Freedom of Religion versus Humane Treatment of Animals: Polish Constitutional Tribunal's Judgment on Permissibility of Religious Slaughter

Judgment of the Constitutional Tribunal of Poland of 10 December 2014, K 52/13

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INTRODUCTION

Until the judgment of the Constitutional Tribunal of Poland (henceforth: the Tribunal) on 10 December 2014, which brought back legally permissibile religious slaughter,[1] the general pattern of all important constitutional cases regarding the 'law and religion' relationship in Poland followed the same format: it was about policing the limits of the dominant Church's influence upon the (formally) secular state. The main question, to which legislators, legal scholars, and of course constitutional judges have been compelled to respond was about confining the public role of the dominant and powerful church. Poland is not a county of religious pluralism, but rather of domination of the hegemonic Roman Catholic Church. According to a recent census, some 87.5 percent of Poles identify themselves as Roman Catholic.[2] Hence, the typical issues arising, constitutionally, at the intersection of religion and the state, are about policing the boundaries between the Church and the state. There is no 'wall of separation' in reality, even if it can be found in the Constitution. The Church, with its

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[1] Judgment K 52/13 of 10 December 2014.

[2] GUS, 'Narodowy Spis Powszechny Ludności 2011: 4.4. Przynależność wyznaniowa (National Survey 2011: 4.4 Membership in faith communities)', p. 99, stat.gov.pl/cps/rde/xbcr/.../LUD_ludnosc_stan_str_dem_spo_NSP2011.p/, visited 27 December 2014.

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hegemonic power, has a constant and perhaps natural tendency to dominate the state: determining the content of laws, recommending the political parties to be voted for, and permeating the public sphere with its symbols, rituals, and personnel. Hence, the typical case law of the Tribunal has been about matters such as the place of religion (de facto: Catholic religion) in public schools – and the Tribunal, in our view, has failed rather spectacularly in defending the secular character of Polish state.[3]

In this particular case, however, the issue was totally different, for which neither the Tribunal nor the general public were prepared, because they were not used to it; in fact, there are very few (if any) traces of the apprehension by the judges deciding this case that the matter is diametrically opposed to what they have been ruling about so far, in their 'law and religion' jurisprudence. The issue here was *not* how to confine the role of the dominant church, but rather how to accommodate small, minority religions which do not aspire to dominate general public life, or to impose their values and norms on the community as a whole, but rather which only ask for a right to pursue their own religious practices undisturbed by the general public. The question is not how to separate the church from the state, but how to let the small, non-dominating, religious groups practise their own religion at the edges, so to speak, of society. Some of the practices may be inconsistent with the prevailing norms – not just dominant religious norms, but also moral, non-faith-based norms of society. How far can religious exemptions for non-majoritarian religions go if they breach some deeply-held values, such as those regarding the humane treatment of animals?

In the end, the secular character of the state is also at stake here – but in a different way than in the case of the dominant church issues. In the dominant church issues, the secular character of the state is compromised by the capture of the state by the church. In the non-majoritarian religion-based exemption cases, secularity of the state is compromised by granting religion-based exemptions from the general rules of social interaction. To use the US constitutional framework, one may say that the issues related to the dominant church category of cases belong to the 'Non-Establishment of Religion' category, while the issues regarding the claims for exemptions from general rules by minoritarian religions belong to the 'Free Exercise of Religion' category.[4] Unfortunately, in the Polish constitutional tradition (and Poland here is not an exception in Europe) the difference between these two clauses of the US First Amendment has no legal or constitutional

[3] For a discussion of main judgments in this line of cases, *see* W. Sadurski, *Rights Before Courts: A study of constitutional courts in postcommunist states of Central and Eastern Europe*, 2nd edn. (Springer 2015) p. 188-193.

[4] Constitution of the United States, 1st Am. For a good, classic discussion about the relationship between two religion clauses of the 1st Amendment, *see* J. Choper, 'The Religion Clauses of the First Amendment: Reconciling the Conflict', 41 *U. Pitt. L. Rev.* (1980) p. 673.

equivalent – hence, there is no immediate recognition of the distinction between these two types of case.

This is not to say that the specific issue decided in the judgment of 10 December 2014 was without precedent in the Tribunal's case law. On 27 November 2012 the Tribunal struck down as unconstitutional a law of 2004 which actually permitted ritual slaughter for the purposes of religious groups and which tried to carve out an exemption from the general animal-protection law that contained such a ban.[5] At that time, the Tribunal founded its rejection of ritual slaughter on a legal technicality (though an important one): the exemption was introduced by a ministerial decree (by the Minister of Agriculture), but a fundamental principle of the rule of law, as (correctly) interpreted in Poland by the Tribunal, provides that one cannot change, qualify, or restrict, a rule enacted by a parliamentary statute through sub-statutory legal acts. This obvious legal defect of the provision that allowed ritual slaughter in Poland offered the Tribunal an escape route. It obviated the need to face head-on a substantive constitutional question: is the absolute ban on such slaughter, justified in the existing statutory law by reference to animal suffering, compatible with religious freedom and the principle of equality of all religions? But the Tribunal could not avoid this question in 2014.

And avoid it the Tribunal did not. On the contrary, the judgment of the Tribunal is *anything but* narrowly legalistic. Both in its majority opinion and in dissenting opinions, constitutional judges freely roam around the open-ended, morally-loaded questions of the meaning of religious freedom, public morals, and the separation of state and religion. To critics of the decision, the judges unduly elevated religious freedom over public morals which condemn excessive pain and suffering inflicted upon animals. To defenders of the decision, the dissenters did not do justice to the value of religious freedom, and were too quick in interpreting 'public morals' without seeing that religious freedom is part of, rather than something external to, public morals. Surprising even the proponents of repeal of an absolute ban on slaughtering animals without prior stunning (the repeal demanded on grounds of religious freedom), and deeply upsetting the advocates of animal welfare, the Tribunal chose not only to find unconstitutionality in the current law, but also to engage in a remarkable over-breadth in its judgment. In a highly-divided opinion (in a panel of fourteen, seven judges submitted separate opinions, of which five disagreed with the outcome and justification, while two dissented from the justification but concurred in the outcome),[6] the Tribunal determined that the ban on slaughter without stunning violates religious freedom. The Tribunal failed to follow the suggestion of the claimant – the Union of Jewish Religious Communes in Poland – to narrowly craft a religion-based exemption. Rather, the Tribunal said

[5] Judgment U 4/12 of 27 November 2012.

[6] *See below*, under 'Dissenting opinions'.

that non-stunned slaughter should be allowed by the law for religious reasons, even when it is not administered for the specific purposes of the religious communities.

The judgment

The claimants' positions and responses by other parties to the procedure

The judgment of 10 December 2014 was directly triggered by a motion of the Union of Jewish Religious Communes in Poland [henceforth: the Union][7] which claimed that the 1997 Act on the protection of animals, insofar as it banned special types of slaughter which were required by some legal religious groups, was contrary *inter alia* to the Polish Constitution's provision on free exercise of religion (Article 53),[8] and to Article 9 of the European Convention on Human Rights,[9] to which Poland is a party. The Union asserted that none of the grounds for legitimate restrictions of Article 53 freedom of religion applied here: neither public security and public order, nor 'the rights of others', nor – more to the point – public morals, because, as the motion said, in Poland the moral point of reference is to be found in the Judeo-Christian tradition, of which various rules about food consumption and food production are an integral part.

In this context, the Union pointed out that Jewish ritual slaughter (*shechita*), which serves to supply meat consistent with the rules of kashrut, is an element of the exercise of the religion of Judaism.[10] They emphasised that, for the Jewish

[7] Under Polish constitutional law, churches and other faith groups have standing to lodge a constitutional challenge (in the 'abstract' procedure, hence not limited to 'constitutional complaint') against a law which concerns matters relevant to their sphere of activities, *see* Art. 191 of the Constitution.

[8] Art. 53 of the Constitution proclaims, inter alia: '(1) Freedom of conscience and religion shall be ensured to everyone. (2) Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services. … (5) The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others.'

[9] Art. 9 reads: '(1) 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. (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.'

[10] For a graphic description of schechita slaughter, *see* A. Coghlan, 'Animals feel the pain of religious slaughter', *New Scientist*, 13 October 2009, www.newscientist.com/article/dn17972-animals-feel-the-pain-of-religious-slaughter/, visited 21 October 2015.

minority in Poland, which numbers around 8,000 people, special rules of kashrut are a foundation of their traditions and customs, and thus a ban on religious slaughter violates not only religious freedom but also the constitutional principles of equality before the law and prohibition of discrimination. Due to the prohibition contained in the law on the protection of animals, members of this community are treated less favourably than members of other religious groups: the differential treatment is based on religious and national affiliation, and cannot be seen as proportionate and based on relevant characteristics which would justify different treatment. While it is still possible to acquire imported kosher meat in Poland, the need to import meat makes it both more costly and cumbersome – which amounts to social and economic discrimination. In addition, the Union alleged a conflict between the law on the protection of animals and the law of 20 February 1997 about the relationship between the state and Jewish communes, the latter act specifying, in Article 9, that Jewish communes are competent to look after religious ceremonies, and in particular, the provision of kosher food. But in this case note we will disregard this last aspect of the claim and of the Tribunal's judgment because, from a constitutional point of view, the alleged or real inconsistency between the two statutes is of much lesser importance than a claimed inconsistency between the statute impugned and the Constitution.

Under the rules of proceedings before the Tribunal, a number of specified institutions may present their views about the law under challenge. In this case, in addition to the Speaker of the Parliament, the Attorney General submitted a position paper in which he defended the existing law, based on 'public morals' as a specific derogation ground attached to the provision about religious freedom. In particular, the Attorney General opposed the claimants' view which linked 'morals' to tradition and customs only – while they are significant factors, they are certainly not the only determinants of 'morals'. In this context the Attorney General emphasised the importance of the evolution of moral conceptions, and agreed with those views that consider slaughter without prior stunning to be inhumane, and hence immoral, under dominant moral sensitivities in Poland today. According to the Attorney General, the full prohibition of slaughter without stunning, while not *required*, is *allowed* by the Constitution, and is within the proper range of legislative discretion.

The status of religious freedom

The Tribunal acceded fully to the claimants' demands. First of all, it defined the main issue at stake as whether, under the constitutional principle of freedom of religion, the unconditional prohibition of slaughter according to the special methods as required by religious ceremonies was permissible (Part III.1.6 of the judgment). This way of framing the issue is not uncontroversial, because the law on the protection of animals does not establish a prohibition *targeted at religious*

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communities, but simply states an unconditional, general rule; the consequences arising for faith groups may be seen as an *effect*, but not the explicit *substance* of the law. But we may put this issue to one side, as pedantic.

Most importantly, the Tribunal set about characterising the status and meaning of the principle of freedom of religion. It began by saying that this freedom is 'fundamental (essential)', and significantly, it derived it not just from the constitutional article about the right to freedom of religion (Article 53) but also from the constitutional preamble (which, as the Tribunal correctly states, identifies 'faith' as a source of 'truth, justice, goodness, and beauty' – but, as the Tribunal *fails* to add, also mentions the citizens who derive these values from non-religious sources),[11] as well as, quite remarkably, from a meta-right of dignity (Article 30 – even though the 'dignity' provision makes no mention of faith or religion). Everything that the Tribunal says about religion and freedom of religion in the opening passages of its substantive part of the judgment (Part III.5) suggests that it wishes to elevate freedom of religion to a position of a superior, privileged right. No such ranking of rights is indicated in the text of the Constitution, so this elevation of religion in the judgment is the Tribunal's own creative contribution to Polish constitutional interpretation. Contrary to the Tribunal's suggestion, nothing about the ranking of particular constitutional rights can be derived from the fact that, as the Tribunal emphasises, the article about freedom of religion (Article 53) is 'one of the most developed provisions of the Constitution, as far as its safeguarding function is concerned' (where the 'developed' character seems to be associated with the article's length), and from the fact that various instances of freedom of religion articulated in this article (ceremonies, teaching, practicing, having churches and temples etc.) are a non-exhaustive list 'which does not preclude a possibility of exercising one's freedom of religion in other ways' (Part III.5.3).

In addition, the Tribunal makes an extravagant claim that, under the constitutional guarantees of freedom of religion, 'public authorities must not assess the plausibility of religious convictions *or the methods of expressing them*' (Part III.6.3, emphasis added). While clearly the state should not be in the business of assessing the 'correctness' or otherwise of religious doctrines, the methods and ways of expressing them may enter into collision with some important individual rights and constitutional values. The asserted laissez-faire approach towards religious manifestations is not credible, and if taken literally, it would deny the state the power to intervene in a religion which, for instance,

[11] The Preamble to the Constitutional refers, inter alia, to 'We, the Polish Nation - all citizens of the Republic, [b]oth those who believe in God as the source of truth, justice, good and beauty, [a]s well as those not sharing such faith but respecting those universal values as arising from other sources … [h]ereby establish this Constitution….'.

requires *human* sacrifices. In fact, the state must assess both religious convictions, at least from the point of view of sincerity (what if a particular religious group disingenuously claims that their religion forbids a particular conduct, for instance, paying taxes?), and of course, manifestations of religion, insofar as they may inflict harm on third parties. In fact, the Constitution itself, by providing grounds for legitimate restrictions of free exercise of religion, demands that the state evaluate how essential given conduct is for a particular religious faith, in order to assess whether its restriction may prevail over certain, enumerated constitutional values.[12]

The very idea of a proportionality analysis, adopted generally by the Tribunal in its entire case law so far, requires evaluation of both sides of the equation – the values of a right subjected putatively to a restriction and the value of the aims pursued by the restriction. In particular, if a court in the end decides to provide an exemption from the general legal standards which apply to everyone else (as the Tribunal did in its judgment on ritual slaughter), it must be based on an evaluation of the protected religious conduct as particularly important *to the adherents*. It is hard to see how it can do so without assessing the plausibility and significance of a particular conviction within the broader framework of a religious belief. As an American scholar noted, in the context of a US debate about permissibility of religious slaughter there, 'Compulsory exemption from general laws for holders of particular religious beliefs hardly seems to fit … the usual understanding of an obligation of religious neutrality'.[13]

Ritual slaughter and 'protection of morals'

It is against this background, marked by a controversial theory of the privileged place of freedom of religion in the general constellation of constitutional rights, in conjunction with the state's incapacity to make any judgments about religious practices, that the Tribunal introduced the question of ritual slaughter. The judgment referred to the jurisprudence of the European Court of Human Rights, namely to *Cha'are Shalom Ve Tsedek* v *France*,[14] to the other member states of the EU,[15] as well as to the United States (quoting, approvingly, the *Lukumi Babalu* case).[16] It announced a general proposition that ritual slaughter is a 'ritual protected by Article 53 paras 1 and 2 of the constitution and Article 9.1 of the [European] Convention' (Part 7.1). But, under a system of protection of rights

[12] This point was made emphatically by Judge Wojciech Hermeliński in his dissenting opinion, Part 4.2.

[13] L.A. Graglia, '*Church of the Lukumi Babalu Aye*: Of Animal Sacrifice and religious Persecution', 85 *Georgetown Law Journal* (1996), p. 50.

[14] ECtHR 27 June 2000, Case No. 27417/95, *Cha'are Shalom Ve Tsedek* v *France*.

[15] E.g. Austrian Constitutional Court judgment of 17 December 1998, VfSlg 15.394.

[16] *Church of the Lukumi Babalu Ay, Inc.* v *the City of Hialeah*, 508 U.S. 520 (1993).

typical of the European proportionality approach, where rights can be legitimately restricted on certain enumerated grounds, this is not the end of the story; the Tribunal had then to consider whether the prohibition of ritual slaughter is a proportionate measure pursued in order to attain constitutionally-listed goals. Having disposed, summarily, of such goals as national security, public order and the rights and liberties of others as unrelated to the law impugned, the Tribunal focused on the two remaining grounds: health and morals. When it comes to public health, the Tribunal plausibly asserted that this motive had never been raised as a *ratio legis* for the statute, and in any event, ritual slaughter may well be conditioned by a number of hygienic and sanitary requirements. The only remaining matter was, therefore, 'protection of morals' as a ground for limiting a right to free exercise of religion.

It is here that the judgment is at its most controversial. The Tribunal fully accepted the claimants' arguments that 'morals', in the constitutional sense, must be understood as informed by 'Judeo-Christian religion and tradition' (Part III.8.2.2), and added, for its part, that it is a *prohibition* on some religion-based form of slaughter which violates moral norms which demand respect for freedom of religion (Part III.8.2.2). In explaining its understanding of 'morals' (or 'morality' – in Polish there is a single word for both: *moralność*), the Tribunal asserted that its role is not to assess whether ritual slaughter is 'moral' or not, but rather, whether a prohibition is necessary to 'protect morals'. This question-begging distinction served it further to say that there is no such necessity: after all, freedom of religion is not only a constitutional value but also a moral value in Polish society (Part III.8.2.2). The Tribunal briefly considered medical (veterinary) evidence about the pain inflicted on animals, but its consideration of the issue can be only characterised as cavalier: it merely asserted, without evidence, that under current expert knowledge, it is not possible to state that a properly conducted ritual slaughter is always more painful than a properly conducted slaughter after stunning (Part III.8.2.2) The Tribunal conceded that the absolute ban on ritual slaughter was motivated by a concern for the wellbeing of animals, but noted that such concern had not been introduced into the Constitution or the Convention as possible grounds for restriction of freedom of religion (Part III.8.2.3). And since the ban was not necessary to serve the explicitly listed goals, it cannot survive the proportionality analysis. In other words, the law incorrectly balanced the comparative values of care for animals' wellbeing and freedom of religion, to the detriment of the latter (Part III.8.3).

As is clear from the dissenting opinions (see below), the immediately most striking feature of the judgment is that it went well beyond the scope of the petition by the challengers. While the Union of Jewish Communes in Poland claimed unconstitutionality of the lack of special religion-based exemption from a general ban on slaughter without stunning (hence, a proper response, if the

Tribunal found such unconstitutionality, would be to carve out an exemption for religion-based ritual slaughter *for the purposes of religious communes only*), the Tribunal went all the way in striking down the law insofar as it does not allow the slaughter demanded by various religious rules, thus reintroducing slaughtering without stunning for whatever purposes. Based on the rules of standing before the Constitutional Tribunal, the Union of Jewish Communes (as a subject having a 'limited standing', in the sense of Article 191 paragraph 2 of the Constitution) could have lodged a petition only on matters related to the sphere of its activity – and so it did. By ignoring the principle that the Tribunal is bound by the scope of the challenge, the majority of the panel decided nevertheless to broaden the reach of its judgment beyond the express rationale for its own judgment, which is based on the concerns for religious freedom.

Dissenting opinions

The Tribunal's judgment was accompanied by a high number of separate opinions, most of which focused on the overbreadth issue, and criticised the judgment for not confining the exception to slaughter for the exclusive purposes of religious groups (something that the Tribunal never properly explained). Judge Wojciech Hamerliński in his eloquent dissent cited expert evidence demonstrating that even the most carefully conducted *shechita* is necessarily crueller and inflicts more pain than a properly conducted, 'regular' slaughter preceded by stunning. He sharply criticised the Tribunal for failing to have regard to any respectable scientific analyses, and for ignoring several submissions (equivalent to *amicus curiae* briefs), including by the Polish Ethical Society urging a dismissal of the constitutional challenge, on moral grounds.[17] Nevertheless, he was in favour of the exception, but only for the specific needs of religious communities. As the judge noted caustically 'The Union addressed the Tribunal to protect the followers of Judaism in Poland but, as an effect of the judgment, became an initiator of a generalised ritual slaughter on mass scale and for export' (Part 2.3. of the separate opinion).

Judge Teresa Liszcz also sharply criticised the majority judgment for going well above the claimants' demands. She also pressed the point that ritual slaughter inflicts more pain and suffering, but grudgingly accepted the religion-based exception. She disagreed with the way the Tribunal construed the 'morals' standard as a ground for the limitation of a right, indicating that ritual slaughter may be seen as a moral evil by the broader community even though it is required by a religion present within that community. She also believed that the 'rights of

[17] A disclosure: one of the co-authors of this case note (W. Sadurski) was a co-signatory of this submission.

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others' are affected because those others have a right to be free of stress and anguish at the thought of the cruel treatment of animals.

Judge Stanisław Rymar in his dissenting opinion expressed a rather eccentric view that the whole matter is moot and the motion by the Union should have been found inadmissible in the first place because, in his view, Article 53 of the Constitution in itself provides an exception to the animal-protection statute, as confirmed by the act on the Jewish communes. Hence, the exception to the general ban on non-stunned slaughter is already tacitly in the law, and no judgment by the Tribunal was needed.

Judge Piotr Tuleja, just as the other dissenting judges, criticised the overbreadth, and emphasised that the minimising of suffering of animals must be seen as an ingredient of public morals. Judge Sławomira Wronkowska-Jaśkiewicz highlighted both these points, too. Vice-President of the Tribunal, Stanisław Biernat, disagreed with the rationale for the judgment (though he concurred in the outcome), insofar as the care for the wellbeing of animals has been wrongly placed, in the majority opinion, outside the scope of public morals. Finally, Judge Mirosław Granat, similarly to Judge Biernat, concurred in the outcome but dissented from the *ratio*, insofar as it denied that ritual slaughter is more painful to animals than after-stunning slaughter, and insofar as the Tribunal assumed that care for animals should not be part of the balancing process in the proportionality analysis. Judge Granat wanted to see this factor as an element of public morals which should be visible in the overall balancing performed by the Tribunal.

Concluding remarks

As we indicated at the outset, the issue of ritual, religious-based slaughter compelled the Polish Constitutional Tribunal to address a substantively new set of questions regarding the intersection of religion and constitutionalism. In a society marked by a strong attachment to religious values and a hegemonic church, this was a significant development. The Tribunal was not called upon to perform the more familiar task of policing the boundaries between the state and the dominant religion. Rather, it was asked to determine the grounds for and limits to exemptions from general norms, based upon the claims of minority and often unpopular religious groups. The way in which the Tribunal handled this new issue is far from satisfactory.

Assuredly, the decision brings Poland into line with the great majority of national European laws, with the jurisprudence of the European Court of Human Rights, and with the US position. All of these legal orders provide exemptions from general norms, to accommodate the practices of believers who abide by

religious prescriptions as to ritual slaughter (including slaughter without prior stunning).[18] Those exemptions are guaranteed at a statutory or constitutional level, as part of the legal understanding of freedom of religious exercise. When constitutional courts in these jurisdictions were called upon to pronounce on the constitutionality of such provisions, they were upheld. For instance, both the German Federal Constitutional Tribunal and the Constitutional Court of Austria upheld religious exemptions from prohibitions on slaughter without stunning.[19] On the only occasion on which the European Court of Human Rights dealt with these questions, the Court considered whether the French authorities were permitted to refuse one particular, orthodox Jewish community a licence to perform ritual slaughter. In *Cha'are Shalom* the Court accepted that ritual slaughter as such (rather than the ritual slaughter conducted by a particular community) was a manifestation of the freedom of religion, and therefore deserved the protection of Article 9 ECHR.[20] Additionally, the Council of Europe's Convention for the Protection of Animals for Slaughter explicitly permits ritual slaughter, but imposes strict limits upon the methods of restraining of animals before slaughter, in order 'to spare them all avoidable pain, suffering, agitation, injury or confusion'.[21] On the other side of the Atlantic, in the leading US Supreme Court case, *Church of the Lukumi Babalu Ay, Inc., v. the City of Hialeah*,[22] the unanimous Court struck down a local ordinance aimed at the prohibition of ritual slaughter conducted by followers of the Santeria religion, as a violation of the constitutional Free Exercise of Religion Clause. Thus, if our evaluation of the Polish Constitutional Tribunal's decision were concerned only with the extent to which it aligned the Polish legal position

[18] For a good overview, *see* C. E. Haupt, 'Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter', 39 *George Washington International Law Review* (2007) p. 839-886. *See also* J. A. Rovinsky, 'The Cutting Edge: The Debate Over Regulation of Ritual Slaughter in the Western World', 45 *California Western International Law Journal* (2014) p. 79-107 and C. M. Zoethout, 'Animals as Sentient Beings: On Animal Welfare, Public Morality and Ritual Slaughter', *Vienna Journal on International Constitutional Law* (2013) p. 308 at p. 313-315.

[19] In Germany: *Schächten Case*, Decision of the Federal Constitutional Court, Bundesverfassungsgericht (BVerfG), 15 January 2002, 1 BvR 1783/99; in Austria: Austrian Constitutional Court, Judgment of 17 December 1998, B 3028/97, VfSlg 15394.

[20] ECtHR 27 June 2000, Case No. 27417/95, *Cha'are Shalom Ve Tsedek* v *France*. For critiques of the decision, *see* P. Lerner and A. M. Rabello, 'The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities', 22 *Journal of Law and* Religion (2007) p. 1 at p. 40.

[21] Convention for the Protection of Animals for Slaughter, signed 10 May 1979, effective 11 June 1982, Official Journal L 137, 27, Art. 13.

[22] *Church of the Lukumi Babalu Ay, Inc.*v *the City of Hialeah*, 508 U.S. 520 (1993).

with that of other liberal, constitutional democracies, the verdict would have to be a positive one.

However, where the judgment seriously disappoints is in the reasoning it supplied to support the decision. These reasons may have far-reaching implications for the future of religion-state relations in Poland – well beyond both the specific question of ritual slaughter, or indeed, religion-based exemptions for minority religions more generally. Given the potential significance of the ruling, it is worth summarising the main misgivings we share.

First, the Tribunal elevated religious freedom to the rank of a supreme, special level of constitutional rights and freedoms, despite lacking any textual basis for such ranking, any strong mooring in the existing case law, or any convincing justification. No doubt freedom of religion is a very important constitutional value, but the Tribunal should have been more careful when constructing such controversial rankings *in abstracto*. It may be that in some circumstances, religious freedom must give way to other constitutional rights and freedoms (such as freedom of expression) or other constitutional values (such as protection of morality or social order). From now on, it will be much more difficult for the Tribunal and other courts to take very seriously those other, competing values, when they clash with claims based on freedom of religion. This is an important (and, in our view, unfortunate) judicial amendment of the balance of constitutional values in Poland.

Second, the Tribunal displayed a regrettable neglect towards the idea of a secular state and a concomitant respect for non-religious citizens. It has done so in a number of ways, none of which are legally or intellectually sound. It has read implied religious meanings to the meta-principle of 'dignity'; it has reinterpreted the famous narrative of the Polish constitutional preamble in a one-sided, biased manner; and it has announced the Judeo-Christian tradition as part of Polish 'public morals', without adding that rationalist, humanistic, atheist, or other comprehensive moral views are also legitimate elements, and must be given equal respect by the law.

Third, in our view, the Tribunal has misinterpreted the very meaning of an appeal to 'public morals', by eroding from that concept humane sentiments towards non-human animals. In particular, the Tribunal had insufficient regard to the moral urge to protect animals from unnecessary suffering. The Tribunal interpreted 'public morals' in a way that incorporates religious traditions and the value of freedom of religion, while at the same time denying any constitutional status to the protection of non-human animals. In doing so, it has taken a very controversial, highly objectionable moral position in the debate about the limits to tolerance of religion-based infliction of animal suffering, and draped this view in the clothes of an allegedly plain-text interpretation of the Constitution. While the concept of public morals has been eroded by the Constitutional Tribunal's

exclusion of care for animal welfare from its content, in contrast, religious freedom now benefits from 'double counting'. It enters into the weighing and balancing exercise both as an independent constitutional principle, and also as an ingredient of 'public morals' as a possible ground for a restriction of religious freedom.

These three features of the judgment – the top ranking of religious freedom, disregard for the non-religious, and religiously interpreted 'public morals' – are likely to bear heavily upon the future of the relationship between law and religion in Poland. They may have the unfortunate effect of further consolidating the pro-religion interpretation of Polish constitutionalism in what had been the central aspect of that relationship – the legal position of the hegemonic Roman Catholic Church. Thus, even though it has no immediate stake in the specific outcome of this decision, the dominant Church stands to benefit significantly.

But there is one other community which has reasons to applaud the judgment, and which has not been mentioned so far in this case note. Hidden behind the attractive slogans of religious freedom, there have been huge commercial interests at stake. Much of the campaign for repeal of the ban on ritual slaughter was carried on and financed by the 'Polish Meat' consortium – an industry lobby. And no wonder: export of kosher and especially halal meat prior to the ban reasserted by the Tribunal in 2012, brought meat producers (far removed from small Jewish communes) a significant commercial benefit. According to some estimates, the value of annual exports of kosher and halal meat from Poland in 2012 amounted to USD 329 million. An estimated 200,000 tons of meat from ritually slaughtered animals was exported annually from Poland, mainly to Arab states but also to France and the United Kingdom.[23] So, from the beginning, the debate about the balance between religious freedom and animal protection has been contaminated by those ulterior motives. The remarkable over-breadth of the Tribunal's decision, which confers the benefits of administering religious-required slaughter far beyond the specific needs of tiny Jewish or Islamic communities in Poland, adds a truly reprehensible feature to the Tribunal's judgment.

[23] D. Pawłowiec, 'Przegrany bój o ubój', www.uwazamrze.pl/artykul/1031527/przegrany-boj-o-uboj/, visited 21 October 2015.

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