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PUBLIC MORALITY AS A LEGITIMATE AIM TO LIMIT RIGHTS AND FREEDOMS IN THE NATIONAL AND INTERNATIONAL LEGAL ORDER

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ABSTRACT

Domestic legislation and international instruments designed for the protection of human rights provide for general clauses allowing limitations of rights and freedoms, e.g. public morals. A preliminary analysis of the case-law leads to the observation that both national courts and the European Court of Human Rights, when dealing with cases concerning sensitive moral issues, introduce varied argumentation methods allowing them to avoid making direct moral judgments and relying on the legitimate aim of protecting morality. In the article the Authors analyse selected judicial rulings in which moral issues may have played an important role. The scrutiny is done in order to identify and briefly discuss some examples of ways of argumentation used in the area under discussion by domestic and international courts. The identification of the courts' methods of reasoning enables us in turn to make a preliminary assessment of the real role that the morality plays in the interpretation of human rights standards. It also constitutes a starting point for further consideration of the impact of ideological and cultural connotations on moral judgments, and on the

establishment of a common moral standard to be applied in cases in which restriction on human rights and freedoms are considered.

KEYWORDS

public morality, morals, legitimate aim, constitutional courts, European Court of Human Rights, methods of argumentation

INTRODUCTION

The possibilities of limiting the rights and freedoms of individuals have become the main matter of public law¹ and are the most actively developing field within statutory and case law. The admissibility of restrictions on the exercise of guaranteed rights and freedoms, restrictions which affect their actual scope and content, is shaped in the paradigm of the principle of proportionality. According to this principle, restrictions can only occur to that extent in which they are necessary in a democratic community for the protection of clearly indicated values, established as legitimate aims.²

The principle of proportionality, consistently developed in the jurisprudence of constitutional courts and the European Court of Human Rights, has been proclaimed the ‘new method of constitutional law’³ and certainly deserves the title of one of the most successful legal transplants that have ever been made.⁴ It has become the foundation for the protection of human rights in the legal order of European countries. The current and most interesting issue is whether the legitimate aims, i.e. the values indicated as the basis for the possibility of limiting human rights, may also gain a universal dimension. It is also worth seeking an answer to the question of whether the protection guaranteed at an European level lead to establishment of a common standard of content and scope of those values restricting rights and freedoms.⁵ Among the values indicated in the European Convention on Human Rights⁶ as legitimate aims, the public morals deserve special attention.

The relationship between law and morals – the question of whether law can formulate moral standards, and to what extent moral and legal order is related – is one of the oldest and most fascinating problems in public philosophy and jurisprudence.⁷ Although it is

1 M Loughlin, *The Idea of Public Law* (OUP 2003) 114–115, 128–130; R Bellamy, ‘Public Law as Democracy’ in C Mac Armlaigh, C Michelon, N Walker (eds), *After Public Law* (OUP 2013) 132.

2 VC Jackson, M Tushnet (eds), *Paradigms of Proportionality* (CUP 2017) 1–10.

3 V Perju, ‘Proportionality and Freedom: An Essay on Method in Constitutional Law’ (2012) *GlobCon* 1–2, 334–367, <<http://www.doi.org/10.1017/S2045381712000044>>.

4 *Ibid.*

5 Ch Nowlin, ‘The Protection of Morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms’ (2002) *HRQ* 24, 278 et subseq.; R Perrone, ‘Public Morals and the European Convention on Human Rights’ (2014) *Israel L Rev* 47(3), 362 et subseq.; K Plouffe-Malette, *Moralité publique des droits de la personne au droit de l’OMC* (Bruylant Larcier 2019).

6 Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No.11 and No.14 (opened for signature 4 Nov 1950, entered into force 3 Sep 1953) CETS No. 005.

7 D Lyons, *Etyka i rzędy prawa* [Ethics and the Rule of Law] (Dom Wydawniczy ABC 2000).

impossible to ignore that introducing morals (public morals) as a legitimate aim which restricts the guaranteed human rights constitutes an openness to the ethical order and goes beyond legal criteria.

The subject of this article is the scrutiny of national and international courts decisions, in which moral issues may play an important role. A preliminary analysis of case-law leads to the observation that both the ECtHR and national courts extremely rarely use public morals as a legitimate aim to limit the scope of human rights.

The authors, noticing its very restrained use, make the assumption that courts and tribunals rarely invoke public morality to assess the legitimacy of public authorities applying restrictions, due to the fear of alleged arbitrariness of assessment.⁸ However morals (public morals) as referred to in the ECHR and internal law are nonetheless an important, though not always explicitly indicated reason for the restriction of rights and freedoms. Therefore, this article attempts to indicate, on the basis of selected examples, some methods and types of arguments that are used by the courts instead of referring to the premise of public morals in the process of application of law. The identification of the courts' methods of reasoning allows for making a preliminary assessment of the real role that the premise of morality plays in the interpretation of human rights standards.

1. LEGAL BASIS FOR RESTRICTIONS OF RIGHTS AND FREEDOMS

Relatively often, acts of national law and international law regarding the protection of human rights provide for the possibility of limiting their implementation on the basis of a condition relating to ethical criteria, called 'morality' or 'public morality'.

The International Covenant on Civil and Political Rights allows for the limitation of many freedoms and rights due to public morality, including the freedom to manifest one's religion or beliefs [Art. 18(3)], freedom of expression [Art. 19(3b)] or the right to peaceful assemblies (Art. 21). The principle of morality as the reason for limitations is indicated by the Covenant with regard to the restriction of the public hearing, which is part of the right to a court [Art. 14(1)].

The European Convention on Human Rights provides that *the public may be excluded from all or part of the trial in the interest of morals* [Art. 6(1)]. The Convention also uses the concept of morality to limit the right to privacy [Art. 8(2)], freedom of thought, conscience and religion [Art. 9(2)], freedom of expression [Art. 10(2)], freedom of assembly and association [Art. 11(2)] and the freedom of movement [art. 2(3) of the Protocol No 4].

The legitimate aim allowing for morality-based limitations of rights and freedom is also formulated in many European constitutional acts. It is enumerated among general limitation clauses of the exercise of rights and freedoms, or in regard to each particular provision. The first of these solutions was adopted by the Polish Constitution of 1997.

8 More about the role of national judges in the development of the rights and freedoms and limits of their judicial activism see S Dijkstra, 'The Freedom of the Judges to Express His Personal Opinions and Convictions under the ECHR' (2017) *Utrecht Law Review* 13 (1), 14; E Bjorge, 'National Supreme Courts and the Development of the ECHR Rights' (2011) *ICON* 1, 29–31.

Article 31(3) allows the limitation of the exercise of constitutional freedoms and rights only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals.

Many European constitutions recognize morality as a condition for the restriction of individual freedoms, in particular freedom of religion; e.g. the Constitution of Denmark of 1953 (Art. 18), the Constitution of Lithuania of 1992 (Art. 26), and the Constitution of Ireland of 1937 (Art. 44). The Czech Charter of Fundamental Rights and Freedoms of 1992 points to the possibility of its limitation on the grounds of ‘morality’ (Art. 16) and the Spanish Constitution of 1978 ‘if necessary to maintain public order’ (Art. 16).

In several countries, the protection of morality is a condition for restricting freedom of expression [e.g. Constitution of Ireland – Art. 40(6); Constitution of Lithuania – Art. 25]. The Constitution of the Netherlands indicates ‘good morals’ with regard to freedom of the media [Art. 7(3)]. The Constitution of Estonia provides for the possibility of interfering with the inviolability of private and family life for the protection of morality (§ 26).

Many constitutional regulations avoid wording directly related to the ethical system of value of behaviour, citing neutral considerations. And so, for example, the Basic Law for the Federal Republic of Germany, with regard to the freedom of associations and unions, indicates a ‘constitutional order’ (Art. 9), or, elsewhere, the protection of young people. The French Declaration of Human and Civic Rights of 1789 states that *the Law has the right to forbid only those actions that are injurious to society* (Art. V).

These examples are not exhaustive. A morality clause appears quite often and in similar normative contexts, but is not always the same. For the purposes of this study, it will be referred to as public morality. This concept is used directly in a few acts (as in the ICCPR), but more often appears in jurisprudence and courts case-law. The morality clause referred to in the legislation and in the judgments is intended to draw attention to its specific dimension, namely the impact of ethical standards on the life of the social and political community.

2. JURISPRUDENCE OF CONSTITUTIONAL TRIBUNALS AND EUROPEAN COURT OF HUMAN RIGHTS

Assessments of moral issues by national judicial bodies and the ECtHR are present in case-law more often than is *explicitly* apparent from the justifications of their decisions. It is also worth noting that in the jurisprudence of the ECtHR, attempts are made not so much to look for solutions common to States Parties, but to indicate guidelines enabling them to achieve a specific goal (or good)⁹ in particular circumstances,

9 The ECtHR made such a conclusion, e.g. in an advisory opinion (avis consultatif) of 10 April 2019 issued under Protocol No. 16 to the ECHR at the request of the French Court of Cassation regarding recognition in domestic law of a family bond between a child born of a surrogate mother abroad and the raising mother. The ECtHR, although it admitted that states have a wide margin of assessment, stated that they must apply measures in internal law to ensure the effectiveness and speed of actions pursuing the child’s overriding interest.

separating the solution from the moral grounds and avoiding making any generalisation on this basis.

2.1. POLISH CONSTITUTIONAL TRIBUNAL

The first example of a ruling in which the constitutional court explicitly avoided the use of public morality as a legitimate aim is the decision of the Polish Constitutional Tribunal of 10 December 2014 (K 52/13)¹⁰, which ruled on the non-compliance of law with the standard of freedom of religion¹¹ in which it did not allow animals to be subjected to the ritual slaughter method.¹²

In seeking a resolution of the conflict between the protection of animals from suffering, related to slaughter without prior stunning (required under Polish law) and the freedom of religion, the Tribunal has broadly referred to the content of this freedom and its relationship with the protection of human dignity.¹³ The Tribunal also referred to the religious significance and tradition of ritual slaughter, using the findings of the ECtHR's judgment in the case of *Cha'are Shalom Ve Tsedek v. France*.¹⁴ The Tribunal expressed the view that ritual slaughter of animals is protected under the freedom of religion guaranteed by Art. 53 sec. 1 and 2 of the Constitution. According to the content of Art. 53 section 5 of the Constitution, the freedom to manifest religion can be limited only by statute, and when it is necessary to protect the security of the state, public order, health, morality or the freedom and rights of others. The requirement of the protection of morality, identified by the Tribunal as a set of moral norms recognized in a given society and relating to interpersonal relations,¹⁵ was made in light of the principle of proportionality. The Tribunal found that a ban on ritual slaughter of animals is not necessary in order to protect morals, because other methods of killing animals may also bring suffering and pain, and all slaughter, including ritual slaughter, is subject to specific requirements to

10 Decision of the Polish Constitutional Tribunal of 10 December 2014, K 52/13 (2014) ZU OTK-A 11, item 118.

11 Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 21 maja 2003 r. w sprawie ogłoszenia jednolitego tekstu ustawy o ochronie zwierząt Act on protection of animals of August 21st 1997 [2003] JoL 106, 1002 [Announcement of the Marshal of the Sejm of the Republic of Poland of May 21, 2003 on the announcement of the uniform text of the Act on protection of animals].

12 The problem appeared in the context of the content of Article 34 (1) and (3) of the Act, according to which an animal can be killed only after de-awareness; while in accordance to Article 35 slaughtering an animal in another way is a crime.

13 The Tribunal particularly referred to L. Garlicki, 'Komentarz do art. 30' [Commentary to Art. 30] in L. Garlicki (ed) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 3 [The Constitution of the Republic of Poland, Vol. 3] (Wydawnictwo Sejmowe 2003) 2–3.

14 Case 27417/95 *Cha'are Shalom Ve Tsedek v France* [2000] ECtHR 2000-VII ECtHR stated that the slaughter of animals according to a special method required by Judaism is a ritual that is protected under the freedom of religion guaranteed by Article 9 of the Convention.

15 Statement of CT after K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP* [The Boundaries of Legislative Interference in the Field of Human Rights in the Constitution] (Zakamycze 1999) 196.

minimize such elements. As the Tribunal stated, the restriction of freedom of religion based on morals allows interference *only on such actions or behaviours that are commonly considered to cause social harm*. Although the Tribunal discerned that the aim of the ban on slaughter was animal welfare; a desire to spare animals unnecessary suffering and pain; but they considered that this is not a value which the constitutional order of rights and freedoms allows for inclusion as a legitimate aim of restricting freedom of religion. The Tribunal stated that freedom of religion is one of the basic moral values in Polish society, which is why it should instead be assumed that, in accordance with the moral standard of ‘the widest respect for freedom of religion’, this morality includes protection of rituals. According to the Tribunal, an absolute ban on ritual slaughter by minority groups is not necessary to protect the public morals of the majority.

In the Tribunal’s argumentation there are at least three threads concerning the treatment of public morality. First of all, public morals come about as a consequence of religious life, without acquiring an autonomous character – due to which, the relationship becomes much less clear and the boundaries of both become difficult to define. Also, the line concerning the social effects of behaviours that are assessed in terms of constitutionality is marked in the Tribunal’s arguments. The Tribunal directly stated the absence of negative social effects of ritual slaughter, indicating cases of permitted killing of animals without stunning (experiments, hunting, slaughter for domestic needs). Thirdly, the Tribunal identified the welfare of animals as the only protected good, thus avoiding the question of whether ethical standards exist regarding the cruelty of killing them. Only such a question could lead to a confrontation of morality with the practice being the object of assessment.

2.2. THE FRENCH CONSTITUTIONAL COUNCIL

Neither the public morality clause nor the general morality references are directly expressed in the constitutional acts of the Fifth French Republic. It does not, however, mean that public morality does not appear on a statutory level and in case-law concerning constitutional matters. The French Constitutional Council has been confronted with public morality several times in preliminary reference proceedings (*question prioritaire de constitutionnalité*). That proceeding is initiated by courts of general jurisdiction when there is a need for the FCC to assess the constitutionality of a provision applied in a particular case. The decision of the FCC, delivered 5th October 2012 (No 2012-278 QPC), considered the constitutionality of an organic law (ordonnance No 58-1270 of 22 December 1958) that provided criteria for appointment of judges. According to that provision, a candidate to a judge’s position was required to fulfil high moral standards (*bonne moralité*).¹⁶ It had been applied to the situation of an applicant, whose candidacy was refused in a proceeding before the National School of Judiciary. The refused applicant

16 See V Planchet, ‘Les garanties morales requises des candidats à la fonction publique’ (2005) AJDA 1, 1016; L Belfanti, ‘Qu’est-ce que «la bonne moralité» du magistrat? Le clair-obscur de la notion de «bonne moralité» comme condition d’accès aux fonctions de magistrat’ (2013) Les Cahiers de la Justice 2, 163.

claimed the provision is unclear and vague because of its open nature and the vast scope of possible associations. According to her opinion, it left space for arbitrariness by the National School of Judiciary and other bodies in selection of candidates for a judicial position. She referred to Article 6 of the European Convention on Human Rights, which is a part of French constitutional law, and claimed that the application of the *bonne moralité* clause violated her right to equal access to positions in the judiciary system. Taking into account that there is no legal definition of the *bonne moralité* clause, the FCC did not deliver a binding interpretation and left space for public bodies involved in candidates selections for a judicial position. At the same time, the FCC distinguished the constitutional requirement of strict certainty (applicable to criminal and penal law provisions) from the general requirement of intelligibility and clarity of law (applicable to different legal provisions). According to the FCC opinion, the *bonne moralité* clause did not have to fulfil the first – mentioned above – requirement. Moreover, taking into account the public responsibility, high position and power of judges, the FCC pointed out that it was constitutionally justified to give public administration bodies the power to assess the morality of candidates.

The decision of the FCC, delivered 1 February 2019 (No 2018-761 QPC), considered the constitutionality of the law of 13 April 2016 (No 2016-444) that allowed for the imposition of penalties on a client of a prostitute.¹⁷ The case aroused public interest and high expectations of many observers due to the public morality references made by both parties. The applicants claimed that the questioned provisions violated constitutional guarantees of private life and personal freedom. Nevertheless, the provisions were recognised as a constitutionally justified limitation of human rights and state interference. On the one hand, the FCC underlined the constitutional need for the protection of public health and public order, as well as prevention of crime. On the other hand, adopted a classical paternalistic type of argument that such provisions were to help protect prostitutes and their clients ‘against themselves’. The FCC reasoning and final ruling is based on a very particular public morality preference. It may be seen in the proportionality test, where the FCC had to balance different constitutional values, protected by the public order and the privacy principle.

The FCC did avoid defining public morality in a general and abstract way in both the aforementioned cases. Instead of delivering a constitutional definition or criteria for a reconstruction of public morality, the FCC preferred to refer to other constitutional values, including the public order or common good. It seems to be a justified judicial strategy that is also reflected in a different constitutional court’s decisions.

17 See C Richaud, ‘Pénalisation des clients de personnes se livrant à la prostitution: la schizophrénie juridique’ (2019) *La Gazette du Palais* 10, 30; É Buge, ‘Pénalisation des clients de la prostitution: le Conseil constitutionnel face aux choix de société’ (2019) *AJDA* 17, 969.

2.3. EUROPEAN COURT OF HUMAN RIGHTS

An example of a ruling of the ECtHR concerning sensitive moral and ethical issues was the judgment in the case *Lambert and Others v France*.¹⁸ It started an intense discussion about judicial standards in relation to so-called end-of-life situations, including in particular the question of the possibility of discontinuation of treatment (artificial nutrition and hydration) of a patient who was unconscious and unable to express his wishes.¹⁹ In its ruling, the Court made use of certain interpretative measures that narrowed the material scope of the decision, eliminating from consideration some threads raised by the applicants.

Although the applicants in the proceedings were close relatives who opposed to the withdrawal of treatment of Vincent Lambert, the Court rejected their complaints based on Articles 2 (violation of the right to life), 3 (ill-treatment amounting to torture) and 8 (infringement of personal integrity) of the Convention insofar as they lodged them on behalf and in the name of their relative. Referring to the lack of convergence of interests between the applicants' assertions and what Vincent Lambert would have wished, it found admissible only the complaint raised by the applicants in their own name.²⁰ In this way the Court avoided examination of some sensitive issues related to the patients' autonomy,²¹ such as whether the patients' right extends to decisions as to how or when to die, or whether it covers the right to refuse treatment.

While examining substantive allegations raised on the basis of Art. 2 of the Convention by the relatives of Vincent Lambert in their own capacity, the Court, using the argument of a lack of consensus between Parties-States in the discussed matter, applied the doctrine of the margin of appreciation to assess regulations concerning the decision-making process of discontinuation of treatment. In conclusion it considered that the State had provided an appropriate legal framework for the procedure to withdraw the administered treatment. In relation to the decision-making process, it assessed that, although the procedure was lengthy, it was also meticulous, and exceeded the requirements laid down by law at

18 Appl. 46043/14 *Lambert and Others v France* [2015] <<https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-155264%22>> accessed 30 Dec 2019; see also Appl. 39793/17 *Charles Gard and Others v United Kingdom* [2017] <<https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-175359%22>> accessed 30 Dec 2019; and a previous decision in Appl. 55185/08 *Ada Rossi and Others v Italy* [2008] <<https://hudoc.echr.coe.int/eng-press#%22itemid%22:%22003-2597660-2816175%22>> accessed 30 Dec 2019. For more information about the fields in which the concept of morality should be used under the ECHR see Ch Nowlin 278–285.

19 For discussions concerning other cases raising sensitive issues see Ch Cosentino, 'Safe and Legal Abortion: An Emerging Human Right? The Long-Lasting Dispute with State Sovereignty in ECHR Jurisprudence' (2015) HR L Rev 15, 569–589; M Eder, 'Parillo v. Italy: ECHR Allows States to Interfere with Individuals' Admittedly Private Lives' (2016) Tul J Int'l & Comp L 24, 376–378.

20 Appl. 46043/14 [103]–[104].

21 J Kapelańska-Pregowska, 'European Court of Human Rights (GC), Case of Lambert and Others v. France, judgment of 5 June 2015, application no. 46043/14' (2016) Comp L Rev (Nicolaus Copernicus Univ) 21, 164.

every stage of its implementation. Therefore – although the applicants disagreed with its outcome – the procedure met the requirements flowing from Art. 2 of the Convention.²²

As a consequence of the application of the wide margin of appreciation, the Court significantly confined its own assessment of compliance with Art. 2 of the Convention of the procedural solutions applied by domestic authorities. What's more, to an even greater extent it limited the examination of premises constituting a basis for making the decision by individual persons and institutions within the national system. In this way, it *de facto* ceded to the national authorities the whole responsibility for defining and construing rules applicable in the material area, including those which may cause the most doubt from the ethical point of view. The Court neither referred to the criteria of fair balance or necessity and proportionality.²³ It is worth noting that when ruling on the basis of Art. 2 of the Convention it made use of the principle of the margin of appreciation, usually applied in the context of Art. 8 of the Convention.

CONCLUSIONS

The process of opening the legal order to ethical issues always creates a significant risk, both for the legislator and national courts, and even more so for international tribunals. Public morality should be read as a standard developed by, and interpreted in, the jurisprudence concerning the implementation of legal rules that define behaviour allowed by public legal order.²⁴ However, the courts and tribunals shape this standard, by largely avoiding direct reference to the legitimate aim of protecting morality, and by introducing varied measures of argumentation. Among these methods one can distinguish above all a) the application of other legitimate aims defined in appropriate legal acts, such as protection of public health or the protection of rights and freedoms of others, b) the application of the concept of margin of appreciation, c) assessment of cases on the basis of material provisions not enumerating legitimate aims which may justify an infringement upon the protected rights, e.g. provisions protecting life or introducing prohibition of ill-treatment and torture and d) examination and assessment of secondary effects, i.e. socially unfavourable outcomes that are a consequence of exercising rights or freedoms.²⁵ All these methods and types of arguments can be recognized in the mentioned judgments, in which courts consistently avoid making any decision on moral background, and thus having to provide justification using the category of morals.

The scepticism of judicial bodies in referring to the legitimate aim of protection of morality as a justification for the interference into the rights and freedoms of individuals, even in matters that *prima facie* require some sort of moral judgment, is a circumstance that encourages more extensive research into the types of arguments used by the courts

22 Appl. 46043/14 [166]-[168].

23 J Kapelańska-Pregowska 173.

24 More about the limits of the notion of public morality see Ch Wolfe, 'Public Morality and the Modern Supreme Court' (2002) *Am J Juris* 45 (1), 65–92.

25 S Legarre, GJ Mitchell, 'Secondary Effects and Public Morality' (2017) *Harv J L & Pub Pol'y* 40, 320.

to replace or rationalize ethical judgments. The analysis of the above indicated ways of legal reasoning may lead to an answer of a question about the possibility of creation of a universal, supranational standard of public morality in the system of protection of human rights, relevant to principle of proportionality.

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