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**Religious Liberty and Mass Expulsion in
the European Union**

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Abstract

Article 19 to the European Charter of Fundamental Rights prohibits mass expulsions. This Working Paper argues that infringement upon religious liberty—in particular, ritual slaughtering, religious dress, and circumcision bans—could rise to the level of an Article 19 violation by forcing adherents of targeted religions to either assimilate or move. Use of Article 19 in this fashion would be unprecedented, but would provide plaintiffs with several benefits as compared to religious liberty provisions or antidiscrimination laws: (1) Article 19 would allow plaintiffs to argue that laws regulating religious expression have become too burdensome in aggregate (2) Article 19 could allow plaintiffs to demonstrate certain xenophobic statements made by lawmakers in enacting these regulations and (3) Article 19 has no derogation principle.

This Paper opens by discussing whether an indirect expulsion, such as forbidding a certain religious practice, can violate Article 19. After determining that such history and caselaw suggest that the answer is yes, this second section discusses three specific areas of regulation (circumcision, ritual slaughter, and religious dress) and how excessively burdensome regulation of these areas could lead to expulsion. The third section addresses why communities, in particular the Muslim community, may wish to consider Article 19 as an avenue for redress when religious liberty and antidiscrimination are already provided for in the Charter, Convention, and EU law.

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INTRODUCTION

Debates in European Union Member States today over the acceptability of circumcision, kosher and halal slaughter, and religious dress in Europe are not new: for centuries, Member States regulated religious rituals to eject certain communities when specific edicts of expulsion failed.¹ Today, the focus is on Islam: a small, but vocal, portion of EU citizens and lawmakers appear to prefer that Europe's Muslim population either assimilate into European Christian culture, or leave.²

However, the EU is not pre-war Europe. Today EU residents enjoy substantial human rights, including for religious liberty and antidiscrimination. Traditionally, cases concerning religious expression are brought under these provisions, either at the Member State level or in the European Court of Human Rights. But these protections aren't alone: Article 19 of the EU Charter on Fundamental Rights forbids mass expulsions, as does Article 4 of the European Convention on Human Rights.

This paper argues that EU fundamental rights protections are not as robust as they appear, but Article 19 might provide Europe's Muslim community a tool for protection against encroachments on their ability to practice Islam, as the various religious dress, ritual slaughter, and religious ritual regulations, though potentially each *individually* justifiable, in combination could result in such a difficult life to lead to an indirect mass expulsion of Muslims. As most of these regulations implicate areas of European Union competency, such a mass expulsion could violate Article 19.

Use of Article 19 in this fashion would be unprecedented, but there are benefits its use. First, Article 19 would allow plaintiffs to argue that laws regulating religious expression are too burdensome in *aggregate*. Second, Article 19 has no derogation principle. Third, Article 19 could allow plaintiffs to demonstrate the Islamophobia used by lawmakers in enacting these regulations.

¹ See THE JEWISH ENCYCLOPEDIA, vol. 2, *Badges* (1906) 425, www.jewishencyclopedia.com/articles/2317-badge; THE JEWISH ENCYCLOPEDIA, vol. 5, *Ghetto* (1906) 652-655, www.jewishencyclopedia.com/articles/6653-ghetto. See also ESTER FABSTEIN, HIDDEN IN THUNDER: PERSPECTIVES ON FAITH, HALACHAH AND LEADERSHIP DURING THE HOLOCAUST, VOLUME 1 (2007) 159; *Antisemitism in Interwar Poland 1919-1939*, WORLD FUTURE FUND, www.worldfuturefund.org/wffmaster/Reading/Total/Polish%20Antisemitism.htm (last visited Apr. 12, 2017).

² See, e.g., Cynthia Kroet, *Wolfgang Schäuble to Muslim Migrants: If You Don't Like Europe, Leave*, POLITICO (Apr. 14, 2017), www.politico.eu/article/wolfgang-schauble-to-muslim-migrants-if-you-dont-like-europe-leave.

To use Article 19, plaintiffs must surmount several hurdles: they must demonstrate that the European Court of Justice has jurisdiction. This paper argues that it does. They must also demonstrate that it can apply to “indirect expulsions,” where a population is expelled not via an edict of expulsion or immigration officials, but restrictive and discriminatory laws. This paper argues that it does. Finally, plaintiffs must demonstrate that current laws, such as those regulating circumcision, ritual slaughter, and religious dress have, either individually or in aggregate, made it so difficult to be an observant Muslim in Europe that the regulations are forcing Muslims to leave. This paper does not take a stance on whether regulations have risen to that level, but provides examples of the expulsive aspects of these laws to demonstrate how such regulations could.

This paper opens by discussing whether an indirect expulsion can violate Article 19. The second section discusses three specific areas of regulation—circumcision, ritual slaughter, and religious dress—and how regulations could lead to expulsions. The third section addresses why the Muslim community may wish to consider Article 19 as an avenue for redress when religious liberty and antidiscrimination are already provided for the Charter, Convention, and EU law.

I. Mass Expulsions in the European Union

A. Direct and Indirect Mass Expulsions

A direct expulsion is “an act, or failure to act, by an authority of a State with the intention and with the effect of securing the removal of a person or persons against their will from the territory of that State.”³ This paper considers there to be three types of Direct Expulsions.

Countries commit a *Type I Direct Expulsion* when the government passes regulations explicitly banning one group from existing in a space, such as the Alhambra Decree, which expelled the Jews from Spain in 1492,⁴ and the Indian Removal Act of 1830, when President Andrew Jackson defied the United States Supreme Court and forcefully ejected hundreds of thousands of Native

³ JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN LAW AND INTERNATIONAL PRACTICE (1995) 4.

⁴ *The Edict of Expulsion of the Jews*, Foundation for the Advancement of Sephardic Studies and Culture, <http://www.sephardicstudies.org/decree.html> (last visited Apr. 12, 2017).

Americans from their homes (commonly known as the Trail of Tears).⁵ Type I Direct Expulsions are relatively rare, because they can be difficult to implement, both practicably and politically.⁶

In a *Type II Direct Expulsion*, immigration officials, acting in official capacity, mobilize and forcefully remove members of one group without substantive review or process. These are more common. For example, in 2006, Russia began a policy of arresting, detaining, and forcibly expelling Georgian nationals, eventually processing more than 4,600 expulsion orders, a sharp increase from previous numbers.⁷ There was little qualitative review of the expulsion process, and it was clear that individuals were expelled solely on the basis of their Georgian nationality.⁸ In a similar situation, 18,000 Romani were deported from France in 2009 and 2010, which also classifies as a Type II Direct Expulsion.⁹ Type II Direct Expulsions could be further divided into *Ila* and *Iib*, where *Ila* refers to deportation, and *Iib* to the rejection of immigrants without consideration to each individual case.¹⁰

Finally, straddling the line with Indirect Mass Expulsions are *Type III Direct Expulsions*, where the government does not use any legislative means to expel, but actively promotes severe violence towards one group, such as Imperial Russia's policy towards Jewish communities from 1880 until World War II, in which the government encouraged civilians to commit pogroms in Jewish villages with the intent that the group will ultimately leave the country.¹¹ Professor Henckaerts, in *Mass Expulsion in Modern Law and International Practice*, defines mass expulsions to include such governmental conduct.¹²

⁵ Patrick Mingos, *Beneath the Underdog: Race, Religion, and the Trail of Tears* (1994), <http://www.us-data.org/us/mingos/underdog.html> (last visited Apr. 12, 2017).

⁶ See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding the Indian Removal Act void. This opinion was ignored to by President Jackson).

⁷ *Georgia v. Russia (I)*, No. 13255/07 Eur. Ct. H.R. (2014) (judgment).

⁸ *Id.*

⁹ Claire Suddath, *Who Are Gypsies, and Why Is France Deporting Them?* TIME MAGAZINE (Aug. 26, 2010), <http://content.time.com/time/world/article/0,8599,2013917,00.html>.

¹⁰ See, e.g., *Čonka v. Belgium*, No. 51564/99 Eur. Ct. H.R. (2002).

¹¹ Avraham Greenbaum, "Bibliographical Essay" in *POGROMS: ANTI-JEWISH VIOLENCE IN MODERN RUSSIAN HISTORY* 376-81 (John Doyle Klier & Shlomo Lambroza, eds. 2004). It goes without saying that pogroms were not the only Type III Direct Expulsion used throughout history. It is arguably the most common form of population transfer, because it is far easier to simply scare a group into leaving than convince them to do so. Other examples include the various population transfers following the First World War and the exile of Tibetan people from Tibet. Violent population transfers are often mixed between Type III Direct and Type II Indirect, such as the population transfer of Jews from Arab Countries and Palestinians from Israel following the 1948 War of Israeli Independence, where some left out of fear of violence promulgated by the state, others left out of fear of violence promulgated by citizens, and others left because of the promise of national independence or not willing to be under the control of others.

¹² Henckaerts, *supra* note 3, at 4.

Indirect Expulsions can similarly be divided into three types. The only difference between a Type I *Indirect* Expulsion—the focus of this paper—and a Type I *Direct* Expulsion is the form of law passed. In a *Type I Indirect Mass Expulsion*, instead of an edict of expulsion targeting one group, the government passes laws making it virtually impossible for one group to live in an area. Because of the intersection of religion and law, Type I Indirect Mass Expulsions are more commonly seen with religious minorities, as the government can simply pass a law prohibiting an essential component of a religion. Religious minorities are not the only targets, however. President Sarkozy's policy of systematically *dismantling* illegal Romani settlements (in addition to deportations) would qualify as Type I Indirect, as it uses non-immigration law to remove remaining settlers.¹³ Several commentators—including the European Union—argued that he was intentionally expelling Romani from France through indirect means.¹⁴ President Trump's Executive Order prohibiting entry by anyone from seven Muslim-majority countries could also apply as an attempt to indirectly ban Arab Muslims from entering the country.¹⁵

Type II Indirect Expulsions involve conduct by citizens,¹⁶ but instead of encouraging systematic violence, the government simply ignores it. In these cases, intent will play a key factor in determining whether government inaction constitutes a mass expulsion. The blind eye the United States took towards American violence against Native Americans during the westward expansion years was a mass expulsion, because the government intended to settle the entire western portion of the continent. In contrast, the American Federal government's blind eye towards lynching in the Southern American States may not have been an indirect mass expulsion, because it was difficult to discern whether the intent was to rid the area of African Americans, or prejudice towards one ethnic

¹³ See Ariel M. Risinger, *The Romani in Europe and the False Promise Fundamental Rights*, http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1648&context=student_scholarship.

¹⁴ *Id.*

¹⁵ See note 38. The Executive Order was, of course, a Type I Direct Expulsion for individuals living in the seven countries targeted.

¹⁶ Like Type III Direct Expulsions.

group. “Refugee making” states, such as those embroiled in civil wars, will tend to fall under this category.¹⁷

Type II Indirect Expulsions distinguish themselves from Type III in that Type II involve violence, while Type III involves only systematic discrimination. In *Type III Indirect Expulsions*, the government turns a blind eye towards employment and education discrimination, not pogroms. Whether the intent is that that group leaves or stays, the loose connection between government action and expulsion means that such inaction rarely constitutes a mass expulsion.¹⁸

B. Article 19 of the Charter of Fundamental Rights of the European Union

Article 19(1) of the Charter of Fundamental Rights of the European Union prohibits collective expulsions.¹⁹ It is meant to have the same meaning and scope as Article 4 of the European Convention of Human Rights,²⁰ which prohibits the collective expulsion of aliens, and should be read to apply equally to nationals and non-nationals.²¹

Caselaw defines a “collective expulsion” as “*any measure of the competent authorities compelling . . . a group to leave the country, except where such measure is taken after and on the basis of a reasonable and objective examination.*”²² An “expulsion” is defined “in the generic meaning, in current use, to drive away from a place.”²³ In writing Article 4 in 1961, lawmakers were inspired by the lessons “of recent history.”²⁴

Does Article 19 cover indirect expulsions? It seems it does. “Competent authorities” appears to require a government official to be the cause,²⁵ but the use of “any measure” implies that the

¹⁷ See Henckaerts, *supra* note 3, at 110-17 (detailing the expulsory impacts of refugee-generating states, suggesting that in most states, such as Bulgaria’s treatment of ethnic Turks, would violate prohibitions on expulsion, but suggests that these states need more assistance than just focusing on the expulsory impacts).

¹⁸ *But see id.* at 109 (“[A]ny indirect measures intentionally aimed at the removal of a category of persons, aliens or nationals, against their will, such as acts of persecution, violations of human rights, discriminatory treatment and various kinds of pressure, constitute a collective expulsion of the kind that is prohibited by the regional human rights conventions if these measures are of such a nature to compel aliens to leave.” (internal quotations removed) (footnote removed)).

¹⁹ “Collective expulsions are prohibited.”

²⁰ Explanation to the European Charter of Fundamental Rights, Official Journal of the European Union, C 303/34, Dec. 14, 2007.

²¹ WILLIAM A. SCHABAS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY* (2015) 1075.

²² *Andric v. Sweden*, No. 45917/99 Eur. Ct. H.R. (1999) ¶ 1 (dec.).

²³ *Khlaifia and Others v. Italy*, No. 16483/12 Eur. Ct. H.R. (2016).

²⁴ Memorandum of the Human Rights Directorate on the Committee’s Third Meeting, Oct. 2, 1961 ¶ 53.

²⁵ Henckaerts, *supra* note 3, at 109-15.

method extends beyond merely edicts of expulsion and deportation orders.²⁶ That “any measure” expands beyond immigration-specific measures is further supported by the history of Europe, simple logic, and that the Charter draws from Member State constitutions, several of which have been interpreted by national courts to express concerns about minority religious groups being able to obtain or perform key religious ritual.²⁷ Commentators have also noted that mass expulsions can use means other than deportation or edicts of expulsion,²⁸ especially with France’s crackdown on Romani settlements.²⁹

If a population is indirectly expelled, must it have been passed by competent authorities who expressed an *intent* to do so? On that, caselaw is not as clear, because “any measure compelling” could mean either “any measure *that* compels” or “any measure *to* compel.” Only the latter implies intent.³⁰ The official French translations are equally ambiguous,³¹ and European Court of Justice

²⁶ *Id.* at 108-109 (noting that indirect expulsions are likely precluded under the European Convention on Human Rights, and that the definition of mass expulsion to include “any measure” likely reflects the history of Europe).

²⁷ Such as Poland, *Polish Ban on Kosher Slaughter of Animals is Overturned*, BBC (Dec. 10, 2014) <http://www.bbc.com/news/world-europe-30412551>, and Germany, 1 BvR 1783/99 of 01/15/2002, German Federal Constitutional Court.

In addition, actions on behalf of lawmakers with regards to circumcision demonstrate further proof that indirect expulsions could violate Article 19. As discussed below, circumcision is a necessary practice in both Judaism and Islam, but it has come under fire recently for child welfare. Despite that only 10% of Europeans are circumcised and that broad public support exists for male circumcision bans, commentators recognize that prohibiting circumcision would cause an exodus of Jews and Muslims from the country. *See, e.g.*, Ally Fogg, The law will not end infant circumcisions, but education just might, *The Guardian* (Apr. 20, 2016) <https://www.theguardian.com/commentisfree/2016/apr/20/male-infant-circumcision-judge-practice> (recognizing that banning circumcision would require Jews and Muslims to leave the country). For example, when a German Court declared circumcision violates the rights of the child, lawmakers scrambled to rectify the judicial circumcision ban by creating a loophole for religious reasons, even though the largest estimate of Muslims and Jews in Germany, including those non-practicing and unaffiliated, is only 5.1%. Judy Dempsey, *Germany, Jews and Muslims, and Circumcision*, *NY TIMES* (Sept. 17, 2012) <http://www.nytimes.com/2012/09/18/world/europe/18iht-letter18.html> (quoting several German Jews saying that the ban, if left in place, would lead them to leave Germany).

In another example, Sweden permits circumcision only until the infant is two months old, shutting out Muslims, who circumcise their sons as toddlers, but not Jews, who do so on the eighth day of their sons’ lives. While this could demonstrate discrimination towards Muslims, it could also reflect that the most important Jewish commandment is eighth-day circumcision. The Swedish law does not create criminal sanctions; Muslim families have more time to travel and plan for the ritual, so regulations that permit parents to circumcise but not do so within Sweden could lead to Jewish families leaving the country.

²⁸ Charter Flights, http://www.meltingpot.org/IMG/pdf/Scheda_voli_charter.pdf (arguing that chartered flights, paid for by the government, violate Article 19); *Working Group on Mass Expulsion*, INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW at 4 (April 1983) (“[T]he concept of expulsion encompasses indirect measures including ill-treatment, racial and other forms of discriminatory practices, harassment and other means of coercion designed to force people to leave—as well as the direct exercise of State power”).

²⁹ Kristi Severance, *France’s Expulsion of Roma Migrants: A Test Case for Europe*, GLOBALRESEARCH (2010), <http://www.globalresearch.ca/france-s-expulsion-of-roma-migrants-a-test-case-for-europe/21558>.

³⁰ *See, e.g.*, *Andric v. Sweden*, No. 45917/99 Eur. Ct. H.R. (1999) ¶ 1 (“[C]ollective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”); *Çonka v. Belgium*, No. 51564/99 Eur. Ct. H.R. (2002) ¶ 59 (“The Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”); *Sultani v. France*, No. 45223/05 Eur. Ct. H.R. (2007) ¶ 81 (“The Court draws attention to its case-law, whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of

cases have yet to touch on the matter at all; all cases involve asylum rejection, not the deportation action itself.³² One influential commentator would require intent, but considers all measures, no matter how tenuous, perpetrated by the government to constitute the basis of a mass expulsion.³³

With regards to indirect expulsions, there is some evidence suggesting that lawmakers must at least *know* their policies could indirectly expel, as the European Court of Justice requires knowledge in Article 19(2) (deportation to areas where individuals are likely to be tortured).³⁴ There is also some evidence that the Court will also consider whether lawmakers intend the result, because the European Court of Human Rights exempts mass expulsions done via deportation order when accompanied with and done on a reasonable and objective examination of each individual's immigration papers.³⁵ That is, if immigration officials demonstrate that the deportation orders were issued due to an examination of individual records, then they by default demonstrate that it was not due to an intent to expel. For indirect expulsions, the required examination process would likely lead the Court to inquire the intent of lawmakers to ensure that the policy was taken both *after* and, importantly, *on* the basis of a reasonable justification. This would ensure that proffered justifications, such as animal welfare, were actually discussed and were not a ruse for mass expulsion, as they were during the early 20th century.³⁶

In sum, a Type I Indirect Mass Expulsion, where laws passed by the government lead to an exodus of one group, likely violates Article 19 when it comprises of (1) any measure taken by (2)

the particular case of each individual alien in the group. Thus, the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.”).

³¹ I am indebted to Sabrina McCubbin-Greydanus, a 2L at Georgetown University Law Center, in assisting with these translations.

³² *Elgafaji v Staatssecretaris van Justitie*, No. C-465/07 E.C.J. (2004).

³³ *Henckaerts*, *supra* note 3, at 109.

³⁴ *NS and Others v. Secretary of State for the Home Department*, C-411/10 E.C.J (2011). *But see* 1990 Dublin Convention v. United Kingdom, Admissibility Decision of 7 March 2000, Appl. No. 43844/98 (writing that a country *can* be liable for indirectly deporting someone to be tortured, under Article 3 to the Convention).

³⁵ *Georgia v. Russia (I)*, No. 13255/07 Eur. Ct. H.R. (2014) (judgment) ¶¶ 180-88. *See cf.* *Sharifi and Others v. Italy and Greece*, No. 16643/09 Eur. Ct. H.R. (2014) (judgment); *see also* *Mutual Recognition in European Immigration Policy in THE FUTURE OF ASYLUM IN THE EUROPEAN UNION: PROBLEMS, PROPOSALS AND HUMAN RIGHTS* (Flora A.N.J. Goudappel, Helena S. Raulus, ed., 2011) 88-96.

³⁶ ANDREAS SNILDAL, ANTI-SEMITISM WITHOUT HATRED? THE ANIMAL PROTECTION MOVEMENT AND THE SEMANTICS OF KOSHER SLAUGHTER IN NORWAY 1895-1913 (noting that the Prime Minister of Norway stated, “We have no obligation to deliver our domestic animals to the cruelties of the Jews, we have not invited the Jews to this country, and we have no obligation to provide the Jews animals to their religious orgies.” It should go without saying that Jews only use kosher meat for consumption.); *Anti-Shechita*, MODIYA <http://modiya.nyu.edu/handle/1964/489> (last visited Apr. 12, 2017) (“At the time, Jews had recently been granted full civil rights [in Switzerland] and some Swiss citizens feared an invasion of Jewish migrants from Eastern Europe, who they considered to be unassimilable, foreign, and unreliable. By banning the performance of a core Jewish ritual, the Swiss people found a disguised way to limit the immigration of Jews into Switzerland.”).

competent authorities that (3) are intended (or at least known) to (4) compel a group to leave and (5) are taken not after and on the basis of substantive examination of the merits of the policy.³⁷

C. Threshold Issues in Bringing Article 19 Claims: Applying the Charter and Distinguishing Between Expulsion and Forced Assimilation

The largest hurdle plaintiffs facing plaintiffs in bringing an Article 19 claim would be applying the Charter. For example, with regards to the expulsion of Romani in France, one commentator has argued that the Charter cannot protect against mass expulsions,³⁸ because the Charter is not brought into play unless something within the European Union's competency is incriminated.³⁹ However, while it might be difficult to implicate the Charter in a Type I Direct Mass Expulsion,⁴⁰ Type I *Indirect* Mass Expulsions, while perhaps being more difficult to prove, *do* implicate several areas of European Union competency. For example, regulations on kosher and halal meat implicate Regulation (EL) No. 1099/2009, which regulates meat, and labeling and import regulations, which have been suggested in Denmark for ritual slaughter, implicate the Free Movement of Goods within the EU.⁴¹ Regulations on religious dress could violate Directive 2000/78/EC (nondiscrimination on the basis of religion), as could regulations favoring kosher slaughtering over halal slaughtering or nuns' habits over hijabs, which may be the case in

³⁷ For an example of how a Court might analyze such a case, consider *Washington v. Trump*, No. 17-35105 (9th Cir. 2017), concerning the legality of Executive Order 13769, which barred all citizens from Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen from entering the United States. Though *Washington* is, of course, not a European Union case, and the United States does not have any provisions similar to Article 19, the case does concern a Type I Indirect Expulsion against Muslims (and a Type I Direct Expulsion against individuals from those seven countries). In *Washington v. Trump*, the court considered not only evidence provided by the government, but evidence provided by the State that the Executive Order was instead intended to ban Muslims from the country, particularly noting the speed with which the Order was passed, the lack of provided rationale for the specific countries, and statements previously made by President Trump that he intended to ban Muslims from the United States. *Id.* at 25. This rationale was echoed in courts around the country. Even though, individually, residents from each country could pose a security threat, and even though, individually, residents from each individual country could have been individually banned, in *aggregate* the impact on Muslim populations was too significant and the intent of the conduct was clearly not for national safety, but expulsion. Though procedurally and statutorily, no case in the Court of Justice or Court of Human Rights will proceed as *Washington* did, it does demonstrate a modern use of a Type I Indirect Expulsion, and the ability of courts to balance intent with alleged justification.

³⁸ Ariel M. Risinger, *The Romani in Europe and the False Promise Fundamental Rights* (2013) 22-29, http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1648&context=student_scholarship.

³⁹ *Id.* at 25.

⁴⁰ Especially if done towards non-natives who are sent to another EU Member State, because the mass expulsion could be seen as simply enforcing the law that EU citizens have three months to live in another country without a job before they can be ejected.

⁴¹ For example, a Belgian court recently filed a question with the Court of Justice concerning ritual slaughter bans. See Alan Hope, *Brussels Seeks Ritual Slaughter Opinion from European Court of Justice*, FLANDERS TODAY (July 29, 2016), <http://www.flandertoday.eu/current-affairs/brussels-seeks-ritual-slaughter-opinion-european-court-justice>.

Germany.⁴² Depending on the method taken, regulations on circumcision could implicate directives on child welfare,⁴³ physicians,⁴⁴ and nondiscrimination,⁴⁵ among others. Thus, as these laws could imply a derogation from an EU directive, they could be referred up to the European Court of Justice—as has already happened in Belgium with a ritual slaughter case⁴⁶—and could implicate the Charter.

The European Union has also demonstrated that Article 19 could be implicated when the European Commission began the process of bringing matters before the Court of Justice through Article 258 of the Treaty on the Functioning of the European Union during the French Romani Expulsion.⁴⁷ In the Roma case, no official agency implicated Article 19, though think-tanks suggested the option of bringing Article 19 in through freedom of movement.⁴⁸

Therefore, paradoxically, victims of indirect expulsion may actually have *more* legal avenues than those attacked by direct means, because most indirect attempts will implicate some area of European Union competency and referred to the Court of Justice from national courts on the issue.

The second significant threshold issue plaintiffs would face is distinguishing between forced expulsion and forced assimilation. Not every prohibition on a religious practice leads to expulsion. For example, despite the existence of laws making it increasingly difficult to be Jewish, many Jews did not leave Germany or Poland in the lead up to or during the Holocaust, but instead innovated within the confines of Jewish law.⁴⁹ To address this issue, plaintiffs should point to the fact that innovations do not inevitably follow a restriction. Jews innovated because they *couldn't* leave.⁵⁰

Whether laws preventing or inhibiting religious practice leads to an abandonment of that practice depends on many factors. Arguably, the strongest of these are the religious devoutness of

⁴² *Discrimination in the Name of Neutrality*, HUMAN RIGHTS WATCH (Feb. 26, 2009) https://www.hrw.org/report/2009/02/26/discrimination-name-neutrality/headscarf-bans-teachers-and-civil-servants-germany#_ftnref84.

⁴³ See Article 3(3) Treaty on European Union (requiring states to protect the right of the child).

⁴⁴ Such as Directive 2005/36/EC (recently amended by Directive 2013/55/EC) (regulating professionals).

⁴⁵ Directive 2000/78/EC.

⁴⁶ See Alan Hope, *Brussels Seeks Ritual Slaughter Opinion from European Court of Justice*, FLANDERS TODAY (July 29, 2016), <http://www.flandertoday.eu/current-affairs/brussels-seeks-ritual-slaughter-opinion-european-court-justice>.

⁴⁷ Kristi Severance, *France's Expulsion of Roma Migrants: A Test Case for Europe*, MIGRATION POLICY (Oct. 21, 2010) <http://www.migrationpolicy.org/article/frances-expulsion-roma-migrants-test-case-europe>.

⁴⁸ *Id.*

⁴⁹ See, e.g., EPHRAIM OSHRY, *RESPONSA FROM THE HOLOCAUST* (Y. Lieman, trans. 2001), *reprinted in* JEWISH ACTION (Summer 2008), https://www.ou.org/jewish_action/04/2013/responsa_from_the_holocaust.

⁵⁰ See, e.g., Holocaust Encyclopedia: Refugees, United States Holocaust Memorial Museum, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005139> (last visited Apr. 13, 2017).

the population and the ability of the population to move. Where, as during the Holocaust, there is a devout population, significant persecution, and little to no chance to escape, innovations in religious law follow as victims attempt to maintain religion as a source of guidance, strength, and resistance.⁵¹ However, where, as today, the population is devout but escape easy—as is required in the European Union, under free movement of persons—the devout have no need to alter their practices in the face of prohibition, for they can simply leave. Forced assimilation may work on some portion of the population, but there will always be those who seek to maintain their tradition and faith, and for whom restrictions on religious ritual could lead to forced emigration.

Moreover, where prohibitions accompany social discrimination, their ability to lead to the group abandoning the practice decreases. This is because social discrimination can push even the secular to identify with the community they are forced into,⁵² increasing devoutness and identification, and *increasing* the likelihood that bans on religious ritual rid a country of those practicing the religion.

Therefore, in the presence of social discrimination, prohibitions on religious rituals cause these communities to strengthen their observance, solidify their identities, and tie their group to the ability to practice their religion, increasing the likelihood that encroachments on religion lead to mass expulsion from a particular country instead of assimilation.

In the second section, this paper considers whether regulations on circumcision, ritual slaughter, and religious dress could be the basis of an Article 19 claim for Muslims in the European Union. In this analysis, this section first briefly discusses the three religious rituals and their importance to Islam, before analyzing the impact regulations have on Muslim communities.

II. The Targeted Practices and the Impacts of Regulation

⁵¹ See, e.g., Oshry, *supra* note 50 (“Many of the ghetto prisoners perceived that the only means available to them of opposing the will of their accursed German warders was to maintain some form of Torah study, along with keeping [biblical obligations] so that the Jewish character would not be destroyed.”).

⁵² See, e.g., *The Jew and the Club*, THE ATLANTIC (1924), <https://www.theatlantic.com/magazine/archive/1924/10/the-jew-and-the-club/306258> (anonymous submission) (noting that, in the face of significant social discrimination against Jews that had increased dramatically, he felt “much more than I used to, a desire to emphasize my Jewish nationality” and that his “children will probably, under the circumstances, feel all this more keenly than I do and are likely to associate much more exclusively than I do with people of Jewish origin. The result will be to accentuate any Jewish traits which they may have inherited and by that very fact to set them off more sharply from others.”).

For observant Muslims, the “burkini” debate this summer represented only another encroachment on their ability to be both European and Muslim amid prohibitions or regulations on circumcision, ritual slaughter, and religious dress that have become increasingly common in Europe.⁵³

A. Targeted Practices: Circumcision, Ritual Slaughter, and Religious Dress

Deriving from several influential hadiths (depictions of Muhammed during his life), virtually all schools of Islamic jurisprudence require male circumcision.⁵⁴ Because different hadiths describe the practice in different ways, customs surrounding male circumcision in Islam vary in timing and specific ritual.⁵⁵

In addition to circumcision, both Islamic halal (and Jewish kosher) dietary laws require meat to be slaughtered in a certain way intended to kill the animal with as little pain as possible and render the meat blood-free.⁵⁶ In addition, to be kosher, meat cannot have had any lesions or disease

⁵³ See, e.g., Lizzie Deardan, *Burkini Ban, Why is France Arresting Muslim Women for Wearing Full-Body Swimwear and Why are People so Angry?* INDEPENDENT (Aug. 24, 2016), <http://www.independent.co.uk/news/world/europe/burkini-ban-why-is-france-arresting-muslim-women-for-wearing-full-body-swimwear-and-why-are-people-a7207971.html>; Sheena McKenzie, *French Mayors Maintain Burkini Bans Despite Court Ruling*, CNN (Aug. 29, 2016) <http://www.cnn.com/2016/08/29/europe/french-mayors-refuse-lift-burkini-ban>; Joseph V. Micallef, *Is France Right to Ban the Burkini?*, THE WORLD POST, http://www.huffingtonpost.com/joseph-v-micallef/is-france-right-to-ban-th_b_11845732.html (last visited Apr. 12, 2017).

⁵⁴ See, e.g., Bukhari, Book 7, Vol. 72, Hadith 777; Bukhari, Book 7, Vol. 72, Hadith 779; Muslim, Book 2, Hadith 496; Malik, Book 49, Hadith 49.3.3; Bukhari, Book 4, Vol. 5, Hadith 575; Bukhari, Book 1, Vol. 1, Hadith 6.

A minority of Islamic jurisprudence argues that circumcision is not required, on the basis of statements in the Koran, such as Surah Ghafir 40:64 (“It is God who made for you the earth a place of settlement, the sky a ceiling and formed you and perfected your form and provided you with good things.”), implying human perfection without circumcision. Some opponents of Islamic circumcision take this to mean that circumcision bans will not impact Muslim communities, especially in comparison to Jewish circumcision, which is detailed in the Torah, Genesis 17:10-14; Leviticus 12:3, and considered the most important biblical commandment. It is true that circumcision is not as important in Islam as it is in Judaism, but it would be difficult to find any Islamic biblical commandment that is as important as circumcision is to Jews. However, that is missing the point. Just because one strain of religious thought argues against a practice does not mean that its ban will not impact a religion, especially when that strain of thought is in the minority. If one group considers something to be integral to their existence, that ritual can be prohibited as a means to expel the group.

The Court of Human Rights protects the right to have differing opinions among religious groups. In *Cha'are Shalom veTsedek v. France*, App. No. 27417/95, Eur. Ct. H.R. (1995), a group of ultra-Orthodox Jews sought to set up a new kosher slaughterhouse which used a different standard of determining whether the meat had any lesions prior to slaughter, one which most Jews found unnecessary, but were denied by the French government because there already existed a kosher slaughterhouse. The Court of Human Rights found that ritual slaughter regulations would only interfere with religious freedom only if it made it impossible for members of a faith—or a group within that faith—to eat meat from animals slaughtered in ways that group considered permissible. The Court did not accept the argument that just because most Jews found the kosher meat available in France at the time permissible, the group seeking an allegedly higher standard could be denied access—but also found that imports from Belgium were sufficient. Thus, that some Muslims permit pre-stunning does not mean that pre-stunning bans can encroach on freedom of religion for those who do not find pre-stunning acceptable.

⁵⁵ Islam, Question and Answer, <https://islamqa.info/en/9412> (last visited Apr. 12, 2017); Khitan, ENCYCLOPAEDIA BRITANNICA, (July 11, 2007) <https://www.britannica.com/topic/khitan-Islam> (“khitan” is the Islamic term for circumcision rituals).

⁵⁶ *What is Shechita?* CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/222240/jewish/What-is-Shechita.htm (last visited Apr. 12, 2017) (shechita is the Hebrew term for ritual slaughter); Rose Troup Buchanan, *What is Halal Meat and Why is it Controversial?* THE INDEPENDENT (Feb. 3, 2015), <http://www.independent.co.uk/news/uk/what-is-halal-meat-and-why-is-it-controversial-10019645.html>.

The animals must be drained of blood because blood is neither kosher nor halal.

prior to death, which prohibits pre-stunning.⁵⁷ Opinions on pre-stunning in Islam vary. Thus, in the United Kingdom, about 85% of halal slaughterhouses pre-stun animals; virtually no kosher slaughterhouses do.⁵⁸ Many, but not all, Muslim adherents will eat kosher meat when halal meat is not available.

Finally, in Islam, popular (though not all) interpretations of the Koran and sunnah (laws and interpretations associated with the Koran) require female adherents to cover their hair out of respect and modesty. Some cover portions of their face as well. Among many other methods, the two most commonly referred to in European debates are hijabs, which are headscarves covering the hair, neck, and shoulders, and burqas, which cover the entire face with a small mesh opening to see.⁵⁹ Muslim girls traditionally begin to wear headscarves as preteens or teenagers; burqas are normally reserved for older women.⁶⁰ Very few women in Europe wear a full-face veil,⁶¹ but about a third percent of adult Muslim women wear headscarves.⁶²

B. The Regulations

Circumcision, ritual slaughtering, and religious dress have long histories of regulation, fueled historically by outright antisemitism.⁶³ Today, most argue that circumcision bans are

⁵⁷ *What is Shechita?*, *supra* note 57.

⁵⁸ RELIGIOUS SLAUGHTER IN THE EU, EUROPEAN PARLIAMENT, [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120375/LDM_BRI\(2012\)120375_REV2_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2012/120375/LDM_BRI(2012)120375_REV2_EN.pdf). For a brief discussion on the legal impact of differing opinions towards religious law, *see* note 54.

⁵⁹ *Why Hijab?*, AL-ISLAM, <https://www.al-islam.org/hijab-muslim-womens-dress-islamic-or-cultural-sayid-muhammad-rizvi/why-hijab> (last visited Apr. 15, 2014). Burqas are often confused with niqabs, which leave a small opening for the eyes. Laws that ban burqas ban niqabs as well. *See* Adam Taylor, *Germany's Potential Burqa Ban has a Problem: Where are the Burqas?*, WASH. POST, https://www.washingtonpost.com/news/worldviews/wp/2016/08/19/germanys-potential-burqa-ban-has-a-problem-where-are-the-burqas/?utm_term=.80113709adec.

⁶⁰ *Why Hijab?*, *supra* note 59.

⁶¹ Adam Taylor, *Germany's Potential Burqa Ban has a Problem: Where are the Burqas?*, WASH. POST, https://www.washingtonpost.com/news/worldviews/wp/2016/08/19/germanys-potential-burqa-ban-has-a-problem-where-are-the-burqas/?utm_term=.80113709adec.

⁶² Sonja Haug et. al., *Muslim Life in Germany*, Deutsche Islam Konferenz at 186-87 (2007), https://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/Forschungsberichte/fb06-muslimisches-leben.pdf?__blob=publicationFile (this report states that 28% of Muslim women in Germany wear a headscarf, but those numbers include girls under the age of ten, who rarely do. Twenty-two percent of women between the ages of 16-25 wear a headscarf, and close to 40% of those 26-65 do so); Asma Khalid, *Lifting The Veil: Muslim Women Explain Their Choice*, NPR, <http://www.npr.org/2011/04/21/135523680/lifting-the-veil-muslim-women-explain-their-choice> (this interview discusses American Muslim women, and reports that 40% wear a hijab).

⁶³ For example, the revolt in 167 BCE against bans on circumcision and ritual slaughter by the Seleucid Empire led to the Jewish holiday of Chanukah. 1 Maccabees 48.

necessary for child welfare.⁶⁴ In Denmark, for example, doctors have suggested prohibiting circumcision in anyone younger than eighteen;⁶⁵ a few years ago in Germany, a court temporarily outlawed childhood circumcision entirely by finding that it violated the rights of the child.⁶⁶ In some Member States, the bans are arguably targeted towards the Muslim community, such as in Sweden, where circumcision is permitted only until the child is two months old, shutting out the portion of the Muslim community following a custom to circumcise their sons as toddlers, but permitting the Jewish community, who circumcise their sons on the eighth day of life.⁶⁷ In addition, though not binding and not within the European Union, the Parliamentary Assembly of the Council of Europe passed a regulation that calls for the end to male circumcision, arguing that it violates child welfare.⁶⁸

With regards to ritual slaughter, the European Union requires countries to pre-stun and allows, but does not require, a ritual slaughter exemption.⁶⁹ Sweden, for example, outright bans kosher and some halal slaughter by requiring pre-stunning since 1937. The Netherlands almost joined Sweden, but at the last minute, the Agriculture Minister signed an agreement with Muslim and Jewish leaders that where, if the animal did not clearly lose consciousness after forty seconds, it would be stunned.⁷⁰ The agreement didn't end the debate: in February, Dutch lawmakers passed a second bill, which bans the export of kosher and halal meat, allegedly to minimize suffering of animals, requires all meat killed ritually to be "clearly labeled," and relegates it to being available only in religious communities.⁷¹ In February 2014, Denmark lawmakers required all

⁶⁴ See, e.g., Melissa Eddy, *In Germany, Ruling Over Circumcision Sows Anxiety and Confusion*, NY TIMES (July 13, 2012), <http://www.nytimes.com/2012/07/14/world/europe/in-germany-ruling-over-circumcision-sows-anxiety-and-confusion.html>.

⁶⁵ Erin McCann, *Danish Doctors' Group Wants to End Circumcision for Boys*, NY TIMES (Dec. 8, 2016), <https://www.nytimes.com/2016/12/08/world/europe/circumcision-boys-babies.html>.

⁶⁶ Stephen Evans, *German Circumcision Ban: Is it a Parent's Right to Choose?*, BBC (July 13, 2012), <http://www.bbc.com/news/magazine-18793842>.

⁶⁷ Ron Kampeas, *US Envoy Warns Circumcision Bans Will Create Jew-free Europe*, TIMES OF ISRAEL (July 12, 2014) <http://www.timesofisrael.com/us-envoy-warns-circumcision-bans-will-create-jew-free-europe>.

⁶⁸ *European Council Passes Anti-ritual Circumcision Resolution*, JEWISH TELEGRAPH AGENCY (Oct. 2, 2013) <http://www.jta.org/2013/10/02/default/council-of-europe-passes-anti-male-circumcision-resolution>.

⁶⁹ Regulation (EL) No 1099/2009, Directive 93/119/EC (1993).

⁷⁰ Jewish Telegraph Agency, *Kosher Slaughter Escapes Ban in Netherlands*, THE FORWARD (June 7, 2012) <http://forward.com/food/157507/kosher-slaughter-escapes-ban-in-netherlands>.

⁷¹ *Holland to Limit Kosher Ritual Slaughter and Ban Its Export*, HAARETZ (Feb. 17, 2016), <http://www.haaretz.com/jewish/news/1.703961>; Kayleigh Lewis, *Netherlands Bans Export of Kosher and Halal Meat to 'Minimise' Negative Effects on Animal Welfare*, THE INDEPENDENT (Feb. 18, 2017), <http://www.independent.co.uk/news/world/europe/netherlands-bans-export-of-kosher-and-halal-meat-to-minimise-negative-effects-on-animal-welfare-a6881406.html>. One should note the implicit xenophobia of the labeling ban in particular. Kosher and halal meat has always been labeled; religious Jews and Muslims

slaughterhouses to pre-stun, thus banning kosher slaughtering, despite the fact that no kosher slaughterhouses existed in Denmark and that all halal slaughterhouses already pre-stunned.⁷² It is completely banned in Luxembourg.⁷³

In contrast, two countries recently affirmed the right to ritual slaughter. In Germany, the German Federal Constitutional Court has found that the German Constitution provides for broader religious freedom rights than the European Convention on Human Rights; ritual slaughter, in addition to being able to obtain ritually slaughtered meat via imports, must be allowed.⁷⁴ In Poland, ritual slaughter was banned temporarily before being overturned by the court.⁷⁵

Outside the European Union, ritual slaughter is completely banned in Norway and Switzerland.⁷⁶ The ban in Norway, while under the guise of animal welfare, was explicitly antisemitic in nature, with the Prime Minister in 1929 stating, “[w]e have no obligation to deliver our domestic animals to the cruelties of the Jews, we have not invited the Jews to this country, and we have no obligation to provide the Jews animals to their religious orgies.”⁷⁷ This rhetoric echoed the rhetoric used during the Switzerland debate,⁷⁸ where kosher slaughtering was banned with hopes that such a ban would limit Jewish immigration.⁷⁹ When the debate was reignited in 2002, lawmakers in favor of continuing the ban suggested that if Jews and Muslims were unduly impacted,

would not purchase it otherwise, and there is a significant market for kosher and halal labeling organizations. That lawmakers are requiring such meat to be labeled demonstrates that they likely have never been in a grocery store that sells kosher and halal meat. Moreover, it echoes of blood libel myths attached to kosher meat during Nazi Germany, which accused Jews of selling tainted kosher meat to gentiles.

⁷² Sara C. Nelson, *Halal & Kosher Slaughter Banned In Denmark As Minister Insists ‘Animal Rights Come Before Religion,’* HUFFINGTON POST (Feb. 24, 2014), http://www.huffingtonpost.co.uk/2014/02/18/halal-kosher-slaughter-banned-denmark-animal-rights-before-religion_n_4807192.html?utm_hp_ref=ukHalal. There are less than 10,000 Jews in Denmark, explaining partially the lack of kosher slaughterhouses, but raising the question why lawmakers felt the need to address the issue at all.

⁷³ Azeem Ibrahim, *Progress? Discrimination? Or Simply a Stunmy Controversy?* THE WORLD POST http://www.huffingtonpost.com/azeem-ibrahim/progress-discrimination-o_b_921354.html (last visited Apr. 16, 2017) (note that the author states that pre-stunning is gradually becoming acceptable in religious communities. This is only true of Islam; no religious authorities in Judaism, even the most progressive, accept pre-stunning animals, and a significant portion of Muslims do not accept pre-stunning.).

⁷⁴ 1 BvR 1783/99 of 01/15/2002, German Federal Constitutional Court.

⁷⁵ *Polish Ban on Kosher Slaughter of Animals is Overturned*, BBC (Dec. 10, 2014), <http://www.bbc.com/news/world-europe-30412551>.

⁷⁶ Azeem Ibrahim, *Progress? Discrimination? Or Simply a Stunmy Controversy?* THE WORLD POST http://www.huffingtonpost.com/azeem-ibrahim/progress-discrimination-o_b_921354.html (last visited Apr. 16, 2017)

⁷⁷ ANDREAS SNILDAL, ANTI-SEMITISM WITHOUT HATRED? THE ANIMAL PROTECTION MOVEMENT AND THE SEMANTICS OF KOSHER SLAUGHTER IN NORWAY 1895-1913.

⁷⁸ *Id.*

⁷⁹ See *Anti-Shechita*, MODIYA, <http://modiya.nyu.edu/handle/1964/489> (last visited Apr. 16, 2017) (shechita is the term for kosher slaughtering).

they could either become vegetarian, or leave.⁸⁰ Recently, Switzerland began discussing banning the import of kosher and non-pre-stunned halal meat as well.⁸¹

Bans on religious dress are perhaps the most well known—particularly following the Nice terrorist attacks, when several cities in France attempted to ban the “burkini,” a full-body swimsuit which covers the hair; these bans were overturned in French courts.⁸² This was, of course, not a new debate in France: France has banned religious dress in public buildings since 2004,⁸³ and has banned full-face veils in public since 2011.⁸⁴ Belgium also bans full-face veils, as does Bulgaria, parts of Italy, Latvia, and some cities in Spain.⁸⁵ Lawmakers have voted to ban the veil in the Netherlands as well.⁸⁶ In the United Kingdom, characterized by the Court of Human Rights as a more pluralistic European country,⁸⁷ there are no bans on religious dress, but an employment tribunal granted a school the right to refuse to hire a teacher wearing a niqab, which hides the face except the eyes.⁸⁸ Veil bans are currently being discussed in Estonia and Norway, and in Amsterdam, lawmakers have discussed prohibiting women who wear veils from receiving unemployment, on the grounds that it makes them unemployable in a non-Muslim majority country.⁸⁹ Rhetoric surrounding the bans tends to focus on the integration of a Muslim minority into Europe and the acceptability of face-coverings within European culture, not safety; indeed, the European Court of Human Rights has held that safety is, right now, not demonstrative enough of a reason to outright ban veils from public, given the repercussions on Muslim women observing the custom.⁹⁰

Though often passed “neutrally”—that is, applying also to other religious dress, such as Jewish kippot and Sikh dastars (Catholic nuns’ habits are sometimes exempted), Islamic dress is the

⁸⁰ *Id.*

⁸¹ Robert S. Wistrich, *European Antisemitism Reinvents Itself*, the American Jewish Committee (2005), <http://www.ajc.org/atf/cf/%7B42D75369-D582-4380-8395-D25925B85EAF%7D/wistrich.pdf>.

⁸² Lizzie Deardan, *Burkini Ban, Why is France Arresting Muslim Women for Wearing Full-Body Swimwear and Why are People so Angry?* INDEPENDENT (Aug. 24, 2016), <http://www.independent.co.uk/news/world/europe/burkini-ban-why-is-france-arresting-muslim-women-for-wearing-full-body-swimwear-and-why-are-people-a7207971.html>.

⁸³ Law 2004-228 of 15 March 2004 (France).

⁸⁴ Alice Foster, *Where in the World are the Burqa and Nikab Banned?* SUNDAY EXPRESS (Dec. 7, 2016), <http://www.express.co.uk/news/world/652842/Burka-Niqab-Islamic-Face-veil-Ban-UK-Fine-France-Belgium-Netherlands-Europe-Muslim-dress>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Case of Leyla Şahin v. Turkey, No. 44774/98 Eur. Ct. H.R. (2005) ¶ 61.

⁸⁸ *Azmi v. Kirklees Metropolitan Borough Council* [2007] IRLR 434.

⁸⁹ *Amsterdam Mulls Axing Dole for Women in Burqas*, SPIEGEL ONLINE (Apr. 21, 2006) <http://www.spiegel.de/international/muslims-in-holland-amsterdam-mulls-axing-dole-for-women-in-burqas-a-412355.html>

⁹⁰ *S.A.S. v. France*, No. 43835/11 Eur. Ct. H.R. (2014).

clear target. These debates are often vitriolic, as the European Court of Human Rights noted in *SAS v. France*, which concerned the 2011 veil ban. The Court wrote that they were “very concerned by the indications of some of the third-party interveners to the effect that certain Islamophobic remarks marked the debate which preceded the adoption of the Law.”⁹¹ However, because this case was in the context of religious liberty, it was therefore “not for the Court to rule on whether legislation is desirable in such matters.”⁹²

C. Impact of Regulations on Religious Communities

The temporary German circumcision ban was illuminating with respect to how religious communities react to bans on religiously-necessary rituals: in the few months between the court ruling and the passage of a hastily-written statute exempting Jews and Muslims,⁹³ hundreds of German Jews began discussing immigrating to Israel,⁹⁴ and even more reported feeling targeted and attacked.⁹⁵ Circumcision and ritual slaughter bans increase the costs of being Muslim, and there is evidence that such bans are written to apply solely to Muslim minorities.⁹⁶

⁹¹ *Id.* at ¶ 149.

⁹² *Id.*

⁹³ Madeline Chambers, *Circumcision Ban Overturned in Germany*, THE GLOBE & MAIL (Dec. 26, 2012) <http://www.theglobeandmail.com/news/world/circumcision-ban-overturned-in-germany/article6288050>.

⁹⁴ Ron Kampeas, *US Envoy Warns Circumcision Bans Will Create Jew-free Europe*, TIMES OF ISRAEL (July 12, 2014) <http://www.timesofisrael.com/us-envoy-warns-circumcision-bans-will-create-jew-free-europe>.

Such a reaction may seem histrionic, but must be considered within context: the experience of Jews in Germany immediately before the Holocaust had been relatively prosperous. Most Jews in Germany believed that discriminatory laws would be overturned with new political parties. That is why, today, claims by legislators that circumcision bans, and the ritual slaughtering bans discussed below, are merely designed for child (and animal) welfare, do little to calm the fears of Europe’s Jewish population. See, e.g., *The Jew and the Club*, THE ATLANTIC (October 1924), www.theatlantic.com/magazine/archive/1924/10/the-jew-and-the-club/306258 (anonymous submission); Zach Teutsch, *Sean Spicer Said Hitler Didn’t Gas His Own People. Let Me Tell Him About My Ancestors*, VOX (Apr. 13, 2017) <http://www.vox.com/first-person/2017/4/13/15278400/spicer-hitler-gas-holocaust-anti-semitism> (explaining that his great-grandparents didn’t leave Germany because Germany was, even during times of discrimination, good to the Jews).

⁹⁵ Melissa Eddy, *In Germany, Ruling Over Circumcision Sows Anxiety and Confusion*, NY TIMES (July 13, 2012), <http://www.nytimes.com/2012/07/14/world/europe/in-germany-ruling-over-circumcision-sows-anxiety-and-confusion.html>.

⁹⁶ Technically speaking, regulations on circumcision and ritual slaughter should impact Jews more than Muslims because all Jewish denominations require circumcision exactly on the eighth day and no Jewish interpretation of kosher law, including those in progressive Jewish movements, allows for pre-stunning, while in Islam, circumcision has a less rigid time frame and several denominations permit pre-stunning. However, practically speaking, European lawmakers are cognizant of Europe’s history towards Jews and take steps to preserve what little Jewish culture remains. For example, in Germany, there is evidence that it is easier to receive certification for a kosher slaughterhouse than a halal slaughterhouse, even when the halal slaughterhouse pre-stuns, and in Sweden, the anti-circumcision law appears to be written explicitly with Jewish circumcision in mind as a loophole.

Religious dress bans in public school have not impacted Jews significantly because most Jews who do wear religious dress attend Jewish school due to France’s school schedule, which requires school on Saturdays, in violation of the Jewish Sabbath.

In general, we can divide the impact of these laws into practical and psychological impacts. The practical impact of these regulations, especially religious dress, is significant. It is important to note that although headscarves and veils appear to many Europeans to be a sign of oppression, to those who wear them, they are often forms of liberation. Full-face veil bans in France have led women who previously felt comfortable living a public life because of the veil to self-described “house arrest,” and there is evidence that women are leaving France due to the ban.⁹⁷ Muslim women have described bans on headscarves in employment as forcing them to choose between their religion and culture and being able to work.⁹⁸ Fully-integrated and assimilated observant Muslim women have found themselves turned away from public amusement parks, schools, and office spaces.⁹⁹

The ban on religious displays in public schools has had impacts on Muslim girls (beyond the hundreds of girls forced to leave public school). For example, in 2015 a young woman who (pursuant to the law) was not wearing a headscarf was sent home from her public school due to her long skirt, which the principal said was a sign of her Muslim faith. The Collective Against Islamophobia found over a hundred of similar cases of school officials sending home students wearing long skirts, sweaters, or broad headbands.¹⁰⁰

Psychologically, the “impact [of religious dress regulations] on European Muslims in general cannot be underestimated.”¹⁰¹ European Union citizens are extremely mistrustful towards Islam: in 2016, 43% of Europeans surveyed openly reported unfavorable views towards Muslims.¹⁰² Thus, when the bans reinforce racism and intolerance in society, it is in a way that normalizes the view that Islam is incompatible with being European. Observant Muslim women in France “say the

⁹⁷ Angelique Chrisafis, *France's Burqa Ban: Women are 'Effectively Under House Arrest,'* THE GUARDIAN (Sept. 19, 2011), <https://www.theguardian.com/world/2011/sep/19/battle-for-the-burqa?INTCMP=ILCNETTXT3487>.

⁹⁸ Nihad El Aabedy, *How Does the EU Hijab Ruling Affect Muslim Women?* AL JAZEERA (March 16, 2017) <http://www.aljazeera.com/indepth/features/2017/03/eu-hijab-rulg-affect-muslim-women-170316073040916.html>.

⁹⁹ Suzanne Daley & Alissa J. Rubin, *French Muslims Say Veil Bans Give Cover to Bias,* NY TIMES (May 26, 2015) <https://www.nytimes.com/2015/05/27/world/europe/muslim-frenchwomen-struggle-with-discrimination-as-bans-on-veils-expand.html>.

¹⁰⁰ Alissa J. Rubin, *French School Deems Teenager's Skirt an Illegal Display of Religion,* NY TIMES (Apr. 29, 2015) <https://www.nytimes.com/2015/04/30/world/europe/french-school-teenagers-skirt-illegal-display-religion.html?action=click&contentCollection=Europe&module=RelatedCoverage®ion=Marginalia&pgtype=article>

¹⁰¹ Aabedy, *supra* note 97.

¹⁰² Richard Wike et. al, *Europeans Fear Wave of Refugees Will Mean More Terrorism, Fewer Jobs,* PEW RESEARCH (July 11, 2016) at 23, <http://www.pewglobal.org/2016/07/11/negative-views-of-minorities-refugees-common-in-eu>. By comparison, between a quarter and a third of EU citizens hold antisemitic views, and only about 20% will outright admit to holding “unfavorable” views of Jews. *Id.*; ADL GLOBAL 100, <http://global100.adl.org>.

constant talk of new laws has made them targets of abuse, from being spat at to having their veils pulled or being pushed when they walk on the streets,” as their choice of head covering becomes not a religious obligation and show of devotion but a political statement.¹⁰³ This may have only gotten worse in light of the violence in 2016, considering that after violent attacks towards Jews in 2014 and 2015, over seventy percent of those surveyed in France, Germany, and Belgium agreed that “violence against Jews in this country affects everyone and is an attack on our way of life,” an overwhelming majority was very concerned about extremism and violence in general.¹⁰⁴ Thus, while even to some minority groups impacted by these regulations, such as Jews, restrictions could be viewed as misguided attempts at security, to European Muslims, they are the statutory manifestation of preexisting hate.

D. Intent to Expel?

Moreover, there does appear to be intent to expel. In addition to the Islamaphobia noted by the Court of Human Rights, multiple lawmakers have stated that Muslims should either abandon their cultural norms or leave the continent.¹⁰⁵ This is especially true with respect to views of migrants, refugees, and immigrants. Debates surrounding veils and hijabs in particular are suspect, but lawmakers have not been hesitant to imply that those impacted by ritual slaughter or circumcision bans should simply leave the country. These statements may indicate intent to expel, especially when combined with the general anti-Islam sentiments popular in Europe today.

III. What About Religious Liberty Protection?

One would be understandably suspect of using Article 19 to secure circumcision, ritual slaughtering, and religious dress rights, because the EU Charter of Fundamental Rights provides for

¹⁰³ Daley & Rubin, *supra* note 98.

¹⁰⁴ Press Release, *New Poll Finds Dramatic Decline in Anti-Semitic Attitudes in France; Significant Drops in Germany & Belgium*, ANTI-DEFAMATION LEAGUE (June 2015), <https://www.adl.org/news/press-releases/new-poll-anti-semitic-attitudes-19-countries>.

¹⁰⁵ See, e.g., Cynthia Kroet, *Wolfgang Schäuble to Muslim Migrants: If You Don't Like Europe, Leave*, POLITICO (Apr. 14, 2017), www.politico.eu/article/wolfgang-schauble-to-muslim-migrants-if-you-dont-like-europe-leave; “Limit Muslims’ birth rate:” *Sweden Democrat*, THE LOCAL SE (Jan. 3, 2013), <https://www.thelocal.se/20130103/45400>; Alison Smale, *Germany’s Embrace of Migrants Spawns Rise of New Far Right Leader*, NY TIMES (March 9, 2016) <https://www.nytimes.com/2016/03/10/world/europe/germanys-embrace-of-migrants-spawns-rise-of-far-right-leader.html>; Europe’s Rising Far Right, NY Times (Dec. 4, 2016) https://www.nytimes.com/interactive/2016/world/europe/europe-far-right-political-parties-listy.html?_r=0. Though far-right parties are far from the majority in Europe, they are far more popular than a simple fringe movement. See generally *European Muslim Youth & the Rise of the Far Right*, Forum of European Muslim Youth and Student Organisations (FEMYSO), <http://www.femyso.org/sites/default/files/reportfemysov5.1.pdf> (noting multiple examples of outright Islamaphobia across the EU, the normalization of Islamaphobic views, and the impact on young European Muslims).

religious liberty and antidiscrimination, and these provisions are bolstered by the EU's antidiscrimination laws, such as Article 3(3) of the Treaty on European Union, which provides that the internal market of the EU shall "combat social exclusion and discrimination, and shall promote social justice and protection," and Directive 2000/78/EC, which prohibits discrimination on the basis of religion except where such difference of treatment is justified on a genuine and determining occupational requirement.

However, these protections are not as robust as they may appear. While the Charter of Fundamental Rights of the European Union provides for the "freedom of thought, conscience and religion" including "in worship, teaching, practice and observance,"¹⁰⁶ the European Court of Human Rights and European Court of Justice have both found religious dress laws and ritual slaughtering bans permissible.

For example, in *March*, the European Court of Justice finally first addressed religious dress bans in *Achbita v. G4S Secure Solutions NV*. *Achbita* concerned two cases, one in France and one in Belgium, where a Muslim woman was terminated from her job due to wearing a hijab in violation of workplace regulations which required "neutrality," including prohibiting "the visible wearing of political, philosophical or religious signs."¹⁰⁷ Both cases concerned claims of indirect and direct discrimination, in violation of Directive 2000/78/EC; the question was then referred to the European Court of Justice to determine whether that Directive should be interpreted to find whether a private employer imposing a blanket ban on visible political, philosophical or religious signs in the workplace constituted direct discrimination.¹⁰⁸ The Court found that it did not, because the policy was "genuinely pursued in a consistent and systematic manner."¹⁰⁹ Whether it constituted indirect discrimination would depend on whether it was "limited to what is strictly necessary," a question to be determined by the lower court.¹¹⁰

¹⁰⁶ Charter of Fundamental Rights Article 10.

¹⁰⁷ *Samira Achbita v. G4S Secure Solutions NV*, C-157/15 E.C.J (2017) ¶¶ 14, 13.

¹⁰⁸ *Id.* at ¶ 22.

¹⁰⁹ *Id.* at ¶ 40.

¹¹⁰ *Id.* at ¶ 42.

The holding departed from Advocate General Sharpston, who, writing for France, argued that the rule constituted direct discrimination.¹¹¹ He carefully noted the individualist approach most people take towards religion, writing that “[r]eligious observance comes in varying forms and varying intensities” and “[w]hat a particular person treats as essential to his or her religious observance may also vary over time.”¹¹² In contrast, Advocate General Kokott, for the Belgian case, argued that “we should not rush into making the sweeping assertion that such a measure makes it unduly difficult for Muslim women to integrate,”¹¹³ and, perhaps more significantly, noted that “it is important . . . when interpreting and applying the principle of equal treatment . . . to have regard to the national identities of the Member States,” suggesting that Member States such as France, which accord secularism constitutional status, have a broader leeway in limiting religion in the public sphere.¹¹⁴ This is the method the European Court of Justice followed.

Analysis in the European Court of Human Rights is similar. These cases further indicate in dicta that religious dress bans must be tailored to the country in question. In *Sahin*, the Court permitted a ban on hijabs in universities in Turkey on the basis of Turkey’s uniquely firm commitment to secularity—it was the basis for the modern Turkish republic—the “peculiarities of Islam,” the significant Muslim majority in the country (over 95% of Turkey is Muslim), and the long history the former Ottoman Empire had with Islamist political rule, suggesting that when a country is secular in reaction to one particular religion, and that religion is the dominant religion of the area, it is acceptable to regulate private conduct with respect to that religion, but that, had circumstances been different—had Turkey been regulating kippot, for example—the outcome could have changed.

Unfortunately, that reading does not appear to be the angle the European Court of Human Rights takes towards religious liberty. Moreover, it is not clear that such tailoring would even protect religious minorities: in France, which is only at most ten percent Muslim and lacks Turkey’s history of Islamism, the Court found that France’s commitment to state secularity justified such bans, even though France’s state secularity commitment developed due to an overpowered *Catholic*

¹¹¹ Opinion of Advocate General Sharpston *in* Bougnaoui v. Micropole SA, C-188/15 E.C.J. (2016) ¶ 135.

¹¹² *Id.* at ¶ 29.

¹¹³ Opinion of Advocate General Kokoff *in* Achbita v. G4S Secure Solutions NV, C-157/15 E.C.J. (2016) ¶ 124.

¹¹⁴ *Id.* at ¶ 125.

Church, not dominant Islamic rule. It seems that while the justifications for religious dress bans will vary according to country, the result—that such bans, directed towards hijabs but including other clothing—is the same. This is also suggested in a later case, where the Court held that full-face veil bans did not violate Article 9’s freedom of religion principles because respect for the conditions of “living together” was a legitimate aim,¹¹⁵ and that in France, “living together” required viewing the face of others.

With regards to religious symbols in schools, while the European Court of Human Rights grants states broad discretion to restraint the wearing of religious symbols in school, the European Union recently stated that they would prefer “more insightful arguments and evidence regarding the principle of secularism, gender equality, public order, health and security in public schools to justify anti-veiling legislation.”¹¹⁶ This does not appear to have led to any changes in outcomes.

With regards to ritual slaughter regulations and religious liberty, so far, no cases have been heard under the Charter and only one has been heard under the Convention (though several have been heard under Member State courts). In the case heard under the Convention, the Court held that a Member State could ban a form of ritual slaughter so long as those who needed it could import the meat from a nearby country.¹¹⁷ The holding was given without regard to whether that nearby country would ban exports, as Denmark recently did, and as other countries are discussing.

So far, most cases concerning circumcision concerns circumcisions gone wrong. It is sufficient to note that all religious discrimination and religious freedom cases will proceed following a similar formula, which balances the interest of the individual against the interests of the state, and justifiable interests of the state include protecting the dominant culture. Laws that impact one religion more than others are frequently found justifiable on the basis of assimilation and protection of culture.¹¹⁸

¹¹⁵ S.A.S. v. France, No. 43835/11 Eur. Ct. H.R. (2014).

¹¹⁶ RELIGIOUS PRACTICE AND OBSERVANCE IN THE EU MEMBER STATES, STUDY, DIRECTORATE-GENERAL FOR INTERNAL POLICIES (2013) at 18, [http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/2013/474399/IPOL-LIBE_ET\(2013\)474399_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/2013/474399/IPOL-LIBE_ET(2013)474399_EN.pdf).

¹¹⁷ Cha’are Shalom veTsedek v. France, App. No. 27417/95, Eur. Ct. H.R. (1995).

¹¹⁸ For a comprehensive suggestion from the viewpoint of the European Parliament on religious discrimination cases, which include those mentioned here but also include funding cases, religious marriage, religious holiday accommodations, and violence between religious groups, see *Religious Practice and Observance in EU Member States*, Prepared for European

Plaintiffs would be remiss in these situations to not bring antidiscrimination and religious liberty claims—but on the basis of past caselaw, such claims do not appear to be successful in the European Court of Human Rights or European Court of Justice.¹¹⁹ In addition, such claims would focus only on one of the encroachments, and not the overall atmosphere of Islamophobia, suspicion, and mistrust towards Islam’s compatibility in Europe. Current European Court of Justice and European Court of Human Rights interpretations of the Charter and Convention appear to assume that when an encroachment is small, its impact is small as well, even when it is surrounded by many other, similarly-sized encroachments. This “death by papercut” method makes it increasingly difficult for minority populations to fight back in court, where each encroachment is considered individually.

Use of Article 19 to protect religious liberty is admittedly very attenuated. Only some of the drawbacks and challenges have been discussed here—this paper does not begin to touch on the difficulties plaintiffs will face demonstrating expulsionary intent, balancing such intent with, for example, national security interests, or even proving the existence of expulsion. However, there are some clear benefits to including Article 19 in a case: first, as said, Article 19 could allow victims to argue against policies in aggregate that may be individually justifiable but together too burdensome. Second, unlike Article 10, Article 19 has no derogation principle—France and Belgium’s state of emergencies won’t justify failing to take a rational and objective consideration of policies. Third, Article 19 could force the Court to examine the stated intent behind circumcision, ritual slaughter, and religious dress bans. Even if the Court does not find blatant expulsionary intent on behalf of lawmakers, the threat of such inquiry could push lawmakers to cabin Islamophobic statements,¹²⁰

Parliament’s Committee on Civil Liberties, Justice and Home Affairs (2013), [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/474399/IPOL-LIBE_ET\(2013\)474399_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/474399/IPOL-LIBE_ET(2013)474399_EN.pdf).

¹¹⁹ Opinion of Advocate General Sharpston *in* Bougnaoui v. Micropole SA, C-188/15 E.C.J. (2016) ¶¶ 45-56 (summarizing Court of Human Rights cases).

¹²⁰ Though, of course, not in the European Union, EU lawmakers might note the process taken by the widely-read, newsbreaking decision by the Ninth Circuit Court of Appeals in analyzing Executive Order 13769, President Trump’s so-called “Muslim Ban,” where the Court took special note of the President’s actual intent, finding arguments that national security interests were merely a ruse designed to enact a “Muslim Ban,” as the President had stated multiple times during his campaign that he would do so. *Washington v. Trump*, No. 17-35105, at 25 (9th Cir. 2017) (“In support of this argument, the States have offered evidence of numerous statements by the President about his intent to implement a “Muslim ban” as well as evidence they claim suggests that the Executive Order was intended to be that ban.”). Lawmakers may be more likely to cabin their use of Islamophobia following President Trump’s experience.

which would at least reduce the sense of persecution and discrimination among European Muslims.¹²¹

CONCLUSION

Between 1881 and 1924, there was a mass exodus of Jews from Eastern Europe. But the Imperial Russian government hadn't passed any law prohibiting Jews. Instead, to reduce the Jewish population, the government simply turned a blind eye to pogroms. The policy worked: two million Jews fled the Pale of Settlement, a mass expulsion without edict.

Article 19's existence reflects Europe's history with minority populations. It should, and this paper argues that it does, also reflect that an edict of expulsion is not the only government policy used to expel a group. Discrimination, violence, restrictions on freedom of religion, and forced poverty have all been used—to resounding success—by governments to rid the area of undesired inhabitants. In light of this history, regulations preventing the free expression of religion must be scrutinized carefully, for while history may never repeat, it often rhymes.¹²²

¹²¹ See *cf.* *European Muslim Youth & the Rise of the Far Right*, Forum of European Muslim Youth and Student Organisations (FEMYSO), <http://www.femyso.org/sites/default/files/reportfemysov5.1.pdf> (noting throughout report the impacts on Muslim youth of lawmakers' Islamophobic statements).

¹²² This quote is often attributed to Mark Twain, though there is no record of him saying or writing it.