



# FREEDOM OF RELIGION VERSUS ANIMAL WELFARE

The Compatibility of the Flemish Ban on Unstunned  
Slaughter with Freedom of Religion

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## **List of abbreviations**

ACIP	Israelite Consistory of Paris
AG	Advocate-General
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EESC	European Economic and Social Committee
EFSA	European Food Safety Authority
EU Charter	Charter of Fundamental Rights of the European Union
FVE	Federation of European Veterinarians
GAIA	Global Action in the Interest of Animals
NGO	Non-Governmental Organisation
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration on Human Rights

## Introduction

Religious freedom is a vast part of our current society, with its traditions that are being passed down to future generations. One of these traditions is religious slaughter, as performed by Jews and Muslims. Kosher and halal slaughter methods were originally developed to spare the animal unnecessary pain<sup>1</sup> through the use of the best available knowledge and through the application of the best available technology.<sup>2</sup> Islamic and Jewish religion underlines the need for animals to be treated humanely with considerate care.<sup>3</sup> Religious slaughter is however becoming more of a concern to the public opinion, which makes this research relevant. A source, the Flemish Veterinaries, find that due to an increased awareness of animal welfare, religious slaughter without stunning the animal is no longer morally acceptable.<sup>4</sup> Public opinion has expressed their concerns, in particular the fact that religious slaughter requires the animal to be completely consciousness during the slaughter causing the animal unnecessary harm.<sup>5</sup> Is it not the time for religious slaughter to conform with the twenty-first century, in a world booming with new technologies?<sup>6</sup>

In response, several countries have introduced a ban on religious slaughter without stunning, thus banning the kosher and halal slaughter. Currently, unstunned slaughter has been

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<sup>1</sup> David B. Adams and Allan D. Sheridan, *Specifying the Risks to Animal Welfare Associated with Livestock Slaughter without Induced Insensibility* (AHC: Animal Welfare Working Group 2008) p. 7

<sup>2</sup> Bart de Wever, 'Onverdoofd slachten is niet meer van deze tijd' *De Tijd* (Brussel, 2 August 2016) <<https://www.tijd.be/opinie/column/Onverdoofd-slachten-is-niet-meer-van-deze-tijd/9794029>> accessed 23 January 2018

<sup>3</sup> David B. Adams and Allan D. Sheridan 2008, p. 7; Carla M. Zoethout, 'Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter' (2013A) 35 HRQ, p. 653

<sup>4</sup> Vlaamse Dierenartsen, 'Consensusdocument van de Vlaamse dierenartsen over onverdoofd slachten' (*NGROD* 2015), p. 1 <[https://www.ordederdierenartsen.be/sites/default/files/articles/file\\_sys\\_Nieuws\\_Bijlage\\_67.pdf](https://www.ordederdierenartsen.be/sites/default/files/articles/file_sys_Nieuws_Bijlage_67.pdf)> accessed 23 January 2018

<sup>5</sup> Ipsos Public Affairs, *Opiniepeiling over het onverdoofd slachten van dieren* (GAIA 2012), p. 4 <[http://www.gaia.be/sites/default/files/campaigns/attachments/opinionpollresults\\_nl.pdf](http://www.gaia.be/sites/default/files/campaigns/attachments/opinionpollresults_nl.pdf)> accessed 23 January 2018

<sup>6</sup> Bart de Wever 2016

banned in Norway<sup>7</sup>, Iceland<sup>8</sup>, Sweden<sup>9</sup>, Denmark<sup>10</sup> and Switzerland<sup>11</sup>. These countries require the animal to be stunned prior to slaughter. Some countries require the animal to be stunned after or during the incision, as is the case for Austria<sup>12</sup>, Estonia<sup>13</sup> and Finland.<sup>14</sup> Having these bans in several countries might form an impulse for other countries to introduce a ban as well. This is exactly what happened with the ban on hunting seals for their fur. After a few countries banned the seal hunt and the trade of their fur, an European wide ban of seal hunt and the trade of their fur was introduced.<sup>15</sup>

Recently, Belgium has introduced a ban on unstunned religious slaughter in the Flemish and Walloon region.<sup>16</sup> It is still unclear whether this ban can work and if it is compatible with International and European law, which is why this research will focus on Belgium. There are

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<sup>7</sup> Aize Kijlstra & Bert Lambooi, *Rapport 161: Ritueel slachten en het welzijn van dieren* (Wageningen UR: Animal Science Group 2008) p. 5; Law on Animal Welfare of 19 June 2009 [2009] KL 16.45, para 12 <<https://lovdata.no/dokument/NL/lov/2009-06-19-97>> accessed 11 June 2018

<sup>8</sup> Federation of Veterinarians of Europe, 'Briefing note: Slaughter without stunning and food labelling' (FVE/012/doc/030, FVE 2012), p. 1

<<http://www.fve.org/uploads/publications/docs/030%20fve%20position%20labeling%20meat%20from%20animals%20slaughtered%20without%20stunning%20final.pdf>> accessed 24 January 2018; Act on Animal Welfare of 1 January 2014 [2014] No. 55, art. 21

<[http://www.mast.is/english/library/Reglugerðir/55\\_2013LogVelferddyraEN1505.pdf](http://www.mast.is/english/library/Reglugerðir/55_2013LogVelferddyraEN1505.pdf)> accessed 11 June 2018

<sup>9</sup> Ester Peeters, *Wetenschappelijk rapport: Welzijnsaspecten bij het slachten (drijven, fixeren, kelen) van runderen en schapen* (Raad voor Dierenwelzijn in België 2007) p. 90; Animal Welfare Act of 2 June 1988 [1988] LEX-FAOC019544, para 14 <<http://extwprlegs1.fao.org/docs/pdf/swe19544E.pdf>> accessed 11 June 2018

<sup>10</sup> Robert J. Delahunty, 'Does Animal Welfare Trump Religious Liberty? The Danish Ban on Kosher and Halal Butchering' (2015) 16 USD, p. 343 <<https://ssrn.com/abstract=2433789>> accessed 24 January 2018; Ordinance of 14 February 2014 on slaughter and killing of animals [2014] BER No. 135, para 9 <<https://www.retsinformation.dk/pdfPrint.aspx?id=161815>> accessed 11 June 2018

<sup>11</sup> Amikam Nachmani, *Haunted presents: Europeans, Muslim immigrants and the onus of European-Jewish histories* (Manchester University Press 2017), p. 147; Animal Welfare Act of 16 December 2005 [2005] No. 455, para 21 <<https://www.globalanimallaw.org/downloads/database/national/switzerland/Tierschutzgesetz-2005-EN-2011.pdf>> accessed 11 June 2018; Animal Welfare Ordinance of 23 April 2008 [2008] No. 455.1, para 185 <<https://www.globalanimallaw.org/downloads/database/national/switzerland/TSchV-2008-EN-455.1-2011.pdf>> accessed 11 June 2018

<sup>12</sup> Ester Peeters 2007, p. 90; Federal Act of 9 June 2004 amending the Animal Welfare Act, as well as amending the Federal Constitutional Act, the Industrial Code 1994 and the Federal Ministries Act 1986 [2004] BGBl. I No. 118/2004, para 32(3)

<[https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2004\\_I\\_118/BGBLA\\_2004\\_I\\_118.html](https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2004_I_118/BGBLA_2004_I_118.html)> accessed 11 June 2018

<sup>13</sup> Rossella Bottoni and Silvio Ferrari, *Report on the legislation regarding religious slaughter in the EU, candidate and associated countries* (DIALREL 2010) p. 10; Regulation of 1 January 2013 on Special methods of religious slaughter of farm animals, more detailed substantive and formal requirements for religious slaughter and requirements and procedure for religious slaughter [2013] RT I 53, para 3(3) <<https://www.riigiteataja.ee/akt/129122012053>> accessed 11 June 2018

<sup>14</sup> Federation of Veterinarians of Europe 2012, p. 1; Animal Welfare Act of 4 April 1996 [1996] No. 1996/247, para 33(1) <<http://www.finlex.fi/fi/laki/kaannokset/1996/en19960247.pdf>> accessed 11 June 2018

<sup>15</sup> Council Regulation (EC) 1007/2009 of 31 October 2009 on trade in seal products [2009] OJ L286/36

<sup>16</sup> Liesbet Dhaene, 'Het is zover: Brussel is de hoofdstad van het onverdoofd slachten' *Knack* (Brussel, 1 September 2017) <<http://www.knack.be/nieuws/belgie/het-is-zover-brussel-is-de-hoofdstad-van-het-onverdoofd-slachten/article-opinion-894919.html>> accessed 26 January 2018

concerns that the ban on religious slaughter might collide with freedom of religion, as mentioned in article 9(1) of the European Convention on Human Rights (ECHR) and article 10 of the Charter of Fundamental Rights of the European Union (EU Charter). The Jewish<sup>17</sup> and Muslim<sup>18</sup> communities have already filed cases<sup>19</sup> against the bans in Wallonia and Flanders, claiming that their right to religion has indeed been infringed on.<sup>20</sup> These cases are still pending, so no judgement has been filed yet. If there is no collision with article 9(1) ECHR or article 10 EU Charter to be found, then the ban in Wallonia and Flanders might be used as a guideline for other countries willing to follow in their footsteps. Belgium could show how a ban on religious slaughter can be filed without colliding with freedom of religion, making it more attractive for other countries to do the same.

There are however several tension fields. One of these tension fields, briefly mentioned above, is the one between animal welfare and the right to religion. On the one hand you have the animal activists who state that unstunned religious slaughter is no longer of this time<sup>21</sup>, and on the other hand you have the Muslims and Jews who simply perform their religious practice (religious slaughter) as they have for many years. The tension between animal welfare and freedom of religion is also clearly visible in the relevant articles on animal welfare and the right to religion. Animal welfare can be found in article 13 of the Treaty of the Functioning of the European Union (TFEU). The tension between animal welfare and right to religion is portrayed quite clearly in this article, as it says that the European Union has to pay full regard to the welfare requirements of animals while respecting the legislative/administrative provisions and customs of the Member States, in particular relation to religious rites.<sup>22</sup> Freedom of religion can be found in article 9(1) ECHR and it says that everyone has the right to freedom of religion and

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<sup>17</sup> ‘Beroep bij Grondwettelijk Hof tegen verbod op ritueel slachten’ *Joods Actueel* (Antwerp, 28 November 2017) <<http://joodsactueel.be/2017/11/28/44314/>> accessed 26 January 2018

<sup>18</sup> ‘Ook moslimorganisaties stappen naar Grondwettelijk Hof tegen verbod op onverdoofd slachten’ *De Morgen* (Asse, 30 November 2017) <<https://www.demorgen.be/binnenland/ook-moslimorganisaties-stappen-naar-grondwettelijk-hof-tegen-verbod-op-onverdoofd-slachten-bd1298fd/>> accessed 26 January 2018

<sup>19</sup> Constitutional Court, Case number 6816 (attached matters: 6618, 6619, 6620 & 6621) of 17 January 2018 on the appeal to annul the Decree of the Flemish region of 7 July 2017 amending the Law of 14 August 1986 concerning the protection and the welfare of animals, as regards to the authorized methods for the slaughtering of animals [2018] <<http://www.const-court.be>> accessed 10 June 2018

<sup>20</sup> Bruno Struys & Ann de Boeck, ‘Klacht van moslims en Joden tegen Vlaams verbod op onverdoofd slachten’ *De Morgen* (Asse, 21 December 2017) <<https://www.demorgen.be/binnenland/klacht-van-moslims-en-joden-tegen-vlaams-verbod-op-onverdoofd-slachten-bbbe8193/>> accessed 26 January 2018

<sup>21</sup> Ipsos Public Affairs 2012, p. 4

<sup>22</sup> Article 9(2) ECHR: 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.

to manifest his religion or belief, in worship, teaching, practice and observance. According to article 9(2) ECHR the right to religion can however be subject to limitations, these limitations need to be prescribed by law and necessary in a democratic society. It can be said that tension is currently present as animal welfare is becoming more morally important to the democratic society, and might thus provide a necessary reason to limit the right to religion.<sup>23</sup> A ban on religious slaughter can however prove to be too rigorous, as a limitation needs to be necessary and reasonable.<sup>24</sup> Justifications are hard to find when limitations are too rigorous, which leads to the question: is there not a less rigorous measure that can ease the tension field between animal welfare and freedom of religion?

Based on the above, the central research question in this thesis is: ‘Is the Flemish ban on unstunned slaughter compatible with freedom of religion as mentioned in article 9 of the European Convention on Human Rights and article 10 of the Charter of Fundamental Rights of the European Union?’. The choice has been made to focus on the compatibility of the ban with International law (ECHR) and European law (EU Charter) as the outcome of this analysis is of particular importance. With 47 states that are a member of the ECHR<sup>25</sup> and the EU Charter being binding on the European Union<sup>26</sup>, the outcome of this analysis might serve as a benchmark for other countries that want to follow in Flanders’ footsteps. The purpose of this thesis is to do a judicial analysis of this ban and the possible violation of freedom to religion. The research conducted in this thesis is mainly through a classical desk study. The research will be mostly based on legal doctrine, combined with the legal doctrine of regional law, European law and International law. In particular, The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. Furthermore, parliamentary preparations of the Flemish ban on unstunned slaughter will be used, as well as case-law. To

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<sup>23</sup> Bart de Wever, ‘Onverdoofd slachten is niet meer van deze tijd’ *De Tijd* (Brussel, 2 August 2016) <<https://www.tijd.be/opinie/column/Onverdoofd-slachten-is-niet-meer-van-deze-tijd/9794029>> accessed 28 January 2018

<sup>24</sup> Article 9(2) ECHR

<sup>25</sup> The 47 states that joined the Council of Europe did also accede to the ECHR. Council of Europe, ‘A Convention to protect your rights and liberties’ (*Council of Europe*) <<https://www.coe.int/en/web/human-rights-convention/>> accessed 11 June 2018; Council of Europe, ‘47 Member States’ (*Council of Europe*) <<https://www.coe.int/en/web/portal/47-members-states>> accessed 11 June 2018

<sup>26</sup> The EU Charter become legally binding upon the adoption of the Treaty of Lisbon on the 1<sup>st</sup> of December 2009. Furthermore, according to article 6(1) of the Treaty on European Union (TEU) the EU Charter constitutes as primary law and is thus binding upon the Member States. Sarah Sy, ‘Fact Sheets on the European Union: The Charter of Fundamental Rights’ (*European Parliament*, March 2018) <[http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU\\_4.1.2.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_4.1.2.html)> accessed 11 June 2018



be more specific, case-law about the collision between animal welfare and freedom of religion, in particular the case of *Cha'are Shalom Ve Tsedek v. France*.

The research will be structured as follows. The first chapter will provide an interpretation of slaughter and stunning requirements by explaining the religious framework applicable to Jewish and Islamic slaughter, to provide a better view on which religious requirements could be violated by the Flemish ban. Furthermore, the legal framework that is applicable to stunned slaughter in Belgium will be provided, in particular European, Federal and Regional law, which will be used to perform the analysis of the research question. Moreover, a scientific perspective will be given on the difference between stunned and unstunned slaughter in terms of painfulness for the animals, which is of importance for the proportionality analysis of the Flemish ban on unstunned slaughter. Lastly, freedom of religion will be interpreted by explaining freedom of religion as mentioned in International (ECHR) and European law (EU Charter). The second chapter will be a case study of Belgium, in particular the ban on unstunned slaughter that has been introduced in Flanders. The parliamentary preparations of the ban will be mentioned and the substantive obligations of the ban will be explained, along with the aftermath of the ban. Chapter three will provide an analysis of the compatibility of the Flemish ban on unstunned slaughter with freedom of religion as mentioned in the ECHR and the EU Charter. In the fourth and final chapter, a conclusion of the performed research will be formulated.

## Chapter one

Religious slaughter is a procedure carried out according to rules that originated in ancient religious laws.<sup>27</sup> This research will focus on religious slaughter as described by the Jewish and Muslim religion, because the Flemish ban on unstunned slaughter influences their religious slaughter requirements.

The development of Kosher and Halal slaughter was the first systematic approach that ensured the best available animal welfare outcomes at slaughter.<sup>28</sup> According to both religions, only living and healthy animals may be slaughtered and they may not suffer during slaughter.<sup>29</sup> Jewish precepts draw from the Biblical text that explicitly forbids cruelty to animals.<sup>30</sup> The Islam stresses the importance of kindness to animals as well, advocating the protection of animals and restraining man from being cruel to them.<sup>31</sup> Both kosher and halal slaughter are however performed without stunning.

In order to understand why religious slaughter traditionally requires unstunned slaughter, this chapter will begin by explaining the procedure of slaughter and its importance for the Jewish and Muslim faith. Hereafter, the legal framework applicable to stunned slaughter in Belgium will be described to clearly see the contradiction between both. Furthermore, the scientific perspective on stunned and unstunned slaughter will be mentioned, which will shed some light on what difference there is between stunned and unstunned slaughter in terms of pain that the animals have to endure. Lastly, freedom of religion in both International and European law will be explained.

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<sup>27</sup> Carla M. Zoethout 2013A, p. 652

<sup>28</sup> David B. Adams and Allan D. Sheridan 2008, p. 7

<sup>29</sup> Carla M. Zoethout 2013A, p. 653

<sup>30</sup> Pablo Lerner & Alfredo Mordechai Rabello, 'The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities' (2006) 22 *Journal of Law & Religion*, p. 4

<sup>31</sup> Pablo Lerner & Alfredo Mordechai Rabello 2006, p. 5

## 1.1 Interpretation slaughter and stunning requirements

### 1.1.1 Religious framework applicable to Jewish and Islamic slaughter

#### 1.1.1.1 Kosher slaughter

Judaism consists of the Written Torah<sup>32</sup> and the Oral Torah.<sup>33</sup> It was a major advancement in the handling of animals in ancient times.<sup>34</sup> The Oral Torah got written down in 219 C.E and is now known as the Mishna, however it was seen as esoteric and there was a need to document the various discussions about the application of the Torah and Mishna, as well as stories meant to illustrate certain points in Judaism which resulted in the creation of the Talmud.<sup>35</sup> The body of law that is formed by the Torah, Mishna and Talmud is called Halacha.<sup>36</sup> Over the years, the meaning of Biblical kosher laws has been interpreted and extended by rabbis to protect the Jewish people from violating any of these fundamental laws, and to address new issues and technologies.<sup>37</sup> The kosher/kashrut dietary laws determine which foods are proper for consumption for the Jewish communities.<sup>38</sup> The Kashrut dietary laws have some general straightforward rules, which will be explained in more detail below.

The first rule is that there are two groups of animals: animals that are permitted to be eaten, and those whom are not. According to Leviticus XI: 1-8, the animals that may be eaten are the ones that live on the land, they should have split hoofs and should chew their cud (e.g. [...]). Furthermore, traditional domestic birds<sup>39</sup> are permissible, birds in the rattrie category (ostrich, emu, and rhea) are however not viewed as kosher.<sup>40</sup> Fish with fins and removable

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<sup>32</sup> The five books of Moses.

<sup>33</sup> An explanation of how the written laws should be executed and followed.; Michelle Hodkin, 'When Ritual Slaughter Isn't Kosher: an Examination of Shechita and the Humane Methods of Slaughter Act' (2005) 1 Journal of Animal Law, p. 130 <[https://www.animallaw.info/sites/default/files/jouranimallawvol1\\_p129.pdf](https://www.animallaw.info/sites/default/files/jouranimallawvol1_p129.pdf)> accessed 11 February 2018

<sup>34</sup> Joe M. Regenstein & Temple Grandin, 'Religious Slaughter and Animal Welfare - An Introduction for Animal Scientists' [1994] Meat Focus International, p. 155

<sup>35</sup> Michelle Hodkin 2005, p. 130

<sup>36</sup> Norman R. Goodman, Jeffrey L. Goodman & Walter I. Hofman, 'Autopsy: Traditional Jewish Laws and Customs "Halacha"' (2011) 32 The American Journal of Forensic Medicine and Pathology, p. 300

<sup>37</sup> J.M. Regenstein, M.M. Chaudry, & C.E. Regenstein, 'The Kosher and Halal Food Laws' (2003) 2 CRFSFS, p. 111

<sup>38</sup> H. Kesselman, S. D. Rosen & S. D. Winegarten (eds), *A Guide to Shechita* (Shechita UK 2009), p. 3

<sup>39</sup> Turkey, chicken, duck, quail, and/or Cornish Rock Hen should be acceptable since they are raised as domestic breed stocks as long as these are slaughtered by kosher methods by those who are qualified. Diana Marie Spillman, 'Some Practical Considerations of the Jewish Dietary Laws' (1985) 5 Journal of Nutrition for the Elderly, p. 52

<sup>40</sup> Leviticus XI: 13-19: "These are the birds you are to regard as unclean and not eat because they are unclean: the eagle, the vulture, the black vulture, the red kite, any kind of black kite, any kind of raven, the horned owl,

scales are permitted as well<sup>41</sup>, but the scales must be visible to the human eye and must be removable from the fish skin without tearing the skin.<sup>42</sup> This means that all crustacean and molluscan shellfish are viewed as unkosher.<sup>43</sup>

The second rule is that animals that are seen as ‘permitted’ need to be slaughtered according to the rules of Shechita.<sup>44</sup> The third rule is that all blood must be drained/broiled out from the meat or poultry before it is ready for consummation.<sup>45</sup> The fourth general rule is that certain parts of the permitted animals may not be eaten, such as the blood, fats and the sciatic nerve.<sup>46</sup> The fifth rule prescribes that fruit and vegetables may be eaten without restriction, but they need to be checked for bugs<sup>47</sup> as most of them are forbidden to eat.<sup>48</sup> The sixth rule prescribes that meat<sup>49</sup> (including poultry) and dairy shall not be combined<sup>50</sup>, but neutral products (pareve)<sup>51</sup> can be used with either meat or dairy products. If neutral products, however, are mixed with meat or dairy they take on the identity of the product they are mixed with.<sup>52</sup> The seventh rule dictates that all equipment (utensils, pipes, seam and so on) must have been assigned to a designated category (meat or dairy)<sup>53</sup>, to make sure that meat and dairy are not

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the screech owl, the gull, any kind of hawk, the little owl, the cormorant, the great owl, the white owl, the desert owl, the osprey, the stork, any kind of heron, the hoopoe and the bat.”

<sup>41</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 113; Leviticus XI: 9-12: “Of all the creatures living in the water of the seas and the streams you may eat any that have fins and scales. But all creatures in the seas or streams that do not have fins and scales—whether among all the swarming things or among all the other living creatures in the water—you are to regard as unclean. And since you are to regard them as unclean, you must not eat their meat; you must regard their carcasses as unclean. Anything living in the water that does not have fins and scales is to be regarded as unclean by you.”

<sup>42</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 113

<sup>43</sup> Diana Marie Spillman 1985, p. 52

<sup>44</sup> “Shechita is the Jewish religious and humane method of slaughtering permitted animals and poultry for food.” H. Kesselman, S. D. Rosen & S. D. Winegarten (eds), *Supra* no. 38, p. 3; Zushe Yosef Blech, *Kosher Food Production* (2<sup>nd</sup> edition, Wiley-Blackwell 2008), p. 363

<sup>45</sup> Diana Marie Spillman 1985, p. 53

<sup>46</sup> M. Haluk Anil, ‘Religious slaughter: A current controversial animal welfare issue’ (2012) 2 *Animal Frontiers*, p. 65 <<https://academic.oup.com/af/article/2/3/64/4638669>> accessed 25 February 2018

<sup>47</sup> Almost all insects are prohibited such that carmine and cochineal, which are used as natural red pigments, are mostly not permitted in kosher, but honey and shellac (lac resin) are however permitted. The exception includes a few types of grasshoppers, which are acceptable in the parts of the world where the tradition of eating them has not been lost. The prohibition of insects focuses on the whole animal: if one’s intent is to make a dish where the food will be chopped up in a food processor, then one may skip the elaborate inspection of fruits and vegetables for insects and assume that the presence of insect parts does not render the food unkosher. J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 113, 114

<sup>48</sup> Diana Marie Spillman 1985, p. 48

<sup>49</sup> A special set of rules applies to fish, which can be eaten at the same meal at which meat is eaten, but it cannot be mixed directly with the meat. J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 116

<sup>50</sup> Exodus XXIII:19, Exodus XXXIV:26, Deuteronomy XIV:21: “Do not cook a young goat in its mother’s milk.”

<sup>51</sup> “The pareve category includes all products that are not classified religiously as meat or dairy.” J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 115

<sup>52</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 116

<sup>53</sup> *Id.*

mixed.<sup>54</sup> Lastly, the eight rule dictates that grape products such as grape juice and wine must be produced entirely by Jews to be kosher<sup>55</sup>, from grape-pressing to the final processing.<sup>56</sup>

As rule two, three and four particularly focus on the slaughter method, these will be discussed in a more detail below. Shechita is performed by a cutter, also known as a shochet who is a trained slaughterman.<sup>57</sup> A license is only granted to upstanding individuals, making the position one that is widely respected within the Jewish community.<sup>58</sup> The shochet is normally assisted by a sealer (shomer) who is responsible for putting the kosher mark on the brisket and on edible offal, however in some instances several shochets may work together in the task of slaughter and tagging meat.<sup>59</sup>

The shochet uses a special knife (chalaf) to perform the shechita, one that is perfectly smooth with no nicks or serrations, to make sure that the incision is as painless as possible.<sup>60</sup> The shochet constantly examines the instrument to ensure this is the case.<sup>61</sup> In addition, the knife should be razor sharp and twice the length of the intended animal's neck.<sup>62</sup> If the knife receives any nick during the act of shechita, the slaughter is not correctly performed and the use of the meat is not permitted for Jewish food.<sup>63</sup> The shochet uses the chalaf to slaughter the fully conscious animal with a single, deliberate swift action<sup>64</sup> severing the frontal structures of the neck<sup>65</sup>, causing an instant drop in blood pressure in the brain<sup>66</sup> while making sure the neck is fully extended in order to keep the edges of the wound open to prevent any pain.<sup>67</sup> The cut is intended to achieve rapid bleeding and therefore needs to reach the major vessels, but it may

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<sup>54</sup> Diana Marie Spillman 1985, p. 50

<sup>55</sup> When the grape liquids are pasteurized then it may be handled by anyone and it will still be considered as kosher. Diana Marie Spillman, *Supra* no. 39, p. 48

<sup>56</sup> J.M. Regenstien, M.M. Chaudry, and C.E. Regenstien 2003, p. 116

<sup>57</sup> Getting a license requires years of training, both religious and practical, under the apprenticeship of an experienced schochet, in the laws of shechita, animal anatomy and pathology. H. Kesselman, S. D. Rosen & S. D. Winegarten (eds), *Supra* no. 38, p. 6

<sup>58</sup> Ari Z. Zivotofsky, 'Government Regulations of Shechita (Jewish Religious Slaughter) in the Twenty-First Century: Are They Ethical?' (2012) 25 *Journal Agricultural Environmental Ethics*, p. 749

<sup>59</sup> David B. Adams and Allan D. Sheridan 2008, p. 8

<sup>60</sup> Ari Z. Zivotofsky 2012, p. 749

<sup>61</sup> Shulchan Oruch, Yoreh De'ah, 6:1: "The instrument must be free of blemishes on or close to its cutting edges that can "catch" even an object as thin as a hair [see 18:2, and 18:4-6,10]. It should be checked (by touch) for such blemishes both before and after slaughtering with it [18:3, 9, 11-12]; this checking must be done very carefully by a qualified expert [18:17].

<sup>62</sup> Mara Miele, 'Religious Slaughter' (2016) 18(1) *EurSafe News*, p. 6

<sup>63</sup> David B. Adams and Allan D. Sheridan 2008, p. 8

<sup>64</sup> David B. Adams and Allan D. Sheridan 2008, p. 8

<sup>65</sup> Melissa Lewis, 'The Regulation of Kosher Slaughter in the United States: How to Supplement Religious Law so as to Ensure the Humane Treatment of Animals' (2010) 16 *Animal Law Review*, p. 264

<sup>66</sup> H. Kesselman, S. D. Rosen & S. D. Winegarten (eds) 2009, p. 5

<sup>67</sup> David B. Adams and Allan D. Sheridan 2008, p. 8

not be so deep that the knife touches the spinal column.<sup>68</sup> The abrupt loss of pressure by the blood flowing out renders an animal insensitive to pain and unconscious<sup>69</sup>, leaving it exsanguinated.<sup>70</sup>

Animals killed by shechita are conscious at the time of slaughter<sup>71</sup>, because stunning the animal pre-slaughter is prohibited.<sup>72</sup> Reasons for rejecting stunning include that the shechita method is superior, painless, and causes instantaneous insensibility while stunning can cause injuries<sup>73</sup> or damage to carcasses,<sup>74</sup> thus rendering the carcass unfit to eat for people of the Jewish faith.<sup>75</sup> Two biblical rules in particular provide a problem when pre-stunning is performed, namely terefah and neveila.<sup>76</sup> Terefah<sup>77</sup> (torn) refers to live animals that are dying from some injury<sup>78</sup>, e.g. animals found to contain lung adhesions, perforated reticulums, or broken femurs, or chickens with thickened or ruptured leg tendons, may not be eaten even if properly slaughtered.<sup>79</sup> Neveila, on the other hand, refers to kosher animals that die other than by shechita.<sup>80</sup> If an animal is stunned prior to slaughter by non-penetrative methods the cause of death becomes uncertain thus making it neveila and therefore unfit to eat. By contrast, pre-stunning with a penetrative captive bolt (the ordinary method for cattle) shatters the skull, rendering the animal terefah.<sup>81</sup>

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<sup>68</sup> Ari Z. Zivotofsky 2012, p. 749

<sup>69</sup> Michelle Hodkin 2005, p. 138

<sup>70</sup> Exsanguination is the bleeding-out of a carcass. Exsanguination is important to the Jewish religion as it is forbidden to consume blood, because it can deteriorate quickly and could putrefy the meat if it is retained in the carcass. H. Kesselman, S. D. Rosen & S. D. Winegarten (eds), *Supra* no. 38, p. 5; Deuteronomy 12:23: “Only be sure that you don’t eat the blood: for the blood is the life and you shall not eat the life with the flesh.”

<sup>71</sup> Melissa Lewis 2010, p. 265

<sup>72</sup> Mara Miele 2016, p. 6

<sup>73</sup> Recent research has developed methods such as reversible electric stunning, which does not lead to injuries and may therefore meet this objection. Caria M. Zoethout, *Supra* no. 3, p. 656

<sup>74</sup> M. Haluk Anil 2012, p. 65

<sup>75</sup> Mara Miele 2016, p. 6

<sup>76</sup> Deuteronomy 14:21: “You must not eat anything that has died a natural death. You may give it to a foreigner living in your town, or you may sell it to a stranger. But do not eat it yourselves, for you are set apart as holy to the Lord your God.”

<sup>77</sup> It is worth noting that many of the conditions that are categorized as terefah are not dangerous if consumed by humans and would pass a veterinary inspection, nonetheless, a consumer who has fidelity to the code of Jewish law will not consume meat from such an animal. Ari Z. Zivotofsky, *Supra* no. 58, p. 750

<sup>78</sup> Exodus 22:31: “You must be my holy people. Therefore, do not eat any animal that has been torn up and killed by wild animals. Throw it to the dogs.”

<sup>79</sup> M. Haluk Anil 2012, p. 65

<sup>80</sup> Joel Silver, ‘Understanding Freedom of Religion in a Religious Industry: Kosher Slaughter (Shechita) and Animal Welfare’ (2011) 42 Victoria University of Wellington Law Review, p. 676

<sup>81</sup> *Id.* at p. 677

There are five Halachic<sup>82</sup> requirements<sup>83</sup> that the shochet is obliged to follow in the performance of shechita<sup>84</sup> to ensure that meat is not rendered unkosher. According to Dr. Temple Grandin, obeying these rules provides that the animal has little reaction and thus improves the welfare of the animal during the slaughter process.<sup>85</sup> Immediately after severance by the shechita incision, the shochet examines the organs and vessels to make sure that the shechita was properly performed<sup>86</sup>, this examination is visual and tactile (b'dikath ha'simanim).<sup>87</sup> A bodek (inspector) carries out a post-mortem examination (b'dikah) of internal organs such as the lungs, by making an incision posterior to the xiphoid process and inserting the arm to detect any adhesions<sup>88</sup> in the thoracic cavity<sup>89</sup>, if he finds any adhesions or haemorrhages the meat is rendered unkosher.<sup>90</sup> Following this inspection, the meat is porged to remove veins and other forbidden tissues including blood, certain fats known as cheylev,<sup>91</sup> and the sciatic nerve (Gid ha'Na'sheh).<sup>92</sup> The removal of the cheylev and Gid ha'Na'sheh is known

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<sup>82</sup> Halachic: in accordance with Halacha

<sup>83</sup> 'i) there should be no interruption during the incision (Shehiya), ii) the knife must be drawn across the throat by forward and backward motions, and there should be no pressing or hacking of the chalaf against the neck (Derasa), iii) the chalaf should be visible and not be covered by fur, hide, wool or feathers (Halada), and therefore the chalaf has to be of an adequate length, iv) the incision must be at the appropriate site to sever the major structures and vessels at the neck (Hagrama), and v) there must be no tearing of the esophagus or the trachea before or during the incision (Ikkur), which can occur if there is a nick in the chalaf." Dr. Temple Grandin, 'The rules of Shechita for performing a proper cut during kosher slaughter' (*Grandin*) <<http://www.grandin.com/ritual/rules.shechita.proper.cut.html>> accessed 21 February 2018; H. Kesselman, S. D. Rosen & S. D. Winegarten (eds), *Supra* no. 38, p. 5

<sup>84</sup> According to the Shulchan Arukh: a compilation of Jewish law by Rabbi Yosef Karo. The requirements can be found in the section of Yoreh De'ah in siman 23.

<sup>85</sup> Dr. Temple Grandin, 'The rules of Shechita for performing a proper cut during kosher slaughter' (*Grandin*) <<http://www.grandin.com/ritual/rules.shechita.proper.cut.html>> accessed 21 February 2018

<sup>86</sup> Shulchan arukh, Yoreh De'ah 25:1: "A Slaughterer must check the signs (that make an animal fit") after slaughter to see if they were slaughtered completely/properly/a sizeable amount. Or if you see during the slaughter that they were slaughtered completely, and if you don't see that it was done completely and it is prohibited. There are those who say that one needs to see them slaughter on the proper spot of slaughter and not on the part where it is not fit to slaughter."

<sup>87</sup> H. Kesselman, S. D. Rosen & S. D. Winegarten (eds) 2009, p. 7

<sup>88</sup> A puncture in the lung generally causes a mucous lesion or scab to form, temporarily occluding the hole and allowing the lungs to function for a period of time, but Halacha recognizes this 'patch' (sircha) as temporary as the patch will eventually break down and cause the animal to get sick, rendering the animal tereifah and therefore unkosher. M. Haluk Anil, *Supra* no. 46, p. 65

<sup>89</sup> "The bodek feels the surface of each lobe of the lungs to verify that it is smooth and free of major lesions, while the lungs are in the thoracic cavity (B'Dikas P'nim – internal inspection) and after they are removed from the animal (B'Dikas Chutz – external inspection)" Zushe Yosef Blech, *Supra* no. 44, p. 364, 365

<sup>90</sup> M. Haluk Anil 2012, p. 65

<sup>91</sup> *Id.*

<sup>92</sup> The sciatic nerve is the largest single nerve in the human body. It runs from each side of the lower spine through deep in the buttock into the back of the thigh and all the way down to the foot. It serves a vital role in connecting the spinal cord with the leg and foot muscles. Dr. Steve G. Yeomans, 'Sciatic Nerve and Sciatica' (*Spine-Health*, 31 augustus 2008) <<https://www.spine-health.com/conditions/sciatica/sciatic-nerve-and-sciatica>> accessed 25 February 2018; Genesis 32:33: "Therefore to this day the children of Israel do not eat the muscle that shrank, which is on the hip socket, because He touched the socket of Jacob's hip in the muscle that shrank."

as Nikkur in Hebrew.<sup>93</sup> Mostly the forequarters are used, since the hindquarters are said to contain over fifty blood vessels which can only be purged by highly skilled ‘purgers’<sup>94</sup> and are therefore rarely used.<sup>95</sup> To further remove the remaining prohibited blood some meat cuts, red meat and poultry in particular, need to be soaked<sup>96</sup> and salted<sup>97</sup> within three days of slaughter.<sup>98</sup> After the soaking and salting of the meat, the prohibited blood is ought to be removed and the meat is ready to be cooked and eaten.<sup>99</sup>

### **1.1.1.2 Halal slaughter**

Which foods are permitted (halal) or prohibited (haram) for Islamic people, is determined by Islamic laws (Shariah).<sup>100</sup> These laws consist of four sources: i) the Quran<sup>101</sup>, ii) Sunnah<sup>102</sup> and Hadith<sup>103</sup>, iii) Ijma<sup>104</sup> and iv) Qiyas.<sup>105</sup> The application of these principles in real life is called Fiqh.<sup>106</sup> The two basic sources of Islamic law are the Quran, and Sunnah and Hadith.<sup>107</sup> Only when the determination of the permissibility of the food is not explicitly

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<sup>93</sup> Zushe Yosef Blech 2008, p. 366; Also known as Treiboring in Yiddish, derived from Czech.

<sup>94</sup> Ari Z. Zivotofsky 2012, p. 750

<sup>95</sup> David B. Adams and Allan D. Sheridan 2008, p. 8

<sup>96</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 115

<sup>97</sup> “The specific process of salting and soaking meat to make it ready for use is also referred to as ‘koshering’ meat. The animal’s heart must be cut open and the congealed blood removed before beginning the overall soaking and salting process.” J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 115

<sup>98</sup> The soaking is done for a half hour in cool water, followed by the salting of the meat which is done for one hour after which the salted meat gets rinsed three times to remove the excess salt. Zushe Yosef Blech, *Supra* no. 44, p. 367

<sup>99</sup> Zushe Yosef Blech 2008, p. 367

<sup>100</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 111

<sup>101</sup> The Quran is a divine book from God (the Creator) to Muhammad (the Prophet) for all people. Mian N. Riaz & Muhammad M. Chaudry, *Halal Food Production* (CRC Press 2004), p. 5

<sup>102</sup> The Sunnah can be described as the life, actions and teachings of Muhammad (the practice/instructions of Prohet Muhammad), as recorded in the books of Hadith. J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 111

<sup>103</sup> The Hadith is a compilation of the tradition (stories and sayings) of the Prophet Muhammad. Mian N. Riaz & Muhammad M. Chaudry, *Supra* no. 101, p. 5

<sup>104</sup> Ijma is based on the consensus or agreement of Muslim scholars (legal opinion). J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 111

<sup>105</sup> Qiyas is based on reasoning by analogy, in which the readings of Hadith are compared/contrasted with the Quran’s readings. J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 111; Yaakob B. Che Man & Awis Qurni Sazili 2010, p. 184

<sup>106</sup> Fiqh is a summmary of Islamic learning and jurisprudence. Pablo Lerner & Alfredo Mordechai Rabello, *Supra* no. 30, p. 11

<sup>107</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 11



covered by these basic sources can one turn to *Iljma* or *Qiyas*<sup>108</sup>, as these may change the interpretation and application of the basic sources to suit the time, place, and circumstances.<sup>109</sup>

Eleven generally accepted principles<sup>110</sup> pertaining to *halal* (permitted) and *haram* (prohibited) in Islam provide guidance to Muslims in their customary practices.<sup>111</sup> In general, everything is permitted for human use and benefit<sup>112</sup>, except what is prohibited either by a verse of the Quran or by *Sunnah/Hadith*.<sup>113</sup> *Haram* is what God (Allah) has explicitly prohibited and anyone who does not obey this, is liable to incur the punishment of Allah in the hereafter as well as to receive legal punishment in this world.<sup>114</sup> If it is unclear whether a certain food or drink is deemed *halal* or *haram*, it is called *Mushbooh* and it should be avoided.<sup>115</sup> According to the Quran there are four categories of *haram* food<sup>116</sup>, namely: i) carrion or dead animals<sup>117</sup>, ii) flowing or liquid blood<sup>118</sup>, iii) pork<sup>119</sup> and iv) animal that is dedicated to anyone other than Allah.<sup>120</sup> Alcohol and other intoxicants (*Khamr*) are deemed *haram* as well.<sup>121</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> K. Nakyinsige, Y.B. Che Man, Zeiad A. Aghwan, I. Zulkifli, Y.M. Goh, F. Abu Bakar, H.A. Al-Kahtani & A.Q. Sazili, 'Stunning and animal welfare from Islamic and scientific perspectives' (2013) 95 *Meat Science*, p. 355

<sup>110</sup> In short these principles are: i) the basic principle is that all things created by God are permitted, with a few exceptions that are prohibited, ii) to make lawful and unlawful is the right of God alone, iii) prohibiting what is permitted and permitting what is prohibited is similar to ascribing partners to God, iv) the basic reasons for the prohibition of things are due to impurity and harmfulness, v) what is permitted is sufficient and what is prohibited is then superfluous, vi) whatever is conducive to the "prohibited" is in itself prohibited, vii) falsely representing unlawful as lawful is prohibited, viii) good intentions do not make the unlawful acceptable, ix) doubtful things should be avoided, x) unlawful things are prohibited to everyone alike, and xi) necessity dictates exceptions. Mian N. Riaz & Muhammad M. Chaudry, *Supra* no. 101, p. 6, 7

<sup>111</sup> Mian N. Riaz & Muhammad M. Chaudry 2004, p. 6

<sup>112</sup> Al-Baqarah 2:172: "O ye who believe! Eat of the good things wherewith We have provided you, and render thanks to Allah, if it is (indeed) He whom ye worship."

<sup>113</sup> Mian N. Riaz & Muhammad M. Chaudry 2004, p. 5

<sup>114</sup> Yaakob B. Che Man & Awis Qurni Sazili 2010, p. 184

<sup>115</sup> *Id.*

<sup>116</sup> Al-Baqarah 2:173: "Indeed, what He has forbidden to you is the flesh of dead animals, blood, flesh of the swine and that which has been sacrificed to anyone other than Allah..."

<sup>117</sup> Al-Maha'idah 5:3: "Forbidden to you are the flesh of dead animals, blood, the flesh of swine and that which has been dedicated to any other than Allah, and that which has been killed by strangling or by beating or by falling or by being gored, and that which has been (partly) eaten by a wild beast except that which you make lawful by slaughtering (before its death), and that which has been sacrificed to idols..."

<sup>118</sup> "Blood that pours forth (liquid blood) is prohibited for consumption, it includes blood of permitted and non-permitted animals alike." J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 121

<sup>119</sup> The flesh of swine: pork and their by-products are prohibited. All chances of cross-contamination from pork into *halal* products must be prevented. Mian N. Riaz & Muhammad M. Chaudry, *Supra* no. 101, p. 13

<sup>120</sup> This could be a name of an idol. The reason for this prohibition is to safeguard the belief in Allah, to purify worship and to fight idolatry and polytheism in whatever form they may be expressed. Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam* (Kamal El-Helbawy, M. Moinuddin Siddiqui & Syed Shukry trs, Islamic Book Trust 2013), p. 39

<sup>121</sup> Al-Ma'idah 5:90-91: "O you who believe! Truly, intoxicants, gambling, idol worshipping and divinations by arrows are an abomination of Satan's doing: avoid it in order that you may be successful. Assuredly Satan

Apart from pork there are several other animals that are not permitted for consumption and are deemed ‘foul’<sup>122</sup>, namely: i) carnivorous animals with fangs or tusks ii) birds with talons or predatory birds<sup>123</sup>, iii) prawns, lobsters, crabs and clams<sup>124</sup>, iv) amphibians<sup>125</sup> and v) both helpful insects and harmful or dirty creatures.<sup>126</sup> There are however some differences among the different schools of Islamic jurisprudence, thus the aforementioned categories may vary. Consequently, the animals that are deemed permitted (halal) are domesticated animals like ruminants with split hoofs and birds that do not hold their food down with their claws.<sup>127</sup>

In contrast to haram, halal means that there are no restrictions on items (foods and drinks) or actions, hence they are allowed according to Allah.<sup>128</sup> For meat to be slaughtered ‘halal’<sup>129</sup>, four broad requirements or conditions need to be met. First of all, the animal that is to be slaughtered needs to be of permissible (halal) species as mentioned above.<sup>130</sup> Furthermore, the animal needs to be alive and healthy at the point of slaughter.<sup>131</sup> For meat to be considered fit for Muslim consumption, it is required that the animal must have been held under conditions contributory to express normal behaviour, and that the slaughter of such animals must be performed in a humane manner.<sup>132</sup> Thirdly, the name of Allah needs to be pronounced before slaughtering the animal<sup>133</sup> and lastly, the person performing the slaughter needs to be an adult (Baligh) and needs to be of sane mind (Aqil), either female or male.<sup>134</sup>

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desires to sow enmity and hatred among you with intoxicants and gambling, and to hinder you from the remembrance of Allah and from Salah. Will you not then desist?”

<sup>122</sup> “Foul things are those which people generally find detestable” Yusuf al-Qaradawi, *Supra* no. 120, p. 49

<sup>123</sup> Yaakob B. Che Man & Awis Qurni Sazili 2010, p. 190

<sup>124</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 121

<sup>125</sup> Amphibians are animals that live both on land and in water, such as frogs, turtles and crocodiles etcetera. J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 121

<sup>126</sup> Helpful insects like bees, ants, and spiders, and harmful or dirty creatures like lice, flies, and mosquitoes. J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein, *Supra* no. 37, p. 121

<sup>127</sup> *Id.*

<sup>128</sup> Yaakob B. Che Man & Awis Qurni Sazili 2010, p. 184

<sup>129</sup> Slaughter in Islamic culture is sometimes referred to as *Zabiha* or *Dhabihah*. Awal Fuseini, Toby G. Knowles, Phil J. Hadley and Steve B. Wotton, ‘Halal stunning and slaughter: Criteria for the assessment of dead animals’ (2016) 119 *Meat Science*, p. 133

<sup>130</sup> Awal Fuseini, Steve B. Wotton, Phil J. Hadley & Toby G. Knowles, ‘The perception and acceptability of pre-slaughter and post-slaughter stunning for Halal production: The views of UK Islamic scholars and Halal consumers’ (2017) 123 *Meat Science*, p. 143

<sup>131</sup> Z.A. Aghwan, A.U. Bello, A.A. Abubakar, J.C. Imlan & A.Q. Sazili, ‘Efficient halal bleeding, animal handling, and welfare: A holistic approach for meat quality’ (2016) 121 *Meat Science*, p. 420

<sup>132</sup> Awal Fuseini, Toby G. Knowles, Phil J. Hadley and Steve B. Wotton 2016, p. 133

<sup>133</sup> The name of Allah needs to be pronounced before cutting the neck, by saying ‘Bismillah’ (in the name of Allah) or Bismillah Allahu Akbar (in the name of God, God is Great). This also follows from Al-An’am 6:118, Al-An’am 6:121, Al-Haj 22:34 and Al-Haj 22:36. Yusuf al-Qaradawi, *Supra* no. 120, p. 19

<sup>134</sup> Yaakob B. Che Man & Awis Qurni Sazili 2010, p. 195

Traditionally, halal slaughter has been performed without any form of stunning<sup>135</sup>, as it is an important requirement that the animal is alive at the moment of slaughter.<sup>136</sup> Whilst some Muslims agree that animals may be stunned before or during slaughter, others are of the view that stunning is contrary to Shariah law.<sup>137</sup> A few reasons that opponents of stunning in halal slaughter bring forward is the possibility of animals dying before slaughter, difficulty in identifying and removing dead animals before neck incision<sup>138</sup>, adverse effect on bleed-out rate and volume, poor carcass and meat quality and the belief that stunning causes more pain than slaughter without stunning.<sup>139</sup> Since the Quran does not explicitly prohibit the use of stunning, proponents of stunning in halal slaughter argue that the application of stunning is dependent on the fact whether the animal is alive at the time of slaughter.<sup>140</sup> A possible stunning technique is 'reversible' stunning, because a stunned animal can make a full recovery if the bleeding-out does not occur.<sup>141</sup>

The slaughtering tools should be dedicated to halal slaughter only. Besides that, the slaughtering knife or blade should be sharpened properly<sup>142</sup> and it should allow for a smooth<sup>143</sup> and quick cut across the animal's throat<sup>144</sup>, followed by a quick flow of blood, and immediate loss of consciousness.<sup>145</sup> Islam places great emphasis on a gentle and humane treatment of animals (as do the Jews), especially before and during slaughter<sup>146</sup>, which is why sharpening the blade either in front of the animal to be slaughtered or in front of other animals should be avoided.<sup>147</sup> According to Grandin, the design of the knife and the cutting technique appears to

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<sup>135</sup> Awal Fuseini, Toby G. Knowles, Phil J. Hadley and Steve B. Wotton 2016, p. 134

<sup>136</sup> Awal Fuseini, Steve B. Wotton, Phil J. Hadley & Toby G. Knowles 2017, p. 143

<sup>137</sup> *Id.*

<sup>138</sup> The possibility of animals dying due to stunning is one of the most compelling reasons for Muslims to reject stunning, as it is believed it is contrary to the Quran since the Muhammad did not use such a technology. Awal Fuseini, Toby G. Knowles, Phil J. Hadley and Steve B. Wotton, *Supra* no. 130, p. 133

<sup>139</sup> *Id.* at p. 134

<sup>140</sup> *Id.* at p. 134

<sup>141</sup> Awal Fuseini, Steve B. Wotton, Phil J. Hadley & Toby G. Knowles 2017, p. 143

<sup>142</sup> The sharpening of the knives should be supervised by plant managers. Z.A. Aghwan, A.U. Bello, A.A. Abubakar, J.C. Imlan & A.Q. Sazili, *Supra* no. 131, p. 423

<sup>143</sup> In order for a smooth cut the edge of the blade should be kept razor sharp at all times and should be free from nicks and blemishes, as these will cause pain by grapping and dragging on flesh of the animal. Z.A. Aghwan, A.U. Bello, A.A. Abubakar, J.C. Imlan & A.Q. Sazili, *Supra* no. 131, p. 424

<sup>144</sup> Yaakob B. Che Man & Awis Qurni Sazili 2010, p. 195

<sup>145</sup> Z.A. Aghwan, A.U. Bello, A.A. Abubakar, J.C. Imlan & A.Q. Sazili 2016, p. 423

<sup>146</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 122

<sup>147</sup> Yaakob B. Che Man & Awis Qurni Sazili 2010, p. 195

be critical in preventing the animal from reacting to the cut. However, halal slaughter does not require a certain knife-design as is the case in kosher slaughter.<sup>148</sup>

The act of slaughtering begins with pronouncing the name of God, as mentioned above, after which a transverse incision is made on the neck.<sup>149</sup> The cut must sever the trachea and the oesophagus<sup>150</sup>, in addition to the two carotid arteries and jugular veins<sup>151</sup>, which will cause a rapid gush of blood<sup>152</sup> and results in the quickest death.<sup>153</sup> The knife should not cut the spinal cord and sever the head<sup>154</sup>, as this could result in cardiac arrest and lead to stagnation of blood in the blood vessels.<sup>155</sup> A trained Muslim inspector is appointed to ensure that animals are properly slaughtered in accordance with Shariah.<sup>156</sup> Unlike kosher, soaking and salting of the carcass is not required for halal. Therefore halal meat is treated like all other commercial meat.<sup>157</sup>

## **1.1.2 Legal framework applicable to stunned slaughter in Belgium**

### ***1.1.2.1 European law***

#### **1.1.2.1.1 Primary legislation**

##### **Treaty on the Functioning of the European Union**

In 2009 the Treaty of Lisbon was ratified<sup>158</sup>, renaming the Treaty establishing the European Community' as the 'Treaty on the Functioning of the European Union'. In terms of animal welfare, the Treaty of Lisbon added a rather striking notion to the TFEU. The TFEU organises the functioning of the European Union, as follows from its title, and houses the values that the European Union and Member States need to respect, the inclusion of animal

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<sup>148</sup> Temple Grandin, 'Euthanasia and slaughter of livestock' (1994) 204 *Journal of the American Veterinary Medical Association* <<http://www.grandin.com/ritual/euthanasia.slaughter.livestock.html>> accessed 22 March 2018

<sup>149</sup> M. Haluk Anil 2012, p. 64

<sup>150</sup> Mian N. Riaz & Muhammad M. Chaudry 2004, p. 18

<sup>151</sup> Z.A. Aghwan, A.U. Bello, A.A. Abubakar, J.C. Imlan & A.Q. Sazili 2016, p. 420

<sup>152</sup> Yaakob B. Che Man & Awis Qurni Sazili 2010, p. 196

<sup>153</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 121

<sup>154</sup> Mian N. Riaz & Muhammad M. Chaudry 2004, p. 19

<sup>155</sup> Yaakob B. Che Man & Awis Qurni Sazili 2010, p. 196

<sup>156</sup> *Id.*

<sup>157</sup> J.M. Regenstein, M.M. Chaudry, and C.E. Regenstein 2003, p. 122

<sup>158</sup> The Treaty of Lisbon amending the Treaty on the European Union and the Treaty on the Establishment of the European Community [2007] OJ C 306/01

welfare in the TFEU is thus of importance. Article 13 of the TFEU acknowledges that animals are sentient beings<sup>159</sup>, by inserting the notion:

“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 [...]”.

What is interesting to see is that animal welfare is being put on equal footing with other key principles that are mentioned in the same title, for instance promoting equality between sexes, combatting racism and guaranteeing social protection.<sup>160</sup> The wordings of article 13 also seem to offer a new approach by defining animals not as merely economic objects or products, but to see them as beings who have needs which are valued<sup>161</sup>, unfortunately, the TFEU is inconsistent in terms of this notion as article 38(1) TFEU does see animals as products.<sup>162</sup> Nevertheless, the fact that animals have needs that need to be valued has been confirmed by several cases, according to which animal welfare is viewed as being a legitimate objective in the public interest.<sup>163</sup> According to the arrest of 19 June 2008 by the European Court Justice (ECJ), the importance of animal welfare has particularly been expressed with the adoption of Protocol No. 33 on the protection of animals by the Member States, which is annexed to the Treaty establishing the European Community and whose content is largely translated into article 13 TFEU.<sup>164</sup> Which was confirmed in the case of *Herbert Schaible v Land Baden-Württemberg*<sup>165</sup>, and the Joined cases of *Viamex Agrar Handels GmbH, Zuchtvieh-Kontor GmbH (ZVK) v Hauptzollamt Hamburg-Jonas*<sup>166</sup> as well. Article 13 does however provide that the legislative or administrative provisions and customs of Member States relating in particular to religious rites, cultural traditions and regional heritage need to be respected while paying regard to animal

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<sup>159</sup> This was also established in Protocol 33, which was be annexed to the Treaty establishing the European Community. The Protocol does however contain an exemption on stunned slaughter in relation to religious rites.

<sup>160</sup> Jan Willem Sap, Carla M. Zoethout & Gerhard van der Schyff, *Ritual Slaughter, Animal Welfare and the Freedom of Religion* (VU University Press 2017), p. 47

<sup>161</sup> Katy Sowery, ‘Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law’ (2018) 55(1) *Forthcoming, Common Market Law Review*, p. 2

<sup>162</sup> Article 38(1) TFEU defines “agricultural products” as “the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products.”

<sup>163</sup> Katy Sowery 2018, p. 10

<sup>164</sup> Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat* [2008] ECR I, para 27

<sup>165</sup> Case C-101/12 *Herbert Schaible v Land Baden-Württemberg* [2013] EU:C:2013:661, para 35

<sup>166</sup> Joined Cases C-37/06 and C-58/06 *Viamex Agrar Handels GmbH and Zuchtvieh-Kontor GmbH (ZVK) v Hauptzollamt Hamburg-Jonas* [2008] EU:C:2008:18, para 22

welfare. This seems to indicate that animal welfare stays inferior to freedom of religion. Furthermore, article 13 only requires the Union and the Member States to “pay full regard to”, which, as Katy Sowery puts it, leads to the conclusion that article 13 prescribes no substantive outcome that needs to be achieved as this “does not bind the Union to prioritize animal welfare considerations per se.”<sup>167</sup> It does however mean that the Union and Member States need to take animal welfare into account when formulating and implementing their policies, in a matter that is comprehensive and thorough.

#### **1.1.2.1.2 Secondary legislation**

##### **Council Regulation 1099/2009 on the protection of animals at the time of killing**

The Council Regulation 1099/2009 on the protection of animals at the time of killing<sup>168</sup> was ratified on the 1<sup>st</sup> of 2013 and replaces the Council Directive 93/119/EC of 1993.<sup>169</sup> This Regulation lays down rules for the killing of animals bred or kept for the production of food, wool, skin, fur or other products as well as the killing of animals for the purpose of depopulation and for related operations.<sup>170</sup> One of the main objectives is making sure that the animals are treated with respect and suffering, stress or pain is being avoided.<sup>171</sup> This is based on the notion that animals are sentient beings as articulated in article 13 TFEU, which was addressed above.<sup>172</sup> As suffering, stress or pain needs to be avoided, animals need to be stunned prior to slaughter, to ensure that the animal loses consciousness and gets in a state of numbness, which needs to be held up until death sets in.<sup>173</sup> Several other animal welfare obligations have to be complied with, such as adhering to stunning methods and related specifications set out in Annex I, standard operating procedures need to be performed by business operators, complying with the rules set out in Annex II, slaughter man need to have a certain level of competence and a

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<sup>167</sup> Katy Sowery 2018, p. 11

<sup>168</sup> Council Regulation (EC) 1099/2009 of 24 September 2009 on the protection of animals at the time of killing [2009] OJ L 303/1

<sup>169</sup> Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing [1993] OJ L 340/21; The Commission was of the opinion that Directive 93/119/EC had become outdated. The concern for animal welfare had grown and new technologies had emerged, resulting in the outdated of certain standard methods of slaughter. The Commission chose for a Regulation as it ensures an uniform and simultaneous application, and it can be actualised more easily which is needed due to the rapid evolvement of technique and science. Proposal for a Council Regulation (CNS) 2008/0180 of 18 September 2008 on the protection of animals at the time of killing [2008] COM(2008) 553, p. 2

<sup>170</sup> Council Regulation (EC) 1099/2009, art. 1(1)

<sup>171</sup> *Id.* at art. 3

<sup>172</sup> Proposal for a Council Regulation (CNS) 2008/0180 of 18 September 2008 on the protection of animals at the time of killing [2008] COM(2008) 553, para 4

<sup>173</sup> Council Regulation (EC) 1099/2009, art. 4(1)

welfare officer needs to be present when slaughterhouses slaughter more than 1.000 livestock units of mammals, or more than 150.000 birds or rabbits per year.<sup>174</sup>

Article 4(4) provides an exemption from stunning animals by stating that: “In the case of animals subject to particular methods of slaughter prescribed by religious rites, the requirements of paragraph 1 shall not apply [...]”. This exemption has been maintained as the provisions from former Directive 93/119/EC have been transposed differently in national contexts. Furthermore, national rules take into account values that go beyond the purpose of this regulation, such as freedom of religion. The objectives belong to the competence of the EU, they cannot be sufficiently achieved by Member States, because:

“Meat, fur and other products related to the killing of farmed animals are traded internationally. Stunning and restraining equipment is also commercialised beyond national borders. Discrepancies in welfare standards governing the killing of animals between the Member States affect the competitiveness of slaughterhouses, farmers, hatcheries and manufacturers of stunning equipment.”<sup>175</sup>

The Regulation does however leave a certain level of subsidiarity to a Member State, in order to derogate from the exception of religious slaughter.<sup>176</sup> Member States can adopt national rules that provide a more extensive protection of animals at the time of killing, as follows from article 26(1). According to article 26(2)(c) these national rules that provide a more extensive protection may be adopted in relation to religious slaughter. However, not everyone agreed with the exception to stunning for religious slaughter. The European Economic and Social Committee (EESC) is of the opinion that the exception of stunning in the case of religious slaughter is “[...] totally inconsistent with the objectives for animal welfare during the slaughter process contained in this proposed Regulation”.<sup>177</sup> Nevertheless, the European Parliament did retain the religious derogation that was proposed in the commission proposal in the final regulation.<sup>178</sup>

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<sup>174</sup> *Id.* at para 22, 32 & art. 6(1), 6(2)(a), 7, 14, 17, 21 and Appendix IV

<sup>175</sup> Proposal for a Council Regulation (CNS) 2008/0180 of 18 September 2008 on the protection of animals at the time of killing [2008] COM(2008) 553, p. 8

<sup>176</sup> Council Regulation (EC) 1099/2009, para 18

<sup>177</sup> Opinion of the European Economic and Social Committee 2009/C 218/14 of 25 February 2009 on the Proposal for a Council Regulation on the protection of animals at the time of killing (COM(2008) 553 final — 2008/0180 CNS) [2009], para 1.5

<sup>178</sup> European Parliament legislative resolution 2010/C 212 E/49 of 6 May 2009 on the proposal for a Council regulation on the protection of animals at the time of killing (COM(2008)553 – C6-0451/2008 – 2008/0180(CNS)) [2009], para 5

Furthermore, according to article 4(4) an exemption from stunning is only permitted when the slaughtering takes place in a slaughterhouse. Slaughterhouses must, according to article 2(k), fall within the scope of Regulation 853/2004<sup>179</sup>, which lays down specific rules on the hygiene of food of animal origin for food business operators.<sup>180</sup> More specific rules for slaughterhouses can be found in Annex III Chapter two of Regulation 853/2004. This requirement provided an issue in Flanders when the Flemish Minister of Animal Welfare, Ben Weyts, banned unstunned slaughter on temporary slaughter-floors was banned starting from the Sacrifice Feast of 2015.<sup>181</sup>

Temporary slaughter-floors were established for the occasion of the yearly Feast of Sacrifice, to guarantee sufficient slaughter capacity and to battle illegal home-slaughter. The slaughtering of animals had to be performed by professionals, which would benefit the animal welfare and hygiene.<sup>182</sup> According to Ben Weyts, however, the establishing of temporary slaughter-floors violates article 2(k) and 4(4) of Regulation 1099/2009. According to article 4(4), religious slaughter needs to take place in a slaughterhouse and according to article 2(k) the definition of a slaughter house is “an establishment used for slaughtering terrestrial animals which falls within the scope of Regulation (EC) No 853/2004”.<sup>183</sup> Regulation 853/2004 lays down specific rules on the hygiene of food of animal origin for food business operators.<sup>184</sup> Ben Weyts argues that these specific rules for slaughter houses have been violated and in September 2014 Weyts announced that due to this violation, he will be banning the unstunned slaughter of animals performed at temporary slaughter-floors.<sup>185</sup> This ban gained a lot of critique from the Jewish and Muslim communities. The main concern was that there would be capacity problems

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<sup>179</sup> Council Regulation (EC) 853/2004 of 29 April 2004 laying down specific hygiene rules for on the hygiene of foodstuffs [2004] OJ L 139/55

<sup>180</sup> *Id.* at art. 1(1)

<sup>181</sup> Ben Weyts, Beleidsnota 2014-2019: Dierenwelzijn [2014] 154 no. 1

<https://docs.vlaamsparlement.be/docs/stukken/2014-2015/g154-1.pdf> accessed 16 April 2018

<sup>182</sup> Royal Decree of 11 February 1988 concerning some slaughter prescribed by a religious rite [1988]

[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1988021131&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1988021131&table_name=wet) accessed 23 May 2018; Royal Decree of 25 March 1998 amending the Royal Decree of 11 February 1988 concerning some of the slaughtering prescribed by a religious rite [1998]

[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1998032531&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1998032531&table_name=wet) accessed 23 May 2018

<sup>183</sup> Council Regulation (EC) 853/2004 of 29 April 2004 laying down specific hygiene rules for on the hygiene of foodstuffs [2004] OJ L 139/55

<sup>184</sup> *Id.* at art. 1(1)

<sup>185</sup> Ben Weyts, Beleidsnota 2014-2019: Dierenwelzijn [2014] 154 no. 1, paras 1.2.1 & 1.2.2

<https://docs.vlaamsparlement.be/docs/stukken/2014-2015/g154-1.pdf> accessed 23 May 2018



at the recognized slaughterhouses<sup>186</sup>, which Ben Weyts refuted by stating that “there are 47 recognized slaughterhouses, of which 16 have cooperated with the Sacrificial Feast”, this leaves enough room to deal with the increased capacity of slaughter.<sup>187</sup> In February 2016, several Muslim organisations start a procedure at the Brussels court of first instance, claiming that the ban is incompatible with article 16(2) of the Law of 16 August 1986 and article 19 of the Belgian Constitution<sup>188</sup>, subsequently, they argue that the rules of article 4(4) and article 2(k) Regulation 1099/2009 violate with freedom of religion as mentioned in article 9 ECHR, article 10 EU Charter and article 13 TFEU, because the recognized slaughterhouses lack sufficient capacity Muslims would no longer be able to fulfil their religious obligations now that temporary slaughter-floors are banned. The Belgian legislator was not equipped to answer this question as this is explicitly left to the ECJ, hence the court turned to the ECJ to ask the preliminary question: if article 4(4) Regulation 1099/2009 provides a violation of in article 9 ECHR and article 10 EU Charter.<sup>189</sup> The Advocate General (AG) filed his opinion on the 30<sup>th</sup> of November 2017, stating that:

“The rule that slaughtering can, in principle, only be carried out in approved slaughterhouses is a perfectly neutral rule that applies regardless of the circumstances and of the type of slaughtering chosen. To my mind, the problem submitted to the Court relates more to a temporary difficulty with the capacity of slaughterhouses in certain geographic areas at the time of the Islamic Feast of the Sacrifice, and ultimately with the costs engendered by the observance of a religious practice, than to requirements which arise from EU rules, which strike a balance between the right to freedom of religion, on the one hand, and the requirements which flow from the protection of human health, animal welfare and food safety, on the other.”<sup>190</sup>

The AG is thus of the opinion that Article 4(4) read together with Article 2(k) Regulation 1099/2009 does not impede freedom of religion as mentioned in article 9 ECHR and article 10

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<sup>186</sup> Commission Meeting (Commissie voor Leefmilieu, Natuur, Ruimtelijke Ordening, Energie en Dierenwelzijn) of 13 May 2015 concerning the question of an explanation about the slaughter capacity during the Feast of Sacrifice [2015]

<<https://www.vlaamsparlement.be/commissies/commissievergaderingen/980244/verslag/981395>> accessed 24 May 2018

<sup>187</sup> Charline de Coster, ‘Hoe koosjer is onverdoofd slachten?’ (2017) 40 Rechtskundig Weekblad 2016-2017, p. 1571

<sup>188</sup> *Id.* at p. 1572

<sup>189</sup> Request for a preliminary decision, filed by the Brussels’ Court of first instance (Belgium) 2016/C 383/06 of 1 August 2016 - *Liga van Moskeeën & Islamitische Organisaties Provincie Antwerpen v Vlaams Gewest* [2016] Case C-426/16

<sup>190</sup> Case C-426/16 *Liga van Moskeeën & Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest* [2017] EU:C:2017:926, Opinion of AG Nils Wahl, para 5

EU Charter.<sup>191</sup> The ECJ came to the same conclusion on the 29<sup>th</sup> of May 2018 by stating that the legality of article 4(4) and 2(k) Regulation 1099/2009 is not infringed upon by article 13 TFEU or by freedom of religion as mentioned in article 9 ECHR and article 10 EU Charter, as a result the ban on unstunned slaughter performed at temporary slaughter-floors is still in force.<sup>192</sup>

### **1.1.2.2 Federal law**

The first law on animal protection in Belgium was adopted on the 22<sup>nd</sup> of March 1929.<sup>193</sup> Today, the applicable Belgian law on animal welfare and animal protection is the law of the 14<sup>th</sup> of August 1986 regarding the protection of animals.<sup>194</sup> With the change of living conditions for animals in our modern society, the legislator wanted to actively stimulate animal welfare (in addition to the purely passive protection of animals against (excessive) atrocities), by keeping animal suffering to a minimum where it cannot be avoided.<sup>195</sup> Two articles are particularly valuable, namely article 15 and 16. According to article 15(1):

“A vertebrate animal may only be killed by a person with the required knowledge and skills, and according to the least painful method. The animal may only be killed under anaesthesia, unless force or necessity is at play [...]”.

According to article 16(1) the provisions of Chapter VI are however not applicable to religious slaughter, which is formulated in a way that is identical to the Council Regulation 1099/2009. The derogation from stunning animals in the case of religious slaughter will be deleted from January 1<sup>st</sup> 2019 in the Flemish region due to the Decree of July 7<sup>th</sup> 2017. Animal welfare had been a federal matter for a considerable time, but the sixth state-reformation on the 11<sup>th</sup> of October 2011 brought a change to this. The political parties of the Federal Government reached

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<sup>191</sup> *Id.* at para 141

<sup>192</sup> Case C-426/16 *Liga van Moskeeën & Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest* [2018] ECLI:EU:C:2018:335, para 84 & 85

<sup>193</sup> Charline de Coster, ‘De ontwikkelde rechtspositie van het dier: Kijken we de kat uit de boom of vatten we de koe bij de horens?’ in Karen Ronsijn & others (eds), *Recht in beweging – 24ste VRG-Alumnidag* (Maklu 2017), p. 140

<sup>194</sup> Guy Adant, ‘De wetgeving op de bescherming en het welzijn van dieren’ in Geertrui Cazaux (ed), *Mensen en andere dieren: Hun onderlinge relaties meervoudig bekeken* (Garant 2001), p. 141; The Royal Decree of 11 February 1988, supplemented by the Royal Decree of 25 March 1998, further implements the provisions on religious slaughter from the law of the 14<sup>th</sup> of August 1986. According to article 1 of the Royal Decree of 25 March 1998, religious slaughter may only be performed in a public or private slaughterhouse, or in establishments approved by the Minister of Agriculture after consultation with the Minister of Public Health.

<sup>195</sup> Explanatory Memorandum No. 469-1 concerning the Law of 14 August 1986 concerning the protection and welfare of animals [1982-83], p. 1

an agreement on a sixth state-reformation<sup>196</sup>, with the result that a lot of federal competences and measures were to be transferred to the Regions<sup>197</sup> on the 1<sup>st</sup> of July 2014. Due to this state-reformation, Flanders has obtained the competence of animal welfare<sup>198</sup> and Ben Weyts was appointed as the first Flemish Minister of Animal Welfare. He adopted the decree that would amend the law of 14 August 1986 to lift the derogation from stunning animals in the case of religious slaughter. Due to the importance of this decree for the research performed in this thesis, the decree will be explained in more detail in the next Chapter.

### **1.1.2.3 Regional law**

The European Directive 93/119/EC<sup>199</sup> concerning the protection of animals at the time of slaughter or killing, was ratified in Belgium law with the Royal Decree of 16 January 1998 on the protection of animals at the time of slaughter or killing.<sup>200</sup> The royal decree determines the rules that apply to the moving, accommodating, secure (restricting the animal's ability to move), stunning<sup>201</sup>, slaughtering and killing of animals that are bred and kept to obtain meat, skins, pelts or other products.<sup>202</sup> On the 19<sup>th</sup> of February 2016, the Flemish region lifted the Royal Decree of 16 January 1998 and replaced it by the Decree of the 24<sup>th</sup> of March 2016, concerning the protection of animals at the time of slaughter or killing.<sup>203</sup>

In 2010 and 2011, during the period that animal welfare still belonged to the federal competence, several different proposals of decree were submitted.<sup>204</sup> All of them envisioned an

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<sup>196</sup> ‘Staatshervorming’ (*Vlaanderen*) <<https://www.vlaanderen.be/nl/vlaamse-overheid/staatshervorming/staatshervorming>> accessed 10 April 2018

<sup>197</sup> Flanders, Wallonia and Brussel.

<sup>198</sup> Although animal health and other aspects of animal welfare remain Federal. ‘Zesde Staatshervorming’ (*Vlaanderen*) <<https://www.vlaamsparlement.be/over-het-vlaams-parlement/het-vlaams-parlement-het-politieke-landschap/zesde-staatshervorming>> accessed 10 April 2018

<sup>199</sup> Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing [1993] OJ L 340/21

<sup>200</sup> The Royal Decree of 16 January 1988 concerning the protection of animals at the time of slaughter or killing [1988] <[http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1998011632&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1998011632&table_name=wet)> accessed 12 April 2018

<sup>201</sup> Stunning was however already mandatory based on the law of the 14th of August 1986.

<sup>202</sup> The Royal Decree of 16 January 1988, art. 1(1)

<sup>203</sup> The Brussel region soon followed and lifted the Royal Decree on the 9<sup>th</sup> of February 2017, and replaced it with the Decree of the 6<sup>th</sup> of March 2017 concerning the protection of animals at the time of slaughter or killing.

<sup>204</sup> Proposal of Decree of 8 October 2010 concerning a ban on religious slaughter [2010] 5-256/1 <<http://www.senate.be/www/webdriver?MItabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=83886310>> accessed 12 April 2018; Proposal of Decree of 17 November 2010 concerning a ban on the unstunned religious slaughter of animals [201] 53-0581/001 <<http://www.dekamer.be/FLWB/PDF/53/0581/53K0581001.pdf>> accessed 12 April 2018; Proposal of Decree of 19 Augustus 2010 on the amendment of the law of 14 August 1986 concerning the protection and the welfare of

amendment of the law of 14<sup>th</sup> of August 1986 regarding the protection of animals, however, none of these proposals resulted in a law. With the competence of animal welfare shifting to the regional level, Ben Weyts' first decision as the first Flemish Minister of Animal Welfare was to ban unstunned slaughter on temporary slaughter-floors starting from the Sacrifice Feast of 2015 as was mentioned above, thereby clearly following the aim of the rejected proposals.<sup>205</sup> The next big step that Flanders' took was the amend of the law of the 14<sup>th</sup> of August 1986 regarding the protection of animals. On the 7<sup>th</sup> of July 2017 the Decree that would amend the law of 1986 was filed. This Decree amended the law of 1986 drastically; it lifted the exemption on stunning in the case of religious slaughter and added the new requirement that animals have to be stunned prior to slaughter, or animals need to be stunned directly after the cut was performed (depending on the advancement of stunning technique per animal). This decree will be discussed in more detail in Chapter Two, to provide a clear overview of its contents (as this goes beyond the scope of this chapter), which is needed for the research done in Chapter Three.

### **1.1.3 Scientific perspective on unstunned versus stunned slaughter**

#### ***1.1.3.1 Slaughter method***

As was explained in Chapter 1.1.2.1.2, Regulation 1099/2009 concerning the protection of animals at the time of killing regulates the process of slaughtering and contains several provisions that need to be upheld when performing slaughter. The main aim of Regulation 1099/2009 is to make sure that animals are treated with respect and suffering, stress or pain is being avoided when performing the act of slaughter.<sup>206</sup> There are several slaughter methods used when slaughtering animals, but for the sake of this research, the focus will be on the bleeding of animals as mentioned in Regulation 1099/2009.<sup>207</sup> Bleeding is performed by cutting

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animals, to ban unstunned religious slaughter [2010] 5-36/1  
<<https://www.senate.be/www/?MItabObj=pdf&MIcolObj=pdf&MINamObj=pdfid&MItypeObj=application/pdf&MIvalObj=83886115>> accessed 12 April 2018; Proposal of Decree of 7 January 2010 on the amendment of the law of 14 August 1986 concerning the protection and the welfare of animals, to ban unstunned religious slaughter [2010] 52-2351/001 <<http://www.lachambre.be/FLWB/PDF/52/2351/52K2351001.pdf>> accessed 12 April 2018

<sup>205</sup> Ben Weyts, Beleidsnota 2014-2019: Dierenwelzijn [2014] 154 no. 1

<<https://docs.vlaamsparlement.be/docs/stukken/2014-2015/g154-1.pdf>> accessed 16 April 2018

<sup>206</sup> Council Regulation 1099/2009, art. 3

<sup>207</sup> As most animals in Europe are slaughtered by using 'bleeding', and kosher and halal slaughter use the same method.; A. Velarde, P. Rodriguez, A. Dalmau, C. Fuentes, P. Llonch, K.V. von Holleben, M.H. Anil, J.B. Lambooi, H. Pleiter, T. Yesildere, B.T. Cenci-Goga, 'Religious slaughter: Evaluation of current practices in selected countries' (2014) 96 Meat Science, p. 278; EFSA Scientific Panel on Animal Health and Welfare, 'Opinion of the Scientific Panel on Animal Health and Welfare on a request from the Commission related to

the neck of an animal, thereby severing both carotid arteries to ensure maximum blood loss, which results in a drop of blood pressure leading the animal to lose consciousness, which ultimately results in death.<sup>208</sup>

The practice of bleeding might cause a sensation of pain to animals. Scientists however, disagree on the degree of pain, stress and discomfort. On the one hand, Grandin argues that a well-executed cut is not painful for a quiet, unstunned animal, if the animals have been brought to slaughter in the right way, are optimally fixed and bleed calmly after the cut.<sup>209</sup> Rosen agrees with Grandin, and states that an unstunned cut does not have to be painful for the animal.<sup>210</sup> A lot thus depends on the situation that an animal is slaughtered in, making it highly variable. While, on the other hand, the European Food Safety Authority (EFSA) emphasises that a large number of pain receptors are located in the neck region, which causes the animal pain due to the substantial tissue damage the cut inflicts.<sup>211</sup> It is however important to underline that not only the slaughter method itself contributes to better or worse animal welfare in slaughterhouses, it depends on several factors, namely: i) stressful equipment and methods, ii) distractions that impede animal movement, iii) lack of employee training, iv) poor equipment maintenance and v) poor condition of the animals arriving at the plant.<sup>212</sup>

### ***1.1.3.2 Stunning***

According to article 2(f) of Regulation 1099/2009, stunning means “any intentionally induced process which causes loss of consciousness and sensibility without pain, including any process resulting in instantaneous death”. The stunning methods that Regulation 1099/2009 prescribes are mechanical, electrical or gas based.<sup>213</sup> As the Flemish ban on unstunned slaughter requires stunning through using the electrical and mechanical method, the research performed here will focus solely on these two methods.<sup>214</sup>

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welfare aspects of the main systems of stunning and killing the main commercial species of animals’ (2004) 45 EFSA Journal, p. 5

<sup>208</sup> Christopher Needham, ‘Religious slaughter of animals in the EU’ (2012) 120375REV2, p. 3; EFSA Scientific Panel on Animal Health and Welfare 2004, p. 5

<sup>209</sup> Joe M. Regenstein & Temple Grandin 1994, p. 157

<sup>210</sup> S.D. Rosen, ‘Physiological insights into Shechita’ (2004) 154 Veterinary Record, p. 762

<sup>211</sup> EFSA Scientific Panel on Animal Health and Welfare 2004, p. 5

<sup>212</sup> Dr. Temple Grandin, ‘Animal Welfare in Slaughter Plants’ (*Grandin*) <<http://grandin.com/welfare/general.session.html>> accessed 16 June 2018

<sup>213</sup> Council Regulation 1099/2009, Annex I

<sup>214</sup> This will be explained in more detail in Chapter Two.

The electrical method consists of two separate methods, namely: stunning by using electrodes for poultry and large animals, or stunning through using an electrical waterbath for poultry.<sup>215</sup> Stunning through the use of electrodes can be done in a way that is irreversible or reversible.<sup>216</sup> Irreversible stunning requires giving an animal a current pulse both to the brain and to the heart.<sup>217</sup> Electrodes must be applied to both sides of the head so that electrical current is passed through the brain and an additional electrode is placed on the torso.<sup>218</sup> The failure of the heart and the release of neurotransmitters in the brain results in the death of the animal.<sup>219</sup> While reversible stunning, requires that the current pulse is only given to the animal's brain which induces a clonic/tonic epileptic fit.<sup>220</sup> If the electrodes are correctly attached, then the animal should lose consciousness and sense of pain, which allows the neck cut to be made. If the animal's throat is not cut, the animal will regain consciousness.<sup>221</sup> Electrical stunning methods that are used on sheep are effective and quickly lead to insensitivity.<sup>222</sup> While in cattle, only the irreversible electrical stunning is fully effective, as animals may regain consciousness during the bleeding when reversible electrical stunning is used.<sup>223</sup> Waterbaths are used solely to stun poultry. The waterbaths need to have an adjusted water level with an electric current that is strong enough to stun every animal in it.<sup>224</sup> In Flanders, a current strength is used that is below the European minimum, in order to avoid carcass damage.<sup>225</sup> Many chickens therefore run the risk of not being properly stunned before they are slaughtered.<sup>226</sup> The animals are usually hung upside down by their legs and then lowered into the water. Hanging animals upside down can

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<sup>215</sup> Council Regulation 1099/2009, Annex I: Table 2

<sup>216</sup> Joe M. Regenstein & Temple Grandin 1994, p. 157

<sup>217</sup> Council Regulation 1099/2009, Annex I: Table 2 No. 2

<sup>218</sup> K. von Holleben, M. von Wenzlawowicz, N. Gregory, H. Anil, A. Velarde, P. Rodriguez, B. Cenci Goga, B. Catanese & B. Lambooi, *Report on good and adverse practices - Animal welfare concerns in relation to slaughter practices from the viewpoint of veterinary sciences* (Dialrel 2010), p. 40; Christopher Needham 2012, p. 3; EFSA Scientific Panel on Animal Health and Welfare 2004, p. 6; Ester Peeters 2007, p. 37

<sup>219</sup> K. von Holleben et al. 2010, p. 40; Joe M. Regenstein & Temple Grandin 1994, p. 157

<sup>220</sup> Council Regulation 1099/2009, Annex I: Chapter two, paragraph 4.1; Temple Grandin & Gary C. Smith, 'Animal Welfare and Humane Slaughter' (*Grandin*, November 2004), p. 5

<<http://www.grandin.com/references/humane.slaughter.html>> accessed 17 June 2018

<sup>221</sup> K. von Holleben et al. 2010, p. 39; Ester Peeters 2007, p. 33

<sup>222</sup> EFSA Scientific Panel on Animal Health and Welfare 2004, p. 11

<sup>223</sup> *Id.* at p. 9; K. von Holleben et al. 2010, p. 42

<sup>224</sup> Council Regulation 1099/2009, Annex I: Table 2 No. 3

<sup>225</sup> Commissie voor Leefmilieu, Natuur, Ruimtelijke Ordening, Energie en Dierenwelzijn, 'Vraag om uitleg over het gebruik van het elektrisch waterbad bij het slachten van kippen' (*Vlaams Parlement*, 17 January 2018) <<https://www.vlaamsparlement.be/commissies/commissievergaderingen/1221765/verslag/1223300>> accessed 17 June 2018

<sup>226</sup> Aize Kijlstra & Bert Lambooi 2008, p. 24

cause pain and discomfort, as shackling animals to hang upside down induces wing flapping which leads to a significant potential of dislocations and fractures to occur.<sup>227</sup>

While electrical methods of stunning are performed prior to slaughter, there is also the possibility of a 'post-cut' stunning.<sup>228</sup> Animals are slaughtered unstunned and receive stunning after the neck cut is performed. Post-cut stunning is mostly used to meet halal and kosher slaughter requirements. The downside here is that animals still have to endure the pain of the neck cut itself. The common used method for post-cut stunning is a penetrative captive bolt device. The captive bolt should be placed in such a way that the projectile penetrates the cerebral cortex, causing brain damage leading to unconsciousness.<sup>229</sup> Research shows that properly applied stunning through the use of the penetrative captive bolt device can numb animals successfully without pain or stress.<sup>230</sup> A disadvantage, however, is that this stunning method is not an automated process and as a result the effectiveness depends on the skills and training of the personnel.<sup>231</sup>

An effective anaesthetic influences the consciousness and sensitivity of animals.<sup>232</sup> The consciousness of an animal consists of "the ability to feel emotions and to control voluntary motor skills".<sup>233</sup> While the sensitivity of an animal exists of the ability to feel pain. When the animal lacks both consciousness and sensitivity, or both consciousness and sensitivity are at least greatly reduced, it can be concluded that there is an effective anaesthetic present.<sup>234</sup> It is clear that every method of stunning has its advantages and disadvantages, and the effectivity of a certain stunning method applied to a certain species depends mostly on the correct application of the said method and on the adequacy of the neck cut.<sup>235</sup>

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<sup>227</sup> *Id.* at p. 24; Christopher Needham 2012, p. 3; EFSA Scientific Panel on Animal Health and Welfare 2004, p. 16

<sup>228</sup> Decree 1213 No. 1 of 26 June 2017 on the alteration of the Law of 14 August 1986 concerning the protection and the welfare of animals, as regards to the authorized methods for the slaughtering of animals [2017], p. 10 <<http://docs.vlaamsparlament.be/pfile?id=1281031>> accessed 17 June 2018

<sup>229</sup> K. von Holleben et al. 2010, p. 46 & 47; Christopher Needham 2012, p. 3; Aize Kijlstra & Bert Lambooi 2008, p. 24

<sup>230</sup> Joe M. Regenstein & Temple Grandin 1994, p. 157; K. von Holleben et al. 2010, p. 49

<sup>231</sup> Aize Kijlstra & Bert Lambooi 2008, p. 24

<sup>232</sup> Council Regulation 1099/2009, para 20

<sup>233</sup> *Id.* at para 21

<sup>234</sup> *Id.* at para 20 & 21

<sup>235</sup> EFSA Scientific Panel on Animal Health and Welfare 2004, p. 5

### ***1.1.3.3 Animal welfare during stunned slaughter versus unstunned slaughter***

Research shows that the unstunned slaughter in comparison with stunned slaughter scores more negatively in terms of animal welfare on a number of points.

When the cut is performed on an unstunned animal, the staff must fix the animal properly in order to make a correct cut which can cause a lot of extra stress.<sup>236</sup> The cut will then cause the animal pain due to the large number of pain receptors in the neck, whether or not suppressed by the endorphins produced by the animal when it is in shock from the cut.<sup>237</sup> Furthermore, the neck cut is not always performed properly. This results in the fact that an animal needs to be cut the animal several of times, causing the animal to suffer unnecessarily.<sup>238</sup> The rapid drop in blood pressure as a result of the cut, also causes stress and pain.<sup>239</sup> A normal reaction would be to express this pain through vocalizations. As the trachea has been cut, an animal is not capable of doing so.<sup>240</sup> Furthermore, the way animals are fixed can lead to blood running into the trachea, making the animal aspirate blood which can cause the feeling of being suffocated.<sup>241</sup> Moreover, the brains of unstunned animals continue to work longer than those of stunned, which results in the fact that unstunned animals will lose only consciousness after the neck cut when a certain degree of blood loss has occurred. Without stunning, the time between cutting the large carotid arteries and the onset of insensitivity of sheep can take up to 20 seconds, for cattle up to 2 minutes and up to 2.5 minutes for poultry.<sup>242</sup>

Most authors and researchers do thus agree that animals that are stunned prior to slaughter experience less pain and stress than animals that are slaughtered unstunned. This view

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<sup>236</sup> Aize Kijlstra & Bert Lambooi 2008, p. 26; Vlaamse Dierenartsen 2015, p. 2; Federation of Veterinarians of Europe 2012, p. 1; Carla M. Zoethout, 'Animals as Sentient Beings: On Animal Welfare, Public Morality and Ritual Slaughter' (2013B) 7 ICL Journal, p. 320; Jan Willem Sap, Carla M. Zoethout & Gerhard van der Schyff 2017, p. 35 & 57; Dr. Temple Grandin, 'Animal Welfare in Slaughter Plants' (*Grandin*) <<http://grandin.com/welfare/general.session.html>> accessed 17 June 2018

<sup>237</sup> Ester Peeters 2007, p. 14; K. von Holleben et al. 2010, p. 56; Christopher Needham 2012, p. 5; EFSA Scientific Panel on Animal Health and Welfare 2004, p. 5

<sup>238</sup> Aize Kijlstra & Bert Lambooi 2008, p. 26; K. von Holleben et al. 2010, p. 56; Christopher Needham 2012, p. 5

<sup>239</sup> Ester Peeters 2007, p. 15; EFSA Scientific Panel on Animal Health and Welfare 2004, p. 5; Decree 1213 No. 1 of 26 June 2017, p. 10

<sup>240</sup> Ester Peeters 2007, p. 16

<sup>241</sup> Jan Willem Sap, Carla M. Zoethout & Gerhard van der Schyff 2017, p. 35; Aize Kijlstra & Bert Lambooi 2008, p. 26; Ester Peeters 2007, p. 16; Carla M. Zoethout 2013B, p. 320; EFSA Scientific Panel on Animal Health and Welfare 2004, p. 5; Dr. Temple Grandin, 'Animal Welfare in Slaughter Plants' (*Grandin*) <<http://grandin.com/welfare/general.session.html>> accessed 17 June 2018

<sup>242</sup> Christopher Needham 2012, p. 5; Joe M. Regenstein & Temple Grandin 1994, p. 157; EFSA Scientific Panel on Animal Health and Welfare 2004, p. 5; Jan Willem Sap, Carla M. Zoethout & Gerhard van der Schyff 2017, p. 35; Vlaamse Dierenartsen 2015, p.3



has been underscored by some scientific institutes and professional organizations as well. The EFS) is of the opinion that all animals that are slaughtered must be sufficiently stunned in the most humane way possible, in order to avoid ‘poor welfare’ until unconsciousness sets in.<sup>243</sup> According to the Federation of European Veterinarians (FVE), unstunned slaughter isn’t acceptable under any circumstances out of respect for an animal as a sentient being.<sup>244</sup> The Order of Flemish Veterinarians also endorses this view and believes that, pending the entry into force of a full ban on religious slaughter, an animal that is slaughtered must at least be stunned immediately after the neck cut.<sup>245</sup>

## 1.2 Interpretation freedom of religion

### 1.2.1 International law

#### 1.2.1.1 *The European Convention on Human Rights*

In the ECHR, freedom of religion can be found in article 9. Article 9 of the ECHR drew its inspiration and its text from article 18 of the Universal Declaration on Human Rights (UDHR)<sup>246</sup>, and certain affinities are clearly visible.<sup>247</sup> Using article 18 UDHR as a basis was done in order to pursue its own aim, as mentioned in the preamble, “to take the first steps towards collective enforcement of certain rights as stated in the UDHR.”<sup>248</sup> Another important reason to base article 9 ECHR as far as possible on article 18 UDHR was to reduce the risk of devising definitions that were at odds with those in United Nations instruments.<sup>249</sup> Article 9(1) ECHR states that:

“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.”

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<sup>243</sup> EFSA Scientific Panel on Animal Health and Welfare 2004, p. 6

<sup>244</sup> Federation of Veterinarians of Europe 2012, p. 2

<sup>245</sup> Vlaamse Dierenartsen 2015, p. 4

<sup>246</sup> Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, 2001), p. 40

<sup>247</sup> Preparatory Work of 16 August 1956 on Article 9 of the European Convention of Human Rights by the European Commission of Human Rights [1956] DH(56)14, p. 2 & 18

<sup>248</sup> Paul M. Taylor, *Freedom of Religion - UN and European Human Rights Law and Practice* (Cambridge University Press 2005), p. 7

<sup>249</sup> *Id.*

There is a clear distinction between the right to hold and change religious beliefs, and the right to express religious beliefs.<sup>250</sup> The right to hold and change religious beliefs is also referred to as ‘forum internum’.<sup>251</sup> This aspect of freedom of religion is absolute, it regards deeply held ideas and convictions that belong to a person’s conscience.<sup>252</sup> The forum internum is a Treaty right which cannot be subject to restrictions or interference<sup>253</sup>, embracing the duty on the State to refrain from religious indoctrination.<sup>254</sup> The right to express religious beliefs is also referred to as ‘forum externum’.<sup>255</sup> The European Court of Human Rights (ECtHR) has added an extra requirement for expression of freedom of religion (forum externum), namely that there has to be a specific relationship between religion and the expression thereof.<sup>256</sup> As so many activities could be deemed to fall under this freedom, the European Commission developed a way to confine the activities that could fall under article 9 ECHR.<sup>257</sup> It has done so in the *Arrowsmith v. The United Kingdom* case, where the Commission stated that the term “practice” in article 9 ECHR does not cover each act that is motivated or influenced by religion, hence the actions of individuals need to express the belief it concerns otherwise they cannot be considered to be protected by article 9 ECHR.<sup>258</sup> In light of this ritual slaughter was deemed to fall under freedom of religion as mentioned in article 9 ECHR, as follows from the *Cha’are Shalom Ve Tsedek v. France* case.<sup>259</sup> Article 9 ECHR sums up some of the ways you can express your own convictions<sup>260</sup>, but it is not without its restrictions as the forum externum might affect or threaten the public order.<sup>261</sup> The right to express your beliefs is a relative right, which means that the Member States get a bit of space to lay down limitations on certain practices, also called ‘margin of appreciation’.<sup>262</sup> These limitations are defined in article 9(2) ECHR, which states that:

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<sup>250</sup> *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001), para 116, 117

<sup>251</sup> A. van de Beek, E.A.J.G. van der Borght & B.P. Vermeulen (eds), *Studies in Reformed Theology: Freedom of Religion*, vol 19 (BRILL 2010), p. 12

<sup>252</sup> Research Division Council of Europe/European Court of Human Rights, *Overview of the Court’s case-law on freedom of religion* (Council of Europe/European Court of Human Rights 2013), para 16

<sup>253</sup> Johan Vande Lanotte & Yves Haeck, *Handboek EVRM: Deel 1. Algemene Beginselen Part 1* (Intersentia 2005), p. 92

<sup>254</sup> Norman Doe 2011, p. 18

<sup>255</sup> A. van de Beek, E.A.J.G. van der Borght & B.P. Vermeulen (eds) 2010, p. 13

<sup>256</sup> Paul M. Taylor 2005, p. 211

<sup>257</sup> *Id.* at p. 210

<sup>258</sup> *Arrowsmith v. The United Kingdom* App no 7050/75 (ECtHR, 5 December 1978), para 71

<sup>259</sup> This case will be explained in detail below.

<sup>260</sup> *Metropolitan Church of Bessarabia and Others v Moldova* 2001, para 114

<sup>261</sup> Research Division Council of Europe/European Court of Human Rights 2013, para 16

<sup>262</sup> Charline de Coster 2017, p. 1565

“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.”

Concretely, there are three requirements that need to be satisfied before a limitation on article 9(1) ECHR is legitimate.

The first requirement is that the limitation has to be prescribed by law.<sup>263</sup> There are two essential components that can be identified from this phrase: the law has to be accessible and foreseeable, which means that the law in question has to be “formulated with sufficient precision to enable the individual to regulate his conduct”.<sup>264</sup> Firstly, the limitation (e.g. national law) in question that provides an interfering measure must be accessible to the citizens<sup>265</sup>, which according to case-law means that “the citizen must be able to have an indication, that is adequate in the circumstances of the legal rules applicable to a given case, of the legal rules applicable to a given case”.<sup>266</sup> Secondly, the law must be formulated in a way that enables the citizens to foresee the exact scope and meaning of the provision, which means that the citizens need to be able “to foresee the consequences a given action entails”.<sup>267</sup>

The second requirement is that the limitation must pursue a legitimate aim, namely one of the five mentioned in the article: public safety, for the protection of the public order, health or morals, or for the protection of the rights and freedoms of others.<sup>268</sup> This requirement is mostly passed over without much of an analysis<sup>269</sup> and the court frequently finds that a measure falls within one of these legitimate aims.<sup>270</sup>

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<sup>263</sup> Johan Vande Lanotte & Yves Haeck 2005, p. 126

<sup>264</sup> *Hasan and Chaush v. Bulgaria* App no 30985/96 (ECtHR, 26 October 2000), para 84

<sup>265</sup> Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002), p. 10; *Silver and Others v. The United Kingdom* App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75 (ECtHR, 25 March 1983), para 87

<sup>266</sup> *Sunday Times v. The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 49; *Silver and Others V. The United Kingdom* 1983, para 87

<sup>267</sup> *Sunday Times v. The United Kingdom* 1979, para 49; *Silver and Others V. The United Kingdom* 1983, para 88; *Olsson v. Sweden* App no 10465/8 (ECtHR, 24 March 1988), para 61(a); *Rekvényi v. Hungary* App no 25390/94 (ECtHR, 20 May 1999), para 34

<sup>268</sup> Although these aims are limited, they are explained quite broadly in the case-law of the European Court of Human Rights. Hence almost all of the potential limitations of freedom based on the general interest are deemed to fall under these aims. Johan Vande Lanotte & Yves Haeck, *Supra* n. 253, p. 135

<sup>269</sup> Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press 2005), p. 302

<sup>270</sup> Bernadette Rainey, Elizabeth Wicks & Clare Ovey (eds), *Jacobs, White & Ovey: The European Convention on Human Rights* (6<sup>th</sup> edn, Oxford University Press 2014), p. 314

The last requirement is that the limitation must be necessary in a democratic society. There needs to be: a pressing social need<sup>271</sup> and the limitation on freedom of religion is to be considered proportionate to the legitimate aim pursued.<sup>272</sup> The pressing social need needs to be in accordance with the requirements of a democratic society<sup>273</sup>, which means that the government needs to bring forward pertinent and sufficient reasons, based on a legitimate aim, to justify the limitation on freedom of religion.<sup>274</sup> It needs to be noted that the Court does not interpret “necessity” as implying that a limitation has to be indispensable, and neither does it have the flexibility that expressions such as “admissible”, “ordinary”, “useful”, “desirable” or “reasonable” bring forward.<sup>275</sup> In terms of the proportionality of a measure, it is also necessary to see whether less far reaching alternative measures can be used that would lead to the achievement of a similar goal. The government has to limit infringements on treaty rights of civilians as much as possible by comparing alternative measures and subsequently try to reach her goals in a way that is the least pressing on human rights.<sup>276</sup> It is up to the authorities to show that there are indeed no other means possible.<sup>277</sup> The requirement of using less restrictive requirement will mostly be used when there is a narrow margin of appreciation.

When addressing the last requirement, it is also important to keep in mind that the ECtHR uses the principle of subsidiarity, which means that: “the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court [ECtHR]”.<sup>278</sup> As a result, while determining if the limitation is necessary in a democratic society, the ECtHR may grant the states a certain ‘margin of appreciation’, or in other words: the ECtHR leaves a certain room for States, that are a party to the ECHR, in determining the extent to which they want to limit rights mentioned in the

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<sup>271</sup> *Id.* at p. 325

<sup>272</sup> This entails the interference with the right that is protected is not greater than is necessary to address the pressing social need. Bernadette Rainey, Elizabeth Wicks & Clare Ovey (eds), *Supra* n. 270, p. 325; *Silver and Others V. The United Kingdom* 1983, para 97; *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 49; *Sunday Times v. The United Kingdom* 1979, para 62

<sup>273</sup> Johan Vande Lanotte & Yves Haeck 2005, p. 140

<sup>274</sup> *Id.* at p. 141

<sup>275</sup> *Handyside v. the United Kingdom* 1976, para 48; *Silver and Others V. The United Kingdom* 1983, para 97

<sup>276</sup> Johan Vande Lanotte & Yves Haeck 2005, p. 145

<sup>277</sup> *Biblical Centre of the Chuvash Republic v. Russia* App no 33203/08 (ECtHR, 12 June 2014), para 58; *Association Rhino and Others v. Switzerland* App no 48848/07 (ECtHR, 11 October 2011), para 65

<sup>278</sup> Jurisconsult, ‘Interlaken Follow-up: the Principle of Subsidiarity’ [2010] European Court of Human Rights (note), para 2

ECHR<sup>279</sup>, this margin must however be subject to European supervision.<sup>280</sup> The margin of appreciation was first articulated in the *Handyside v. The United Kingdom* case, and is based on the principle that:

“By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.”<sup>281</sup>

Or in other words, the margin of appreciation is used as “a tool to define relations between domestic authorities and the Court”.<sup>282</sup> The scope of the margin of appreciation varies depending on the circumstances, including: the nature of the right protected and the nature of the interference.<sup>283</sup> According to case-law the margin of appreciation tends to be narrowed when “a particularly important facet of an individual’s existence or identity is at stake”, and the margin of appreciation tends to be wider when there is “no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best protect it”.<sup>284</sup> A wide margin of appreciation implicates that states have a lot of freedom to establish the proportionality of a possible violation of freedom of religion, while a limited/narrow margin entails less freedom to establish the proportionality and a stronger judgement of the ECtHR in determining if there is a possible violation of freedom of religion.<sup>285</sup> According to case-law it can be concluded that there is a wide margin of appreciation granted to the the Member States when limiting freedom of religion. For example, in the case of *Lautsi v. Italy*, the ECtHR granted Italy a wide margin of appreciation to decide whether crucifixes had to be displayed on state school rooms.<sup>286</sup> In the case of *Leyla Sahin v. Turkey*, where the ECtHR granted Turkey a wide margin to forbade students from wearing religious symbols at

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<sup>279</sup> Gerhard van der Schyff, ‘Onverdoofd ritueel slachten getoetst aan het EVRM: Het Deense verbod als Europees vraagstuk’ (2015) 6 Tijdschrift voor Religie, Recht en Beleid, p. 63

<sup>280</sup> *Kokkinakis v Greece* App nos 3/1992/348/421 (ECtHR, 25 May 1993), para 47; *Manoussakis and Others v. Greece* App no 18748/91 (ECtHR, 26 September 1996), para 44

<sup>281</sup> *Handyside v. the United Kingdom* 1976, para 48

<sup>282</sup> *A. and Others v. The United Kingdom* App no 3455/05 (ECtHR, 19 February 2009), para 184

<sup>283</sup> *S. and Marper v. The United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008), para 102

<sup>284</sup> *S. and Marper v. The United Kingdom* 2008, para 102; *Dickson v. The United Kingdom* App no 44362/04 (ECtHR, 4 December 2007), para 78; There is thus no Common European Standard as its existence would lead to a narrower margin of appreciation. F.M.C Vlemminx, *Het moderne EVRM* (Boom Juridische Uitgevers 2013), p. 82 & 83

<sup>285</sup> *Handyside v. the United Kingdom* 1976, para 48

<sup>286</sup> *Lautsi v. Italy* App no 30814/06 (ECtHR, 18 March 2011), para 69

state universities<sup>287</sup>, or in the case of *Cha'are Shalom Ve Tsedek v. France* where France was given a wide margin of appreciation to regulate ritual slaughter.<sup>288</sup>

The only case to date that has dealt with religious slaughter in relation to freedom of religion is the case of *Cha'are Shalom Ve Tsedek v. France*. In this case a small Jewish religious association filed a complaint at the European Commission of Human Rights on the 23<sup>rd</sup> of May 1995, stating that the French government had allegedly violated their freedom of religion by refusing to accede to the association the permission to perform their own slaughter<sup>289</sup>, while it had granted a similar approval to the Israelite Consistory of Paris (ACIP). The small Jewish religious association had torn off from the ACIP, because it was of the opinion that meat should not only be kosher but also “glatt”.<sup>290</sup> Not obtaining a licensing right led to the association importing glatt meat from Belgium or slaughtering their animals illegally.<sup>291</sup> The European Commission on Human Rights found the application admissible and filed their report on the 20<sup>th</sup> of October 1998 stating that the refusal amounts to a violation of freedom of religion as mentioned in article 9 ECHR<sup>292</sup>, after which they referred the case to the ECtHR on the 6<sup>th</sup> of March 1999. The judgment of 27 June 2000 starts with the question whether religious slaughter falls under freedom of religion as mentioned in article 9 ECHR. The ECtHR confirms that religious slaughter is part of freedom of religion as mentioned in article 9 ECHR, as slaughtering animals according to kosher rules is an essential aspect of the Jewish religion.<sup>293</sup> Furthermore, the ECtHR examines whether the refusal of the French government does indeed amount to a violation of freedom of religion, by using a twofold examination. Firstly, the Court establishes whether there is an interference with the right to freedom of religion. If an interference is found the court goes on to examine whether this interference is compatible with the requirements of article 9(2) ECHR, if so the interference is deemed legitimate. The Court states that an interference only exists when the association cannot obtain or consume meat that is slaughtered according to their religious requirements<sup>294</sup>, which sets a high threshold for

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<sup>287</sup> *Leyla Şahin v. Turkey* App no 44774/98 (ECtHR, 10 November 2005), para 109

<sup>288</sup> *Cha'are Shalom Ve Tsedek vs France* App no 27417/95 (ECtHR, 27 June 2000), para 84

<sup>289</sup> *Id.* at paras 2 & 36

<sup>290</sup> Glatt means that the lungs of the slaughtered animals may not contain any impurities. Charline de Coster, ‘Hoe koosjes is onverdoofd slachten’ (2017) 40 *Rechtskundig Weekblad* 2016-2017, p. 1566

<sup>291</sup> *Cha'are Shalom Ve Tsedek vs France* 2000, paras 2 & 36

<sup>292</sup> *Id.* at para 3

<sup>293</sup> *Id.* at paras 73 & 74

<sup>294</sup> *Id.* at para 80

finding an interference with freedom of religion.<sup>295</sup> In line with this the Court argues that the association indeed still has access to meat that has been slaughtered according to their specific religious requirements, e.g. is “glatt”, and it is not deprived of the ability to consume it either.<sup>296</sup> According to the ECtHR, freedom of religion does not extend to the right to take part in person in the religious slaughtering of animals and the refusal by the French government does not constitute an interference of the association’s right to freedom of religion.<sup>297</sup> The Court goes on by stating that even if the refusal was viewed as providing an interference with article 9 ECHR, the measure would still be seen as compatible with article 9(2) ECHR, as the measure is

“[...] prescribed by law, pursues a legitimate aim, namely protection of public health and public order, in so far as organisation by the State of the exercise of worship is conducive to religious harmony and tolerance. [...]”<sup>298</sup>

Furthermore, the ECtHR states that France endures a wide margin of appreciation, which leads to the conclusion that the refusal “cannot be considered excessive or disproportionate”.<sup>299</sup>

The *Cha’are Shalom Ve Tsedek* case has been criticised for mistreating the freedom of religion of minority groups. The simple fact that the association is able to import meat that is slaughtered according to their religious requirements does not justify the conclusion that there is no interference with article 9 ECHR.<sup>300</sup> The ECtHR argues that taking part in religious slaughter does not fall within freedom of religion as mentioned in article 9 ECHR, but this denies the fact that within one religion there might be different groups who require different requirements for religious slaughter. In this case the French government had only granted a license to the majority Jewish group ‘ACIP’, while the applicant association (minority group) required that meat that was slaughtered according to kosher requirements also needed to be “glatt”. The fact that taking part in religious slaughter does not fall under religious freedom mentioned in article 9 ECHR and a license is only granted to the majority means that the minorities’ freedom of religion, in this case the applicant association, is suppressed. The Court should have generated

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<sup>295</sup> Gerhard van der Schyff, ‘Ritual Slaughter and Religious Freedom in a Multilevel Europe: The Wider Importance of the Dutch Case’ (2014) 3 Oxford Journal of Law and Religion, p. 88

<sup>296</sup> *Cha’are Shalom Ve Tsedek vs France* 2000, paras 82 & 83

<sup>297</sup> *Id.* at paras 82 & 83

<sup>298</sup> *Id.* at para 84

<sup>299</sup> *Id.*

<sup>300</sup> *Cha’are Shalom Ve Tsedek vs France* App no 27417/95 (ECtHR, 27 June 2000) (Sir Nicolas Bratza, Fischbach, Thomassen, Tsatsa-Nikolovska, Pantíru, Levits and Traja. Joint Dissenting Opinion), p. 27

a theory that would account for differences within religious groups that arise due to pluralism<sup>301</sup>, as the court needs to facilitate tolerance between the divided communities.<sup>302</sup>

## 1.2.2 European law

### 1.2.2.1 *The Charter of Fundamental Rights of the European Union*

The Charter of Fundamental Rights of the European Union was prompted at a European Council meeting in Cologne, where they saw the need for a Charter of fundamental rights to show their importance and relevance.<sup>303</sup> The European Council welcomed this decision and the drafting of the EU Charter was set in action<sup>304</sup>, which was finalised on the 18<sup>th</sup> of December 2000 and with the ratification of the Treaty of Lisbon on the 1<sup>st</sup> of December 2009 the EU Charter took effect.

The fear during the drafting of the EU Charter was that it would preclude accession to the ECHR<sup>305</sup> or that the existence of the ECHR would lessen the importance of drafting the EU Charter.<sup>306</sup> According to the European Commission, the drafting of the EU Charter will not diminish the interest in joining the ECHR, as accession would only effectively establish an external supervision at Union level, nor would accession to the ECHR lessen the importance of drafting the EU Charter.<sup>307</sup> The Secretariat expressed in a preparatory document that the ECHR should be considered as a minimum standard, e.g. the EU Charter “cannot take a step backwards in relation to the Convention as interpreted by the European Court of Human Rights.”<sup>308</sup>, it would thus be useful to incorporate a clause that establishes that the Charter does not restrict the protection that is offered by the ECHR and other instruments.<sup>309</sup> This led to the creation of

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<sup>301</sup> Bernadette A. Meyler, ‘The Limits of Group Rights: Religious Institutions and Religious Minorities in International Law’ 22 St. John's Journal of Legal Commentary, p. 546

<sup>302</sup> Joel Silver 2011, p. 692

<sup>303</sup> Cologne European Council Presidency Conclusions and Annexes of 3-4 June 1999 [1999], Annex IV

<sup>304</sup> European Parliament Resolution B5-0110/1999 of 16 September 1999 on the establishment of the Charter of Fundamental Rights [1999] OJ C 54/93; European Parliament resolution A5-0064/2000 of 16 March 2000 on the drafting of a European Union Charter of Fundamental Rights (C5-0058/1999 – 1999/2064(COS)) [2000] OJ C 377/329

<sup>305</sup> Secretariat of the European Council, ‘Draft Charter of Fundamental Rights of the European Union: Horizontal questions’ [2000] Charte 4111/00 Body 3 (note), para 15

<sup>306</sup> Commission Communication of 13 September 2000 on the Charter of Fundamental Rights of the European Union [2000] COM(2000) 559 final, para 14D

<sup>307</sup> *Id.*

<sup>308</sup> Secretariat of the European Council, ‘Draft Charter of Fundamental Rights of the European Union: Horizontal questions’ [2000] Charte 4111/00 Body 3 (note), para 16

<sup>309</sup> Secretariat of the European Council, ‘Draft Charter of Fundamental Rights of the European Union: Horizontal questions’ [2000] Charte 4111/00 Body 3 (note), para 18; Paul Lemmens, ‘The Relation between the



article 53, which states that nothing in the EU Charter shall be interpreted as restricting human rights and fundamental freedoms as recognised by Union law and international law.

Contrary to the ECHR, which sums up specific for rights in each article<sup>310</sup>, the EU Charter contains a general limitation clause, article 52(1), which sets out the requirements that every limitation on the exercise of freedoms and rights recognize in the EU Charter must satisfy in order to comply with EU law.<sup>311</sup> The wording of article 52(1) is largely inspired by case-law of the ECJ on the protection of fundamental rights, which in turn was based on case-law of the ECtHR.<sup>312</sup> According to article 52(1), freedom of religion may only be limited when the limitation is: i) provided for by law, ii) respect the essence of those rights and freedoms, and iii) is proportionate.<sup>313</sup> In addition article 52(3) states that freedom or rights mentioned in the EU Charter that correspond with rights that are guaranteed by the ECHR, shall have the same meaning and scope as laid down in the ECHR, but this does not prevent EU law to provide a more extensive protection. Article 52(3) thereby ensures a necessary consistency between the EU Charter and the ECHR<sup>314</sup>, without affecting the autonomy of EU law and that of the ECJ.<sup>315</sup> As a result the rights or freedoms that correspond to the ECHR are said to be subject to the specific limitations set by the ECHR.<sup>316</sup> The explanations relating to the EU Charter provide a list that sums up the rights that correspond with right guaranteed by the ECHR.<sup>317</sup>

Freedom of religion according to the EU Charter can be found in article 10(1), and has the exact same wordings as article 9 ECHR. According to article 10(1):

“Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and

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Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects’ (2001) 8 Maastricht Journal of European and Comparative Law, p. 50

<sup>310</sup> Thomas von Danwitz & Katherina Paraschas, ‘A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights’ (2012) 35 Fordham International Law Journal, p. 1414

<sup>311</sup> Koen Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 European Constitutional Law Review, p. 388

<sup>312</sup> *Id.*; Case C-44/94 *R. v. Minister of Agriculture, Fisheries and Food, Ex Parte Fishermen’s Organizations and Others* [1995] ECR I-3115, para 55; Case C-292/97 *Kjell Karlsson and Others* [2000] ECR I-2737, para 45

<sup>313</sup> Which means that limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

<sup>314</sup> Praesidium, ‘Draft Charter of Fundamental Rights of the European Union: Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50’ [2000] Charte 4473/00 Convent 49 (note), p. 84; Explanations Relating to the Charter of Fundamental Rights to the European Union [2007] OJ C 303/17, p. 33

<sup>315</sup> Koen Lenaerts 2012, p. 394

<sup>316</sup> Thomas von Danwitz & Katherina Paraschas 2012, p. 1414

<sup>317</sup> Explanations Relating to the Charter of Fundamental Rights to the European Union [2007] OJ C303/17

in public or in private, to manifest religion or belief, in worship, teaching, practice and observance”.

According to the explanations relating to the EU Charter, freedom of religion as mentioned in article 10(1) corresponds with freedom of religion as mentioned in article 9 ECHR and thus has the same scope and meaning.<sup>318</sup> Limitations on freedom of religion as mentioned in article 10(1) EU Charter should therefore, according to article 52(3), respect the requirements that article 9(2) states.<sup>319</sup> From case-law however follows that although fundamental rights recognized by the ECHR constitute as general principles of EU law<sup>320</sup> and article 52(3) provides that the rights mentioned in the EU Charter that correspond with rights that are guaranteed by the ECHR, shall have the same meaning and scope as laid down in the ECHR, the ECHR does not constitute a legal instrument which has been formally incorporated into EU law, as the European Union has not acceded to it yet.<sup>321</sup> The case-law of the ECtHR is thus strictly not binding<sup>322</sup> which, according to AG Wahl, results in the fact that “an examination of the validity of secondary EU law may be undertaken solely in the light of the fundamental rights guaranteed by the Charter.”<sup>323</sup> Nevertheless the case-law provided by the ECtHR can provide a source of inspiration for interpreting article 10 EU Charter, and as mentioned before the ECHR is considered to be the minimum standard, and must thus be taken into consideration when a limitation on freedom of religion is at play.<sup>324</sup> In the case of religious slaughter, the ECJ might even follow the level of protection provided for by the ECHR, because, as Gerhard van der Schyff underscores, the ECJ has a lack of experience in matters relating to freedom of religion.<sup>325</sup> As the ECHR is considered to be the minimum standard and the case-law provided

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<sup>318</sup> Explanations Relating to the Charter of Fundamental Rights to the European Union [2007] OJ C303/17, p. 21

<sup>319</sup> Praesidium, ‘Draft Charter of Fundamental Rights of the European Union: Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50’ [2000] CHARTE 4473/00 CONVENT 49 (note), p. 12

<sup>320</sup> This follows from article 6(3) of the Treaty of the European Union.

<sup>321</sup> Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson* [2013] ECLI:EU:C:2013:105, para 44; Case C-398/13 *P Inuit Tapiriit Kanatami and Other v. European Commission* [2015] ECLI:EU:C:2015:535, para 45; Case C-601/15 *PPU J. N. v. Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para 45; Case C-426/16 *Liga van Moskeeën & Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest* [2017] EU:C:2017:926, Opinion of AG Nils Wahl, para 47

<sup>322</sup> Stephen Brittain, ‘The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis’ (2015) 11 *European Constitutional Law Review*, p. 510

<sup>323</sup> Case C-426/16 *Liga van Moskeeën & Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest* [2017] EU:C:2017:926, Opinion of AG Nils Wahl, para 47

<sup>324</sup> *Id.* at para 48

<sup>325</sup> Gerhard van der Schyff 2014, p. 86

by the ECtHR serves as an inspiration for the EU Charter, the analysis in Chapter three will focus primarily on article 9 ECHR.

### 1.3 Conclusion

In this chapter the interpretation of slaughter and stunning requirements was explained, in particular the religious framework applicable to Jewish and Islamic slaughter and the legal framework applicable to stunned slaughter in Belgium, as well as freedom of religion as mentioned in International and European law.

Religious slaughter by Jewish and Muslim communities consists of several religious requirements that ensure that their meat is deemed kosher and halal, e.g. permissible to be eaten. One of these requirements is that an animal needs to be unstunned and alive at the time of slaughter. There are however some different opinions on stunning animals before or during slaughter amongst Jewish and Islamic faith. Some authors claim that Muslim law is not as strict with regard to the prohibition of stunning as Jewish law, as the position adopted by Islamic law is somewhat different from that of Jewish law.<sup>326</sup> Overall, people pertaining to Jewish religion are quite strict in not accepting stunning, because they believe that their method is superior, painless, and causes instantaneous insensibility while stunning can cause injuries or damage to carcasses, thus rendering the carcass unfit to eat for people of the Jewish faith. People pertaining to Islamic law seem to be a bit less strict regarding stunning. Some of the Muslim community accept stunning before or during slaughter. Halal slaughter does not require that meat may not be injured or damaged after slaughter, as oppose to kosher slaughter. The only requirement here that might prove problematic is the fact that halal slaughter requires the animal to be alive at the time of slaughter. This could lead to the conclusion that using a stunning technique that is reversible (e.g. the stunned animal can make a full recovery from the stunning if the slaughter does not occur) would fall within the requirements of halal slaughter, making stunned slaughter permissible. The views of the Jewish and Muslim communities on stunning in relation to the Flemish ban on unstunned slaughter will be mentioned in the next Chapter in relation to the Flemish ban on unstunned slaughter.

Regular slaughter in Belgium, on the other hand, requires that animals need to be stunned prior to slaughter to avoid unnecessary pain, which is articulated in Regulation

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<sup>326</sup> Caria M. Zoethout 2013, p. 657

1099/2009 and the Law of 14 August 1986 concerning the protection and the welfare of animals. This derives from article 13 TFEU that contains the notion that animals are sentient beings, resulting in the fact that Member States of the European Union need to take animal welfare into account when formulating and implementing their policies. Both Regulation 1099/2009 and the Law of 14 August 1986 however, contain a derogation from stunning in the case of religious slaughter. According to article 4(4) of Regulation 1099/2009, animals do not have to be stunned prior to slaughter when it concerns religious slaughter, as long as the slaughtering takes place in a slaughterhouse. The fact that religious slaughter has to take place in a slaughterhouse was found problematic by Muslim communities when temporary slaughterfloors were banned, and a case was filed claiming that their freedom of religion was being violated. According to the ECJ however, article 4(4) of Regulation 1099/2009 did not provide a violation of freedom of religion mentioned in article 9 ECHR and article 10 EU Charter. The derogation from stunning in article 16(1) of the Law of 14 August 1986 uses the same wordings as article 4(4) of Regulation 1099/2009. This derogation from stunning in article 16(1) has however been lifted by the Flemish ban on unstunned slaughter, which be explained in detail in the next Chapter. One of the main reasons for introducing the Flemish ban on unstunned slaughter was that animals who were slaughtered unstunned had to suffer more than animals who were stunned due to a number of reasons. In short: properly restraining the animal to be slaughtered unstunned causes the animal a great deal of extra stress. The neck cut proves painful due to the number of pain receptors in the neck and cuts are not always successful the first time. They sometimes require two or three more cuts to be made, causing more stress and pain. Furthermore, the way animals are restrained can cause blood to run in to their trachea, making them aspirate blood and causes the sensation of being suffocated. Moreover, it takes more time for unstunned animals to get unconscious, which lets them suffer on longer than is necessary.

The Flemish ban on unstunned slaughter thus puts a limitation on religious slaughter, to limit the amount of suffering of animals. According to the case of *Cha'are Shalom Ve Tsedek v. France*, religious slaughter falls under the notion freedom of religion as stated in article 9 ECHR. Furthermore, freedom of religion is also prescribed in article 10 EU Charter and according to article 52(3) EU Charter, freedom of religion as prescribed in article 10 EU Charter has the same scope and meaning as freedom of religion in article 9 ECHR. The ECHR is considered as providing the minimum standard for the EU Charter and the case-law of the ECtHR must be seen as a source of inspiration for the EU Charter. In light of this, the analysis

in Chapter three will focus solely on article 9 ECHR. In the next Chapter the Flemish ban on unstunned slaughter will be analysed in more detail.

## Chapter two

The Belgian Flemish and Walloon region recently introduced a ban on unstunned religious slaughter in the respective regions. It is still unclear whether this ban is compatible with constitutional and European law. In addition, there are concerns that the ban on religious slaughter might collide with the right to religion, as mentioned in article 9(1) of the ECHR. In order to get a better understanding of the ban that is introduced, this chapter give an overview of the substantive obligations of the ban supplemented with an overview of its parliamentary preparations and its aftermath. This Chapter will in particular focus on the ban in the Flemish region. The ban proposed by the Walloon region is based on the Flemish ban, hence the conclusions drawn from this chapter might also apply to the Walloon ban.

### 2.1 Parliamentary preparations for the Flemish ban of unstunned slaughter

### 2.2 Ban on unstunned slaughter

#### 2.2.1 Substantive obligations

The proposal of decree for the Flemish ban on unstunned slaughter<sup>327</sup> was submitted on the 26<sup>th</sup> of June 2017 by Ben Weyts, the Flemish Animal Welfare Minister.<sup>328</sup> This decree aimed at altering the Law of 14 August 1986 concerning the protection and the welfare of animals. According to article 3 of the decree, the stunning methods that are applied to religious slaughter, must be reversible and may not result in the death of the animal. Stunning by means of electric current is the present stunning technique that is in line with this requirement. It has currently only been perfected in the case of small ruminant and poultry. As a result, stunning with electric stunning is currently only obligatory for small ruminants and poultry.<sup>329</sup> Meanwhile, post-cut stunning is made obligatory for calves and cattle, until electro-narcosis is sufficiently developed for them as well.<sup>330</sup> In addition to article 3, other alterations concerning the protection and welfare of animals have been made as well.<sup>331</sup> On the 28<sup>th</sup> of June 2017, the

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<sup>327</sup> Decree 1213 No. 1 of 26 June 2017 on the alteration of the Law of 14 August 1986 concerning the protection and the welfare of animals, as regards to the authorized methods for the slaughtering of animals [2017] <<http://docs.vlaamsparlement.be/pfile?id=1281031>> accessed 29 March 2018

<sup>328</sup> The Flemish Animal Welfare Minister of Mobility, Public Works, Flemish Periphery, Tourism and Animal Welfare.

<sup>329</sup> Decree 1213 No. 1, art. 3

<sup>330</sup> *Id.* at art. 5

<sup>331</sup> The definitions of slaughter and killing were altered accordingly to fit similar definitions in Regulation 1099/2009, and a definition of stunning was added in line with article 2(f) Regulation 1099/2009. Animals now

proposal of decree was adopted in a fast-track procedure, where 88 of the 89 members of parliament present in the plenary meeting, voted in favour of banning unstunned (religious) slaughter. The decree was ratified and promulgated on the 7<sup>th</sup> of July 2017<sup>332</sup>, and was published in the Belgian Official Gazette on the 18<sup>th</sup> of July 2017, it will come into effect on the 1<sup>st</sup> of January 2019.<sup>333</sup>

Prior to the Flemish ban on unstunned slaughter, two other proposals of decree with similar objectives were submitted and rejected. On the 6<sup>th</sup> of October 2014 the first proposal of decree<sup>334</sup> was submitted. The intention was to improve the whole slaughter process. It contained an unambiguous prohibition of unstunned slaughter<sup>335</sup>, hence the main aim was to lift article 16(1) of the law of 14 August 1986 concerning the protection and welfare of animals. Furthermore, the ban contained improvement points based on existing scientific knowledge and aimed to increase an understanding of the situation in Flanders. The ultimate goal was to achieve a life without suffering for animals awaiting slaughter, ultimately resulting in death with suffering and obtaining more transparency.<sup>336</sup>

On the 8<sup>th</sup> of May 2015 the second proposal of decree was submitted.<sup>337</sup> Its intention was the same as the decree of 6 October 2014, namely: introducing a ban on unstunned religious slaughter, based on the fact that animals should not unnecessarily suffer<sup>338</sup> and thereby lifting article 16(1)(2) of the law of 14 August 1986 concerning the protection and welfare of animals<sup>339</sup> as well. In addition, the decree also aimed to lift article 16(2)(2) of the law of 14

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always need to be slaughtered according to the fastest and most selective way, while it used to be a requirement that was only applicable to animals killed without stunning based on the practice of hunting, fishing, another legal requirement or if the animals were killed under regulations for the control of harmful organisms. Decree 1213 No. 1 of 26 June 2017, *Supra* no. 327, art. 2 & 3; The Flemish government also took the opportunity to make general improvements to animal welfare during the slaughter process. Decree 1213 No. 1 of 26 June 2017, *Supra* no. 327, art. 4

<sup>332</sup> Decree 1213 No. 2 of 28 June 2017 on the alteration of the Law of 14 August 1986 concerning the protection and the welfare of animals, as regards to the authorized methods for the slaughtering of animals [2017]

<<http://docs.vlaamsparlement.be/pfile?id=1282140>> accessed 30 March 2018

<sup>333</sup> *Id.* art art. 6

<sup>334</sup> Decree 111 No. 1 of 6 October 2014 on the amendment of various provisions of the Law of 14 August 1986 concerning the protection and welfare of animals, in particular a painless way to die for animals to be slaughtered [2014] <<http://docs.vlaamsparlement.be/pfile?id=1168685>> accessed 27 March 2018

<sup>335</sup> Including unstunned religious slaughter

<sup>336</sup> *Id.* at p. 4

<sup>337</sup> Decree 351 No. 1 of 8 May 2015 on the amendment of the Law of 14 August 1986 concerning the protection and the welfare of animals, and the Law of 5 September 1952 concerning meat inspection and meat trade, with regards to the introduction of a prohibition on unstunned ritual slaughter [2015]

<<http://docs.vlaamsparlement.be/pfile?id=1097621>> accessed 27 March 2018

<sup>338</sup> *Id.* at p. 2

<sup>339</sup> Article 16(1)(2): “The provisions of Chapter VI of this Law, except article 16, § 2, second paragraph, are not applicable to slaughter prescribed by religion.”

August 1986 concerning the protection and welfare of animals<sup>340</sup>, and article 24 of the Law of 5 September 1952 concerning meat inspection and meat trade.<sup>341</sup> These two proposals of decree were addressed simultaneously during a plenary meeting on the 11<sup>th</sup> of May 2016 by the Committee for the Environment, Nature, Spatial Planning, Energy and Animal Welfare. On the 25<sup>th</sup> of May 2016, the advice of the Council of State was requested on both proposals of decree, which was given on the 29<sup>th</sup> of June 2016.

The advice of the Council of State's main objective was to determine whether the provisions contained in the proposals were compatible with religious freedom. Its first action was to check the proposals compatibility with Regulation 1099/2009. According to the first paragraph of article 26(2) of Regulation 1099/2009, Member States

“may adopt national rules aimed at ensuring more extensive protection of animals at the time of killing than those contained in this Regulation, in relation to the following fields: [amongst other things] the slaughter, and related activities, of animals in accordance with Article 4(4)”.

In addition, paragraph two of article 26(2) states that Member States need to inform the European Commission of these national regulations. Based on the above, the Council of State concludes that the Member States are authorized to adopt national regulations to ensure a more extensive protection of animals at the time of religious slaughter, if these national regulations are brought to the attention of the European Commission.<sup>342</sup> Then the Council of State turned to the main question: are the provisions contained in the proposals compatible with freedom of religion? The Council of State immediately came to the conclusion that the two proposals interfere with freedom to religion, if ones religion requires animals to be slaughtered unstunned.<sup>343</sup> In their reasoning they referred to an advice<sup>344</sup> they gave in 2006 on a federal bill

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<sup>340</sup> Article 16(2)(2): “The King can decide that certain ways of slaughter prescribed by religion must be carried out in approved slaughterhouses or in establishments approved by the Minister to whose authority the animal welfare belongs after advice from the Federal Agency for the Safety of the Food Chain, by offerors whom are authorized to do so by the representatives of the religion.”

<sup>341</sup> Article 24(1): “...or if a legal or regulatory provision allows religious slaughter outside a slaughterhouse.”

<sup>342</sup> Decree 351 No. 2 of 29 June 2016 on the amendment of the Law of 14 August 1986 concerning the protection and the welfare of animals, and the Law of 5 September 1952 concerning meat inspection and meat trade, with regards to the introduction of a prohibition on unstunned ritual slaughter [2016], para 7 <<http://docs.vlaamsparlement.be/pfile?id=1195213>> accessed 28 March 2018; Decree 111 No. 2 of 29 June 2016 on the amendment of various provisions of the Law of 14 August 1986 concerning the protection and welfare of animals, in particular a painless way to die for animals to be slaughtered [2016], para 7 <<http://docs.vlaamsparlement.be/pfile?id=1195211>> accessed 28 March 2018

<sup>343</sup> *Id.* at para 8

<sup>344</sup> Advice of the Council of States 40.350/AV of 16 May 2006 on a bill of an amendment of the Law of 5 September 1952 concerning meat inspection and meat trade and of the Law of 14 August 1986 concerning the protection and welfare of animals, on ritual slaughter [...] [2006], p. 9



containing provisions with a comparable scope regarding the compatibility with religious freedom, which was based on the *Cha'are Shalom Ve Tsedek v. France* case, dealt with by ECtHR. According to the advice given in 2006, the possibility of having kosher or halal meat falls under freedom of religion, as guaranteed in article 9 ECHR. With the implementation of mandatory stunning prior to slaughter in the case of religious slaughter based on the promotion of animal welfare, religious freedom is impaired in a disproportionate way. The proposed measures would make it disproportionately difficult for some religious followers to purchase and consume meat that they consider to be in line with their religious rules, as the possibility of being able to purchase or consume kosher or halal slaughtered meat falls under the freedom of religion, it can be said that religious freedom is disproportionately impaired.<sup>345</sup> Based on the above and the fact that the case-law of the ECtHR has not been altered since, the Council of State does not find any reason to judge differently on the compatibility of the two proposals with freedom of religion.<sup>346</sup> The Council of State further elaborates this based on the following elements.

According to article 9(2) ECHR, freedom of religion can be susceptible to limitations when a measure is provided for by the law, that is to say that the measure is contained in an adequately accessible and precise regulation, that the measure pursues a legitimate aim, and that it is necessary in a democratic society. According to the Council of State, the two proposals of decree are “provided for by the law”, because the proposed decrees are sufficiently formulated.<sup>347</sup> Concerning the “pursuing of a legitimate aim” it can be concluded that they do pursue a legitimate aim, namely the protection of health, public order and morality.<sup>348</sup> As for the last requirement, “necessary in a democratic society”, the Council of State has already stated that the proposals of decree disproportionately compromise religious freedom, because the proposed measures make it disproportionately difficult for believers to purchase and consume meat in accordance with their religion.<sup>349</sup> The Council of State emphasises that freedom of religion is a fundamental right, while animal welfare is not.<sup>350</sup> Animal welfare can however form a limitation on freedom of religion, when the inference meets an urgent social need, which is present when there are pertinent and sufficient reasons for the interference, and when there

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<sup>345</sup> Decree 351 No. 2, para 8; Decree 111 No. 2, para 8

<sup>346</sup> *Id.* at para 9

<sup>347</sup> *Id.* at para 12

<sup>348</sup> *Id.* at para 13

<sup>349</sup> *Id.* at para 14

<sup>350</sup> *Id.* at para 15

is a reasonable connection with proportionality between the legitimate aim pursued and the restriction of freedom of religion.<sup>351</sup> The Council of state thus advises the legislator to issue a proposal of decree that is balanced and respects both freedom of religion and animal welfare.<sup>352</sup> They emphasise that there are other alternative measures that would benefit animal welfare, that would not form a ban on unstunned slaughter and thus could be a permissible limitation on freedom of religion. These alternative measures can best be elaborated in a dialogue with the involved religious communities, requiring an openness for alternatives from both sides.<sup>353</sup> It will eventually be up to the proposer of the decree to determine the balance between respect for freedom of religion and the strive to reduce animal suffering, while taking into account the constitutional protection as well as treaty protection of fundamental rights.<sup>354</sup> After receiving the advice the Committee for the Environment, Nature, Spatial Planning, Energy and Animal Welfare rejected both proposals of decree on the 26th of October 2016.<sup>355</sup>

Based on the Council of State's advice, an independent intermediary, Piet Vanthemsche, was appointed on the 7th of July 2016<sup>356</sup> to start a dialogue with the involved parties, to better animal welfare significantly during religious slaughter and with the view on the transition to a general ban on unstunned slaughter.<sup>357</sup> Based on, among other things, this dialogue he filed his report in March 2017. This report formed the basis for the Flemish ban on unstunned slaughter, as many of its findings and its recommendations have been used in the ban. According to his report, the independent intermediary should correctly interpret the problems and techniques of unstunned slaughter, identify resistances and sensitivities and offer suggestions for solutions.<sup>358</sup> In order to do so he held discussions with several groups, among others: the Jewish and Islamic

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<sup>351</sup> *Id.* at para 14

<sup>352</sup> *Id.* at para 16

<sup>353</sup> *Id.* at para 17

<sup>354</sup> *Id.* at para 17

<sup>355</sup> Decree 111 No. 6 of 10 November 2016 on the amendment of various provisions of the Law of 14 August 1986 concerning the protection and welfare of animals, in particular a painless way to die for animals to be slaughtered, and on the amendment of the Law of 14 August 1986 concerning the protection and the welfare of animals, and the Law of 5 September 1952 concerning meat inspection and meat trade, with regards to the introduction of a prohibition on unstunned ritual slaughter [2016], p. 12 <<http://docs.vlaamsparlement.be/pfile?id=1218079>> accessed 28 March 2018

<sup>356</sup> Piet Vanthemsche was appointed by Ben Weyts, the Flemish Minister of Mobility, Public Works, 'Vlaamse Rand', Tourism and Animal Welfare.

<sup>357</sup> Piet Vanthemsche, *Rapport over de dialoog met de geloofsgemeenschappen met het oog op een significante verbetering van het dierenwelzijn bij de praktijk van ritueel slachten en de overgang naar een algemeen verbod op onbedwelmd slachten* (Flemish Parliament: 2017), p. 4 <<https://www.lne.be/sites/default/files/atoms/files/Rapport%20Ritueel%20slachten.pdf>> accessed 28 March 2018

<sup>358</sup> *Id.* at p. 4

religious groups, and an animal welfare Non-Governmental Organization (NGO), Global Action in the Interest of Animals (GAIA). The outcomes vary among the Muslim and Jewish communities. The Executive of the Muslims in Belgium states that slaughter-techniques may evolve and that they can't turn away from technological advancement, while referring to the techniques of reversible stunning and post-cut stunning. These techniques do have to guarantee the access to Halal food.<sup>359</sup> The Coordination Board of the Islamic Institutions of Belgium does not want to make concessions that deviate from the principle of unstunned slaughter, but they do want to work on initiatives that would better animal welfare during the remaining part of the slaughter process.<sup>360</sup> Muslink<sup>361</sup> does not rule out the possibility of stunned slaughter, but there needs to be more research performed on new stunning technique.<sup>362</sup> The Central Israelite Consistory of Belgium<sup>363</sup> also proposes that more research needs to be done on the effect of stunning. They take a similar stance as the The Coordination Board of the Islamic Institutions of Belgium, stating that the principle of unstunned slaughter needs to remain as is, but they do want to cooperate on creating other initiatives to improve animal welfare during slaughter.<sup>364</sup>

Based on, among other things, the conversations with the involved parties, the report concludes that a reversible, non-lethal anaesthesia (like electro-narcosis) is a proportional measure when performing religious slaughter, because it “respects the spirit of religious slaughter in the context of freedom of religion and takes into account animal welfare to the fullest”.<sup>365</sup> The independent intermediary states that these measures are acceptable for at least a part of the Muslim community (read the Executive of the Muslims in Belgium), although this would most certainly not be the case for the Jewish community.<sup>366</sup> It is not clear how the independent intermediary came to this conclusion as the conversations mentioned above indicate that the Jewish and Muslim communities both (currently) don't accept stunned slaughter.<sup>367</sup>

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<sup>359</sup> *Id.* at p. 7

<sup>360</sup> *Id.* at p. 8

<sup>361</sup> An association that consists of young Flemish people with a Muslim background.

<sup>362</sup> Piet Vanthemsche 2017, p. 9

<sup>363</sup> Representing the Jewish community.

<sup>364</sup> Piet Vanthemsche 2017, p. 10

<sup>365</sup> *Id.* at p. 57

<sup>366</sup> *Id.* at p. 58

<sup>367</sup> The Executive of the Muslims in Belgium regrets hearing that the report of the independent intermediary states that they accept the proposed measures of stunning. They claim that they send a note to the independent intermediary, in which they underlined that both the principles of the Islam regarding animal welfare and the necessity of unstunned slaughter needed to be preserved. Salah Echallaoui, Taher Tujgani & Coskun Beyazgül,

Concluding, the report recommends to make reversible, non-lethal anaesthesia obligatory for animals for which the method is sufficiently developed. Post-cut stunning<sup>368</sup> is recommended for animals (cows and calves) for whom reversible stunning methods are not yet fully developed, awaiting this development. These recommended forms of anaesthesia are not an unconditional prohibition, as was requested by the Council of State, and are in line with the possibility to impose additional measures to protect animal welfare during religious slaughter, as provided for by Regulation 1099/2009.<sup>369</sup>

### 2.2.2 Aftermath

The responses of the stakeholders were quite diverse. As expected, animal welfare organisation GAIA is very enthusiastic about the adopted decree.<sup>370</sup> The mood among religious groups is less euphoric. The Muslim and Jewish religious groups are unhappy to say the least, about the prohibition of unstunned slaughter and argue that the decree is a violation of religious freedom.<sup>371</sup> The decree makes it almost impossible for the adherents of the Jewish and Islamic faith to eat kosher or halal, which damages one of the most essential food regulations of their faiths: the requirement that animals must be slaughtered ritually (halal or kosher) for them to be able to consume meat.<sup>372</sup>

A total of five appeals have since been submitted to the Belgian Constitutional Court.<sup>373</sup> These complaints focus on the prohibition of unstunned slaughter in Flanders and more specifically demand that the decree of the Flemish region of 7 July 2017 amending the Law of 14 August 1986 on the protection and welfare of animals, as regards to the authorized methods

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‘Persbericht Brussel’ (*Moskee El Mouslimiene*, 29 March 2017) <<https://moskee-elmouslimiene.be/persbericht-brussel-29-maart-2017-emb/>> accessed 19 April 2018

<sup>368</sup> This stunning method accelerates the loss of consciousness of slaughtered animals significantly, hence providing a major gain on the field of animal welfare.

<sup>369</sup> *Id.* at p. 57, 58

<sup>370</sup> GAIA-chairman Michel Vandenbosch and GAIA director Ann de Greef responded with praise: “22 years fighting and today the time has finally come: the Flemish Parliament approves the parliamentary-supported decree that legally (albeit after a transitional period of one and a half years) ends the unnecessary and avoidable suffering of hundreds of thousands sheep and cattle, which are slaughter without stunning due to religious traditions. It is a historical event.” GAIA, “Historisch”: Vlaams Parlement stemt vandaag decreet verbod op onverdoofd ritueel slachten’ (*GAIA*, 28 June 2017) <<https://www.gaia.be/nl/nieuws/historisch-vlaams-parlement-stemt-vandaag-decreet-verbod-op-onverdoofd-ritueel-slachten>> accessed 30 March 2018

<sup>371</sup> Joods Actueel, ‘Beroep bij Grondwettelijk Hof tegen verbod op ritueel slachten’ *Joods Actueel* (Antwerp, 28 November 2017) <<http://joodsactueel.be/2017/11/28/44314/>> accessed 1 April 2018

<sup>372</sup> ‘Ook moslimorganisaties stappen naar Grondwettelijk Hof tegen verbod op onverdoofd slachten’ *De Morgen* (Asse, 30 November 2017) <<https://www.demorgen.be/binnenland/ook-moslimorganisaties-stappen-naar-grondwettelijk-hof-tegen-verbod-op-onverdoofd-slachten-bd1298fd/>> accessed 1 April 2018

<sup>373</sup> Belgian Official Gazette of 19 February 2018 an official message: Constitutional Court [2018] 2018/200867

for the slaughtering of animals, will be annulled.<sup>374</sup> The appeals were submitted by various parties, including among others: Union Mosques Antwerp, Islamic Sacrifice Festival Antwerp and the Coordination Committee of Jewish Organisations of Belgium. The submitted appeals have not yet been judged and are not scheduled yet, hence a decision is not yet available

## 2.3 Conclusion

In this chapter the parliamentary preparations for the ban of unstunned slaughter in the Flemish region were explained and the Flemish ban on unstunned slaughter was analysed.

In 2014 and 2015 two proposals of decree were submitted. The main aim of the decrees was to lift article 16(1) of the law of 14 August 1986 concerning the protection and welfare of animals. When the Council of State was asked to give an advice about both decrees, they advised the legislator to issue a proposal of decree that was more balanced and respected both freedom of religion and animal welfare, as the Council of State was of the opinion that the decrees disproportionately compromised religious freedom. Furthermore, the Council of State emphasized that new measures could best be elaborated in a dialogue with the involved religious communities. After receiving the advice both proposals were rejected.

Based on the Council of State's advice an independent intermediary was appointed to start a dialogue with the involved parties. The independent intermediary recommendations were to make reversible, non-lethal anaesthesia obligatory for animals for whom the method was sufficiently developed, while post-cut stunning was recommended for animals (cows and calves) for whom reversible stunning methods were not yet fully developed. Following the advice of the independent intermediary a new proposal of decree was submitted on the 26<sup>th</sup> of June 2017 on the alteration of the Law of 14 August 1986 concerning the protection and the welfare of animals, as regards to the authorized methods for the slaughtering of animals. The proposed decree amends several provisions of the law of 14 August 1986 concerning the protection and welfare of animals, but lifting the derogation from stunning in the case of religious slaughter was the main aim. The decree puts the independent intermediary's recommendations into practice by introducing mandatory stunning in all cases, through the use

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<sup>374</sup> Constitutional Court, Case number 6816 (attached matters: 6618, 6619, 6620 & 6621) of 17 January 2018 on the appeal to annul the Decree of the Flemish region of 7 July 2017 amending the Law of 14 August 1986 concerning the protection and the welfare of animals, as regards to the authorized methods for the slaughtering of animals [2018] <<http://www.const-court.be>> accessed 1 April 2018

of an electric current on small ruminants and poultry, and post-cut stunning on calves and cattle, thereby banning unstunned slaughter all together.

It can be questioned whether the report of the independent intermediary really was 'independent'. One could argue that the recommendation of the independent intermediary to ban unstunned slaughter, was foreseen from the start and the Jewish and Muslim communities could do very little to change this. In the introduction of the report it is indeed clearly mentioned that the consultations with the different stakeholders are being held with the view "on the transition to a general ban on unstunned slaughter". Is an open dialogue even possible, if the ultimate goal already favours one side of the stakeholders? Furthermore, based on the held consultations the independent intermediary concludes that the Muslim community was somewhat on board with the proposed measures, on the contrary, the Executive of the Muslims in Belgium says during a press release that they have never made such allegations and are not in favour of these new stunning techniques. It thus came as no surprise that not all parties were enthusiastic about the decree and a total of five appeals have since been submitted to the Constitutional Court in Belgium. These complaints focus on the prohibition of unstunned slaughter in Flanders and demand that the new decree will be annulled. The submitted complaints have not yet been judged, hence a decision is not yet available.

In the next chapter it will be researched whether the ban on unstunned slaughter imposes an infringement on the right to religion as mentioned in article 9 of the ECHR.

## Chapter three

The main question that comes to mind in relation to the decree of the Flemish region on banning unstunned slaughter, is whether the measures that the decree proposes constitute a legitimate limitation on freedom of religion. If the decree is found to be a legitimate limitation on freedom of religion, it could function as a guideline for other countries willing to follow in their footsteps. Belgium could show how a ban on religious slaughter can be filed without colliding with the right to religion, making it more attractive for other countries to do the same. Hence, in this chapter the compatibility of the Flemish ban on unstunned slaughter with freedom of religion will be examined. This research will in particular focus on the compatibility with the ECHR. As explained in Chapter one, freedom of religion mentioned in article 10 EU Charter has, according to article 52(3) EU Charter, the same meaning and scope as freedom of religion prescribed in article 9 ECHR. As the ECHR is seen as the minimum standard for the EU Charter and the case-law of the ECtHR is to be perceived as an inspiration when analysing limitations to rights mentioned in the EU Charter, the research done in this Chapter will limit itself to freedom of religion as mentioned in article 9 ECHR.

### 3.1 Research on the compatibility of the ban on unstunned slaughter

#### 3.1.1 The European Convention on Human Rights and the Charter of Fundamental Rights of the European Union

Before conducting the analysis of the compatibility of the Flemish ban on unstunned slaughter with article 9(1) ECHR, it is necessary to answer the question whether religious slaughter falls under the protection afforded by article 9(1) ECHR. The ECtHR requires that there has to be a specific relationship between religion and the expression thereof, as so many activities could be deemed to fall under this freedom.<sup>375</sup> According to the *Arrowsmith v. The United Kingdom* case, the term ‘practice’ in article 9 ECHR does not cover each act that is motivated or influenced by religion, therefore actions of individuals need to express the belief concerned otherwise they cannot be considered to be protected by article 9 ECHR.<sup>376</sup> In this regard the only case that has since dealt with religious slaughter is the *Cha’are Shalom Ve Tsedek v. France* case<sup>377</sup>, which was explained in detail in Chapter 1.2.1.1. According to the

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<sup>375</sup> Paul M. Taylor 2005, p. 211

<sup>376</sup> *Arrowsmith v. The United Kingdom* 1978, para 71

<sup>377</sup> *Cha’are Shalom Ve Tsedek vs France* 2000

Court's considerations religious slaughter falls within freedom of religion as mentioned by article 9(1) ECHR<sup>378</sup>, as

“it 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.”<sup>379</sup>

Now that it is clear that religious slaughter falls within the scope of religious freedom of article 9(1) ECHR, it needs to be established whether there is an interference (or limitation)<sup>380</sup> with said right. In the case of the Flemish ban on unstunned slaughter, it can be concluded that there is indeed an interference with freedom of religion. The Flemish ban on unstunned slaughter clearly impairs religious slaughter as it requires religious slaughter to be performed with stunning through either the use of an electric current or through the use of post-cut stunning, while halal and kosher slaughter requires that the animal needs to be alive and healthy at the time of slaughter, and thus does traditionally not allow for stunning. This results in the fact that the Jewish and Muslim communities cannot fully satisfy the requirements that their religion prescribes and as religious slaughter falls within the scope of religious freedom of article 9 ECHR, it can be concluded that there is an interference with religious freedom.

As the Flemish ban on unstunned slaughter forms a limitation on freedom of religion as stated in article 9(1) ECHR, it must be ascertained whether the limitation can be justified according to the three requirements that follow from article 9(2) ECHR, which have been explained in detail in Chapter 1.2.1.1. These three requirements are: the limitation needs to be prescribed by law, pursue a legitimate aim and must be necessary in a democratic society.

### **Prescribed by law**

Firstly, article 9(2) ECHR requires that the limitation must be prescribed by law, which means that the limitation must be based on national (Belgian) law that is sufficiently accessible and foreseeable.<sup>381</sup> This requirement is satisfied as the Flemish ban on unstunned slaughter is laid down in a decree (Belgian law), which is sufficiently accessible and foreseeable as the

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<sup>378</sup> *Id.* at para 74

<sup>379</sup> *Cha'are Shalom Ve Tsedek vs France* 2000, para 73

<sup>380</sup> ‘Interference’ and ‘limitation’ will be both be used alternately, depending on the structure of the sentence. They both have the same meaning in light of the performed analysis.

<sup>381</sup> *Hasan and Chaush v. Bulgaria* 2000, para 84; *Sunday Times v. The United Kingdom* 1979, para 49; *Silver and Others V. The United Kingdom* 1983, paras 87 & 88; *Olsson v. Sweden* 1988, para 61(a); *Rekvényi v. Hungary* 1999, para 34



Jewish and Muslim communities have access to the said decree and have been notified of its implications through the publication of the decree. Furthermore, they will be guided and supported by a designated person in the transition from the current situation towards the entry into force of the decree to make sure the transition runs smoothly.<sup>382</sup> The same conclusion can be deducted from advice given by the Council of State on a proposed decree with a similar objective.<sup>383</sup>

### **Pursue a legitimate aim**

The second requirement is that the limitation on freedom of religion needs to pursue one of the five legitimate aims mentioned in article 9(2) ECHR, namely: public safety, for the protection of the public order, health or morals, or for the protection of the rights and freedoms of others.

From the *Cha'are Shalom Ve Tsedek v. France* case follows that a limitation on religious slaughter can be seen as protecting the public order, because religious slaughter derogates “from principles that underpin the domestic and international legal rules” that are applicable to slaughter.<sup>384</sup> One of these core principles is that an animal should not unnecessarily suffer. Limiting religious slaughter by requiring that an animal should be stunned improves the animal’s welfare, as was explained in Chapter 1.1.3, thereby fulfilling this core principle.<sup>385</sup> Furthermore, as is also brought forward in the proposal of the Flemish decree, the public opinion nowadays attaches more importance to animal welfare.<sup>386</sup> This growing importance of animal welfare is recognized by the inclusion of the notion that animals are sentient being in article 13 TFEU. Over the years the notion of morality has changed considerably, for example it is now accepted that animals have consciousness.<sup>387</sup> This change of the notion of morality and the growing concern for animal welfare can provide leeway to assume that animal welfare and their wellbeing is currently being regarded as part of morality.<sup>388</sup> The main objective of the Flemish ban on unstunned slaughter is clearly based upon this improvement as it aims to

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<sup>382</sup> Decree 1213 No. 1, p. 17

<sup>383</sup> Decree 351 No. 2, para 12; Decree 111 No. 2, para 12

<sup>384</sup> *Cha'are Shalom Ve Tsedek vs France* 2000, paras 68 & 84

<sup>385</sup> Jan Willem Sap, Carla M. Zoethout & Gerhard van der Schyff 2017, p. 85; Council Regulation (EC) 1099/2009, art. 3

<sup>386</sup> Decree 1213 No. 1, para 1.1.1

<sup>387</sup> Tali H. Shaddow, ‘Religious Ritual Exemptions: Sacrificing Animal Rights for Ideology’ (1991) 24 *Loyola Los Angeles Law Review*, p. 1392; Carla M. Zoethout 2013, p. 668

<sup>388</sup> Jan Willem Sap, Carla M. Zoethout & Gerhard van der Schyff 2017, p. 60; Carla Zoethout, ‘Onverdoofd Ritueel Slachten’ (2011) 3 *Tijdschrift voor Religie, Recht en Beleid*, p. 4

improve animal welfare at the time of slaughter by requiring mandatory stunning. The Flemish ban can thus, as Carla M. Zoethout argues, be viewed as aiming to protect public morality as well. The Council of State came to a similar conclusion in their advice on a proposed decree with a similar objective, and stated that the ban on unstunned slaughter aims to protect both public order and public moral.<sup>389</sup>

Following this reasoning it can be concluded that the ban on unstunned slaughter is pursuing the protection of the public order as well as the public moral, through ensuring the highest standard of animal welfare by reducing the suffering of animals prior and during slaughter.

### **Necessary in a democratic society**

The last requirement is that the limitation on freedom of religion needs to be necessary in a democratic society, e.g. is there a pressing social need pursued, in a manner that is proportionate?

#### *Margin of Appreciation*

As was explained in Chapter One, the ECtHR grants states a certain ‘margin of appreciation’. This basically means that the ECtHR leaves room for States, that are a party to the ECHR, in determining the extent to which they want to limit rights mentioned in the ECHR.<sup>390</sup> In the case of limiting freedom of religion, it can be derived from the case-law of the ECtHR that a wide margin of appreciation is granted to Member States<sup>391</sup>, which implicates that states have a lot of freedom to establish the proportionality of a possible violation of freedom of religion. Whether a wide margin of appreciation can be granted to Belgium in the case of the Flemish ban on unstunned slaughter is contestable, as religious freedom that is being limited by the Flemish ban on unstunned slaughter differs from religious freedom that was present in the case-law of the ECtHR. The case-law of the ECtHR<sup>392</sup> concerned religious freedom that was being exercised in places owned by the government, hence these cases fell within the responsibility of the state. While religious freedom limited by the Flemish ban concerned religious slaughter, which is performed in slaughterhouses that are privately owned

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<sup>389</sup> Decree 351 No. 2, para 13; Decree 111 No. 2, para 13

<sup>390</sup> *Handyside v. the United Kingdom* 1976, para 48

<sup>391</sup> *Lautsi v. Italy* 2011, para 69; *Leyla Şahin v. Turkey* 2005, para 109

<sup>392</sup> In particular, the cases of *Lautsi v. Italy* and *Leyla Şahin v. Turkey*.

and do not belong to the Belgian government, which results in the fact that the regulation of freedom of religion in this particular case does not fall within the responsibility of the government.<sup>393</sup>

Furthermore, the *Cha'are Shalom Ve Tsedek v. France* case is particularly important to mention here, as this is the only case to date that has dealt with religious slaughter. In this case the state is, in line with other ECtHR case-law, afforded a wide margin of appreciation.<sup>394</sup> It could thus be assumed that in the case of the Flemish ban on unstunned slaughter, Belgium should be granted a wide margin of appreciation as well, giving the government a lot of room to limit the freedom of religion, or in this case religious slaughter. This assumption would however be faulty, as the situation in Flanders differs from the situation in France in several ways. Firstly, the Flemish ban on unstunned slaughter impacts the Jewish and Muslim communities as a whole, as oppose to the *Cha'are Shalom Ve Tsedek v. France* case where it concerned a small religious group that had torn off from the ACIP. In addition, in the *Cha'are Shalom Ve Tsedek v. France* case the religious group was not allowed to perform religious slaughter that would satisfy their religious requirements in particular, while in the case of Flanders religious slaughter can still be performed, under the condition that animals are stunned when being slaughtered. Being able to perform unstunned slaughter is “crucial to the individual's effective enjoyment”<sup>395</sup> of religious slaughter (religious freedom), as halal and kosher slaughter traditionally do not allow for an animal to be stunned, as was explained in Chapter One. As the Flemish ban on unstunned slaughter requires that religious slaughter may solely be performed with stunning, and performing unstunned slaughter is crucial to Jewish and Muslim communities to effectively enjoy freedom of religion, this might lead to a narrower margin of appreciation.<sup>396</sup>

Another factor that might lead to a narrower margin of appreciation is the existence of a Common European Standard, as was mentioned in Chapter One.<sup>397</sup> From article 4(4) of Regulation 1099/2009 follows that is common standard to make an exception to the obligation to stun animals before slaughter when it concerns religious slaughter, unless there are reasons

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<sup>393</sup> Gerhard van der Schyff, 2014, p. 95

<sup>394</sup> *Cha'are Shalom Ve Tsedek vs France* 2000, para 84

<sup>395</sup> *S. and Marper v. The United Kingdom* 2008, para 102

<sup>396</sup> *S. and Marper v. The United Kingdom* 2008, para 102; *Dickson v. The United Kingdom* 2007, para 78

<sup>397</sup> F.M.C Vlemminx 2013 82&83; *S. and Marper v. The United Kingdom* 2008, para 102; *Dickson v. The United Kingdom* 2007, para 78

to provide a more extensive protection to animals at the time of slaughter<sup>398</sup>, while according to article 4(1) stunning prior to slaughter is the norm. As the European Union consists of more than half of the members of the Council of Europe, and most of the Member States of the European Union do indeed have a derogation from stunning in the case of religious slaughter in place<sup>399</sup>, it can be concluded that a Common European Standard exists.<sup>400</sup>

Based on the fact that what is at stake is unstunned religious slaughter which is a crucial part of freedom of religion and the fact that an European Common Standard seems to be present, there is reason to grant Belgium a narrow margin of appreciation. This leaves less room for the Flemish legislator to determine whether a limitation on freedom of religion is proportionate, and entails that the ECtHR will provide a stricter judgement of a possible violation of religious freedom and its proportionality in meeting the so-called pressing social need.

### *Pressing social need*

The pressing social need entails that pertinent and sufficient reasons can be brought forward to justify the limitation on freedom of religion.

In our current society animal welfare is of great importance and is, as has been stated above, said to be part of today's established morality. Animal welfare was the main reason for introducing a ban on unstunned slaughter and, as was explained above, the limitation provided by the ban on unstunned slaughter aims at protecting the public order and public moral through ensuring the highest standard of animal welfare by reducing the suffering of animals prior and during slaughter. Several other countries have acknowledged the importance of animal welfare, for example Germany has given animal welfare a place in its national constitution, by adding an animal protection clause.<sup>401</sup> Furthermore, animal welfare has been defined as a legitimate aim in the eye of public interest in a number of cases.<sup>402</sup> According to the case of 19 June 2008 by the ECJ, its importance has particularly been expressed with the adoption of Protocol No. 33 on the protection of animals by the Member States, which is annexed to the Treaty

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<sup>398</sup> Council Regulation 1099/2009, art. 26(1) & 26(2)(c)

<sup>399</sup> Rossella Bottoni and Silvio Ferrari 2010, p. 2

<sup>400</sup> Gerhard van der Schyff 2015, p. 64; Gerhard van der Schyff 2014, p. 95

<sup>401</sup> Basic Law of the Federal Republic of Germany of 23 May 1949 [1949] Federal Law Gazette Part III 100-1, art. 20(a) <<https://www.btg-bestellservice.de/pdf/80201000.pdf>> accessed 14 June 2018; Gerhard van der Schyff 2015, p. 63; Gerhard van der Schyff 2014, p. 98

<sup>402</sup> *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat* 2008, para 27; *Herbert Schaible v Land Baden-Württemberg* 2013, para 35; *Viamex Agrar Handels GmbH and Zuchtvieh-Kontor GmbH (ZVK) v Hauptzollamt Hamburg-Jonas* 2008, para 22

establishing the European Community and whose content is largely translated into article 13 TFEU.<sup>403</sup> In addition, the Constitutional Court has used similar wordings in two other cases<sup>404</sup>, confirming that animal welfare is indeed a legitimate aim in the eye of public interest.<sup>405</sup> Based on the foregoing, it can be concluded that a pressing social need is indeed present, namely animal welfare.

### *Proportionality*

The ‘pressing social need’ needs to be of proportionate nature, which means that there must be a reasonable relationship between the importance of the objective pursued and the severity of the restriction on the fundamental right. The first question that comes to mind is whether animal welfare even benefits from a ban on unstunned slaughter in Flanders. A ban on unstunned slaughter does not mean that the consumption of unstunned slaughtered meat is no longer permitted, but as religious communities can no longer slaughter their own animals accordingly, this will probably result in a higher import of unstunned slaughtered meat from other countries. It could very well be the case that unstunned religious slaughter in these countries is performed in even worse circumstances, thereby just shifting the problem towards another country. This can however not form a legitimate reason for not introducing a ban on unstunned slaughter, or as Charline de Coster puts it: “the lack of jurisdiction abroad cannot form an excuse to not conduct policies in their own country.”<sup>406</sup> This would only work counterproductive and would lead to no improvement at all in terms of animal welfare, while animal welfare is deemed important as followed from the reasoning above. Furthermore, as follows from Chapter 1.1.3.3 animals suffer more when slaughtered without stunning. Properly restraining the animal to be slaughtered unstunned causes the animal a great deal of extra stress. The neck cut that follows proves painful due to the number of pain receptors in the neck, that are not numbed due to the animal being slaughtered unstunned. These cuts are not always successful the first time and sometimes require two or three more cuts to be made, causing more

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<sup>403</sup> *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat* 2008, para 27

<sup>404</sup> Constitutional Court, the annulment of the decree of the Walloon Region of 22 January 2015 amending the law of 14 August 1986 concerning the protection and welfare of animals in order to prohibit the possession of animals exclusively or mainly for the production of fur (2016) No. 134/2016, paras A5.7 & B21; Constitutional Court, the appeal to annul articles 2 and 4 of the law of 7 February 2014 on various provisions concerning animal welfare, international trade in endangered species of wild fauna and flora and animal health (abolition of the 7° of article 3bis, § 2, of the law of 14 August 1986 concerning the protection and welfare of animals and the insertion of an article 6bis in that law) (2015) No. 66/2015, para B8

<sup>405</sup> Decree 351 No. 2; Decree 111 No. 2; The Constitutional Court emphasised that animal welfare is not limited to the framework of free trade as was suggested by the Advices of the Council of State.

<sup>406</sup> Charline de Coster 2017, p. 1570

stress and pain. Furthermore, the way animals are restrained can cause blood to run in to their trachea, making them aspirate blood and causes the sensation of being suffocated. Moreover, it takes more time for unstunned animals to get unconscious, which lets them suffer on longer than is necessary. In light of the above it can be concluded that animal welfare would benefit from a ban on unstunned slaughter.

Another point of interest may be whether freedom of religion is disproportionately limited. The aim for a balance between the protection of animal welfare and freedom of religion is clearly an important aspect of the ban on unstunned slaughter. Firstly, the Flemish legislator took the Council of State's advice and appointed an independent intermediary who would conduct dialogues with the stakeholders to address alternatives to a ban on unstunned slaughter. Although it can be questioned whether these dialogues were indeed 'independent' as the transition to a ban on unstunned slaughter was the aim from the start, it does point to goodwill to involve the Jewish and Muslim communities. Secondly, in order to be in accordance with religious requirements for slaughter certain stunning methods were proposed, namely an electric current on small ruminants and poultry, and post-cut stunning on calves and cattle. According to halal and kosher requirements, it is important that the animal dies due to a cut to the neck, resulting in the drainage of blood of the animal. Through stunning the animal with an electric current prior to slaughter, the animal will be unconscious during slaughter, making sure the animal does not endure any pain, but if the animal does not get slaughtered it will just wake up from the anaesthesia unharmed. This is in accordance with the requirement provided by halal and kosher slaughter that an animal may only die due to the cut to the neck. Furthermore, the post-cut stunning for calves and cattle provides that an animal gets killed by a cut to the neck, and while the animal starts to bleed out it gets stunned, making sure the animal does not have to suffer unnecessarily when bleeding out. As the stunning takes place after the neck cut, it is clear that the animal dies due to the cut and not due to the stunning, which is in accordance with the kosher and halal requirements as well. Thirdly, as was mentioned above, a ban on unstunned slaughter does not entail a ban on the consumption of unstunned slaughtered meat. As explained by the ECtHR in the *Cha'are Shalom Ve Tsedek v. France* case, the consumption of religiously slaughtered animals is more important than the actual partaking in religious slaughter itself.<sup>407</sup> The Jewish and Muslim communities can still import unstunned slaughtered meat to conform to the halal or kosher requirements, although this might be viewed as difficult for some religious

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<sup>407</sup> *Cha'are Shalom Ve Tsedek vs France* 2000, paras 82 & 83

followers as was brought forward by the Council of State in 2016, it is not impossible.<sup>408</sup> For the Jewish and Muslim community that find it too hard to come by unstunned slaughtered meat, there is always the option to consume religious slaughtered meat that has been stunned prior to slaughter or after the neck cut has been made, in accordance with the ban on unstunned slaughter.

### *Alternative measures*

As a result of the fact that a narrow margin of appreciation is given to Flanders in the case of the Flemish ban on unstunned slaughter, it is important to analyse whether there are less restrictive alternative measures. This requires that the state considers less restrictive interferences in achieving a legitimate aim, provided that such alternatives are reasonable.<sup>409</sup>

An alternative measure would for example be to demand that animals that suffer more greatly when slaughtered without stunning are indeed stunned when slaughtered, while animals that don't seem to suffer more when they are slaughtered without stunning will remain unstunned when performing the slaughter.<sup>410</sup> This would provide a less far-reaching limitation on freedom of religion, while still improving animal welfare. Although this could provide a good alternative, it would be quite difficult to examine which animals suffer less or more during slaughter, because this depends on a number of factors that vary per situation: the handling of animals before and during slaughter, the quality of the performed cut e.g.<sup>411</sup> Furthermore, animal welfare would benefit less from a 'less far-reaching limitation'. Moreover, it can be said that the Flemish ban on unstunned slaughter is already a reasonable measure, as the ban puts a great emphasis on providing measures that are acceptable to both animal welfare and freedom of religion. The Flemish legislator chose to use stunning methods that could be compatible with halal and kosher requirements, namely electro narcosis and post-cut stunning. The ban clearly aims at finding the perfect balance between freedom of religion and animal welfare. As a ban on unstunned slaughter is reasonable in terms of achieving greater animal welfare during slaughter and an alternative measure would not achieve the same goal, it can be concluded that the limitation that is used is the least far-reaching limitation to achieve the goal and there is no alternative measure that would interfere less with freedom of religion. Concluding it can be said

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<sup>408</sup> Decree 351 No. 2, para 14; Decree 111 No. 2, para 14

<sup>409</sup> Gerhard van der Schyff 2014, p. 97

<sup>410</sup> Gerhard van der Schyff 2015, p. 66

<sup>411</sup> Aize Kijlstra & Bert Lambooi 2008, p. 26

that based on the above, it seems reasonable to conclude that there is indeed a reasonable relationship between the importance of animal welfare and the severity of the restriction on freedom of religion. The Flemish ban on unstunned slaughter does not affect freedom of religion of the Jewish and Muslim communities in such an extent that it must be considered as disproportionate, while animal welfare does improve significantly, hence the ban on unstunned slaughter complies with the last requirement of ‘proportionality’.

Based on the above it can be concluded that all three requirements of article 9(2) ECHR are satisfied and that the Flemish ban on unstunned slaughter thus provides a legitimate limitation on freedom of religion, e.g. the Flemish ban is compatible with freedom of religion as mentioned in article 9 ECHR.

### **3.2 Conclusion**

In this chapter the compatibility of the Flemish ban on unstunned slaughter with freedom of religion, as mentioned in article 9 ECHR, was analysed. The aim of the Flemish ban was to make sure that slaughter could only be performed on a stunned animal, thereby lifting the derogation from stunning in the case of religious slaughter as prescribed in article 16(1) of the Law of 14 August 1985.

As was explained in Chapter 1.2.2.1, freedom of religion mentioned in article 10(1) EU Charter has the same meaning and scope as article 9(1) ECHR. Consequently, the compatibility of the Flemish ban on unstunned slaughter with freedom of religion as stated in article 9 ECHR was analysed as oppose to the compatibility with article 10 of the EU Charter. From this analysis, based on the three requirements stated in article 9(2) ECHR, follows that the Flemish ban on unstunned slaughter provides a legitimate limitation on freedom of religion as mentioned in article 9(1) ECHR.

Firstly, the limitation had to be prescribed by law, which means that it had to be sufficiently accessible and foreseeable, which was the case as the limitation is formulated in a decree. Secondly, the limitation needed to pursue one of the legitimate aims mentioned in article 9(2) ECHR. From the *Cha'are Shalom Ve Tsedek v. France* case follows that a limitation on religious slaughter can be deemed to aim at protecting the public order. Moreover, the ban aims at improving animal welfare, which is of great importance to the current society now that the welfare of animals falls within our notion of morality, as was explained above. The limitation placed on freedom of religion does thus also aim at protecting the public moral, e.g. improving



animal welfare by banning unstunned slaughter protects both the public moral and the public order. The last requirement is that the limitation needed to be necessary in a democratic society, in other words: was there a pressing social need pursued in a manner that was proportionate?

The margin of appreciation that states get is of importance too here as it determines how much room Member States get to limit freedoms as mentioned in the ECHR, this was explained in more detail in Chapter 1.2.1.1. In this case Flanders was given a narrow margin of appreciation, which means that the Flemish legislator was granted less room to determine whether a limitation on freedom of religion is proportionate, and entails that the ECtHR would provide a stricter judgement of a possible violation of religious freedom and its proportionality in meeting the so-called pressing social need.

The pressing social need in this case is animal welfare. It has been defined as a legitimate aim in the eye of the public interest in a number of cases, for example the arrest of 19 June 2008 where it was stated that: “[...] that the protection of animal welfare is a legitimate objective in the public interest, the importance of which was reflected, in particular, in the adoption by the Member States of the Protocol on the protection and welfare of animals, annexed to the Treaty establishing the European Community [...]”<sup>412</sup>. Furthermore, this ‘pressing social need’ needed to be proportionate, e.g. there must be reasonable relationship between the importance of the objective pursued and the severity of the restriction on the fundamental right. Several justifications for the severity of the limitation were given, but the most important one (in light of the objective pursued) was the fact that animal welfare benefits from the ban. Unstunned slaughter provides an animal with more pain than necessary, as for example it can lead to blood running into the trachea and causing the animal to feel as if it is being suffocated in addition to the pain it feels due to the neck cut being made while the animal was conscious. As Flanders is granted a narrow margin of appreciation, it was also important to examine whether the proposed limitation is the least far-reaching measure, e.g. there are no other reasonable measures that could be used to achieve the same objective. Animal welfare would benefit less from alternative measures and it can be argued that the limitation is already reasonable. The ban on unstunned slaughter puts great emphasis on providing an acceptable balance between freedom of religion and animal welfare, by for example putting in place special stunning techniques specifically tailored to fit the halal and kosher requirements. As the Flemish ban on unstunned slaughter

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<sup>412</sup> *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat* 2008, para 27

satisfies all three requirements of article 9(2) ECHR, it can be concluded that the Flemish ban on unstunned slaughter is a legitimate limitation on freedom of religion and is thus compatible with article 9(1) ECHR.

As the Flemish ban on unstunned slaughter has not yet been reviewed by the ECtHR, it remains to be seen whether the Court will follow the same line of enquiry when the Flemish ban on unstunned slaughter is brought before the Court to be reviewed. It will certainly be interesting to see whether the religious communities will conform to the Flemish ban on unstunned slaughter, or whether illegal slaughter at home will rise again and if there will be an increase in unstunned religious slaughter in Brussel, as this remains the only region where it is still legal to slaughter unstunned (for now).

In the following chapter the analysis of this thesis will be provided alongside recommendations for the future.

## Chapter four

The main aim of the research performed in this thesis was done to answer the question: ‘Is the Flemish ban on unstunned slaughter compatible with freedom of religion as mentioned in article 9 of the European Convention on Human Rights and article 10 of the Charter of Fundamental Rights of the European Union?’.

In 2017 the Flemish ban on unstunned slaughter got ratified. Although it will enter into force on the 1<sup>st</sup> of January 2019, it has already been subject to some grave objections. It was loudly applauded by animal rights activists, while the Jewish and Muslim communities expressed their concerns. The main aim of the Flemish ban is to ban the exemption on stunning for religious slaughter, thereby requiring that all forms of slaughter are performed with stunning either prior to slaughter or post-cut. The religious communities argue this new requirement is incompatible with freedom of religion, as mentioned in article 9 of the ECHR, which led to the research performed in this thesis. From the analysis in Chapter Three follows that the Flemish ban on unstunned slaughter is a legitimate limitation on freedom of religion and is thus compatible with freedom of religion of article 9 ECHR, based on the fulfilment of the requirements in article 9(2) ECHR.

As was explained in Chapter 1.2.2.1 freedom of religion mentioned in article 10(1) EU Charter has the same meaning and scope as article 9(1) ECHR, moreover, the case-law of the ECtHR provides a minimum standard and a source of inspiration for the ECJ, from which the ECJ can derogate by providing a higher level of protection. Therefore, only the compatibility of the Flemish ban on unstunned slaughter with freedom of religion as stated in article 9 ECHR was analysed as oppose to the compatibility with article 10 of the EU Charter. AG Wahl in his opinion on the case of *Liga van Moskeeën & Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest*, which was explained in Chapter 1.1.2.1.2, provides the framework for the application of limitations on article 10 EU Charter. From this opinion follows that a high level of protection would be afforded to freedom of religion in the case of religious slaughter.<sup>413</sup> As the case-law of the ECtHR is not legally binding and solely presents a

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<sup>413</sup> Case C-426/16 *Liga van Moskeeën & Islamitische Organisaties Provincie Antwerpen, VZW and Others v Vlaams Gewest* [2017] EU:C:2017:926, Opinion of AG Nils Wahl

minimum for the ECJ to uphold, it thus remains to be seen whether the ECJ does indeed follow the level of protection afforded by the ECtHR or if it expands it when the Flemish ban on unstunned slaughter is brought before it.

If the ECtHR or ECJ do find that the limitation provided by the Flemish ban on unstunned slaughter is legitimate, as was argued in Chapter three, then it might serve as a guideline for other Member States that want to introduce a limitation on unstunned religious slaughter as well. This could lead to a uniform application of possible limitations on religious slaughter. Furthermore, the Flemish and Walloon could also be an impetus for Brussel to follow in the same footsteps. Momentarily, Brussel is the only region in Belgium that still has the possibility to slaughter unstunned and it is possible that Brussel will be overwhelmed with an increasing demand for unstunned religiously slaughtered meat. This could then in turn lead to more animal welfare issues, as slaughterhouses cannot keep up with demand.

The discussion surrounding unstunned slaughter is however, far from over. Several appeals have already been submitted to the Belgian Constitutional Court. It is safe to say that the Flemish ban isn't perfect. A recommendation that can be made in order to give some leeway to the religious communities, is to lift the specific stunning method that religious communities need to use when performing religious slaughter. This would put religious slaughter on equal footing with conventional slaughter. Furthermore, it would have been better if the independent intermediary had been assigned with the task to investigate which practices could have improved in both conventional and religious slaughter. As a result, the Jewish and Muslim community might have felt less targeted than when, as is the case in Flanders, a specific law is made with the aim to limit religious slaughter.

In the coming years it will undoubtedly become clearer what the fate of the Flemish ban on unstunned slaughter is, and by extension all other national legislation introduced by Member States, that imposes limitations on religious slaughter on the basis of animal welfare. Hopefully, the ECtHR and the ECJ do not lose sight of the evolution that the importance of animal welfare has undergone.

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