

6 *Shechita* Legal Bans in the Comparative Perspective (Historically and Today)

Iddo Porat

Abstract

In the current study, a detailed analysis of legal restrictions on ritualistic animal slaughter, or *shechita*, in various comparative settings is undertaken. The chapter deals with the historical and present debate on this phenomenon, very controversial both in Europe and beyond Europe since the 1990s. Analyses establish that civil society campaigns for the ban on *shechita*, supported by medical and veterinary authorities and activists on social media, have been effective in some, but not all, countries. The chapter will have two main aims. First, to document the historical bias against ritual animal slaughter, starting in medieval times and culminating in 19th and 20th century European anti-Semitism, and to show the reemergence of this bias in recent decades. This reemergence, it will be shown, combines classic anti-Semitism with more recent Islamophobia (from the Right), and animal rights and anti-religious progressivism (from the Left). Second, to suggest that constitutional doctrines grounded in anti-discrimination principles are more effective than the doctrine of proportionality in protecting the religious and cultural rights of the Jewish minority in the context of *shechita*. This is because they are better equipped to expose hidden biases and prejudices against Jews than their proportionality-based counterparts.

Keywords

Shechita; animal slaughter; legal restrictions; religious freedom; historical bias

6.1 Introduction

The question of ritual animal slaughter is among the most hotly debated questions currently discussed in Europe. Campaigns addressing banning this practice have been taking place since the 1990s in Germany, Switzerland, the Netherlands, Belgium, Denmark, Luxemburg, Slovenia, Sweden, Norway, Finland, Poland, and England, and involve civil society organizations, medical or veterinary organizations, internet websites, social media and traditional

media, and legal challenges. They are also present outside of Europe in Australia, New Zealand, and the United States.¹

Several such campaigns have been successful. Thus, ritual animal slaughter has been recently banned in Slovenia (2012),² Belgium (2017),³ Denmark (2014),⁴ and Poland (2002, overruled by the constitutional tribunal in 2014).⁵ It was banned in Germany for Muslims until overruled by the constitutional court in 2002⁶ and has been continuously banned since the 1930s in Sweden (1938) and Norway (1930), and since the late 19th century in Switzerland (1893).⁷ A legislative attempt in Switzerland, in 2002, to relax prohibitions on ritual animal slaughter met with staunch opposition and was aborted.⁸ Ritual animal slaughter was also banned recently outside of Europe, in New Zealand (2010).⁹

1 See discussions in the Introduction and in Sections 2.1, 2.3, and 2.4.

2 N. Siegal, *Butchering Laws Pit Religion Against Animal Rights*, “New York Times” January 1, 2018, A4; see G. van der Schyff, “Ritual Slaughter and Religious Freedom in a Multilevel Europe: The Wider Importance of the Dutch Case”, *Oxford Journal Law Religion*, vol. 3, no. 1 (2014): 76–102. <https://doi.org/10.1093/ojlr/rwt046> (discussing the bill which later became into law).

3 In June 2017, the Flemish Parliament accepted a regional decree revoking religious exemptions for the requirement of pre-stunning in all animal slaughter, to take effect from January 1, 2019. In that, it joined the Walloon region whose parliament accepted a similar decree earlier in the year, to take effect in September 2019. See Gerhard van der Schyff, “Reviewing the recent Ban on Ritual Slaughter in Flanders”. <https://verfassungsblog.de/reviewing-the-recent-ban-on-ritual-slaughter-in-flanders/>. Accessed October 29, 2024.

4 See R.G. Delahunty, “Does Animal Welfare Trump Religious Liberty? The Danish Ban on Kosher and Halal Butchering”, *San Diego International Law Journal*, vol. 16 (2015): 341–342; A. Withnall, “Denmark Bans Kosher and Halal Slaughter as Minister Says ‘Animal Rights Come Before Religion’”. <http://www.independent.co.uk/news/world/europe/denmark-bans-halal-and-kosher-slaughter-as-minister-says-animal-rights-come-before-religion-9135580.html>. Accessed October 29, 2024.

5 Case of Constitutional Tribunal of Poland, K 52/13 [2014]. <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/7276-uboj-rytualny>. Accessed October 29, 2024 (striking down a law banning slaughter without pre-stunning without religious exceptions, henceforth, the Polish ritual animal slaughter decision). See also A. Śledzińska-Simon, “A ‘Stunning’ Decision of the Polish Constitutional Tribunal: The Ritual Slaughter Case”. <http://www.icconnectblog.com/2015/01/a-stunning-decision-of-the-polish-constitutional-tribunal-the-ritual-slaughter-case/>. Accessed October 29, 2024.

6 German Federal Constitutional Court, *Schachten*, BVerfGE 104 [2002] – interpreting the Animal Protection Act in light of the constitutional right to freedom of religion and finding in it an exception for Muslim ritual animal slaughter).

7 F. Bergeaud-Blackler, “New Challenges for Islamic Ritual Slaughter: A European Perspective”, *Journal of Ethnic and Migration Studies*, vol. 33, no. 6 (2007): 965–980. <https://doi.org/10.1080/13691830701432871>.

8 F. Bergeaud-Blackler, “New Challenges for Islamic Ritual Slaughter: A European Perspective,” 967.

9 See J. Silver, “Understating Freedom of Religion in a Religious Industry: Kosher Slaughter (Shechita) and Animal Welfare”, *Victoria University of Wellington Law Review*, vol. 42 (2011): 671–672. <https://doi.org/10.26686/vuwlr.v42i4.5113>.

When such campaigns receive legal treatment through challenges in European courts,¹⁰ the main method used to decide them is balancing and proportionality.¹¹ Such challenges are usually couched in the following terms: religious freedom is not absolute. It is subject to those limitations that could be reasonably justified in a democratic society because of conflicting considerations – in particular because of the harms religious practices might inflict on the rights and interests of others (in the case of ritual slaughter, these would be the rights of animals or the societal interests in the prevention of unnecessary cruelty to animals). One must, therefore, assess those harms and balance them with the harms that would be inflicted on the religious community in case of a ban. The assumption behind this exercise is that it is possible to objectively assess the relative harms of ritual animal slaughter and balance them with the harms to religion caused by a ban of the practice.

US constitutional law, however, treats religious freedom claims quite differently. Under the doctrine in *Division of Employment v. Smith*,¹² (henceforth the *Smith* doctrine) there is a clear distinction between two types of religious freedom claims. When laws are “specifically directed”¹³ at religious practices, and there is evidence of animus or bias against religion, those laws would be subjected to the austere “strict scrutiny review”. On the other hand, “neutral law[s] of general applicability”,¹⁴ which only incidentally burden religious practices, will receive the lowest level of judicial review and would usually be left to the forces of the democratic process.

The chapter will have two aims. First, to document the long historical bias against ritual animal slaughter in Europe and the Christian world more generally, and to show the resurfacing of this bias in the last few decades, and the new shapes modern bias in Europe has taken. And secondly, to suggest that

10 See judgment of the German Federal Administrative Court, *Bundesverwaltungsgericht*, BVerwGE 99 [1995] p. 1) (maintaining that ritual animal slaughter is not mandatory under Islam and that the ban on it is therefore constitutional); *The Cha'are Shalom Ve Tsedek v. France*, 27417/95 [2000] § 84, ECHR 2000-VII) (maintaining that ritual animal slaughter is not a mandatory practice in Judaism and therefore allowing a ban on non-mainstream-Jewish-Orthodox abattoirs to perform Jewish ritual animal slaughter in France) (henceforth the HCtHR *Cha'are Shalom* decision); The Polish ritual animal slaughter decision: Constitutional Tribunal of Poland, K 52/13 [2014] (striking down the complete ban on ritual animal slaughter in Poland); German Federal Constitutional Court, *Schachten*, BVerfGE 104 [2002] (striking down the ban on Muslim ritual slaughter in Germany).

11 See generally, V. Jackson, “Constitutional Law in the Age of Proportionality”, *Yale Law Journal*, vol. 124 (2105): 3094; A. Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012); M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013). <https://doi.org/10.1017/CBO9781139134996>.

12 *Employment Division v. Smith*, 494 U.S. 872 [1990].

13 *Employment Division v. Smith*, 494 U.S. 872 [1990] 877–878.

14 *Employment Division v. Smith*, 494 U.S. 872 [1990] 879 (“The right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)’”) (quoting *U.S. v. Lee*, 455 U.S. 252 [1982] 263 n. 3).

the US *Smith* Doctrine, because of its emphasis on smoking out bias and prejudice, does a better job than proportionality of protecting religious and cultural minorities from bias and discrimination, and therefore is more appropriate in cases such as those pertaining to ritual animal slaughter.

The chapter will progress as follows. In Section 6.2, I outlay the historical background for ritual animal slaughter. Here I provide information as to the origins, details, and meanings of this practice in Judaism and in Islam, as well as the history of the debate and of the cultural animosity around it, starting in medieval times and culminating in 19th and 20th century European anti-Semitism. Section 6.3 will then analyze the resurrection of this debate in Europe today. This phenomenon starts roughly in the 1980s and steadily intensifies since then and combines old biases against Jews with new ones against the rising Muslim population. In this section, I provide a typology of the different aspects of the cultural animosity towards this practice, as well as the different political and ideological strands that join forces against it. In section 6.4, I engage in legal and constitutional analysis. Here I review three European cases on ritual animal slaughter and describe their analysis and the doctrine of proportionality that is at their center. I then compare the proportionality review with the US doctrine that has evolved in *Smith* and its progeny, the *Lukumi* case, as well as some of the cases that followed them, and show how this doctrine provides a better doctrinal framework than proportionality if applied to ritual animal slaughter.

6.2 Historical Background

6.2.1 *Origins and Meanings*

As part of the dietary restrictions imposed on their believers, both Judaism and Islam have rules regarding the way animals consumed for food should be slaughtered. These apply mainly to cattle, sheep, and poultry. In Judaism, the basis for the rules can be found in the Torah,¹⁵ and they were originally part of the rules for the proper sacrifice of animals during the time of the two Temples, which were also, usually, consumed after the sacrifice. After the destruction of the second Temple, animal sacrifice was banned, but the rules regarding the choice of animals and other rules accompanying sacrifice remained and have been further elaborated and complicated over the years.¹⁶

15 The Torah does not command a particular way of slaughter but does have rules as to the prohibition on consuming blood (Leviticus 7:26; Deuteronomy 12:15, 12:23), as well as detailed rules regarding the permitted species (Deuteronomy 12:3) and parts for consumption (Genesis 32:33; Leviticus 7:24), and the separation of milk and meat (Deuteronomy 12:21), from which the rules regarding slaughter were deduced.

16 The rules in the Torah were further elaborated, first in the *Mishna* and *Gemara* (*Talmud*) in the 1st to 5th century, and then later on in Jewish law sources until they were canonized in *Shulchan Aruch* in the 16th century, which remains the central source for the current rules of Jewish slaughter.

Anthropological explanations for ritual slaughter and for animal sacrifice vary. The practice of animal sacrifice probably began with the move of man to hunting and was widespread in the ancient world. It was commonly used in ancient Greece and in the Roman world, and detailed documentation of it can be traced back to the Mesopotamian culture in the third millennium BC.¹⁷ Anthropologists speculate that it was a way of justifying and sanctifying meat eating, which was relegated originally only to the priesthood and upper classes, and to commoners only on special festivities.¹⁸ Others argue that it was originally a symbolic way of repenting for the killing of animals for food.¹⁹ Other explanations have to do with the symbolic nature of blood in all cultures – either as a curing or magical element or as a purifying mechanism.²⁰ As to the particular form of slaughter used in Judaism and Islam – a cut to the throat and a complete drainage of blood – it is reasonable to assume that this method facilitates the preservation of meat, as it helps to prevent the meat from rotting.

Religious justifications for the practice also vary. From a religious perspective, one must note, the mere question of justification or rationale is usually secondary or irrelevant. In Judaism, the main, and usually the only, explanation to all dietary rules including the rules of slaughter, is that it is so commanded by God in the Torah. However, over the years, Judaism has provided some additional rationales which are often superimposed on the practice, or give it a rationalization, although they do not affect its binding force. First, the rules of the choice of animal and the way it is slaughtered are supposed to ensure the purity of the animal that is then transmitted to the purity, or impurity, of the person consuming it.²¹ Secondly, it is claimed that ritual slaughter ensures minimal suffering for animals, in keeping with Jewish commandments

17 W.W. Hallo, “The Origin of Israelite Sacrifice”, *Biblical Archaeology Review*, vol. 37 no. 6 (2011): 6.

18 W.W. Hallo, “The Origin of Israelite Sacrifice,” 7. See also D. Biale, *Blood and Belief: The Circulation of a Symbol between Jews and Christians* (Oxford: Oxford University Press, 2007): 8. <https://doi.org/10.1525/california/9780520253049.001.0001> – “The biblical rules that the priests fashioned for the proper disposition of animal blood enacted their ritual monopoly”.

19 D. Biale, discussion Jacob Milgrom’s work on blood in the bible writes that “for Milgrom since blood is equated with life, the killing of an animal for nourishment...involves a capital crime that can be expiated only by the blood of the animal itself” D. Biale, *Blood and Belief: The Circulation of a Symbol between Jews and Christians* 8. This seems to have been also one of the rationales for sacrifice in the Hellenic and Roman world.

20 D. Biale, *Blood and Belief: The Circulation of a Symbol between Jews and Christians* 26 “as with Israel blood was used by the Greeks as a purifying agent”. See also “Purification rite”. In: *Encyclopedia Britannica*. <http://www.britannica.com/topic/purification-rite/Types-of-purification-rites>. Accessed October 28, 2024.

21 See J. Silver, “Understating Freedom of Religion in a Religious Industry” 675.

that forbid cruelty to animals, some of which are written in the Torah.²² Finally, Judaism, as well as Islam, strictly forbid eating blood, which is another rationale for the drainage of blood during ritual slaughter.

The practice in Judaism and in Islam is quite similar, but there are also important differences. In Judaism, ritual animal slaughter (*shechita*) is considered a commandment (*Mitzva*) that confers virtue on the person committing it. The particle is governed by the following essential requirements: First, performing shechita requires a professional slaughterer – a *Shochet*. The *Shochet* is in charge of both the actual slaughter and of the inspection of the animal before and after it. He (as only males can hold this office) has to be a Jew in good standing and has to go through a long and rigorous training – both practical and liturgical – including exams and a lengthy apprenticeship.²³ Second, the practice requires a special knife – a very sharp knife that must be completely smooth and without any nicks. Third, prior to being slaughtered, the animal itself has to be completely intact, externally and internally, and alive. Fourth, the killing itself has to be done by one clear strong and fast cut at the throat of the animal, dissecting, preferably entirely, the trachea, esophagus, carotid arteries, jugular veins, and vagus nerve, and allowing the blood to drain fully from the carcass. Fifth, there must be an inspection of internal parts of the carcass to see that the animal is not flawed, including inspections of the lungs in cattle. And sixth, so as to ensure a complete drainage of the blood from the carcass, there is usually a process of salting the meat – as salt absorbs fluids.²⁴

This is a crude simplification, as the rules themselves are very detailed, and a flaw in any step along the way brings about the disqualification of the meat for eating (*Treifa*). There is also some variance between two degrees of strictness of the practice (e.g., regular *Kosher* and *Glatt Kosher*).

Islamic ritual animal slaughter is called *dhabihah* and similarly requires a clear and fast cut in the throat by a sharp knife, and the drainage of blood. But the rules in Islam are less detailed and more relaxed than in Judaism. *Dhabihah* requires only that the person performing the slaughter pronounce the name of Allah three times before the act, and, like in Judaism, the blood should be properly drained from the body of the animal. Unlike in Judaism not only professionals can engage in *dhabihah* but any Muslim. As with Judaism, there are restrictions on the animal whose meat is allowed for consumption, although there is more variance among different sects of Islam as to the extent of the prohibitions. Meats of pigs, boars, and swine are strictly prohibited in Islam, and so are meats of carnivorous animals, such as lions, tigers, cheetahs, dogs,

22 This rationale is given by Maimodes, for example, in *Guide of the Perplexed*, 3:17. It is still used as a rationale by Orthodox Jews today; see, e.g., in a recent Jewish publication in the UK: *A Guide to Shechita*, (London: Shechita UK, 2009). https://www.shechitauk.org/wp-content/uploads/2016/02/A_Guide_to_Shechita_2009__01.pdf. Accessed October 28, 2024. “The time-hallowed practice of shechita, marked as it is by compassion and consideration for the welfare of the animal, has been a central pillar in the sustaining of Jewish life for millennia”.

23 See J. Silver, “Understating Freedom of Religion in a Religious Industry” 677–678.

24 J. Silver, “Understating Freedom of Religion in a Religious Industry” 676.

and cats. Meat that is not worthy of consumption is called *Haram* meat, and meat that is worthy of consumption is called *Hallah*.²⁵ The command to eat only *Halal* meat has its source in the Quran.²⁶

6.2.2 *The Controversy Around Ritual Animal Slaughter in the Modern Era*

Banning ritual animal slaughter and the controversy around it are relatively recent (unlike the banning of other practices in Judaism, such as circumcision, for example, which dates back to antiquity). This is so, partly, since slaughter – the cutting of the throat of the animal and the draining of its blood – was the traditional and universal way of killing animals for centuries and so in itself did not provoke any special concern.²⁷ However, blood libels – folklore myths and concocted stories about Jews using the blood of non-Jews for ritual purposes²⁸ – which were present already in medieval times, included elements that relate to the Jewish ritual around animal slaughter. Many of the medieval blood libels depicted the victims as slaughtered at the throat or as hung from their legs like animals that are slaughtered during *shechita*.²⁹ Blood libels were revived in 19th- and 20th-century Europe, at which time the association with animal slaughter became more explicit, as will be described next.³⁰

The direct controversy around the practice begins only when it appears to conflict with animal rights, and when new methods for killing the animal prior to slaughter are devised. This happened first in Germany in the middle

25 D. Waines, *An Introduction to Islam* (Cambridge: Cambridge University Press, 2003): 78–79. <https://doi.org/10.1017/CBO9780511801037>.

26 *The Holy Qur'an* (transl. N.J. Davidson, London: Penguin, 1975) 6:121: “Do not eat of any flesh that has not been consecrated in the name of Allah for that is sinful”.

27 In the recent controversy over the ritual animal slaughter ban in Poland, traditional Christian butchers also objected to the ban since they used a similar method of slaughter. See A. Gliszczynska-Grabias, W. Sadurski, “Freedom of Religion versus Humane Treatment of Animals: Polish Constitutional Tribunal’s Judgment on Permissibility of Religious Slaughter Judgment of the Constitutional Tribunal of Poland of 10 December 2014, K 52/13”, *European Constitutional Law Review*, vol. 11, no. 3, (2015): 599. <https://doi.org/10.1017/S1574019615000280>.

28 See generally A. Dundes (ed.), *The Blood Libel Legend: A Casebook in Anti-Semitic Folklore* (University of Wisconsin Press, Madison, 1991): 304, 318.

29 E. Rappaport describes how in the Blood Libel of Wessenburg, Bavaria, in 1270 “the victim is put into a head-down position like a slaughtered animal in a butcher shop...and the alleged murderers with great eagerness collect the blood, even after Passover when matzah are no longer made”. E. Rappaport, *The Ritual Murder Accusation: The Persistence of Doubt and the Repetition Compulsion*. In Dundes, *The Blood Libel Legend*, 304, 318. Note the inversion, often present in anti-Semitic myths – Jews, who are strictly forbidden by their religion from eating blood, are depicted as eagerly collecting blood to be consumed as part of Jewish ritual. Some anti-Semites tried to explain this contradiction by stating that only animal blood is forbidden in Judaism, and Jews therefore compensate for this restriction by eating human blood. Dundes, *The Blood Libel Legend*, 319.

30 J. Silver, “Understating Freedom of Religion in a Religious Industry” and accompanying text.

of the 19th century, with the rise in awareness of animal rights and with the industrialization of slaughtering.

Slaughter is required, till this day, for the drainage of blood from animals consumed for food and the prevention of bacteria, regardless of whether it has a religious reason or not. During earlier times, slaughter was also considered to be the fastest and least painful way of killing the animal since the quick drainage of blood after the slaughter results in losing of consciousness of the animal within a short period of time. Today, scientists agree that the average time for loss of consciousness is 30 seconds after the slaughter and the maximum time is 2 minutes.³¹ However, modern techniques that began being developed allowed for quicker ways of killing the animal before it is slaughtered, or for ways of rendering it unconscious before it is slaughtered. Such methods (whether bringing about death immediately, or only unconsciousness) are referred to as “stunning”. Stunning, in the 19th century, with regards to cattle, included a blow with a big hammer to the head of the animal or a bolt that was hammered into the head. Today, an air pressure bolt-gun is used to drive the bolt through the head of the animal, and sometimes electrocution is used instead. The conflict around the practice until this day therefore stems from the fact that both Judaism and some interpretations of Islam³² do not permit the stunning of animals prior to their slaughter. In Islam since this inhibits the flow of blood, and in Judaism both for this reason but mainly because the animal must be completely intact and alive prior to the slaughter.³³ Judaism and Islam therefore seem to require a method of killing animals for food in which the animal feels the pain of the slaughter, even if for a short period of time, whereas with stunning, this feeling of pain is reduced or eliminated.

6.2.3 *Banning Campaigns and Anti-Semitism*

According to Shai Lavi, banning campaigns in Germany in the 19th century originated from three movements – Progressivism which wished to make Germany more progressive, among others by providing for more humane treatment of animals; Romanticism associated also with German nationalism and anti-Semitism; and scientific health reasons having to do with hygiene in abattoirs and the inspection of healthy meat.³⁴

31 The Humane Slaughter Act defines ritual slaughter as a humane method of slaughter. 7 U.S.C.A. § 1902.

32 A. Bruce, “Do Sacred Cows Make the Best Hamburgers? The Legal Regulation of Religious Slaughter of Animals”, *University of New South Wales Law Journal*, vol. 34, no. 1 (2011) – “There appears to be no consistent agreement on the issue with the result that some Islamic scholars insist on the practice whereas others do not”).

33 J. Silver, “Understating Freedom of Religion in a Religious Industry” 676–677.

34 S. Lavi, “Animal Laws and the Politics of Life: Slaughterhouse Regulation in Germany, 1870–1917”, *Theoretical Inquiries in Law*, vol. 8, no. 1 (2007): 221–222. <https://doi.org/10.2202/1565-3404.1149>. See also S. Lavi, “Enchanting a Disenchanted Law: On Jewish Ritual and Secular History in Nineteenth-Century Germany”, *UC Irvine Law Review*, vol. 1, no. 3 (2011): 813. <https://scholarship.org/content/qt8f08j7dn/qt8f08j7dn.pdf?t=qx22aj>. Accessed October 29, 2024.

Progressives, according to Shai Lavi, were concerned with the respectability of Germany and its status among civilized nations. Animal Humane Societies that were first established in Germany in the mid-19th century followed their counterparts in other European countries (England being the first in 1820) and gained popularity in the second half of that century. Progressivism also introduced a scientific element to the debate. Scientific research opposing ritual slaughter tried to show that in traditional ways of slaughter the pain extended for a long period of time (arguments were made that it took between 10 to 30 minutes for the animal to die³⁵). However, even at that time, the scientific conclusions were not unanimous, and some argued that these times are vastly exaggerated. There were also debates at the time as to whether the then available methods of stunning were reliable or whether they ended up creating more pain for animals than the traditional methods.³⁶

Health regulations issues included concerns that the meat produced by ritual slaughter would be unhealthy because of poor sanitary conditions or because of the drainage of blood. Most of these concerns, in retrospect, were unfounded.³⁷

Finally, Romanticism and anti-Semitism, while not being at the center of the early campaigns against ritual animal slaughter, soon became the focal point of these campaigns. These ideologies coupled ideas on a romantic affinity with nature – the idea of the return to nature, to rural life and simplicity, and a wholeness of an organic connection between man and nature – with ideas on nationalism – a nostalgic return to the German Teutonic tribes, an organic conception of the German nation, and a concern for not contaminating the German nation with external elements. Jews were targets on both these accounts: first, they were a foreign element to the ethnic and national Germanic tradition, and secondly, they represented a culture which was dissociated from nature and from rural life, and, through animal slaughter, was also cruel to animals. In addition, Jews were associated with the liberal and modern strands of German society, and for that reason also, were anathema to the right-wing nationalists and conservatives.

The campaign against ritual animal slaughter therefore fit well with the rising anti-Semitism of late 19th and early 20th century, and as mentioned before, the revival of blood libels at that time created a direct association between Jewish cruelty to animals and Jewish cruelty to human beings. Studies show that there were more than 100 blood libels in Europe between 1880 and 1911. Many of them, as the one that occurred in the Prussian town of Konitz

35 R. Judd, "The Politics of Beef: Animal Advocacy and the Kosher Butchering Debates in Germany", *Jewish Social Studies. New Series*, vol. 10, no. 1 (2003): 117, 121.

36 S. Lavi, "Animal Laws and the Politics of Life" 231–232.

37 S. Lavi, "Animal Laws and the Politics of Life" 233. The only valid concern was, quite amusingly, the claim that meat produced by ritual slaughter was not as rich and tasty as meat produced by pre-stunning methods because of the drainage of blood from the meat.

in 1900, included accusations against Jewish slaughterers.³⁸ In these blood libels, as D. Biale writes, “Jewish ritual slaughter became conflated with ritual murder”, reflecting the accusation that “Jewish ritual slaughter was a barbarous practice that bespoke the Jews’ bloodthirstiness: just as they butchered their animals inhumanly so the Jews would no doubt be wont to do to their neighbors”.³⁹ The phenomenon did not completely pass over America, as in a 1919 blood libel in the town of Pittsfield Massachusetts, in which a Jewish slaughterer and Mohel was accused of dragging a Polish boy to the synagogue and extracting two bottles of blood from him.⁴⁰

Lavi shows how the campaign for regulating animal slaughter that was first led by Progressives and humanitarian societies in the 1870s and at that stage either allowed for exceptions for Jewish ritual slaughter or was uninterested in it, was taken over by the conservative and anti-Semitic movement, and then started targeting specifically the Jewish ritual and focusing attention on not allowing any exceptions to Judaism. The heated debate at the German Reichstag in the 1890s over a law banning Jewish *shechita* was an overt show of anti-Semitism, recognized as such by both proponents and opponents of the law.⁴¹ A similar and more successful campaign that also involved explicit anti-Semitism was held in Switzerland, which banned *shechita* in 1893 – a ban that still holds today.⁴² In Switzerland, the campaign met divisions not only on political but also on religious grounds, as the Catholic Church opposed the ban, and the polls of the plebiscite showed that the ban was supported by a majority of German Protestant Swiss but rejected by a majority of the French Catholic Swiss.⁴³

The German campaign was unsuccessful eventually, but this changed during the Nazi regime. One of the first laws promulgated by Hitler, in 1933, was a ban on Jewish *shechita*, which was accompanied by similar laws in other

38 In that incident, a young man was murdered and his body carved into pieces. The blame lay on a Jewish butcher, A. Levi, because of a testament given by his neighbor Christian butcher who had most likely committed the crime. S. Lavi, “Animal Laws and the Politics of Life” 126.

39 D. Biale, *Blood and Belief* 127; See also Judd, note 32 at 120.

40 A.G. Duker, *Twentieth-Century Blood Libels in the United-States*. In: A. Dundes (ed.), *The Blood Libel Legend* 233, 249. A.G. Duker reports at least 20 cases of blood libels in the early 20th century in America. Many of them were instigated by European immigrants to the USA, especially Poles.

41 A.G. Duker, *Twentieth-Century Blood Libels in the United-States*. See also T. Kushner, “Stunning Intolerance: A Century of Opposition to Religious Slaughter”, *The Jewish Quarterly*, vol. 36 (1989): 216.

42 J.M. Efron, “The Most Cruel Cut of All? The Campaign Against Jewish Ritual Slaughter in Fin-de-Siècle Switzerland and Germany”, *Leo Baeck Institute Yearbook*, vol. 52 (2007): 167.

43 “[T]hose in favor of the ban numbered 180,000, most of them in predominantly Protestant cantons, versus 120,000 who were opposed, who included many of the country’s Catholics”. read more: <http://www.haaretz.com/jewish/features/.premium-1.671934>. The article also notes that at the time the constitutional amendment was adopted there were only 8,000 Jews in Switzerland.

European countries and in all the countries occupied by Nazi Germany.⁴⁴ The Nazi regime, like its precursors in the 19th century, also combined anti-Semitic ideology with ideology regarding the natural world.⁴⁵ Hitler and Himmler were both vegetarians, which enhanced their opposition to *shechita*. The *Der Stürmer* magazine – the mouthpiece of Nazi propaganda – has made ample use of caricatures depicting ritual animal slaughter and referencing the way Jewish barbaric slaughter practices extended from animals to human beings. The notorious 1940 Nazi propaganda film *The Eternal Jew* by Fritz Hippler opens with a long and gruesome scene of a Jewish slaughter of a cow, extending for a whole 10 minutes out of the film's 60 minutes.⁴⁶

6.3 The Modern Resurrection of the Debate

6.3.1 Resurrection of the Debate

In the decades following WWII, ritual animal slaughter was generally tolerated in European societies (with the exception of the few countries that did not repeal their laws banning ritual animal slaughter)⁴⁷ and did not raise controversy or debate. This may have been a result of the recent memory of the persecution of Jews by the Nazis, and possibly also of the radical diminishment of the Jewish population after the war, which reduced the extent of the phenomena.⁴⁸ In Germany, some of the laws banning ritual animal slaughter were repealed and those that were not, were not enforced.⁴⁹ It is not until the 1980s that one notices a rekindling of the debate around the practice. However, once the debate resumes, it seems to be in full force and constantly on the rise, to the point that banning the practice has become very popular in several European countries. In addition, the debate has acquired

44 Following Germany in outlawing *shechita* were Poland (1938) Italy (1938) and Sweden (1938). Norway had banned *shechita* even earlier at (1930). See F. Bergeaud-Blackler, "New Challenges for Islamic Ritual Slaughter" 965, 967.

45 For fascinating recent research as to the Nazi relationship with blood and with the natural world, see J. Chapoutot, *La Loi du Sang* (Paris: Éditions Gallimard, 2014): 34–44, which has a special section on Nazi attitudes towards Jewish ritual slaughter. The author brings evidence from H. Himmler's correspondence where he argues that the cruel attitude of Jews towards animals were a trait of the Jewish race that differed it from the Nordic race that was close to Nature. H. Himmler believed that the Buddhist monks, who spared even the life of insects, were decedents of Nordic people who emigrated from Europe to Asia during prehistoric times and attest to the Nordic affinity with nature. *Id.* at 37. Except for the law against Jewish ritual slaughter one of the first laws of the Nazi regime was a law restricting cruelty towards animals in hunting – Reichtierschutzgesetz [1933]. The author notes, however, that it was very rarely applied in practice and hunting was in effect not restricted during Nazi times, as Herman Goring, for example, was a devout hunter.

46 See D. Biale, *Blood and Belief* 128.

47 See list of countries banning ritual animal slaughter.

48 See S. Lavi, "Animal Laws and the Politics of Life" 250.

49 S. Lavi, "Animal Laws and the Politics of Life" 225.

all the attributes of a passionate and positional debate in which there is little attempt at compromise, as we will see.⁵⁰

Surveys of the past two decades show strong popular support in several European countries for banning ritual animal slaughter. A 2013 internet survey commissioned by the *Jewish Chronicle* in Britain to YouGov (an internet-based market research company)⁵¹ has shown that 45% of respondents supported a ban on ritual animal slaughter (27% were against and 28% were undecided). Interestingly, support for the ban was evenly distributed among Left and Right voters (Conservative, Labor, and Liberal Democrats) with the exception of the radical right-wing party UKIP, members of which have shown a considerably higher support for banning the practice (71%). A more recent internet poll, on the same website, commissioned by the RSPCA (Royal Society for the Prevention of Cruelty to Animals) found even greater popular support for a ban of ritual animal slaughter, with 77% of the people surveyed supporting the ban.⁵²

To date, there are several countries that completely ban ritual animal slaughter. These include, in Europe, Switzerland (1893), Norway (1930), Sweden (1938),⁵³ and Denmark (2014), and outside of Europe, New Zealand (2010).⁵⁴ The Federation of Veterinarians of Europe has issued a statement that it is of the opinion that “the practice of slaughtering animals without prior stunning is unacceptable under any circumstances”.⁵⁵

50 O. Liviatan compares the debate over Muslim practices, including ritual animal slaughter in Western Europe, to the debate over abortion. Both issues, she argues, are “passionately and acrimoniously debated as positional (rather than valence) issues, with little inclination for compromise”. O. Liviatan, “From Abortion to Islam: The Changing Function of Law in Europe’s Cultural Debates”, *Fordham International Law Journal*, vol. 36 (2013): 93–94. <https://www.corteidh.or.cr/tablas/r30420.pdf>. Accessed October 29, 2024.

51 F. Cranmer, “Ritual slaughter, religious male circumcision and public opinion: a YouGov poll”, <http://www.lawandreligionuk.com/2013/04/07/ritual-slaughter-religious-male-circumcision-and-public-opinion-a-yougov-poll/>. Accessed October 29, 2024.

52 “Almost 80 percent of UK wants an end to non-stun slaughter”. <http://www.politics.co.uk/opinion-formers/rspca-royal-society-for-the-prevention-of-cruelty-to-animals/article/almost-80-per-cent-of-uk-wants-an-end-to-non-stun-slaughter>. Accessed October 29, 2024.

53 F. Bergeaud-Blackler, “New Challenges for Islamic Ritual Slaughter” 965, 967.

54 The ban was administered through a ministerial code adopted by the Minister of Agriculture. The Animal Welfare (Commercial Slaughter). Code of Welfare 2010. <https://www.mpi.govt.nz/dmsdocument/46018-Code-of-Welfare-Commercial-slaughter>. Accessed October 29, 2024. The minister refused to introduce a religious exemption to the code, despite an earlier recommendation of the National Animal Welfare Advisory Committee (‘NAWAC’) that argued, “This is necessary to allow Jewish people to manifest their religion and belief (as provided for in the New Zealand Bill of Rights Act 1990, Public Act 1990 No 109) and because NAWAC considers that Shechita does not meet the minimum standard for commercial slaughter”.

55 Slaughter of Animals Without Prior Stunning, FVE Position Paper, FVE/02/104 Final. https://fve.org/cms/wp-content/uploads/fve_02_104_slaughter_prior_stunning.pdf. Accessed October 29, 2024.

6.3.2 Sociological Analysis – Five Types of Arguments

The following is a summary of five types of arguments currently being made in banning campaigns against ritual animal slaughter in order to show how current biases and anti-Semitic tropes join old ones in today's banning campaigns. The five arguments are as follows: (1) Not Modern/Barbaric. (2) Oppressive. (3) Not Us. (4) Not Natural/Against Nature. (5) Supported by Powerful Forces.

6.3.2.1 Not Modern/Barbaric

Ritual animal slaughter is portrayed by opponents as being pre-modern, pre-liberal, irrational, archaic, barbaric, bloody, and sacrificial. In many of those campaigns, the target is both the practice of religious minorities and religion *per se*.⁵⁶ Secular societies are vocal in these campaigns and lament the surrender of logic, liberal ideas, and of vital interests and rights to religious pressure⁵⁷ – but, at the same time, and not always consciously, the target is minority religion and not Christianity.

The ancient nature of the practice and its involvement with blood and pain exacerbate the feelings of alienation that modernity has with religion in general and with Judaism and Islam in particular.⁵⁸ So is the ritualistic nature of the practice, including the use of “professionals” such as a Shochet, prayers, and ceremony, and the use of ritual instruments – the knife in animal slaughter.

56 It is so viewed by religious members. See the following on the campaign against ritual animal slaughter: “This assault on Judaism is, of course, part of a broader assault on religion, all religions, including Christianity, and the biblical understanding of life. The basic idea is that religion is primitive and ignorant and must be repressed. This is a militant form of secularism and while Muslims and Jews are today's victims, there will be many more tomorrow”. M.A. Kellner, “Danish Ban on Ritual Slaughter Unites Jews and Muslims”. <http://www.deseretnews.com/article/865597101/Danish-ban-on-ritual-animal-slaughter-unites-Jews-and-Muslims.html?pg=all#ygx0PgTZDevChxbA.99>. Accessed October 29, 2024.

57 The British Secular Society for example engages in a campaign against animal ritual slaughter as one of its ten major campaigns posted on its website: “Our campaign areas”. <http://www.secularism.org.uk/campaigns.html>. Accessed October 29, 2024. It argues in its website that “Whilst we support the right to religious freedom, this is not an absolute right, and we do not think that exemptions should be made on religious grounds to animal welfare regulations which apply without exception to everyone else”. An example of rhetoric lamenting the over-protection of religion can be seen here by the excessive hyperbole: “whatever the result may be, the claim that ritual slaughter is part of the freedom of religion, and is thus untouchable, is an incorrect one”. C.M. Zoethout, “Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter”, *Human Rights Quarterly*, vol. 35, no. 3 (2013) 651–672.

58 See, e.g., an interview on BBC with the Swiss animal activist E. Kessler, May 2003: “And we are today in a modern world and cannot accept many things that have been prescribed by religion in earlier times. Like stoning women that has been abandoned ritual slaughter is a very brutal thing and should be given up too”. “Interview von Radio BBC mit Erwin Kessler zum Schächten in Europa”. <http://vgt.ch/news2003/030515.htm>. Accessed October 29, 2024.

The association with sacrifice, and in particular the sacrifice of blood, is another element in the perception of this practice as barbaric or archaic and irrational. As noted earlier, ritual animal slaughter has its origins in animal sacrifice, and although the current use of the practice is designed for the purpose of food consumption, it is still associated with the symbolic sacrifice of the animal's well-being to the idolatry of religion.

As a speculation, I would like to suggest that one may see less of an objection to the ritual and irrational nature of this practice in Catholic communities than in Protestant communities (Poland being an exception for which I have no explanation).⁵⁹ There is an interesting geographical correlation between active objection to ritual animal slaughter and countries with a Protestant majority. The debates seem to be stronger in the Anglo-Saxon countries, the Nordic countries, Germany, Austria, and the German part of Switzerland (recall the objection of French Catholics to the ban on ritual animal slaughter in the plebiscite of the late 19th century). On the other hand, Spain, Italy, and France do not seem to object too strongly to this practice. This may come from the individualized nature of Protestant belief – the idea that faith is a personal and individual practice rather than a communal and familial one – and its rejection of ritual and ceremony as idolatry. On the other hand, Catholicism has retained more of its ritualistic nature as a religion, and Catholic societies tend to be more family and community oriented so that such community-based practices may be less alien to them.

6.3.2.2 *Oppressive*

Aligning objections to ritual animal slaughter with objections to oppression makes for the association of the Left with campaigns against this practice. The term “oppression” is often used in the context of animal rights and is used in particular in the context of opposition to animal ritual slaughter. Animals are helpless and innocent, and the graphic descriptions, photographs, and videos of religious slaughter arouse outrage against the oppression of helpless creatures. The argument of oppression also allows the coupling of those who engage in ritual animal slaughter with other categories of oppressors – white oppressors of blacks,⁶⁰ male oppressors of women, rich oppressors of the poor, and colonial oppressors of the colonized.

The argument of oppression is also associated with the use of human rights conceptualism and rhetoric, which is another aspect coupling objections to ritual animal slaughter with the progressive Left. Animal rights are often seen as the logical extension of human rights to other, non-human, groups so that cruelty towards animals is on par with human rights violations.⁶¹ The turn to

⁵⁹ I thank L. Zucca for this observation.

⁶⁰ See, e.g., Facebook group called “People of Color Against Forced Genital Cutting”.

⁶¹ W. Kymlicka, S. Donaldson, “Animal Rights, Multiculturalism and the Left”, *Journal of Social Philosophy*, vol. 45, no. 1 (2014): 126–127. <https://doi.org/10.1111/josp.12047>.

rights rhetoric intensifies the debate and furthers it away from compromise, as rights, generally, serve as a trump, and as arguments of principle, and eschew compromise.⁶²

6.3.2.3 “Not Us”

While the argument of oppression is usually associated with the Left, the argument of “Not Us” is usually associated with the Right. It is an argument most associated with the persecution of Jews over the ages, and anti-Semitism was often coupled by nationalism, not the least during the Nazi regime. But the current nationalistic angel of these debates has an important modern “twist” by adding Islam as a target – at times the main target – of the campaigns. Lavi has argued that Islam and Judaism are both representations of the foreign for the German society of the 1980s, but in different ways: the Jews are “strangers from within” and the Muslims “strangers from without”.⁶³ Used by nationalists such as the racist English Defense League,⁶⁴ and by others more covertly, these types of arguments allude to the fact that those using this practice are different, alien to the culture, to the history and habits of the country, and thus threaten to fracture its integrity and organic wholeness. They also allude, either overtly or covertly, to the oriental origins of these religious communities and practices, which are ethnically and culturally different from the European ethnic and cultural origins. In this respect, the campaign against ritual animal slaughter joins the Islamophobic campaigns against the burqa and the building of Minarets, all of which are designed to stop the advent of Islam into Europe.

6.3.2.4 “Not Natural/Against Nature”

The objection to ritual animal slaughter on the account of it being averse to the protection of nature is direct, and , as described earlier, was also used in past anti-Semitic campaigns against the practice, by portraying Judaism as averse to the natural and the rural. Today too, similar associations are being made in relation to the current debate on ritual animal slaughter. Animal

62 Compared to the way, according to Liviatan, the abortion debate in Western Europe was framed by the Court, Liviatan argues, “Courts and legislatures framed debates beyond the clash of rights or worldviews, generating legal arrangements that incorporated additional social and public policy concerns for the purpose of generating compromises”. However, this did not happen, according to her, with regard to conflicts over Muslim cultural practices, towards which the legal attitude was one of forced “integration and assimilation”.

63 S. Lavi, “Unequal Rites – Jews, Muslims and the History of Ritual Slaughter in Germany”, *Tel Aviv Yearbook for German History*, vol. 37 (2009): 164, 167. <http://www.tau.ac.il/GermanHistory/Lavi.pdf>. Accessed October 29, 2024.

64 See, e.g., “EDL targets Blackburn KFC in protest over Halal chicken”. http://www.lancashiretelegraph.co.uk/news/8429843.EDL_targets_Blackburn_KFC_in_protest_over_Halal_chicken/?ref=rl. Accessed October 29, 2024.

societies all too often portray Judaism and Islam as inherently averse to animals and to nature, ignoring central elements in both religions that show compassion to animals and concern for nature.

It may therefore be no surprise that one finds among the vocal opponents to ritual animal slaughter many who are also engaged in ecological campaigns or are members of the Green Party. In Finland, the Green Party was vocal against ritual animal slaughter.

6.3.2.5 Supported by Powerful Forces

This last attribute is associated with the sinister and omnipotent perception of religion generally, but in particular with perception of the omnipotence of Judaism that draw also on anti-Semitic imagery and include the belief in an all-powerful Jewish lobby and a Jewish takeover of the Media. Islam, while more recently joining this club, is also at times associated with the powerful forces by using the corrupt power of oil money.

The main manifestation of this argument is in conspiracy theories that argue that powerful forces protect this practice from criticism and manipulate scientific findings.

This feature, coupled with some of the other features portrayed earlier, may also account for the very extreme, high toned, and, at times, violent nature of some of the instances of the debate, especially when taking into account the fact that, in some of the societies where the debate is held, only a few instances of the practice have occurred (in Denmark, for example, where ritual animal slaughter was banned, there was no instance of the practice for decades). Comparisons of ritual animal slaughter with murder are common in these heated debates, as are comparisons of this practice with the atrocities of the Nazis during the Holocaust.⁶⁵

What the review in this and the previous section shows is that the debate over ritual animal slaughter is ripe with opportunities for cultural bias, prejudice, and “othering”, which must be taken into account as a background for any normative assessment of them.

This realization indicates that we must be very cautious about arguments being made in this context, and therefore must check ourselves well, using the entire arsenal of safeguards against selective bias and prejudice, before we reach normative conclusions. The next section will make the argument that constitutional law has developed tools to do just that, but that these tools are more developed in American constitutional law than in European constitutional law.

65 In the UK, for example, during one of the peaks of the debate on ritual animal slaughter, the following cartoon was circulated: cattle are seen standing outside a facility with a sign that says, *kosher meats* and one cow remarks, “I understand we’re just here to take a shower”. See Modiya Project: “Topic: Anti-Shechita”. <http://modiya.nyu.edu/handle/1964/489>. Accessed October 29, 2024.

6.4 Comparative Constitutional Law and Ritual Animal Slaughter

This section reviews and assesses constitutional judicial responses to challenges regarding ritual animal slaughter in Europe and compares them with actual or hypothetical similar challenges in the United States. Following the previous parts, my argument would be that constitutional law should be attuned to the dangers of cultural and religious bias. My comparative claim would be that the American *Smith* Doctrine is better equipped to do just that than the European-based proportionality analysis.

6.4.1 *The Two Regimes of Religious Freedom*

Comparative constitutional law provides us with two quite different regimes with regards to religious freedom – the American regime and the European regime, for which the jurisprudence of the European Court of Human Rights (ECtHR) and of the German Federal Constitutional Court (GFCC) will be the main examples.⁶⁶ The current American regime, as will be further elaborated, follows the *Smith* Doctrine according to which accommodation claims are not protected, only claims against animus-based religious discrimination that specifically target religion. In the words of a US freedom of religion scholar, the American Constitution “does not grant a right to religious exemptions from general legal obligations, but it does provide a shield against religious discrimination”.⁶⁷

The jurisprudence of the ECtHR, GFCC and specific European constitutional courts that follow their model is very different. Under the jurisprudence of the ECtHR and its analogues, there is no distinction between accommodation claims and claims against animus-based laws. There is, similarly, no distinction between neutral and generally applicable laws, and laws targeting religion. Rather, first, the court must determine whether freedom of religion is implicated, many times centering the review on the nature of the practice involved – whether, for example, it is mandatory according to a recognized religious sect, whether it is central to the religion, and so on. Secondly, if a religious activity which falls under the scope of this definition is burdened by a law, the law can stand only if it meets the requirement of the applicable limitation clause.

In the case of freedom of religion, the limitation clause in the European Convention on Human Rights (henceforth the Convention) allows for the

66 For the general division between the American and the European constitutional models, see G. Nolte (ed.), *European and US Constitutionalism* (Strasbourg: Council of Europe, 2005); M. Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005); K. Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2013); M. Cohen-Eliya, I. Porat, *Proportionality and Constitutional Culture*.

67 J.M. Oleske, “Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare”, *Animal Law Review*, vol. 19 (2013): 295, 297.

limitation of the right to freedom of religion only for a limited set of purposes – for “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”.⁶⁸ The first test of the limitation clause would therefore be to determine whether the law indeed furthers one of these purposes. The second test would be to determine whether the infringement, even if done for the proper purpose, is “necessary” or “necessary in a democratic society” for the furtherance of that legitimate purpose. Although the term “necessary” can be interpreted narrowly as excluding only such laws that impose completely gratuitous burdens, and including any law that furthers, even to a small extent, the appropriate purpose, the term was in fact interpreted as imposing a proportionality test.⁶⁹ That is, “necessary” means a law that does not impose on religion a disproportionate burden in relation to the gain achieved by the legitimate purpose.

ECtHR law therefore often boils down to a balancing test of proportionality, whereby religious freedom will be pitted against the countervailing rights and interests in order to show that the law is indeed necessary for the protection of the governmental purpose.

While it is often argued that religious freedom is substantially less protected in the United States than in Europe,⁷⁰ the cases of ritual animal slaughter show how the European seemingly protective proportionality doctrine can be a double edged sword. Proportionality, while allowing for the protection of accommodation claims, which are generally unprotected in America, can also more easily facilitate a balance in which even laws which, according to American law, might be struck down because of animus towards religion or because they single out religion can be saved if balanced with important countervailing interests.

The next sections will review the three main European constitutional cases regarding ritual animal slaughter and compare them with the analogous analysis under US law to exemplify this point.

6.4.2 Three European Cases and Proportionality

6.4.2.1 The Polish Case of Ritual Animal Slaughter

Perhaps the sole example of a constitutional analysis by a Supreme constitutional court that hinges directly on the constitutionality of ritual animal slaughter is the decision of the Polish Constitution Court in the Ritual Slaughter case⁷¹

68 See A. Gliszczyńska-Grabias, W. Sadurski, “Freedom of Religion versus Humane Treatment of Animals” 580.

69 See M. Cohen-Eliya, I. Porat, “The Hidden Foreign Law Debate in Heller: Proportionality Approach in American Constitutional Law”, *San Diego Law Review*, vol. 46 (2009): 367, 373.

70 See note 10 and accompanying text.

71 Constitutional Tribunal of Poland, K 52/13 [2014].

In Poland, ritual animal slaughter was banned in the time of the Nazi occupation but was reinstated after the war. A law from 1997 – the Animals Protection Act (henceforth the Law) – that followed a 1993 European Union directive decision, banned animal slaughter without pre-stunning, but initially exempted ritual slaughter from the ban. The exemption was, however, removed from the law in 2002 and put back only by executive ordinances in 2004. This executive ordinance was annulled following a petition to the Constitutional Tribunal of Poland, which found that it was promulgated without due authorization from the legislature. Therefore following this court decision, the ban on animal ritual slaughter became absolute, and it was this ban that was subsequently challenged as unconstitutional in the case on animal slaughter that is the center of our review. The ban was also backed by criminal sanction of up to two years imprisonment.⁷²

Note, therefore, that the type of challenge in this case is a challenge against the absence of an exemption on religious grounds from a law of general applicability. This fact has been noted by A. Gliszczyńska-Grabias and W. Sadurski, who criticize the case.⁷³ But the challenge comes on the background of there being such an exemption initially in the law – an exemption that was subsequently removed, reinstated by the executive, and removed again after a court petition. It also comes on the background of the EU directive which explicitly absolves ritual slaughter from the ban on slaughter without pre-stunning, and, while allowing member states to adopt a more animal protective regime, requires them to make a special notification to that effect, which Poland did. Therefore it could be argued that the exemption is the rule rather than the exception in this case.

The petitioners were representatives of the Jewish community in Poland as well as representatives of slaughterhouses that were not Jewish – since meat produced from ritual slaughter had become a business for export in Poland, especially since Turkey began importing meat from Poland – who claimed that the law without the exception conflicted with the right to religious freedom.⁷⁴

The Court accepted the claim that freedom of religion was infringed, and then the legal analysis of the court began with the conflict between the total ban in the Law and Article 53 of the Polish constitution and Article 9 of the European Convention of Human Rights, (henceforth the Convention), both protecting freedom of religion in very similar words. Both Articles had a

72 Anna Śledzińska-Simon, *A “Stunning” Decision of the Polish Constitutional Tribunal: The Ritual Slaughter Case*, Int’l J. Const. L. Blog, January 19, 2015. <http://www.icconnectblog.com/2015/01/a-stunning-decision-of-the-polish-constitutional-tribunal-the-ritual-slaughter-case/>. Accessed October 29, 2024.

73 A. Gliszczyńska-Grabias, W. Sadurski, “Freedom of Religion versus Humane Treatment of Animals” 600: “This way of framing the issue [asking whether an absolute ban is constitutional] is not uncontroversial, because the law on the protection of animals does not establish a prohibition targeted at religious communities, but simply states an unconditional, general rule”.

74 A. Gliszczyńska-Grabias, W. Sadurski, “Freedom of Religion versus Humane Treatment of Animals” 603.

similar limitation clause, allowing the infringement of freedom of religion only by a law which is necessary for the protection of a closed set of purposes – public safety (or State security), public order, health, morals, or the freedoms and rights of others.⁷⁵

The purposes of security, public order and health, and the rights of others were summarily done with – the Court did not view animals as included within the “others” in the sense of the “rights of others” that were being protected⁷⁶ – leaving for discussion only the purpose of “morals”. The majority opinion argued that while public morals did include a concern for the protection of animals and the alleviation of unnecessary suffering for animals, and this interest has even entered into constitutional axiology as a constitutionally protected value, the total ban on ritual slaughter was not “necessary” for the protection of public morals. Since it was evident that slaughter itself for the purpose of food is not contrary to public morals of the vast majority of the Polish people, the Court concluded that

a total ban on one of the methods (a ritual method) – protected by the freedom of religion, and as to which scientific studies had not unambiguously determined that in every case it was more painful than other methods – was not necessary for the protection of morals.⁷⁷

The Court further argued that it fitted with public morals because of the special importance given in Polish society to the protection of religious freedom and noted that “various methods of slaughter after stunning animals that had been permitted by law caused suffering, pain and distress to animals” and referred to hunting and other practices that allow the killing of animals without pre-stunning.

The Court also applied the test of proportionality to the case, although stating that this was not strictly required, and maintained that “the challenged provisions did not maintain proper proportion between a constitutionally safeguarded value in the form of the protection of animals and concern for their welfare on the one hand and the freedom of religion on the other”.

75 Art. 53(5) of the Constitution of the Republic of Poland [1997] (<https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>. Accessed October 29, 2024) reads, “The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defense of State security, public order, health, morals or the freedoms and rights of others”. Art. 9 of the Convention reads: “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”. Animal Welfare (Commercial Slaughter) Code of Welfare Report.

76 Although a minority opinion by Judge T. Liszcz concluded that the right of others were also implicated, referring to people who would be offended or distressed by learning of the cruelty to animals. A. Gliszczyńska-Grabias, W. Sadurski, “Freedom of Religion versus Humane Treatment of Animals”, 604.

77 Constitutional Tribunal of Poland, K 52/13 [2014].

The decision manifests an analytical blunder between the purpose test and the proportionality test that characterizes many proportionality decisions.⁷⁸ The Court claimed that no balancing was needed, as the purpose test was not met – i.e., it was not proven that the total ban fit into one of the allowed purposes for the restriction of freedom of religion. But the Court nevertheless did balance when it assessed whether the law was “necessary” to the furtherance of the purpose of public morals.

The main point about the case, however, is that the proportionality analysis did not at all relate to the reasons why the exemption from the Law was removed, or to legislative proceedings and protocols, or to the public campaign that brought about the repeal of the exemption, or to the possibility of bias motivating the Law. All of these are generally irrelevant to the proportionality test. Where present, such consideration can come into play within the “legitimate purpose test”. But, as noted by many scholars, this test is seldom used as the determinative test in European-style constitutional analysis, and it is the proportionality test that takes center stage.⁷⁹ Proportionality itself does have an indirect mechanism that can help uncover illicit purposes and motivations behind a law – these are the tools of over-inclusiveness and under-inclusiveness built into the proportionality sub-tests – and indeed a certain reading of the case focusing on the parts that show such over- and under- inclusiveness can portray it as focusing on illicit motive.⁸⁰ But, unlike in American doctrine, there is no direct engagement with the issue of illicit motive, or animus, so the discussion of these issues is only indirect and less developed.

6.4.2.2 *The German Schachten Cases and the ECtHR Cha’are Shalom Case*

The two other European court decisions that revolved around ritual animal slaughter were also high-profile cases, and predated the Polish decision, but were not centered on a direct assessment of the constitutionality of ritual animal slaughter.

The German *Schachten* case from 2002⁸¹ revolved mainly on the question whether the Muslim animal ritual slaughter – *dhabibah* – was a universally mandatory practice under Islam, in order to determine whether it deserved the protection under current legislation and under the German Basic Law. The German Animal’s Protection Act exempted from the requirement of pre-stunning only religious rites that were mandatory in a recognized religious community. A previous case interpreting that law in the Supreme Administrative

78 See M. Cohen-Eliya and Iddo Porat, “American Balancing and German Proportionality: The Historical Origins”, *International Journal of Constitutional Law*, vol. 8, no. 2 (2010): 263, 270. <https://doi.org/10.1093/icon/moq004>.

79 M. Cohen-Eliya and Iddo Porat, “American Balancing and German Proportionality: The Historical Origins” 268.

80 M. Cohen-Eliya and Iddo Porat, “American Balancing and German Proportionality: The Historical Origins”.

81 German Federal Constitutional Court, *Schachten*, BVerfGE 104 [2002].

Court rejected a claim of a German Muslim butcher for an exemption since, the Court argued, the practice was not mandatory in Islam and furthermore since freedom of religion was not infringed as the law did not force Muslims to eat meat against their religion, and they could eat vegetarian food or import *Halal* meat. This also created inequality between Muslims and Jews, as Jewish *shechita* was considered to be mandatory and protected under the law.⁸² The decision of the Federal Constitutional Court, however, accepted the Muslim butcher's claim, on the grounds of both freedom of occupation and freedom of religion, rejecting the claim that the practice was not mandatory and does not infringe freedom of religion.

The Court maintained, first, that protecting animals was a worthy cause and a proper purpose of the law, but that it can be limited by an exemption for the purpose of protecting religious freedom. The Court ruled that the interpretation of the exemption given in the law had to be one that properly balances the religious freedom of the Muslim butcher and his clients and the interest in protecting animals. The court determined that depriving Muslim butchers of their practice did not reflect such proper balance.⁸³

The second high-profile case is *Cha'are Shalom Ve Tsedek v. France*.⁸⁴ This is a decision of the ECtHR concerning a petition by members of an Ultra-Orthodox community in France against the French law. The decision seems less protective to religious rights than the two decisions reviewed earlier, as it allows the State to *de facto* ban certain forms of animal ritual slaughter – namely, those of the Ultra-Orthodox Jewish sect – and as it reverts back to arguments that the German Constitutional Court rejected, that religious practitioners could obtain their meat from import and that their religious rights were therefore not infringed.⁸⁵ But this is only according to a superficial reading of the case. The case allowed for a restriction on ritual animal slaughter only since it revolved around the question of whether the State could choose which religious representative it views as authoritative for the religious community. France is traditionally tolerant to *shechita* and did not witness the same type of high-profile debates as in Germany and Scandinavia, but it has a special relationship between the State and religion. It therefore allowed for an exemption for the rule against pre-stunning but conferred the authority to the official representatives of the majority of the Jewish population to regulate the matter – the Orthodox, rather than Ultra-Orthodox, community – and gave them, in effect, a monopoly over *kosher* slaughter.

82 S. Lavi, "Unequal Rites" 84.

83 See C. Haupt, "The Nature and Effects of Constitutional State Objectives: Assessing The German Basic Law's Animal Protection Clause", *Animal Law Review*, vol. 16, no 2 (2010): 237–241 (reviewing the German *Schachten* decision and its determination regarding the mandatory nature of ritual animal slaughter).

84 *The Cha'are Shalom Ve Tsedek v. France*, 27417/95 [2000] § 84.

85 See P. Lerner, A.M. Rabello, "The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities", *Journal of Law and Religion*, vol. 22, no. 1 (2007): 14–15.

However, both decisions noted in passim that the permission of ritual animal slaughter was indeed proportionate and fit within the regime of the protection of religious freedom. Indeed both decisions were also later quoted to that effect in the Polish decision.

6.4.3 The American Constitutional *Smith* Doctrine

6.4.3.1 *Smith and Lukumi*

American jurisprudence is governed by Scalia's opinion in the *Smith* case of 1990. This section will review the main elements of this doctrine as applied in *Smith* and in the subsequent case of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993).⁸⁶

The *Smith* case has laid down two main doctrinal tests: neutrality and general applicability. According to *Smith*, laws that are neutral and generally applicable would not be subject to strict scrutiny review, and only laws that specifically target religion or are based on bias and animus towards religion would be subject to such review.⁸⁷

The *Smith* case itself, however, did not involve a law that was based on animus against religion but rather a law that was quite clearly neutral and generally applicable law – a criminal law prohibiting the use of illegal drugs, including the use of a drug called peyote. There were no indications that the law in question was designed in order to limit religious practices, and it did not single out in any way religious practices. Rather, as Justice Scalia wrote in the case, the State of Oregon had maintained an “across-the-board” prohibition of peyote in its drug laws,⁸⁸ and therefore Smith's claim for accommodation and exemption was rejected (Smith asked that he not be denied unemployment benefits on account of him being fired from his job because of violating the law by smoking peyote in a religious Indian ceremony).

The *Smith* case is usually read together with the next major free exercise Supreme Court case – *Lukumi* – which did involve animus against religion. *Lukumi* involved a municipal set of ordinances that were quite obviously designed to prevent the practices of a religious sect and were clearly singling out this practice and devaluing them in comparison to other similar non-religious practices. The practice in question was animal sacrifice, which is practiced by the Santeria religion, and the event the ordinances responded to was the intention of the head of the Santeria Church in America to build a center of that religion in the city of Hialeah, Florida. *Lukumi* further elaborated on the two main tests set by Justice Scalia in *Smith* – neutrality and general applicability – in a context which resembles in many respects that of claims against

86 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993].

87 See notes 2–4 and accompanying text.

88 *Employment Division v. Smith*, 494 U.S. 872 [1990] 884.

ritual animal slaughter in Europe. I will therefore turn to a more detailed review of this case and the way it applied the *Smith* Doctrine.

6.4.3.2 *Six Principles*

While the *Smith* Doctrine consists of only two principles or tests – neutrality and general applicability – there is considerable overlap between the two,⁸⁹ and even greater confusion as to what exactly each of them stands for.⁹⁰ It therefore makes sense to address directly some of the main principles invoked by both these tests in order to later compare them with the proportionality test used in Europe. I will analyze the *Smith* Doctrine as applied and elaborated in *Lukumi* according to six such principles.

6.4.3.2.1 ANIMUS AND DISCRIMINATORY INTENT

It is not clear from *Smith* and *Lukumi* whether the showing of animus or discriminatory intent is necessary for the purposes of subjecting a law to strict scrutiny or whether the other principles that I will discuss, such as under-inclusiveness and over-inclusiveness, are only evidentiary tools for the determination of intent, or whether they stand by themselves. However, it is certain that the showing of animus, discriminatory intent, or an object of targeting religion (I will use these terms interchangeably) would suffice to prove that a law is not neutral and therefore subject to strict scrutiny.⁹¹ The Court has used several doctrinal tools to deduce discriminatory intent, drawing, among others, on similar tools developed in equal protection and free speech jurisprudence.

“In determining if the object of a law is a neutral one under the Free Exercise Clause” maintained the Court in *Lukumi*

[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, as well as the legislative or administrative history, including contemporaneous statements made by members of the decision making body.⁹²

89 In *Lukumi*, the Court wrote, “Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied”. *Employment Division v. Smith*, 494 U.S. 872 [1990] 884.

90 See, e.g., Brief for the National Association of Evangelicals and others as Amicus Curiae, pp. 1–2, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Stroman’s v. Weisman*: “[The jurisprudence of religious liberty] is mired in doubt because, a quarter century after this Court decided *Employment Division v. Smith*, 494 U.S. 872 (1990), followed by *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), federal circuits and other lower courts cannot agree what makes a law neutral and generally applicable”. <https://www.scotusblog.com/wp-content/uploads/2016/03/Stromans-Brief-of-Religious-Organizations.pdf>.

91 See J.M. Oleske, “*Lukumi* at Twenty 295, 339.

92 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 540.

Following these criteria, the Court in *Lukumi* quoted at length from the hearings of the city council during the legislative proceedings regarding the ordinances. A Councilman was quoted saying at the hearing that Santeria devotees “are in violation of everything this country stands for”, and the city attorney as saying, “This community will not tolerate religious practices which are abhorrent to its citizens”.⁹³ The Court also noted the fact that these resolutions took place in direct relation and in temporal proximity to the news about the intention to build the Church. It was relevant therefore that they were enacted “because of”, not merely “in spite of”, “their suppression of Santeria religious practice”.⁹⁴

Other, indicia for the existence of a legislative object of targeting religion in the case were the language itself used by the ordinances, that included words such as “sacrifice” and “ritual” to describe the prohibited conduct,⁹⁵ as well as the actual effects of the ordinances, which was that only religion was detrimentally affected by the ordinances.⁹⁶ The next principles to be discussed – under-inclusiveness and over-inclusiveness – were also used as indirect evidence for illicit motive.

6.4.3.2.2 UNDER-INCLUSIVENESS: FACIALLY AND IN APPLICATION

The Court in *Lukumi* noted that the “ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings”.⁹⁷ In other words, the ordinances were under-inclusive in not including within their scope similar activities with no religious motive. Under-inclusiveness could be facial, i.e., apparent from the terms of the legislation itself. This was the case with some of the ordinances which, as noted earlier, specifically targeted religious activities such as “ritual” or “sacrifice”, thus leaving out of their scope non-religious types of animal killings.

However, even when an ordinance was neutral facially, or “on its face”, the Court noted that it could look into its application. Rejecting *Hialeah*’s claims that at least one of the ordinances was neutral and broad since it had no mention of religion in its text – the ordinance punished “whoever [...] unnecessarily [...] kills any animal”, – the Court wrote,

The problem [...] is the interpretation given to the ordinance by [Hialeah] and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a per se basis, deems hunting,

93 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 541–542.

94 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 540.

95 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 534–535.

96 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 535 (courts should look into the “effect of a law in its real operation”).

97 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 542.

slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported cases [...] concludes that the use of live rabbits to train greyhounds is not unnecessary.⁹⁸

6.4.3.2.3 OVER-INCLUSIVENESS

Another aspect of neutrality, or its absence, and possible indication for illegitimate motive is the over-inclusiveness of the law. The Court noted that “the legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice”. For example, “regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city’s concern, not a prohibition on possession for the purpose of sacrifice”,⁹⁹ and public health concerns can be addressed by regulations as the proper disposal of carcasses rather than the prohibition of slaughter.

6.4.3.2.4 SELECTIVE EXEMPTIONS AND “DEVALUATION” OF RELIGION

A particular aspect of under-inclusiveness that was accorded special notice in *Lukumi* as well as in following cases is the occurrence of “selective exemptions” – that is, exemptions from a general rule that exist only for secular reasons but not for religious reasons. Such exemptions, the Court maintained, professed a “devaluation” of religion, as they expressed the view that religion reasons are of lower value than other reasons. The Court wrote,

As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government ‘may not refuse to extend that system to cases of “religious hardship” without compelling reason.’ Respondent’s application of the ordinance’s test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.¹⁰⁰

6.4.3.2.5 A LEGITIMATE INTEREST IS NOT ENOUGH

The Supreme Court in *Lukumi* addressed the District Court’s ruling that affirmed the ordinances. It noted that the lower court’s view was that

[a]lthough [...] the city’s concern about animal sacrifice was ‘prompted’ by the establishment of the Church in the city... the purpose of the

⁹⁸ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 537.

⁹⁹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 538.

¹⁰⁰ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 537.

ordinances was not to exclude the Church from the city but to end the practice of animal sacrifice, for whatever reason practiced.

The lower court also argued that “specifically regulating [religious] conduct” does not violate the First Amendment “when [the conduct] is deemed inconsistent with public health and welfare” and that the “ordinances’ effect on petitioners’ religious conduct was “incidental to [their] secular purpose and effect”.¹⁰¹

The Court expressly rejected this analysis. A critical point of the *Smith* Doctrine is that the availability of a legitimate governmental interest behind the legislation – the prevention of animal cruelty – does not cure a selective treatment of religion and its singling out versus other types of activities: “The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause”.¹⁰²

6.4.3.2.6 NO BALANCING AND NO EVALUATION OF RELIGIOUS BELIEF

The District Court’s ruling in the *Lukumi* case was handed down before *Smith* and therefore applied to the case a pre-*Smith* strict scrutiny balancing test despite viewing it as involving accommodation. The Court in *Lukumi* notes that the District Court “proceeded to determine whether the governmental interests underlying the ordinances were compelling and, if so, to balance the governmental and religious interests”. The Court quoted from the District Court that wrote that this “balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity”.¹⁰³

This passage of the District Court was also expressly rejected in *Lukumi*. It was rejected since it no longer fit with current doctrine post-*Smith*. But more than that, it was rejected since it contradicted one of the main tenets of the *Smith* Doctrine – the avoidance of balancing and of the need to assess the strength of the religious claim or of the authenticity of religious belief.

In a famous passage in *Smith* Justice Scalia wrote that

[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.¹⁰⁴

101 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 529.

102 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 543.

103 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 [1993] 529.

104 *Employment Division v. Smith*, 494 U.S. 872 [1990] 890 (emphasis added).

Scalia therefore thought that it would be worse to allow judges to balance between the social importance of laws and religion, than to suffer a disadvantage to minority religion. One of the reasons was that such balancing necessarily required the Court to evaluate the centrality or importance of religious claims, so that it could balance them with social importance. “Repeatedly” wrote Scalia, “and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim”.¹⁰⁵

6.5 Applying *Smith/Lukumi* to the Animal Slaughter

How would the claims against animal ritual slaughter brought in the European cases fare under the US *Smith* Doctrine? Following the review of the European cases and the way they are set in their cultural and historical context, as well as the main principles of the American *Smith* Doctrine, I would argue in this section that the *Smith* Doctrine provides a better framework for the assessment of these cases.

Note that my point here will not be to compare the actual outcomes of the European cases with the hypothetical outcomes of similar cases under American law, nor would such a project be a fruitful one. The reason is that doctrine is always filtered by judicial discretion, and thus never fully determined. Therefore, as we have seen, some of the proportionality cases in the European cases arrived at outcomes that were favorable to minority religion (e.g. the Polish ritual animal slaughter case and the German *Shachten* case) while others did not (e.g. the first German *Shachten* case, as well as, to an extent, the ECtHR *Cha'are Shalom* case). And similarly, the *Smith* Doctrine, while arguably more determinate than proportionality, leaves many questions open and is often lamented for the doctrinal confusion it creates, especially in the “hard” cases that lie in between the “easy” cases of *Smith* and *Lukumi*. My point, rather, would be to show that the kind of considerations that each of these doctrines puts to the fore, and the focus of the analysis in each, makes a better case for minority religion claims under the American regime, at least to the extent that ritual animal slaughter is a representative example. I will focus on the Polish case.

Recall that the review in the Polish animal ritual case focused on determining whether the total ban on ritual slaughter was “necessary for the furtherance of public morals”, which, as mentioned earlier, meant, determining where the balance between public morals (the protection of animals) and freedom of religion lies. The five principles of the *Smith/Lukumi* doctrine, however, would focus attention on quite different questions and factors.

Animus and Discriminatory Intent. The *Smith/Lukumi* doctrine would attempt to determine whether animus and bias were in any way involved in the motivations behind the Polish Animal Protection Law and in particular behind

105 *Employment Division v. Smith*, 494 U.S. 872 [1990] 885–887.

the absence (or extraction) of the religious exemption from the Law. As with the *Lukumi* case, the legislative hearings behind the Law would be a pertinent piece of evidence, as well as the public debate that accompanied legislation and that might have affected it. The *Smith* Doctrine would therefore allow for evidence regarding the nationalistic and, at times, anti-Semitic and Islamophobic overtones of the Polish public debate over animal ritual slaughter.¹⁰⁶ It would also have required a close look at the legislative hearings and pronouncements of members of parliament, which could have found problematic pronouncements such as those that were documented earlier in the legislative hearings in the *Lukumi* case. General background evidence relating to animus would also be relevant for the constitutional analysis – the general Islamophobic atmosphere and the rise in anti-Semitism in current Europe, as well as the long history of anti-Semitism in Poland, including anti-Semitism revolving around the particular practice of ritual animal slaughter (recall that Poland adopted anti-*shechita* laws even before it was occupied by the Nazis, based on overt anti-Semitism, in 1938). Such evidence would serve as a background raising suspicion that animus was involved in the Law, the way the general unpopularity of Santeria in America was relevant for raising a similar suspicion in the *Lukumi* case. Note that all the factors reviewed earlier – legislative hearings and pronouncements, public debate, general background of animus – are completely absent from the proportionality-based review in the Polish case.

Another factor that is completely absent from the Polish review and would be pertinent under the *Smith/Lukumi* animus review is the history of the law itself – the fact that it included a religious exemption that was subsequently removed from the law, the fact that even when the exemption was reinstated by the government this brought about a petition that resulted in its repeal, and the fact that the total ban persisted despite an express EU endorsement of religious exemptions.¹⁰⁷ All these facts in the history of the law can be used as indications that the law was not “neutral” with regard to religion, and may have resulted from bias and animus. At the very least, this history would show that the Law differs from laws, such as in *Smith*, that do not even contemplate a conflict with religion, and in which the conflict is completely incidental to

106 See L. Janion, “Wspólnoty mięsa. Konstruowanie tożsamości grupowej wokół sporu o ubój rytualny”, *Kultura Popularna* no 4 (2014): 49 (English abstract): “Tatars cement their collective identity of meritorious Poles while add an element of being the victims of political quarrels and religious discrimination. Animal rights activists deny being anti-Semitic or Islamophobic, but they present themselves as more civilized and humane than the minority. Thus, the view on the superiority of the majority’s culinary practices is strengthened. Both groups refer to the nationalist discourse and the category of being Polish”.

107 This is indeed the usual case with bans on ritual animal slaughter. See, e.g., the ban in New Zealand promulgated by the Minister of Agriculture. The Minister did not include an exception for religious slaughter despite an early recommendation to do so by the National Animal Welfare Advisory Committee.

the law.¹⁰⁸ The legislative history shows that the conflict with religion was very much at the background of the entire process of legislation and that the law can even be said to be more restrictive than an existing standard – to the extent that EU law provides a European standard.

As noted earlier, the discriminatory effect of the law was also considered in *Lukumi* as a possible indication for the lack of neutrality and existence of animus. In the Polish case, as in *Lukumi*, the law adversely affects only minority religions – Islam and Judaism – which would be pertinent to the review, and does not enter in any direct way into the proportionality review in the Polish case.¹⁰⁹

Under-Inclusion and Selective Exemptions – this aspect of the Polish law would be immediately at the center of a *Smith/Lukumi* review, and indeed the *Lukumi* case itself provides for good arguments that directly apply to the ritual slaughter case. Petitioners against a ritual animal slaughter law, such as in Poland, would no doubt argue that the law is under-inclusive or singling out religion, or has selective exemptions, or devaluates religious reasons, either expressly or in application, in not banning similar activities that result in pain and suffering for animals. These other activities include hunting, rodent extermination, unsupervised small-scale slaughter that is done in farms, cruel transport and living conditions of farm animals, and so on. Note that the Polish Court did indeed point to some of these factors, but not in any doctrinally orderly manner. They were used as an indication that general morality did not object to a religious exemption from animal cruelty norms, and they could have been used under the first proportionality test also, to show that there is no rational connection (or at least not a good one) between the law and its objective. However, the *Smith/Lukumi* review makes this type of analysis much more central to the constitutional review. Indeed it can be seen as one of the primary indications to bias, as it shows a double standard – one that applies to the majority and one to the minority religion.

Over-Inclusion – this factor too would be immediately picked up in the animal slaughter case if reviewed under the *Smith/Lukumi* doctrine. One could argue that careful inspection of religious slaughter, making sure that the handling of cattle is done properly, and that the slaughter itself is done as quickly and efficiently as possible, would reduce much of the concerns around

108 See, for example, the difference between the laws in *Lukumi* that were enacted directly in relation to the coming of the Santeria church to town, and the laws in Merced that predated the conflict by a long time and did not anticipate it. See also in Newark Police Department “the medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not”.

109 Effects obviously do matter in a proportionality review, but not as indications for animus. The review would need to show that the harmful effects on minorities outweighs the benefit to the entire society, maybe adding into the calculus the fact that there might be extra harm when someone is the sole bearer of the social cost.

religious slaughter without banning it completely. Examples from other countries (South Africa, Australia) of compromises between concerns for animals and religion that resulted in less than a total ban would also be indications for the over-inclusiveness of the regulation. Again, proportionality has tools to review over-inclusion – especially the second test of proportionality, the least restrictive means test – but these would not be as directly related to animus, and therefore, they would be more malleable than in the American case.

Legitimate Interest Is Not Enough: proponents of the absolute ban on ritual animal slaughter often argue that it is not motivated by anti-Semitism or Islamophobia, but rather by a secular legitimate interest – preventing cruelty for animals. As the *Lukumi* case shows, such claims may have better answers in the *Smith/Lukumi* type reviews than in the proportionality review that takes governmental interests at face value and balances them with religious hardship.

No Balancing and No Evaluation of Religious Belief: Recall that one of the express motivations of the *Smith* reasoning is to avoid judicial balancing between the public interest and religion, and leave it to the political and democratic process. The European proportionality analysis, on the other hand, cannot avoid such balancing. The Polish decision attempts to be an exemption, as the court almost expressly wished to avoid assessing the validity and strength of the religious claim and the balancing of it versus the animal rights/public morals interest. But, as A. Gliszczyńska-Grabias and W. Sadurski rightly write, it could not really achieve this. In order to assess whether a total ban was “necessary” for the furtherance of public morals, the court had to, and in effect did, assess the gravity of the infringement of religious freedom versus the gravity of the public moral concern. In other cases, such as in the German *Shachten* case and in the HCtHR *Cha’are Shalom* case, this was done even more expressly and included an evaluation of the obligatory nature or centrality of a religious practice according to its own terms – as in evaluating whether ritual slaughter was mandatory under Islam (*Shachten*) or whether having *Kosher* meat imported as a replacement for local slaughter is religiously neutral under Jewish law (*Cha’are Shalom*).

Balancing and evaluation of religious reasons do not inherently point to less protection of minority of religion, but they may. This is apparent if one takes into consideration the fact that balancing has to be done according to a certain standard. The yard stick for the balance in a European-type proportionality analysis is a community-based set of values, enshrined in the constitutional order. This is especially formalized in German jurisprudence, and the Polish decision shows the clear influence of German constitutional jurisprudence. While the Polish decision identified consensual public morals with toleration to minority religion, the potential of such a test to reflect bias towards minority religion is more than evident. The shared mores and habits of society may very well be the opposite of what minority religion and culture stands for.

6.6 Conclusion

The chapter attempted to show the extensive background of bias and prejudice in disputes around ritual animal slaughter in Europe, and to argue that in such cases doctrines that are attuned to fleshing out bias – such as the American *Smith* Doctrine – are preferable to proportionality.

The discussion in this chapter does not mean to say that the Polish ritual slaughter case, for example, or its counterparts in Germany and in the ECtHR would necessarily be easy cases under American post-*Smith* review. A. Gliszczynska-Grabias and W. Sadurski, e.g., argue that the case should not be reviewed as one of singling out religion but as one of generally applicable law. In addition, the mere fact that a religious exemption was contemplated but not included is not enough in and of itself to show bias and non-neutrality. The reasons for not exempting religion are also of crucial importance, and may turn out to indicate neutrality, or be viewed as compelling. But it does seem that a history of anti-religious sentiment around a law, coupled with under- and over-inclusiveness, and awareness to a general standard favoring exemption, carry considerable weight in terms of the legal analysis in America, and they are almost completely absent in the European formal analysis.

The history and jurisprudence of the practice of two minority religions in Europe provide a rich example of the shortcomings of the European alternative to *Smith* – the proportionality doctrine – and of some of the advantages of *Smith* in the area of minority protection.