed, the subtitle of his book is *Forming Communities of Charity*. Therefore, in sharp contrast to liberalism, institutional religious autonomy is the central element of religious freedom. Viewed against this backdrop, it seems unlikely that ritual slaughter could be banned entirely in post-liberalism, though the more integralist variant may in turn also pose a threat.

6. Conclusion

We can conclude that the attitude taken toward religious groups by European courts reveals a mixed picture. On one hand, the ECtHR recognizes the importance of religious groups to democracy in principle. On the other hand, the CJEU turns a blind eye to a ban on unstunned ritual slaughter in a member state. I have argued here that this ruling can be interpreted against the background of the European model of constitutional rights, as it can be observed in practice. This model is undergirded by liberal-egalitarian thinking, which has theological features related to a strong belief in ongoing secularization. The analysis thus concludes that a belief in secularization does not necessarily lead to increased tolerance.

Does this finding call into question the claim that veritable freedom of thought, conscience, and belief exists under liberalism? That is a crucial issue. On one hand, we can deduce that the CJEU could rule as it did in the ritual slaughter case because of the particular variant of egalitarian liberalism that has recently taken hold. Post-liberals will tend to assume that egalitarian liberalism is an inevitable outcome of the evolution of liberalism — and even more so as secularization increases. However, because of the emergence of a substantively robust alternative, it is also conceivable that liberalism will retrace its steps.

¹¹ For a definition of integralism in three sentences, see Waldstein 2016.

Even if that does not happen, it is to the credit of post-liberal schools of thought that they challenge the conventional wisdom that liberalism automatically guarantees religious freedom. Just as secularization does not necessarily lead to greater tolerance, under liberalism the freedom of thought, conscience, and religion is not automatically guaranteed. From a scholarly perspective, it is fascinating to note that modern constitutionalism is again coming under thorough scrutiny 250 years after its inception.

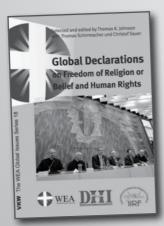
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