

■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

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Ritual slaughter and the freedom of religion

Austrian Constitutional Court
Judgement from December 17th, 1998
B 3028/97, VfSlg 15394

Circumstances of the case

In November 1996 the District Administrative Authority (Bezirkshauptmannschaft) convicted the applicant under the Vorarlberg Animal Welfare Act ("Tierschutzgesetz"; hereinafter Vbg TSchG). The applicant had been accused of having known of and having tolerated the ritual slaughter of 26 sheep on his farm.

The act of ritual slaughter is performed by cutting the animal's throat with a sharp knife causing the blood of the animal to drain out. The entire procedure is carried out without anaesthesia. Ritual slaughter is often criticised by Animal Welfare Organizations and is object to different legislation around the world.¹

The appeal by the applicant against that decision was dismissed by the Vorarlberg Independent Administrative Panel. The applicant challenged this decision before the Austrian Constitutional Court. He alleged violations of the freedom of religion, conscience and creed as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), the Fundamental Law of 1867 on the General Rights of Nationals (hereinafter Fundamental Law) and the Treaty of Saint-Germain-en-Laye (hereinafter Treaty of Saint-Germain).

Relevant Provisions

Art 9 ECHR – Freedom of thought, conscience and religion

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

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in

1 The German Federal Constitutional Court overruled Germany's former ban on ritual slaughter in 2002. The United States of America protects Jewish and Muslim ritual slaughter by the Humane Slaughter Act.

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.

Art 14 Fundamental Law

(1) Everyone is guaranteed complete freedom of conscience and creed.

(2) The enjoyment of political rights is independent of religious belief. Nevertheless, duties incumbent on nationals may not be prejudiced by religious beliefs.

(3) No one can be forced to observe a ritual act or to participate in an ecclesiastical ceremony as far as he is not subordinate to another who is by law invested with such an authority.

Art 63 (2) Treaty of Saint-Germain

All inhabitants of Austria shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.

§ 11 Vbg TSchG

(1) The slaughter of animals without anaesthesia is prohibited. If giving anaesthesia is impossible or unreasonable under the circumstances, the slaughter should be carried out in a way without inflicting needless pain to the animal.

Ruling of the Austrian Constitutional Court

The Court states that ritual slaughter is a common form of butchering certain animals in both Islam and Judaism. It is nearly unchallenged that ritual slaughter is a religious custom falling under the scope of the freedom of religion established by Art 9 § 1 ECHR, Art 14 Fundamental Law and Art 63 § 2 Treaty of Saint-Germain.

Even if there are some differences within the Islamic community whether or not anaesthesia is necessary, the Court refuses to decide a conflict of religious doctrines. Freedom of thought and religion is guaranteed regardless of different views within a religious community concerning certain modalities of ritual practising. Moreover, the scope of the right is not restricted only to performing a ritual but encloses religious customs as well. The custom has to be widely recognised and performed by a religious community (VfSlg 2002/1950). That applies to ritual slaughter.

The Court states that ritual slaughter both in Islamic and Jewish traditions is within the scope of the provisions mentioned above. Therefore, a ban on ritual slaughter constitutes an interference with these freedoms.

If a measure can be regarded as interfering with the exercise of a fundamental freedom, it must be assessed whether the interference might be justified. The three provisions mentioned above have to be seen as a unity. The freedom of thought and religion is not absolutely guaranteed by the Constitution but is subject to a "reservation of interference" (Eingriffsvorbehalt). The reservation of

interference in Art 63 § 2 Treaty of Saint-Germain is kept narrower than the reservation in Art 9 § 2 ECHR. Art 53 ECHR states that nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party. Therefore, the Court assesses the case according to Art 63 § 2 Treaty of Saint-Germain but states that the reservation of interference in that article is concretised in Art 9 § 2 ECHR. The freedom of religion can be subject to limitation according to a domestic law and has to be necessary in a democratic society in the interests of the protection of public order or morals.

The term "public order" mentioned in Art 63 § 2 Treaty of Saint-Germain expresses the fundamental ideas dominating the legal order. Legitimate restrictions of the freedom of thought and religion compatible with the Austrian Constitution shall not necessarily refer to central objects of legal protection or main principles of law. "Public order" means legal provisions which are essential for the functioning of cohabitation within a state such as main principles of road traffic regulations (VfSlg 3505/1959) or provisions concerning funerals in due form (VfSlg 3711/1960). Only massive interferences to the cohabitation in a state are incompatible with "public order".

The Court observes a shift in values concerning animal welfare which today represents a widely recognised and important public interest. Regarding the scale of values typified in the fundamental rights, animal welfare nevertheless does not exceed the freedom of thought and religion. Animal welfare does not justify a ban on a thousands-of-years old tradition which tries to minimise pain and harm to the animal during the procedure.

Ritual slaughter is subject to autonomous legislation in the Austrian federal states (Bundesländer). The Council Directive 93/119/EC on the protection of animals at the time of slaughter or killing considers the requirements of ritual slaughter such as the renunciation of anaesthesia. From the Court's point of view, ritual slaughter is neither a massive interference to the cohabitation in a state nor a threat to the public order. Ritual slaughter is compatible with "public morals" (gute Sitten) as well. The term "public morals" means the general idea of a "just" lifestyle protected by law and is not linked to animal welfare.

Nevertheless, the Austrian Constitutional Court does not perform a "concrete judicial review" (konkretes Normprüfungsverfahren) because the provision of § 11 Vbg TSchG is not necessarily unconstitutional. According to § 11 (1) Vbg TSchG, the slaughter has to be carried out in a way without inflicting needless pain to the animal if anaesthesia is impossible or unreasonable under certain circumstances. The Court interprets according to the Constitution by stating that the slaughtering of animals with anaesthesia is unreasonable for believing Muslims or Jews. Therefore § 11 (1) VbG TSchG does not give a general obligation for anaesthesia and allows – considering the freedom of thought and religion – ritual slaughter. That interpretation also corresponds with the Council Directive 93/119/EC on the protection of animals mentioned above.

Due to these circumstances, the Court rules that the prosecuting authority imputed to the legislature an unconstitutional content, namely an intention to curtail fundamental rights. Therefore, the prosecuting authority acted arbitrarily and violated the equal protection clause.

Note

The Court's assessment is in line with early decisions of the Austrian Administrative Court (e.g. VwGH 30.4.1897, Budw 10.666) and a decision of the Austrian Supreme Court (OGH 28.3.1996, 15 Os 27/96, 28/96). The European Court on Human Rights (ECtHR) allows ritual slaughter under certain circumstances (e.g. adequate hygiene; see ECtHR 27.6.2000, ÖJZ 2001, 774). The argument of animal welfare against the practise of ritual slaughter has always been made, especially in the last period of the 19th century. At that time, the demand for a ban on ritual slaughter was directly linked to the rising political anti-Semitism (see *Potz*, JBI 1999, 457). Subsequently, early Nazi-legislation banned ritual slaughter as a dark herald of what was yet to come. Today, the (alleged) "clash of civilisations" (see *Huntigton*, Clash of Civilisations [1996]) between the Islamic religion and the Western world is not just reflected in political conflicts but also in debates on religious customs. It's quite difficult to draw a line between justified increasing interest in animal welfare and a rising anti-Islamism.

The Austrian Constitutional Court is aware of the freedom of religion as a matter of special importance. In my view, the freedom of thought and religion is essential for a person as a human being having its own philosophical ideas whereas animal welfare is a relatively new conception² which cannot overrule one of the most important fundamental freedoms.

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2 Even more, animals are indubitably not holders of fundamental rights.