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Kosher Slaughter, State Regulation of Religious Organizations, and the European Court of Human Rights

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KOSHER SLAUGHTER, STATE REGULATION OF RELIGIOUS ORGANIZATIONS, AND THE EUROPEAN COURT OF HUMAN RIGHTS

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I. Introduction

On May 6, 2009, the European Parliament passed a legislative resolution regarding the regulation of animal slaughter in the European Union. The resolution addressed a proposal made by the European Commission in September 2008. The Commission's proposal had also been referred to the European Economic and Social Committee (EESC), and the latter produced an opinion in its regard on February 25, 2009. The European Parliament's new resolution is an important milestone in the European debate surrounding the slaughter of animals in general and the regulation of ritual slaughter in particular. Against the background of this resolution, we may now assess the unfolding of recent developments in the debate over ritual slaughter in Europe, and highlight a number of issues that have recently been afforded little attention.

To begin, we note that kosher and *halal* (Muslim) slaughter methods have been allowed by European Union rules, and that the exemption from stunning animals prior to slaughter has been tolerated at the European level.[1] A study that was commissioned by

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[1] The issue of stunning is briefly addressed below. The first European directive on the issue of animal slaughter was enacted in 1974 (74/577/EEC). Exemptions from the requirement of stunning were recognized in The European Convention for the Protection of Animals for Slaughter, 1979, Art. 17. The Convention was approved by the Council of Europe on behalf of the European Economic Community in 1988 (88/306/EEC). The Council then further acted to homogenize and regulate slaughter in a directive issued in 1993 (93/119/EC), replacing the 174 directive. Article 13 of the Treaty of Lisbon (which has not been ratified to date) recognizes animals as "sentient beings" and calls for attention to

the European Commission and that has informed current efforts at regulating animal slaughter suggests that the impetus for the European effort at streamlining stunning and other pain and anxiety reducing measures for cattle, pigs, and sheep in slaughter is at least in part economic.[2] Yet, variations in slaughter practices persist, and the statistics presented regarding the slaughter of cattle without stunning are often based on estimates and survey responses.[3] As we shall see, the promotion of animal welfare and economic and administrative motivations for the tight oversight of slaughter practices are balanced against the need for a margin of discretion in responding to demands for exemptions, and such demands are often founded in ritual requirements. Indeed, the most recent proposal of a Council resolution to regulate animal slaughter by the European Commission and the debate it generated reflect both concern for animal welfare and sensitivity to religious rituals and to local and regional traditions.

The Commission's proposal for the new regulation of animal slaughter was based on the understanding that the 1993 directive addressing this issue has become outdated. Not only has the public debate on animal slaughter evolved over the past fifteen years, technological and scientific innovation have rendered certain old standards obsolete.[4] Yet, overall, the debate regarding the

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animal welfare as well as respect for national provisions on account of religious and cultural rites (C115/54 Official Journal of the European Union 9.5. 2008). The European Commission's proposal on the protection of animals at the time of killing of September 18, 2008 also accounts for exemptions to accommodate ritual slaughter, and authorizes member states not to offer such exemptions (Art. 4(2) COM/2008/0533). These are further addressed below.

[2] *Study on stunning/killing practices in slaughterhouses and their economic, social, and environmental consequences: Final Report; Part 1: Red Meat*, FCEC Civic Consulting et al., 25 June 2007, at 1-2, 30. There, both the physical injury of animals and the release of stress hormones are recognized as factors that reduce revenue. Injuries may reduce meat yields, whereas animal stress adversely affects meat quality. Conversely, the costs of implementing measures aimed at increasing animal welfare are associated with greater efficiency and higher revenue. The study also highlights the vulnerability of the European red meat sector to liberalization (*id.* at 9-10).

[3] *Id.* at 12-13.

[4] COM/2008/533/3, 2.

Commission's proposal and Parliament's resolution reflected little interest in the details of scientific progress and innovation, and greater comfort with familiar arguments about the ongoing need to find a balance between centralized oversight and national or local control, as well as the attempt to reconcile an animal welfare agenda with the demands of religious practice. Paragraphs 15, 16 and 18 of the Commission's proposal address religious ritual and custom. Both paragraphs 15 and 16 relate to rites that involve the killing of animals during particular events. However, article 18 highlights the need to derogate from the standard stunning rules for the purposes of religious slaughter that takes place in slaughterhouses. At the same time, it also underscores the discretion of member states in applying this derogation, in accordance with the principle of subsidiarity.[5] In contrast, the EESC Opinion categorically stipulates that for "the proposal to allow derogation in the case of the ritual slaughter of animals is totally inconsistent with the objectives for animal welfare during the slaughter process contained in this proposed Regulation."[6] The same view was expressed during the parliamentary debate.[7]

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[5] *Id.* at 16.

[6] Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the protection of animals at the time of killing (COM(2008) 553 final – 2008/0180 CNS) §1.5. In addition, §4.4 clarifies: "Innovative technology such as the Stun Assurance Monitor allows those who wish to slaughter with prior electric stunning in compliance with *Halal* rules to accurately monitor how much electrical charge is given to an animal. This ensures that it is properly stunned but still alive prior to slaughter… It is important that the Commission would actively support research into systems that would convince religious groups with regard to stunning thereby protecting animal welfare at slaughter."

[7] *See* statement made there by Conservative MEP for the South West of England and Gibraltar and Chair of the European Parliament's Agriculture Committee, Neil Parish: "the Commission must make up its mind. Either you accept religious slaughter and the fact that the animals are not stunned, so those animals in other countries which we want to be killed at Christmas can have the same process, or you actually stand up for what I believe to be right, and that is that we, as man, decide how an animal is to be slaughtered and that animals should be stunned before slaughter. I think it is absolutely clear that this should happen. In some Member States there is pre-stunning and post-stunning of animals under both *halal* slaughter and under Jewish slaughter. I wonder why it cannot happen in the whole of Europe" (transcripts of MEP statements are available on line at:

Nevertheless, the parliamentary resolution amends the Commission's texts to reinforce the prominence of religious exemptions, especially in the context of ritual slaughter that takes place outside the slaughterhouse. It also reinforces the existing derogations from the stunning standard.[8] It should come as little surprise that Jewish proponents of this resolution celebrate it as a positive step towards greater toleration of religious freedom, while recognizing that the European Parliament only has consultative power.[9]

Yet, this resolution is but another milestone in the ongoing debate over the European regulation of ritual slaughter, and addresses only part of the regulatory challenge associated with it. Among the various ritual practices addressed by European regulation, kosher slaughter stands out. The *kashrut* of meat and its regulation present particular challenges to the modern Western state and to European institutions, and these transcend the mechanics of the slaughter-act. Clearly, while concerns relating to the Jewish practices of ritual slaughter have been debated for more than a century in Western Europe, in a number of European countries regulatory difficulties persist and sentiments occasionally run high.[10] One reason kosher slaughter entails such difficulty may be that it represents a particularly awkward challenge to Western societies: On the one hand, it reflects a Jewish insistence upon the primacy of pre-modern patterns of religious authority and practice, and a resistance to subjecting them to modern review, let alone regulation. In this respect, it constitutes a rejection of both national authority and modern scientific norms by some members of the Jewish minority and a reminder that in certain respects modernity has failed to "close

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http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20090505&secondRef=ITEM-015&language=EN&ring=A6-2009-0185.

[8] *See* amendments 3,4 to the proposal. The text is available online at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0369&language=EN&ring=A6-2009-0185.

[9] *See* coverage in Israel's daily Ha'aretz newspaper, '*EU Parliament Legalizes Kosher Slaughter Practice,*' Cnaan Lipshiz, May 7, 2009.

[10] In Sweden, Finland, Latvia, Estonia and Lithuania, kosher slaughter is currently restricted. In Switzerland (not a member of the EU), only the kosher slaughter of chickens is allowed, and in Norway (also not an EU member state) kosher slaughter is also restricted.

the deal" with this constituency. On the other, it also highlights the boundaries of tolerance among modern, Western societies towards groups that seem to openly reject the promise of modernity. Thus, the problem of kosher slaughter signals that modern societies have failed to fully win-over, integrate, and assimilate some members of the Jewish community, and still struggle to accommodate them and their practices. To be sure, the dynamic of European minorities that refuse to fully accept Western, modern values and that occasionally test the tolerance of the majority and of its governing institutions is not confined to Jewish groups. However, friction between Western European governments and Jewish minorities raises particularly difficult issues, in part because it reopens wounds that have not entirely healed following World War II and the Holocaust.

The principal, most often expressed, European objection to kosher slaughter has not changed over the past century. Kosher slaughter has been thought to cause unnecessary suffering to animals, especially to cattle. The stunning of cattle has been widely credited with reducing the pain of slaughter, and has become routine in Europe's slaughterhouses. However, certain rabbis have prohibited stunning for fear that stunned animals would not satisfy the requirements for slaughter in Jewish law, and ruled the meat of animals stunned prior to slaughter unfit for consumption (that is, non-kosher). For this reason, much of the debate regarding the regulation of kosher slaughter has throughout focused on the granting of exemptions from the stunning requirement to Jewish slaughterhouses. Yet, the concern with animal welfare and interest in stunning has overshadowed other issues, such as state regulation of the rights to engage in kosher slaughter and to distribute kosher meat, and its implications within and beyond the Jewish community. The regulation of kosher food in the Unites States has also been controversial, albeit differently. The American debate has focused on consumer protection on the one hand, and the avoidance of an entanglement of civil law with religious precepts and rules of conduct on the other. In the following pages I offer a brief introduction to kosher supervision and an overview of American attempts to regulate it. Against this backdrop, the discussion shifts to *kashrut* and its regulation in France. In this second part of the essay,

I offer a close reading of the decision of the European Court of Human Rights in the case of *Cha'are Shalom* ve *Tsedek v. France* and assess its significance in the light of the ongoing French effort at regulation. The discussion of this case is followed by an examination of Jewish writings that address these modern European efforts and their perceived impact upon those seeking to observe the laws of *kashrut*. The concluding section highlights the subtle and complex challenges entailed in kosher slaughter regulation in Europe, as well as the potential for greater understanding and more meaningful dialogue on this topic.

II. Kosher Food and its Regulation in the United States: A Brief Overview

A. Kosher Food – An Introduction

The Hebrew word '*kasher*' or '*kosher*' literally means untainted, upright, fit, approved, or valid. While for many this word is most commonly associated with food that corresponds to Jewish law requirements, in rabbinic literature it is often employed with regard to people in general and to those who participate in religious and judicial functions. It is also used to describe time, location, official documents, and various substances or materials.[11] In short, the terms '*kashrut*' (the state of being 'kosher', kosher-ness) is widely used, and it signifies correctness, validity, and fitness for purpose. Kosher food is of the kind that is approved for Jewish consumption according to Jewish law (*halakhah*). In order for food to be recognized as kosher, it has to be grown, produced, processed, prepared and presented in line with stringent requirements. Indeed, *kashrut* requires some control over the entire chain of food

[11] *See* B. Talmud Shabbat 105b for a mention of a 'kosher', or upright man; B. Talmud Shabbat 145a-b for a discussion of 'kosher', or approved, fit witness; B. Talmud Yoma 28b addressing the appropriateness 'kashrut' of the eighth day in the life of a boy for the performance of circumcision; B. Talmud Sukkah 4a-b for a discussion of the validity of a tabernacle depending on its location on the roof of a building; B. Gittin 4a that regard the validity of a bill of divorce; B. Talmud Sukkah 9b-10a concerning the fitness of certain materials for use as covering for tabernacles.

production, service, and consumption. Thus, the origins of various types of food may disqualify products that would otherwise be allowed. For example, the meat of the offspring of an impure animal is disqualified, even if the offspring corresponds to the description of a pure animal.[12] Also, milk requires supervision from the moment it is collected to ensure that it is not mixed with non-kosher milk or stored in an unclean container.[13] Incorrect or unsupervised processing, and production with materials that are not kosher may also disqualify food. For this reason, cheeses produced by non-Jews who are not supervised have been considered non-kosher. Cheese is often made with rennet, and it can be derived from (non-kosher) animals.[14] Further, improper cooking and preparation of food may render the mix of kosher ingredients non-kosher. For example, kosher meat and kosher milk may not be mixed in cooking or other preparation.[15] Among other restrictions, this means that cooking vessels and utensils require separation.[16] Meat and milk dishes may also not be served simultaneously (even if they are cooked separately and served on appropriate plates), and a consumer of meat must wait before eating dairy.[17] In other words, the laws of *kashrut* touch upon all stages of food production and consumption and require some Jewish involvement in or oversight of these activities. Where the consumer has direct contact with the producer, such control or oversight may be arranged between the parties. However, where the food industry is characterized by remoteness between the consumer and the producer, the individual consumer is more likely to require assistance. Thus, since the industrial revolution, Jews who follow the requirements of *kashrut* have been able to exercise control over its cooking, serving, and eating; however, they often could not independently ascertain the origin of their food, nor have they been able to regulate the production processes of the items they purchase; the longer and more complex the (vertical) chain of food production

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[12] RAMBAM, FORBIDDEN FOODS, 1:5.
[13] YD 115a.
[14] YD 115b.
[15] YD 87.
[16] YD 93-6.
[17] YD 88, 89.

and distribution – the greater the challenge of adequate supervision.[18] For these reasons, in spite of substantial vertical integration, to comply with the rules of *kashrut*, Jews have increasingly had to rely on the supervision and certification of others.[19]

B. How Kosher Are Kosher Regulations in the United States?

The need to rely on the supervision and certification of trusted experts to maintain *kashrut* was at the root of a crisis of confidence among members of the Jewish community in New York during the late nineteenth and early twentieth centuries. There, state intervention was required because the Jewish community failed to consistently enforce a standard of *kashrut* on merchants, and instances of false advertising led to a loss of confidence in kosher labeling. At the same time, price-fixing occasionally emerged as an acute concern, especially among members of the Jewish working classes.[20] To address the need for this market's regulation, New York's State Legislature enacted the first American kosher food law in 1915, and established a standard that would be consistent with "orthodox Hebrew religious practice."[21] New York state law would be enforced to ensure that products that were labeled kosher

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[18] For an accessible overview of the industrial revolution's impact on the food industry see M. E. Stalveit, *Agriculture Since the Industrial Revolution, in* 1 ENCYCLOPEDIA OF FOOD AND CULTURE 54-60 (S. H. Katz & W. W. Weaver eds., Scribner/Thomson Gale 2003) and for a recent journalist's account of the industrial revolution's impact on kashrut and the reactions to it, see S. M. Shapiro's *Kosher Wars*, N.Y. TIMES MAGAZINE, Oct. 9, 2008.

[19] For an analysis of vertical integration in the US food market see S. Bhuyan, *Does Vertical Integration Effect Market Power? Evidence from U.S. Food Manufacturing Industries*, 37 J. AGRICULTURAL & APPLIED ECON. 263-276 (April 2005). One of the largest kosher certifying organizations in the world today is the Orthodox Union (OU), based in New York. For the OU's own narrative of the growth of its kosher certification see http://oukosher.org/index.php/common/article/thebeginningsofoukosher/.

[20] Marc D. Stern, *Kosher Food and the Law*, in JUDAISM 389-392 (1990). *See also* P. Hyman, *Immigrant Women and Consumer Protest: The New York City Kosher Meat Boycott of 1902*, *in* THE AMERICAN JEWISH EXPERIENCE 151-164 (Jonathan D. Sarna ed., Holmes & Meyer, New York/London, 2nd ed. 1997).

[21] New York Agricultural and Market Law § 201-a.

corresponded to that description, and that those intentionally misrepresenting foods as kosher would be prosecuted. Thus, the impetus for the legislation was a perceived need for consumer protection. Other states followed with legislation regulating kosher food, and consumer protection remained the principal goal of these efforts.[22]

The New York kosher food law and attempts to enforce and reinforce its provisions in 1922 did not put an end to fraudulent practices. In fact, the persistence of regulatory difficulties contributed to rabbinic resolve to address this problem, and to develop supervision and certification capacities (starting with poultry, in the early 1930's).[23] At the same time, kosher food legislation was also challenged. The involvement of states in kosher certification was attacked, most notably on the grounds of vagueness, as contravening the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution, and on the basis of the Establishment Clause of its First Amendment. Already in 1916, two butchers accused of selling non-kosher meat as kosher challenged the validity of the statute.[24] They argued that its language was impossible to interpret, that the essential word 'kosher' used in the statute was a foreign word, and that the statute assumed extensive knowledge of Jewish law, history, and literature.[25] They also contended that the law created a special privilege or immunity.[26] In another early case, a butcher argued that the statute ill defined the crime, because of the nature of rabbinic literature regarding kashrut. There, the central argument was that the vast rabbinic literature on this subject contained much inconclusive material, and that it was impossible for anyone to definitively determine whether meat was kosher or not.[27] Within the decade, the argument highlighting the vagueness of the New York statute was employed in a case that

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[22] Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667 at 671 (1993).

[23] Stern, *supra* note 20, at 392.

[24] People v. Goldberger, 163 N.Y.S. 663 (1916).

[25] *Id.* at 665.

[26] *Id.* at 666.

[27] People v. Atlas, 170 N.Y.S. 834; 230 N.Y. 629 (1921).

reached the federal courts. In spite of the Due Process clause of the Fourteenth Amendment requiring precise definition for criminal statutes, in *Hygrade Provision Co., Inc. v. Sherman* the court found that the violation of the statute required both the breach of kashrut standards and the intention to sell non-kosher food as kosher. Rabbinic disagreement regarding kashrut would, therefore, not entail difficulty if the purveyor sold a product in good faith.[28]

Additional challenges to kosher food statutes and ordinances arose in California, Florida, Maryland, New Jersey, and New York.[29] In California, an opponent of kosher food legislation wrote that "Judaism need not call upon the State to settle its own internal affairs." The same author pointed out that in spite of legislative efforts in New York, fraud in the kosher food industry persisted.[30] The challenge to the California statute came decades later, and again focused on the indeterminacy of kashrut, given the plurality of rabbinic views. In Miami Beach, a hotel operator was fined for selling non-kosher-for-Passover cakes as kosher-for-Passover. On appeal, he was the first to argue that the Miami Beach ordinance established religion, compelling the observance of religious law under threat of prosecution.[31] In New York, both the *Brach's Meat Market* and *Hebrew National Foods* Cases highlighted the difficulties entailed in rabbinic disagreements regarding the kashrut of food items. In *Brach*, a kosher inspector found that tongues offered for sale were not kosher while the orthodox rabbi supervising the butcher's shop insisted that they were.[32] Another case involved

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[28] Hygrade Provision Co., Inc. v. Sherman, 266 U.S. 497, 501 (1925).

[29] Ehrlich v. Municipal Court of Beverly Hills Jud. Dist., 360 P.2d 334 (1961); Sossin Systems Inc. v. City of Miami Beach, 262 So. 2d 28 (Fla. Ct. of Appeals, 1972); Barghout v. Mayor of Baltimore, 325 Md 311, 600 A2d 841, and see Barghout v. Bureau of Kosher Meat and Food Control, 66 F 3d. 1337 (4th Cir. 1995); Ran Dav's County Kosher, Inc. v. State of New Jersey, 579 A2d 316 (Super App Div 1990), rev'd, 608 A2d 1353 (1992); Brach's Meat Market v. Abrams, 668 F. Supp. 275 (S.D.N.Y. 1987).

[30] Elazar & Goldstein, *The Legal Status of the American Jewish Community*, *in* 1972 AMERICAN JEWISH YEARBOOK, at 37. *See also* Stern, *supra* note 20, at 393.

[31] *Id.*

[32] Stern, *supra* note 20, at 394.

the Hebrew National Foods' possession of allegedly improperly kashered meat. Inspectors who visited a Hebrew National Foods facility in Queens reportedly found pieces of meat immersed in hot water. The dispute arose while Hebrew National Foods was moving from New York to Indiana, and it alleged that the citation of a violation against it amounted to retaliation on this account. Also, according to press reports, Rabbi Rubin, who headed New York's kosher compliance unit at the time, said in a sermon that Hebrew National was "hollering" at him because he would not accept bribes and gifts.[33] While in both of these cases arguments were made regarding the constitutionality of New York's kosher statute, they also highlighted internal disagreements regarding kashrut standards and chipped at the credibility of state sanctioned kosher supervision.

A successful challenge of kosher food laws eventually arose in New Jersey. An inspection of employees of the Bureau of Kosher Enforcement in New Jersey cited Mr. Weisman, a kosher butcher, for violations of the state's kosher food regulations. Mr. Weisman had reportedly possessed meat that had not been soaked and salted and failed to properly label it. He was also charged with possessing tongues that were not deemed kosher. Mr. Weisman denied violating the rules of kashrut, and eventually filed suit along with Ran-Dav's County Kosher, Inc. ("Ran-Dav"). Ran-Dav argued that the New Jersey regulations established religion and violated the First Amendment of the United States Constitution, as well as the establishment clause of the New Jersey Constitution. State supervision, they contended, amounted to an imposition of one religious standard of observance to the exclusion of others. Also, they suggested that the choice of an Orthodox Rabbi to head Attorney General's Bureau of Kosher Enforcement was problematic. Indeed, Mr. Weisman stated that the charges against him stemmed from a religious dispute between the certifying rabbi at Ran-Dav and the state's kosher inspector and others. The courts, it was argued, would not be competent to intervene in such matters.[34] The appellate

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[33] S. Labaton, *Business and the Law: New York Dispute over Kosher Meat*, N.Y. TIMES, July 3, 1989.

[34] Stern, *supra* note 20, at 395-96.

court rejected Ran-Dav's constitutional challenge.[35] However, the New Jersey Supreme Court found that the statute violated the Establishment Clauses of both the federal and state constitutions.[36] The court ruled that the regulations were unconstitutional because they "fostered an excessive government entanglement with religion."[37] Following the New Jersey Supreme Court decision in *Ran-Dav*, Baltimore's kosher ordinance was invalidated in 1995, and New York's kosher statute was found unconstitutional in 2002.[38] Both of these recent challenges were mounted on the basis of the Establishment Clause of the First Amendment.

While state and local kosher regulations have been subject to legal debate, kosher slaughter and its commercial supervision have also attracted increasing attention among rabbis and lay members of the Jewish community. A notable recent controversy involved the Agriprocessors Inc. plant in Postville Iowa, formerly the largest kosher meatpacking plant in the United States. On August 2, 2004, a PETA investigator who worked in the Agriprocessors plant started recording video films that revealed the inhumane slaughter of animals.[39] One particular segment of film showed an animal being slaughtered in a pen, its throat being slit, its trachea torn, and its attempts to stand on its legs during the moments following its release from the pen.[40] The film was released in November 2004. It generated both condemnation of and support for Agriprocessors in the Jewish community, and led to the launch of a USDA investigation. In May 2007, PETA again filmed a video of similar slaughter practices in the Agriprocessors plant in Gordon, Nebraska.[41] It is worth noting that PETA's campaign against

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[35] Ran Dav's County Kosher, Inc. v. State of New Jersey, 129 N.J. 141, 326-29, 608 A.2d 1353 (1992).

[36] *Id.*

[37] *Id.* at 1360.

[38] Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995); Commack Self Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002).

[39] PETA Undercover: Sacred and Federal Laws Violated at Iowa Slaughterhouse, http://www.goveg.com/feat/agriprocessors/video.asp.

[40] *Id.*

[41] Undercover at Rubashkin's...Again, http://www.goveg.com/undercover-

Agriprocessors seemed to have been targeted at inhumane slaughter practices, and not at the legitimacy of kosher slaughter.[42] In May 2008, Agriprocessors was also confronted with allegations of abusive labor practices, and in November 2008 it sought bankruptcy protection and halted production. In response to concerns regarding practices in the Agriprocessors plant in Postville Iowa, Reform Judaism's Central Conference of American Rabbis resolved in August 2008 to join forces with the Rabbinical Assembly and the United Synagogue of Conservative Judaism "to create an additional certification for kosher products taking into account ethical considerations in addition to ritual laws."[43]

Thus, not only has kosher regulation in the United States recently been in flux following successful legal challenges, the credibility of commercial (ultra-orthodox) kosher certification has also been further undermined. While the current state of affairs does not represent a return to the early stages of the American kosher regulation debate, it does reflect an inability to overcome a number of the problems that led to the enactment of state regulation in the first place. In conclusion to this brief overview, we may advance a number of initial observations and hypotheses. The first concerns the ongoing difficulty in determining what the definitive standard of kashrut is, and how it should be implemented. It appears that regulation in itself does not resolve this issue, nor does the homogenization of kosher food production and supervision necessarily moderate religious differences. In fact, the debate regarding kashrut and its supervision remains vibrant. Another unresolved issue involving kosher food regards the credibility of its

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agri.asp.

[42] Evidence for this is adduced from a number of PETA documents. One example is Benjamin Goldsmith's open letter to Mr. Nathan Lewin regarding Agriprocessors. The text of the letter is available at: http://www.goveg.com/feat/agriprocessors/letter-Lewin-Reply.asp. *See also* http://www.goveg.com/feat/agriprocessors/letter-Genack-Reply.asp. In this letter, Goldsmith endorses kosher slaughter as humane.

[43] The text of the CCAR Resolution is available at: http://data.ccarnet.org/cgi-bin/resodisp.pl?file=kashrut&year=2008A. The May 22, 2008 statement of the United Synagogue of Conservative Judaism and Rabbinical Assembly is available on-line at:http://www.rabbinicalassembly.org/law/kashrut.html.

supervision. Allegations of fraud and findings of abuses continually undermine the credibility of those entrusted with supervision and certification. Indeed, awareness of competing economic interests associated with certification undercuts faith in the impartiality of kosher supervision. State regulation has neither put a stop to rumors of abuse nor promoted the religious authority and standing of kosher supervisors. Further, it is clear that government regulation of kosher food entails risks, including that of promoting one particular standard or approach to religious practice above others, and of lending civil authority to controversial religious interpretations. In short, the root causes of the difficulty in regulating kashrut have less to do with the regulatory – consumer protection - impulse itself and more with religious values, case-by-case determinations, and commercial interests that influence its administration. While in the United Stated kashrut has been regarded as an enforceable standard of food production and preparation, it has also been increasingly viewed as a lightning-rod-issue, or as a subject for ongoing interpretation and debate, regarding the interaction among Jews, their environments, and the foods they consume.

III. Kosher Slaughter Regulation in France and The European Court of Human Rights

A. The Case of Cha'are Shalom

With these propositions in mind, let us now turn to the European courts' approach to the national regulation of kosher slaughter. The complexity of ritual requirements and the challenge they represent to regulatory authorities were highlighted in the case of *Cha'are Shalom veTsedek v. France*.[44] This case involved a group that separated itself from the Jewish Central Consistory of Paris (hereinafter, the 'Consistory'). It became a cultural association and subsequently, in 1986, was registered as a liturgical association in Paris (hereinafter, the 'Association'). Its general aims as a liturgical association have been the promotion and financing of public Jewish

[44] Cha'are Shalom veTsedek v. France, App. No. 27417/95, 86 Eur. Comm'n. H.R. 2000 (1995).

worship and other religious activities, and the advancing of collaboration with other associations for the purposes of fostering the observance of *kashrut*.[45] In addition to its other activities, in 1987, it sought the Minister of the Interior's proposal for approval by the Minister of Agriculture for state permission of its own kosher slaughter.[46] The Minister's refusal to accede and the Association's repeated attempts to either challenge this decision or otherwise gain approval to perform kosher slaughter under its own auspices led to an application to the European Court of Human Rights in 1995. The central claims of the Association, endorsed by the Commission and repeated before the Court were that the French government's refusal to authorize the Association's kosher slaughter constituted an unacceptable infringement upon its freedom to manifest religion, guaranteed by Article 9 of the European Convention on Human Rights. Further, the Association argued, the government's refusal when considered in the context of its authorization of kosher slaughter under the auspices of the Consistory also amounted to discrimination prohibited under Article 14 of the European Convention.[47]

The reasons for the Association's application to perform its own kosher slaughter deserve close consideration. According to representatives of the Association, the Consistory through its Beth Din (Jewish law court that *inter alia* supervises kosher slaughter and offers certification) did not examine slaughtered animals closely enough, and there was growing demand for meat that was supervised more thoroughly. Only such meat, identified as not simply kosher, but *glatt* kosher (that is – 'strictly' kosher, 'clear-cut' kosher), would satisfy the demand of certain Jewish consumers.[48] The Association did not suggest that its slaughterers would perform the act of kosher slaughter following stricter halakhic rules, or that animals would be treated or processed differently. Nevertheless, it asserted that more rigorous supervision would guarantee the kashrut of the meat, and would earn the trust of its adherents. In fact, evidence adduced by the

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[45] *Id.* § 27-29, 35.
[46] *Id.* § 36-37.
[47] *Id.* §§ 58-59.
[48] *Id.* § 32.

French Government revealed that the Association had already engaged in its own *glatt* kosher certification in the early 1990's, and derived an income from the sale of meat that was either illegally slaughtered or imported from Belgium and that bore its *glatt* kosher certificate. The Association conceded that to satisfy the needs of its constituents it did resort to the sale of meat that was either illegally slaughtered or imported.[49] Indeed, the economic interest associated with kosher slaughter is as significant in this case as it is in various disputes in the United States: The system of Jewish consistories had been established by Napoleon I in a decree made in 1808.[50] Jewish officials of the Consistories started to earn monetary support from the French government for religious activities in 1830.[51] However, following the Act of 1905 on the Separation of Churches and the State, both monetary and political state sponsorship for the Consistory ended, and the Consistory reconstituted itself as an umbrella organization of Jewish communities, and was authorized to solicit its constituents for financial support and attract gifts and bequests.[52] The new Consistory retained the name given to it by Napoleon, and has in many ways continued to enjoy the status of a mediator between the French government and the Jewish community. It has also been authorized to levy a tax on kosher meats that it certifies, and, according to French government figures, in the early 1990's kosher tax revenues accounted for roughly half of its income.[53] While the Consistory levied a tax of roughly 8 FRF per kilogram of kosher meat sold, the Association levied a tax of 4 FRF / kg, and this tax generated for the Association an income of more

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[49] *Id.* § 33-34.

[50] For a 19th Century account of the Napoleonic regulation of Jewish life in France, see S. Debré's *The Jews of France in* 3:3 JEWISH Q. REV. 367-435 (Apr. 1891). For an account of the early decades of Jewish consistorial development see especially *id.* at 367-376. For a leading scholarly account of the same period, see S. SCHWARZFUCHS, NAPOLEON, THE JEWS, AND THE SANHEDRIN (Routledge, Kegan, & Paul 1979).

[51] For example, Debré, *The Jews of France*, at 374-5; L.M. Leff, *Jewish Solidarity in Nineteenth Century France: The Evolution of a Concept* in 74 J. MOD. HIST. 33-61, 42 (2002).

[52] Act of 9 December 1905 on the separation of Churches and the State, § 19 [hereinafter *Act of 9 December 1905*].

[53] *Id.* n. 37, § 26.

than 4,000,000 FRF in 1995.[54] As far as the French government was concerned, the dispute regarding kosher slaughter was primarily commercial, and the failure of the Consistory and the Association to negotiate an arrangement that would allow for supervision of the Association under the auspices of the Consistory likely reflected the parties' inability to agree on a revenue-sharing formula.[55] A similar negotiation had apparently produced a positive result allowing for collaboration between the Consistory and one (ultra-orthodox) Lubavitch community.[56] Indeed, the principal reason for the government's refusal to recognize *Cha'are Shalom ve Tzedek* as a liturgical association was that it deemed its activities "essentially commercial" – the supply of meat that it certified as *glatt* kosher – and "only religious in an accessory way." For this reason it was not considered a religious body for the purpose of a proposal of the Minister of the Interior.[57] In fact, the French government argued that its actions led to no interference with the right to freedom of religion. While the government recognized that Judaism's complex dietary rules formed part of Jewish practice, it stated they did not require that Jews actively participate in the slaughter of animals themselves. Religious freedom would only be unduly restricted if as a result of the government's refusal to allow for *glatt* kosher slaughter the kind of meat Jews sought to consume were unavailable. This, the government asserted, was not the case.[58] If the government's refusal to allow for *glatt* kosher slaughter under the supervision of the Association interfered with any freedom, it was strictly economic. As far as the French government was concerned, the only difference between the *glatt* kosher meat certified by the Consistory and that certified by the Association was its price, and the different levels of tax levied by the Consistory and Association accounted for the discrepancy.[59]

To support this argument and address the religious concerns

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[54] *Id.* § 34.
[55] *Id.* §§ 63-64, 67, 69.
[56] *Id.* § 65.
[57] *Id.* § 69.
[58] *Act of 9 December 1905*, *supra* note 52, § 64.
[59] *Id.* § 67.

raised by the Association, the French government produced a document delivered by its Chief Rabbi stating that *glatt* kosher meat was available to adherents of the Association at the shops of the Consistory.[60] While recognizing that the Association would dispute this *glatt* kosher certification, the government insisted that this was a religious matter that the Chief Rabbi of France was competent to determine, and that in disputing the Association "was challenging the findings of *the legitimate and independent religious authorities who personified the religion it professed.*"[61] While a secular French government would not intervene in disputes over religious law and practice, it "observed that it could not be contested that the Chief Rabbi of France, whose opinion . . . was based on the rulings of the Beth Din . . . was qualified to say what was or was not compatible with Jewish observance."[62]

In any event, in the government's view, if it were found that the French government's refusal did constitute interference with religious freedom, such interference was justified. The Association represented approximately 40,000 adherents, a small minority of French Jews, as opposed to the 700,000 Jews who were represented by the Consistory, and the granting of kosher slaughter permits to representatives of such minorities would potentially result in the proliferation of kosher slaughtering organizations that would, in turn, render the government's oversight and administration of such slaughter more difficult.[63] In this regard, the government also argued that kosher slaughter departed from international norms of public hygiene and animal protection. The concern for hygiene and public health rendered severe restrictions necessary. Further, because ritual slaughter reflected a "radical derogation" from international rules designed to protect animals and from France's legal requirements (that included stunning prior to slaughter), it was appropriate that the tight regulation of exceptions should be deemed "prescribed by law,"

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[60] *Id.* § 34.
[61] *Id.* § 66.
[62] *Id.*
[63] *Id.* §§ 69, 71.

and recognized as pursuing legitimate aims.[64]

B. The European Court's Judgment

In their judgment, a majority of judges of the European Court of Human Rights accepted the French government's main arguments. Most significantly, the majority endorsed the view that the "freedom of religion protected by Article 9 of the Convention [could] not extend to the right to take part in person in the performance of ritual slaughter and the subsequent certification process."[65] Because the adherents of the Association could easily obtain *glatt* kosher meat from Belgium and the Consistory's Beth Din also engaged in *glatt* kosher certification, it could not be argued that the government's refusal to empower the Association to engage in kosher slaughter deprived ultra-orthodox Jews from access to the kind of meat they would be able to consume. Had ultra-orthodox Jews been so deprived on account of the government's actions, these would be recognized as interfering with the right to manifest religion. Under the circumstances, however, the majority found that there was no interference with the freedoms protected by Article 9.[66] Further, the Court endorsed the French government's position to the effect that even if its actions had constituted an interference with the freedom to manifest religion, such interference was prescribed by law, pursued a legitimate aim, and was proportional to the aims of the measure.[67] On a related matter, the Court also agreed with the government's view that the reason for the failure of the Consistory and the Association to reach and agreement regulating *glatt* kosher slaughter to everyone's satisfaction was economic.[68] In any event, having determined that there was no violation of Article 9, the court held that the claim of discrimination on the basis of Article 14 could not succeed. Article 14 was understood to complement other provisions of the Convention and Protocols, and not to be applicable

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[64] *Act of 9 December 1905, supra* note 52, § 68.
[65] *Id.* § 82.
[66] *Id.* § 83.
[67] *Id.*. §§ 84, 87.
[68] *Id.* § 82.

independently.[69]

While a number of these arguments have already been addressed, one principal argument advanced by the French government and echoed by the Court has not yet attracted the attention it merits. Dissenting judges of the European Court of Human Rights responded to the distinction drawn by the government between the Consistory – a religious umbrella organization – and the Association, which was deemed to engage in primarily commercial activities. They noted that both the Consistory and the Association levied taxes on the kosher meat they certified, and both generated much income from such a tax. On the other hand, the Association also promoted religious services and functioned in synagogue settings. Thus, the dissenting judges found there was no material difference between the institutions identified as 'religious' and acceptable to the government for the purposes of kosher slaughter, and those considered 'commercial' that were not. Indeed, they identified the discriminatory treatment of the Association, a religious minority organization that was not represented by the Consistory, on the grounds of its relatively small number of adherents. In their view, the claim of discrimination was reinforced by the suggestion that the French government's regulation of *halal* slaughter was more permissive than the administration of its kosher parallel. The dissenting opinion also countered the government's claim that because imported and Beth Din approved *glatt* kosher meat was available to members of the Association there was no interference with the Association's right to manifest religion. According to this view, the government's rejection of the Association's application denied it the opportunity to authorize ritual slaughterers, thereby restricting its religious freedom. In addition, it disputed the government's claim that the refusal to allow for slaughter under the auspices of the Association was justified by concerns for public health and hygiene. Rather, dissenting judges found little reason to doubt that the Association's slaughterers would perform their functions as would those of the Consistory and be subject to the same regulatory regime. Most importantly, while the majority opinion

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[69] *Id.* §§ 86-87.

focused on the preservation of Contracting States' margin of appreciation, the Joint Dissenting Opinion emphasized the interpretation of the relevant articles of the Convention with a view to protecting and enhancing religious pluralism and tolerance.[70] This particular issue was also echoed in the scholarly literature addressing this case.[71] Incidentally, the concern with animal welfare was neither central to the argument before the European Court, nor to the judicial procedures that preceded it in France. Nevertheless, it was rendered prominent in an important scholarly contribution that also examined this dispute.[72] The key argument that has not yet been properly examined concerned the roles of the Consistory and Chief Rabbi in Jewish communal organization in France in general, and their functions in the regulation of kosher slaughter in particular. It is to this central issue that we now turn our attention.

C. The Jewish Consistory and Rabbinic Authority

The Jewish consistorial system in France traces its origins to the regime of Napoleon I, and particularly to the Napoleonic state's determination to organize and regulate a modern, French-Jewish religious culture. A Concordat signed on July 15, 1801 regulated Catholic activities in France, and a Consistorial system for French Protestants had been established by decree on April 8, 1802. The Jews of France had been granted citizenship on September 27, 1791. However, Jewish religious life had not been regulated, and many Jewish communities experienced stagnation or decline. An ongoing crisis in communal organization coupled with concern in the face of persistent anti-Jewish sentiment led to Jewish efforts to seek communal reorganization and revival. Jewish interests in this regard

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[70] *Id.* § 84. The Joint Dissenting Opinion is published with the Judgment, *id.* n. 37.

[71] *See, e.g.,* Claudia E. Haupt, *Free Exercise of Religion and Animal Protection: A Comparative Perspective on Ritual Slaughter,* 39 GEO. WASH. L. REV. 849-856 (2007).

[72] Pablo Lerner & Alfredo Mordechai Rabello, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, 22 J. L. & Religion 1, 38-43 (2006-7).

matched the French administration's determination to regulate religious life and to bring it under firm state control.[73] Following a decree made on May 30, 1806, Jewish delegates were summoned to address questions presented to them by the French government. The questions addressed Jewish views with regard to personal status, such as marriage and divorce, rabbinic authority, Jewish loyalty to France and solidarity with non-Jewish French citizens, and commercial and professional practices. Among the issues that generated controversy among the delegates was the role and authority of rabbis. The responses of the delegates to the questions limited rabbinic authority to religious functions and paved the way for Jewish integration into France's social fabric. However, they lacked authority because rabbis constituted a minority of the delegates. An assembly, or Sanhedrin, of seventy-one Jewish representatives, most of whom were rabbis, was then called to ratify the earlier responses made by the Jewish delegates. The robust rabbinic presence, it was hoped, would lend halakhic authority to the content that had already been communicated. While the rabbis of the Sanhedrin could overturn the responses made by delegates before them, they were keenly aware of the need to respond positively to the Emperor. Also, the discussions of the Sanhedrin were limited to issues addressed by the delegates whose work they were called upon to approve.[74] Further, as Debré noted:

> [T]hree non-Jewish commissioners were appointed by the Government to be present at all the meetings of the assembly, summoned to discuss and reorganize the religious, moral, and social doctrines of Judaism. These commissioners were to direct the debates, to ask questions, to prorogue the meetings, and it is possible that the presence of these representatives of the Emperor strongly

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[73] Max Warschawski, *The Legal Birth of French Judaism*, TRADITION AND TRANSITION: ESSAYS PRESENTED TO CHIEF RABBI SIR IMMANUEL JAKOBOVITZ TO CELEBRATE TWENTY YEARS IN OFFICE 293-303 (Jonathan Sacks ed., Jews College Publications, London 1986); Jay R. Berkovitz, *Rites and Passages: The Beginnings of Modern Jewish Culture in France*, 1650-1860 (Heb.), *in* THE ZALMAN SHAZAR CENTER FOR JEWISH HISTORY 202-209 (Jerusalem 2007).

[74] *See* Warschawski, *supra* note 73, at 296-9.

> affected certain important points, those for instance concerning the rabbinical hierarchy, which are foreign to the spirit of Judaism and recall the organization of Roman Catholicism.[75]

In any event, the Sanhedrin's endorsement of the work of the delegates paved the way for the French government's recognition of Jewish religious practice and for the establishment of the Jewish Consistorial system on March 17, 1808. At the same time, it altered previously established patterns of Jewish authority, and undermined the power of the rabbinate. Indeed, the edict explicitly stated: "the function of the consistories is to be on the watch to prevent the Rabbis from giving, either in public or private, any instruction or any explanation of the law which does not conform to the doctrinal decisions of the Great Sanhedrin".[76] Inevitable tensions between the reformers in the consistories and rabbis, reflecting a struggle to wield authority with regard to various aspects the modernization and integration of Judaism in France, are well documented.[77] It is clear that while the rabbinate retained important leadership and pedagogic roles in the community, as well as a great deal of prestige and autonomy with regard to determinations of *halakhah*, the consistories did exercise a certain measure of control over the rabbinate, and succeeded in imposing modest reforms in Jewish practice. Most importantly, throughout the nineteenth century, they retained some control over the appointment of communal rabbis.[78] While the consistories constituted a counter-weight to the rabbinate, they were also regarded as acting to impose centralized control in the face of local, grassroots Jewish organization. Further, throughout the nineteenth century, the consistorial system was identified with established Jewish communities, and failed to win the trust of marginal constituencies, like the often-disadvantaged Eastern European Jews and the most liberal reformers.

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[75] S. Debré, *The Jews of France,* 3:3 JEWISH Q. REV., 367, 370 (April 1891).
[76] *Id.* at 374.
[77] J. Berkovitz, *supra* note 73, at 282-297.
[78] *Id.* at 284-287.

D. The Jewish Consistory and Kosher Meat Certification

Among the Jewish activities that consistories sought to control, sometimes with little success, was kosher slaughter.[79] Starting in 1823 (following an ordinance empowering the consistories to name slaughterers), they had a monopoly *de jure* on the certification of slaughterers, and control over the certification of kosher meat. However, during the mid-nineteenth century, economic issues made the administration of this monopoly difficult. The cost of kosher meat certified by the consistories was typically higher than the cost of production and supervision, and the consistory would collect the additional revenue (that was referred to as a tax). Not unlike the situation described in *Cha'are Shalom*, the moneys generated from the consistory's meat tax would support other aspects of Jewish life. In Paris, as early as 1821, the consistory started collecting income from the meat trade directly from butchers and determined that the money would be used to repay debts associated with the consistorial temple, rather than support the needy. At the same time, as Parisian Jews joined the ranks of the middle class, they often left their old neighborhoods and moved to areas that did not have kosher butcher shops. The majority of them ceased to follow the laws of kashrut, and some continued to have kosher meat delivered to them. Less affluent Jews, however, continued consuming kosher meat and paying the meat tax. One of their complaints was that the meat tax supported the consistorial temple, and that it was either too far or too expensive for them to attend. In other words, they resented subsidizing the Jewish observance of other, sometimes wealthier members of the community.[80] The 1848 revolution ushered an era of "anarchical tendencies", and in its wake, the resolve of opponents to the consistorial monopoly grew stronger.[81]

Socio-economic friction aside, in spite of the enactment of ordinances, the formal challenges consistories faced with regard to

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[79] *Id.* at 205.

[80] *See* COHEN ALBER, THE MODERNIZATION OF FRENCH JEWRY: CONSISTORY AND COMMUNITY IN THE NINETEENTH CENTURY 224 (Brandeis University Press, Hanover, New Hampshire 1977).

[81] *Id.* at 227.

enforcement are also copiously documented. Following the 1823 ordinance, a complaint was made by the Strasbourg consistory regarding an unauthorized butcher who was competing with its appointed slaughterer. As Cohen-Albert writes: "when the prefect referred the case to the courts, the *procureur-général* and the *procureur* of Séléstat ruled that no law had been broken. It was apparent that consistory authority was going to be unenforceable." In Nancy, M. Horviller, a butcher who sought to sell both kosher and non-kosher meat, circumvented his local consistory, traveled to Metz, and received a slaughterer's certificate from Chief Rabbi Lambert there. He then opened his butcher shop back in Nancy in the face of the opposition of Nancy's Chief Rabbi.[82] A stronger ordinance was passed to reinforce the power of the consistories in 1844, and it reasserted the authority of consistories to name slaughterers. Shortly after its enactment, the Nancy consistory complained that yet another slaughterer continued his work in Mittelbronn after his certification was removed. The consistory argued that this constituted a breach of article 258 of the penal code, addressing the usurpation of public functions. The *procureur-du-roi* in Sarrebourg ruled that this article did not cover religious functions, and left the consistory without legal recourse. The following year, the Nancy consistory launched the prosecution of another butcher, Bolack, on the grounds of his "infraction of *règlements* concerning public administration. The tribunal de simple police of Saint Michiel ruled on June 20, 1845, that Bolack had not exercised the functions of a *shochet* (slaughterer) but had merely slaughtered animals for his own butcher shop; this, the court found, did not constitute an infraction."[83] A successful appeal of the Paris consistory to the Inspector of Markets resulted in the conviction of an uncertified butcher in respect of the breach of official regulations regarding slaughter.[84] Nevertheless, the challenges to consistorial authority undermined its ability to control the meat market. After 1848, pressure brought to bear by struggling butchers led to a decline in the

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[82] *Id.*

[83] *Id.* at 126.

[84] *Id.* at 126-7.

price of kosher meat and in consistorial income from the meat tax.[85]

E. Kosher Food Observance in Contemporary Europe and the Cha'are Shalom *Case*

Interestingly, the case of *Cha'are Shalom* reflects the French administration's protectiveness of a consistory-system that, long after the act of December 9, 1905, is no longer funded or formally sponsored by the state. In contrast to the officials of the Second Republic, the French government and its representatives seem enthusiastically committed to securing consistorial income and to enhancing the religious clout of the Chief Rabbi. Indeed, government backing for the Consistory and the ability of the Chief Rabbi to determine kosher slaughter standards are central to this dispute. They are at issue because of the lasting perception that these institutions (especially the Consistory), created under Napoleon I, were not founded organically, from within Judaism, but rather imposed upon it to ensure modernization and conformity with life in the republic. The difficulty reflected in this case is not that the Consistory would be unable to provide *glatt* kosher meat to the Jews of France, but rather that its strict adherence to the requirements of Jewish law and certification would not be universally trusted. The Association makes this point explicitly. On the other hand, the French government's insistence that the Consistory can supply *glatt* kosher meat and that the Chief Rabbi is competent to rule on matters of kashrut reflects lack of sensitivity to the ideological posture of Jews who reject the religious authority that some would attribute to the consistorial structure and status of the Chief Rabbi. Further, such expressions of trust or lack thereof do not merely constitute expressions of religious sentiment, but also statements of personal and religious-group identity.

The findings of a study carried out in the 1990's in Copenhagen reveal that patronage of Samson's butcher shop, a small establishment located in a historically poor area of the city and owned by members of the Ultra-Orthodox (*Machsike ha-Das*)

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[85] *Id.* at 227-9.

community, was motivated by both faith and allegiance to an identifiable group. On the other hand, the purchase of meat at a deli that was located in a suburb and affiliated with the more liberal, mainstream Jewish community was regarded as an act of identification with and support of the community's main institutions. While the clientele at Samson's would be offered *glatt* kosher, frozen, meat, consumers at the deli would have access to fresh meat certified by the community's rabbi. The purchase of meat in either venue was deemed both religiously significant and identity affirming for the two constituencies. Also, the variety of kashrut-observance standards among the Jews of Copenhagen reflected a need to negotiate the demands of the non-Jewish world. For example, certain Jews would maintain kosher kitchens while eating non-kosher food outside the home, while others would resort to vegetarian or other diets to obscure the reasons for restrictive practices and to facilitate their interactions with non-Jews who were not familiar with the requirements of kashrut. Others yet would not consume non-kosher food outside the home. As the author explains, "the complexity of kosher symbolism makes every group meal a symbolic event, a place in which to negotiate and express the nature of Jewish community."[86] Further, kashrut observance and non-observance would have to be negotiated in the home, especially among Jews who either married or partnered with non-Jews and those living with Jewish partners whose dietary traditions were inconsistent with their own. An effort to follow or decision to reject dietary rules and customs would provide an opportunity to express either respect and concern for a spouse's tradition, or, alternatively, rejection, dismay, and disapproval. Often, the purchase, preparation, and consumption of food for all members of the household would have to be discussed.[87] Such challenges and opportunities are characteristic of Jewish life throughout the Western world.[88]

As we have already noted, the majority of judges in the case of *Cha'are Shalom* accepted the French government's contention that

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[86] A. Buckser, *Eating and Social Identity Among the Jews of Denmark,* 38 ETHNOLOGY 191, 198-200 (1999).

[87] *Id.* at 201-203.

[88] *See id.* at 199.

Jewish observance and protected religious freedom guaranteed the believer's ability to consume meat that is deemed kosher, but did not extend to the right to participate in ritual slaughter. Thus, whether the meat was imported or slaughtered locally was immaterial. However, the Joint Dissenting Opinion suggested that the Association's authorization or appointment of ritual slaughterers would constitute religious expression that was worthy of protection. We may now add that the consumer's selection of kosher meat would conceivably constitute an expression of faith in a particular religious interpretation as well as an act of affiliation and solidarity, or distinction and alienation with respect to a Jewish institution or constituency. The symbolic value and implications of such an act would reverberate in the consumer's home, in relations among Jews, and interactions between Jews and non-Jews. It would be an expression of religious definition and a manifestation of faith that deserves protection. The availability of imported *glatt* kosher products would satisfy the demand for meat supply. However, it would also force consumers-believers to financially support and express solidarity with a producer with whom they had no particular affinity, or to deprive them of an opportunity to fully affiliate with the group of their choice. In other words, the supply of frozen meat would serve the purpose of self-definition against a mainstream group, in our case –- the Consistory. However, it would fail to allow for the expression and support of the wide range of religious identities that characterizes the contemporary Jewish community.

In the case of *Cha'are Shalom*, this is particularly significant: The loyalty of 40,000 adherents claimed by the Association, as well as its determined attempts to receive both official recognition as a liturgical association and approval for slaughter all point to the Association's assessment that it could sustain a slaughter, processing, distribution, and marketing operation for *glatt* kosher meat. Such an effort could only be successfully mounted by an established, properly supported community, and would be atypical of small Ultra-Orthodox communities around the world (like the Ultra-Orthodox community of Copenhagen). The establishment of such an operation and the recognition it would require would signify an important step in the life of that community; it would constitute a source of pride,

and generate for it the additional resources and increased visibility needed to enhance its unique identity. On the other hand, the refusal to recognize this group and to authorize its kosher slaughter operation constituted a denial of the value of the Association to its adherents and an assault on its potential to increase its following. For these reasons, in this case, I suggest that the ECHR failed to recognize the full implications entailed in the consumption of kosher meat, and defined the observance of kashrut and its religious significance too narrowly.

F. Kosher Slaughter: The Regulatory Challenge

Another important conclusion we may draw from a study of this case relates to the difficulties entailed in the regulation of kosher slaughter. Beyond the concern with animal stunning prior to slaughter, the issues raised in this case are precisely those that emerge in the regulatory challenges that occur in the United States. The case of *Cha'are Shalom* highlights the intra-Jewish debate regarding the standards of kosher slaughter, and represents a challenge to the authority of the Chief Rabbi and his Beth Din to make determinations in this regard. Further, it suggests that in spite of the centralization of Jewish institutional life in France, the discussion regarding kashrut has not ended. In addition, this case turns on the reliability and credibility of supervision. As representatives of the Association made clear, the Association sought to engage in the same slaughter practiced under the auspices of the Consistory. However, the Association's supervision would be more stringent. Further, this dispute sheds light on the economic implications entailed in the production of kosher meat for the community. Finally and perhaps most importantly, this case illustrates the dangers associated with government intervention on behalf of a particular group or denomination and to the detriment of others while regulating slaughter. Thus, the *Cha'are Shalom* case underscores the similarity of challenges with respect to government regulation of kosher slaughter on both sides of the Atlantic Ocean.

In the recognition of these regulatory issues lies the silver lining, or promise of this case. As other scholars have already

pointed out, the debate over exemption from animal stunning standards for the sake of kosher slaughter is fraught with emotion because of the association of the stunning requirement and the Nazi campaign against kosher slaughter.[89] As Lerner and Rabello correctly explain, halakhic authorities have tended to view the complete prohibition of slaughter without prior stunning in Europe as an expression of anti-semitism, rather than genuine concern for animal welfare.[90] While the issue of stunning remains prominent in the European debate on slaughter regulation, substantive progress on the issues raised in *Cha'are Shalom* is more likely. Jewish representatives and European institutions would do well to focus on these issues rather than focus their efforts on a zero-sum struggle to ban or permit the derogation from stunning standards throughout the European Union. Interfaith relations would perhaps improve as a consequence of the adoption of such an approach, and the protection of religious expression and manifestation may well be advanced.

IV. Conclusion

The latest, still unfolding, chapter in the European debate over the regulation of cattle slaughter has to date been defined by a familiar clash of mutually exclusive agendas. On the one hand, a coalition of animal rights proponents and industry advocates seeking to maximize efficiency have been arguing for the imposition of a ban on the slaughter of cattle without stunning. On the other, promoters of greater respect for cultural diversity and regional and local autonomy as well as representatives of religious (especially Jewish) minorities have been arguing for the establishment of an all-European derogation from stunning standards. The prospects for a consensus in this regard emerging or for a definitive conclusion to this discussion are poor. While the dispute on the stunning requirements has been central to the administration of kosher

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[89] *See* BORIA SAX, ANIMALS IN THE THIRD REICH: PETS, SCAPEGOATS AND THE HOLOCAUST 139 (Continuum, New York & London 2000); *see also* Lerner & Rabello, *supra* note 72; Kate M. Nattrass, *Und die Tiere: Constitutional Protection for Germany's Animals,* 10 ANIMAL L. 283, 291 (2004).

[90] *Id.* at 33-35.

slaughter in Europe, it has also obscured regulatory issues that arise in member-states that allow the derogation from stunning standards, and wherein kosher slaughter is practiced. Among the important regulatory issues that require additional consideration are the extent of government intervention for or against a particular group that purports to represent a Jewish constituency and the distinction between commercial interests and religious manifestations entailed in the production and distribution of kosher meat. The controversy regarding stunning is in essence political, and therefore typically arises in debates on legislation. On the other hand, the regulatory issues identified above require the assessment of governments' roles in either promoting or restricting religious expression, and have demanded the attention of national and European courts.

The European Court of Human Rights' judgment in the case of *Cha'are Shalom* was significant for two main reasons: it shed light on religious organization in France and especially on the French government's regulation of religious activity that generates income. At the same time, it also underscored the difficulty in formulating *kashrut* standards that would be acceptable to all of France's Jewish constituencies. As this essay demonstrates, these two issues are inextricably linked. A shared characteristic of efforts to regulate kosher slaughter in both the United States and Europe has been the tendency to regard *kashrut* as a system that can generate definitive and binding standards. However, as experience on both sides of the Atlantic Ocean demonstrated, *kashrut* should be regarded as a platform for ongoing religious expression and self-definition, rather than a system of principles and rules that would allow for limited interpretation and disagreement. Perceptions of *kashrut* in general and the religious import of kosher slaughter in particular have informed both governmental regulation and its challenges in the courts. The case of *Cha'are Shalom* revealed that the French government and a majority of judges on the European Court held an inappropriately narrow view of *kashrut*, and of the interpretation and implementation of its requirements. While the issue of stunning may not be resolvable at this point, greater appreciation for the rich potential of religious expression through the observance of *kashrut* may well be advanced. Renewed attention to religious slaughter

practices would hopefully lead to a reconsideration of religious regulation at the member-state level, as well as the European Court's role in safeguarding the manifestation of religion.