



## **BALTIC JOURNAL OF LAW & POLITICS**

A Journal of Vytautas Magnus University

VOLUME 12, NUMBER 1 (2019)

ISSN 2029-0454



Cit.: *Baltic Journal of Law & Politics* 12:1 (2019): 137–154

DOI: 10.2478/bjlp-2019-0006

### **FREEDOMS AND RIGHTS VERSUS PUBLIC MORALS: NOTES ON CONSTITUTIONAL PRACTICE IN POLAND**

#### **Dorota Lis-Staranowicz**

**Ph.D. with Habilitation, Head of Constitutional Law Department  
University of Warmia and Mazury in Olsztyn, Faculty of Law and Administration  
(Poland)**

#### **Contact information**

Address: ul. Warszawska 98, 10-702 Olsztyn, Poland

Phone: + 48 89 524 64 70

E-mail address: staran@uwm.edu.pl

#### **Wojciech Guzewicz**

**Professor, Dean of the Branch of UWM in Ełk  
University of Warmia and Mazury in Olsztyn, Branch of UWM in Ełk (Poland)**

#### **Contact information**

Address: ul. Kościuszki 23, 19-300 Ełk, Poland

Phone: + 48 87 621 60 76

E-mail address: wojciech.guzewicz@uwm.edu.pl

Received: April 29, 2019; reviews: 2; accepted: August 19, 2019.

#### **ABSTRACT**

This article does not seek a universal answer to the question of what morality or public morals are; rather it focuses on the issue of morality as grounds for limiting constitutional rights and freedoms. We narrow the problem to constitutional practice, and in particular to the

judgments of the Polish Constitutional Tribunal, which settles disputes centered around the freedom of humans and public morals. Public morals as grounds for limiting personal rights or liberties rarely appear on the Constitutional Tribunal's docket. The Constitutional Tribunal does not conduct philosophical, moralistic or ethical discussions in search of the meaning of public morals. Judges tend to apply the concept in an intuitive manner. We argue that they limit it to a folk understanding, which may be explained as follows: do good and avoid evil. Judges assign meaning to the public morals clause by referring to their own experiences or seek insight into morality in public opinion polls, which may not be a reliable source of knowledge about what is good and what is evil (the primacy of the "will of the majority"). Two difficult cases await the judgment of the Constitutional Tribunal. Each of them concerns major ethical and moral dilemmas. The first one relates to eugenic abortion, which is legal in Poland under certain conditions, while the second one involves the relationships of homosexual couples, which are not currently subject to legalization. The Constitutional Tribunal is not ready to solve these cases, making uses of public morality as grounds for limiting constitutional rights and freedoms.

**KEYWORDS**

Public morality, rights and freedoms, Constitutional Tribunal, morality, constitutional rights and freedoms

## INTRODUCTION

The notions of morality and freedom as well as their mutual interaction have long been the subject of endless disputes between philosophers, theologians, and lawyers. The problem lies in the concept of "morality" and "freedom", the meanings of which may be determined in a number of situational, ideological, and methodological contexts. In general, public morality in philosophical and theological sciences is defined as a relation of deeds to the standards of social ethics.<sup>1</sup> The Western culture appropriated social standards from older cultures of Sumer, Akkad, Egypt, Babylon, Assyria, Israel, Persia, numerous other cultures of the Middle East, from the Minoan, Greek and finally the Roman culture. Christianity adopted the ethical essence from all of those cultures and it later transpired that fundamental moral standards are the same in many cultures of the world. Christianity, however, unified and refined that universal moral code due to the revelation of the Old (Decalogue) and New Testament, devising what it presents as the perfect code of moral standards. Naturally, that code continues to develop and is open to new moral issues while preserving its objective identity.<sup>2</sup> However, some believe that no morality or ethics, especially deriving from Catholicism (Christianity), should be addressed in the public (political) domain as it would inhibit the natural, desirable processes characteristic for that area.<sup>3</sup> It is assumed that there exists no "objective mirror" in which man and the entirety of humanity can look at itself and judge whether it is moral or immoral. After that "common human mirror" broke, shards were created, i.e. pluralistic, relative and subjective ethics. Ethics is typically considered a religious construct, depriving man of freedom.<sup>4</sup> In simplified terms,

---

<sup>1</sup> Mieczysław Albert Krąpiec, "Moralność"; in: Andrzej Maryniarczyk, ed., *Powszechna Encyklopedia Filozofii*, vol. VII (Lublin: Polskie Towarzystwo Tomasza z Akwinu, 2006).

<sup>2</sup> Conscience is not merely a sense or feeling. It is an act of practical reason, determining whether to do something or not, if one should perform a given act, or if one is not allowed to do so and whether the act is morally good or evil. The very core of conscience is the principle of the most general moral standard: "One should do good and avoid evil." However, conscience itself is not what is objectively good and what is evil, it only judges whether I am on the side of good or on the side of evil. I must therefore confront my conscience with moral standards and codes, not dependent only on me. From the beginning, humanity developed moral standards and combined them into collections, akin to the codes of law as such.

<sup>3</sup> See in general: Jan Hartman, *Etyka. Poradnik dla grzeszników* (Warszawa: Agora, 2015); Ulrik Nissen, Sven Andersen, and Lars Reuter, eds., *The Sources of Public Morality: On the Ethics and Religion Debate: Proceedings of the Annual Conference of the Societas Ethica in Berlin, August 2001* (Münster: LIT 2003).

<sup>4</sup> A good example is a renowned Polish philosopher Tadeusz Kotarbiński (died in 1981), who as an atheist in scientific works presented ethics independent of religion, but the essential content of that ethics continued to be Christian because the author came from a Christian family and was a believer for a time. From the other hand: "We do not enforce a positive moral ideal, but rather limit enforceable morality to the absolute minimum we need for living together. Our democratic system constitutes indeed a major negative insight into human character: we tolerate a number of competing ideas on the supposition that we are safer from tyranny when no one person or group can claim a right to all the power. No religious or political philosophy may be pushed at the expense of any other, for we know well the ugly results of attempting to enshrine one ideal by punishing all dissident religious or political views" (Christopher F. Mooney, "Public Morality and Law", *Journal of Law and Religion* 1 (1983): 54-55).

freedom signifies independence. It is an attribute of humanity that allows us, as rational beings, to assess our own behaviour.<sup>5</sup>

This article does not seek a universal answer to the question of what morality or public morals are, and it does not describe relationships between law and morality, which long have been the subject of study of philosophers and philosophers of law.<sup>6</sup> We focus on the issue of morality as grounds for limiting constitutional rights and freedoms. We narrow the problem to constitutional practice, and in particular to the judgments of the Polish Constitutional Tribunal (hereinafter: Tribunal or constitutional court), which settles disputes centered around the freedom of man and public morals.

## 1. MORALITY AS A RATIONALE FOR RESTRICTING PERSONAL FREEDOM

The starting point for further analysis is the assertion that the rights or freedoms guaranteed to individuals are not of an absolute nature. Many international acts or constitutional charters guarantee inalienable and inherent human dignity which is the source of personal rights and freedoms, while stipulating interference with and limitation thereof by reason of "morality" or "public morals".<sup>7</sup> By way of example, art. 29.2 of the Universal Declaration of Human Rights may be called upon, according to which "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of *morality*, public order and the general welfare in a democratic society". The European Convention for the Protection of Human Rights and Fundamental Freedoms also refers to morality as grounds for restriction of the right to a fair trial, the right to privacy, the freedom of religion, the freedom of expression<sup>8</sup> and the freedom of assembly. Morality is also present in the text of the

---

<sup>5</sup> Artur Schopenhauer, *O wolności ludzkiej woli*, trans. Adam Stögbauer (Warszawa: 1908), 25 // <https://wolnelektury.pl/media/book/pdf/schopenhauer-o-wolnosci-ludzkiej-woli.pdf>.

<sup>6</sup> Lon Luvois Fuller, *Moralność prawa*, trans. Roman Tokarczyk (Warszawa: Dom Wydawniczy ABC, 2004).

<sup>7</sup> Roberto Perrone, "Public Morals and the ECHR," *University of Leicester School of Law Research Paper* 14 (2014): 2-3.

<sup>8</sup> Onder Bakircioglu, "Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases," *German Law Journal* 7 (2007): 727.

Constitution of the Republic of Lithuania of 1992<sup>9</sup>, e.g. art. 25(3)<sup>10</sup>, 26 (4)<sup>11</sup>, 36<sup>12</sup> and 43<sup>13</sup>.

The problem of morality as a rationale for limiting rights and freedoms is not theoretical but practical.<sup>14</sup> It may be demonstrated by the case of *Sekmadienis Ltd. v. Lithuania* which was pending before the European Court of Human Rights. The actual subject of the dispute, in short, concerned advertisements of clothing that used the image of Mary and Jesus.<sup>15</sup> In terms of axiology, it referred to a conflict of values, i.e. the impact of morality on the limits of the freedom of expression. That case is well described in the legal literature, yet it is worth recalling the words of the Lithuanian government in defence of public morals:

The Government acknowledged that [...] did not prohibit the use of religious symbols or motifs in advertising *per se*, as that would be contrary to the principles of pluralism, tolerance and broadmindedness. However, they argued that morals could be based on religious views, especially taking into account the historic importance of Christianity in Lithuania and the number of Christians among the population [...]. As for the aim pursued by the interference, the Government submitted that it had been twofold – protection of morals (the morals arising from the Christian faith and shared by a substantial part of the Lithuanian population) and protection of the rights of others (the right of religious people not to be insulted on the grounds of their beliefs). [Moreover,] the Government therefore argued that the understanding of “public morals” in Lithuanian society was closely connected to the morals stemming from the Christian religious tradition, and that that understanding was shared by a substantial part of the population.<sup>16</sup>

<sup>9</sup> Gediminas Mesonis and Kazimieras Meilius, “Constitutional Conventions and the Theory of Relativity of Moral Norms,” *Warszawskie Studia Teologiczne* XXVII (2002): 228.

<sup>10</sup> “The freedom to express convictions and to impart information shall be incompatible with criminal actions—incitement to national, racial, religious, or social hatred, incitement to violence or to discrimination, as well as defamation and disinformation” (*The Constitution of the Republic of Lithuania*, adopted by the citizens of the Republic of Lithuania in the Referendum of 25 October 1992 // <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>).

<sup>11</sup> “The freedom to profess and spread religion or belief may not be limited otherwise than by law and only when this is necessary to guarantee the security of society, public order, the health or morals of people, or other basic rights or freedoms of the person” (*ibid.*).

<sup>12</sup> “Citizens may not be prohibited or hindered from assembling unarmed in peaceful meetings. This right may not be limited otherwise than by law and only when this is necessary to protect the security of the State or society, public order, the health or morals of people, or the rights or freedoms of other persons” (*ibid.*).

<sup>13</sup> “The State shall recognise the churches and religious organisations that are traditional in Lithuania; other churches and religious organisations shall be recognised provided that they have support in society, and their teaching and practices are not in conflict with the law and public morals” (*ibid.*).

<sup>14</sup> The case of *Sekmadienis Ltd. v. Lithuania* was particularly interesting from the point of view of the limits of the freedom of expression. See. *Sekmadienis Ltd. v. Lithuania*, ECtHR, 2018, no. 69317/14.

<sup>15</sup> An administrative penalty was imposed on the advertiser, which was upheld by the Lithuanian administrative courts. After using the legal means, the advertiser lodged an application with the ECHR requesting a determination that freedom of expression had been interfered with (Article 10 of the Convention).

<sup>16</sup> *Sekmadienis Ltd. v. Lithuania*, *supra* note 14.

The Constitution of the Republic of Poland of 2 April 1997, is not impartial to the question of morality and it asserts a specific system of values already in the first sentence of the Preamble<sup>17</sup>:

We, the Polish Nation – all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, Equal in rights and obligations towards the common good – Poland. Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values [...].<sup>18</sup>

Additionally, negative values are also referred to in the constitution, meaning:

Undesirable, unnecessary, harmful and adverse phenomena, such as totalitarianism, fascism, Nazism, communism, hatred, violence (art. 12), discrimination (art. 32 sec. 2), censorship (art. 54, sec. 2), danger [to public security – author’s note] (art. 228 et seq.). These and other constitutional negative values make up the axiology of the Polish constitution, forge its identity and specificity.<sup>19</sup>

However, we omit the issue of constitutional axiology, as it is a broad subject which extends well beyond the limited framework of this article. We focus on the term “morality”, which features as many as six times in the text of the Constitution,<sup>20</sup> specifically, morality as grounds for limiting freedom and human and rights. Within that meaning, the term of interest to us is referenced twice: 1) “Any limitation upon the exercise of constitutional freedoms and rights may be imposed 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, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights” (art. 31.3 of the Constitution); 2) “The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others” (art. 53.5 of the Constitution). At the outset, a certain lack of consistency by the authors of the constitution should be indicated, as in the first

<sup>17</sup> Marek Piechowiak, “Elementy prawnonaturalne w stosowaniu Konstytucji RP,” *Przegląd Sejmowy* 5 (2009): 75.

<sup>18</sup> *The Constitution of the Republic of Poland*, adopted on 2 April, 1997 as published in *Dziennik Ustaw* No. 78, item 483 // <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>19</sup> Marcin Dąbrowski, “Antywartości konstytucyjne. Wprowadzenie do problematyki,” *Przegląd Sejmowy* 5 (2018): 24.

<sup>20</sup> For example, a citizen whose religious beliefs or moral principles do not allow him to perform military service may be obliged to perform alternative service (Article 83 sec. 3). In addition, Poland protects children against demoralization (Article 72 of the Constitution). Parents have the right to ensure that children receive moral and religious education and teachings in accordance with their convictions (Article 53 sec. 3 of the Constitution). Everyone has the right to a public hearing. Exceptions to the public nature of hearings may be made for reasons of morality (Article 45 of the Constitution).

instance morality was defined by the adjective "public", while there is no such specification in the other. Moreover, the Constitution, much like the Convention, does not clarify the substance of public morals and morality,<sup>21</sup> nor does it contain direct guidelines on how to determine its meaning.<sup>22</sup>

## 2. WHAT DOES MEAN THE PUBLIC MORALITY?

The legal doctrine attempts to bridge the abovementioned gap.<sup>23</sup> It is stated in the recent commentaries to the Constitution that public morals are based on moral standards and judgments. Moral standards should be construed as standards provided with axiological justification by moral judgments. However, moral judgments are "qualifications of human behaviours made from the perspective of certain points of reference which may vary, depending on the presented trend or concept of morality".<sup>24</sup> The authors identify two trends of morality. One is a perfectionist trend, according to which a moral assessment of human behaviour is made from the perspective of compliance with specific models of perfection or human dignity. The other solidarity-based trend assesses the approach of man to the so-called common.<sup>25</sup> Public morals as grounds for the restriction of rights and liberties include, inter alia, moral standards that are "based on the Christian religion, widely accepted in Polish society – even if not as the basis of individual faith and attitude to transcendence, then as a universal cultural model, strongly embedded in the entire contemporary European (Western) culture".<sup>26</sup> Wojciech Brzozowski, for whom public morality should be perceived in view of the principles of the state's ideological neutrality, approaches the problem in a different manner:

---

<sup>21</sup> Such clarification is also lacking in the European Convention for the Protection of Human Rights and Fundamental Freedoms which allows restricting certain rights and liberties in the name of morality. Roberto Perone claims that "Unfortunately, to date the Court has not provided a definition of 'public morals'". See Roberto Perrone, *supra* note 7: 3.

<sup>22</sup> Anna Kalisz, "Klauzula moralności (publicznej) w prawie polskim i europejskim jako przykład regulacyjnej, ochronnej oraz innowacyjnej funkcji prawa," *Principia* 57 (2013): 197-203; Tomasz Buksiński, "Moralność publiczna i jej wpływ na funkcjonowanie sfery publicznej," *Zeszyty Naukowe Politechniki Poznańskiej* 74 (2014): 31-32. Such an attempt was made in Ukraine, e.g. "draft law on protection of public morals defining public or social morals as a system of human values, behavioural norms, which developed in society on the basis of spiritual and cultural achievements, views regarding [such concepts as] good, conscience, responsibility, dignity, civic duty" (Małgorzata Greßler, "Moralność publiczna jako wyznacznik treści pojęcia wolność gospodarcza", *Prawo Kanoniczne: Kwartalnik Prawno-Historyczny* 2 (2015): 165).

<sup>23</sup> In an American legal context, Richard Posner "defines morality as 'the set of duties to others [...] that are designed to check our merely self-interested, emotional or sentimental reactions to serious questions of human conduct'. Michael Perry refers to morality as 'a system of normative commitments' and to moral judgment as 'a judgment about how some matter ought to be dealt with, about how it is good or right or just to deal with some matter'" (Daniel Piar, "Morality as a Legitimate Government Interest," *Penn State Law Review* 117 (2012): 141). Moreover "John Finnis has proposed a principled moral limit to the authority of the state to enforce morality" (Robert George, "The Concept of Public Morality," *The American Journal of Jurisprudence* 17 (2000): 28).

<sup>24</sup> Leszek Bosek and Marek Szydło, "Komentarz do art. 31 ust. 3 Konstytucji"; in: Marek Safjan and Leszek Bosek, eds., *Konstytucja RP. Tom I. Komentarz do art. 1-86* (Warszawa: C. H. Beck, 2016).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

[...] under the conditions of coexistence of many axiological systems, certain behaviours will be condemned in the light of one ethical stance, and regarded as morally indifferent or even desirable in the light of another. Limiting rights and freedoms in the name of assumptions adopted by one of many ideological groups contradicts the idea of the state's neutrality in the matters of beliefs.<sup>27</sup>

He suggests it is imperative to search for such an interpretation of the public morals clause that will preserve the principle of the state's ideological neutrality.<sup>28</sup> Certainly public morals may not, in our opinion, be identified with the moral convictions of people exercising public authority as representing the beliefs of the majority.

Leszek Garlicki and Krzysztof Wojtyczek emphasize the significance of the adjective "public". The determination of the contents of the morals clause must include the public element. Thus, reprehensible behaviour (prohibited by the legislator) should have negative consequences for all members of society. "A given behaviour causing discomfort to individual citizens will not suffice."<sup>29</sup> In addition, the public nature means that this concept does not encompass humans' behaviour towards themselves. The legal literature also advances a view that one should consider forgoing admissibility of limiting rights and liberties for the safeguard of public morals.<sup>30</sup>

### 3. PUBLIC MORALS BEFORE THE CONSTITUTIONAL TRIBUNAL IN POLAND

It is a cliché that the vast majority of cases pending before the Constitutional Tribunal concern the limitation of the domain of law and freedoms originating from the Constitution. Out of thousands of cases that the Constitutional Tribunal had to deal with, in only a few of them does it directly refer to morality as the rationale for their limitation.<sup>31</sup> That handful of cases against the background of the rich oeuvre of the Constitutional Tribunal compels us to adopt a case-by-case approach.

---

<sup>27</sup> Wojciech Brzozowski, *Bezstronność światopoglądowa władz publicznych w Konstytucji RP* (Warszawa: Wolters Kluwer, 2010), 162.

<sup>28</sup> "We do not enforce a positive moral ideal, but rather limit enforceable morality to the absolute minimum we need for living together. Our democratic system constitutes indeed a major negative insight into human character: we tolerate a number of competing ideas on the supposition that we are safer from tyranny when no one person or group can claim a right to all the power. No religious or political philosophy may be pushed at the expense of any other, for we know well the ugly results of attempting to enshrine one ideal by punishing all dissident religious or political views" (Christopher F. Mooney, *supra* note 4: 54-55).

<sup>29</sup> Leszek Garlicki and Krzysztof Wojtyczek, "Komentarz do art. 31 ust. 3": 88; in: Leszek Garlicki and Marek Zubik, eds., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II (Warszawa: Wydawnictwo Sejmowe, 2016).

<sup>30</sup> Wojciech Brzozowski, *supra* note 27, 162-163.

<sup>31</sup> The jurisprudence of the Constitutional Tribunal includes cases with a deep moral context, such as abortion, de-communization. In those cases, however, the Constitutional Tribunal did not invoke morality as grounds for limiting rights and freedoms.



One of the first cases concerned the maintenance obligations of a divorced spouse guilty of the breakdown of marriage.<sup>32</sup> The applicant (ex-husband) argued that the Polish regulation obliges him to provide means of subsistence to his ex-wife for an indefinite period of time, in principle until her death. The Constitutional Tribunal assumed that the protection of the financial status of the former wife results from the nature of marriage as an institution which, first, is subject to constitutional protection, and second, is a relationship of an emotional and financial nature. On the one hand, the spouses believe (trust) and respect each other and make joint decisions, while on the other hand they provide each other with means of subsistence. Violating that relationship due to the fault of one of the spouses deserves moral condemnation. Public morals, as emphasized by the Constitutional Tribunal, are also important for an assessment of the scope of duties of a divorced spouse, who cannot derive benefits from his reprehensible behaviour (*nemo turpitudinem suam allegans audiatur*). The applicant's fault is the basis of an assumption that divorce occurred as a result of his behaviour which was in conflict with moral principles. A negative moral judgment of his behaviour towards his wife entails certain legal consequences. "It renders restrictions of his constitutional rights and freedoms dictated by the requirements of public morals permissible."<sup>33</sup>

Another case was initiated by a legal question of the Voivodship Administrative Court and concerned the loss of a license as a sanction for selling alcohol to minors.<sup>34</sup> A business operator (shop owner) lost his license because a prohibited transaction was carried out at the store he was running. The Court argued that the employees sold alcohol to minors, but they did so without the knowledge and consent of the business operator. Under such circumstances, the store owner should not be penalized because he was not the one to blame. The sanction imposed on him, in the Court's opinion, is too restrictive and violates the constitutional freedom of operating a business. The Constitutional Tribunal did not uphold the Court's position. The freedom to conduct a business activity is not, in the light of the Constitution, of an absolute nature and may be subject to a number of restrictions. Administration of

---

<sup>32</sup> *Judgment of the Constitutional Tribunal of 11 April 2006*, file ref. no. SK 57/04. The Tribunal ruled that "art. 60 § 3 of the Act of 25 February 1964 - the Family and Guardianship Code [...] to the extent to which it provides that pursuant to art. 60 § 1 of that Code, the obligation of a divorced spouse who was found guilty of the breakdown of marriage, to provide the means of subsistence to the other divorced spouse, does not expire as a result of the passage of time, is in line with art. 64 in conjunction with art. 31 sec. 3 of the Constitution of the Republic of Poland and with the instruction to implement the principles of social justice expressed in art. 2 of the Constitution."

<sup>33</sup> *Ibid.*

<sup>34</sup> *Judgment of the Constitutional Tribunal of 5 September 2011*, file ref. no. P 26/09. The Tribunal ruled that "art. 18 sec. 10(1a) of the Act of 26 October 1982 on Upbringing in Sobriety and Counteracting Alcoholism [...] to the extent that it excludes the possibility for a business owner to effectively invoke performance of duties to ensure compliance of his employees with the rules applying to the sale of alcoholic beverages to minors set out in the Act, it is in line with art. 22 in connection with art. 31 sec. 3 of the Constitution of the Republic of Poland."

such a severe punishment is based on a legitimate public interest, which is the protection of children and young people against demoralization resulting from consumption of alcohol. Public morals protest against selling stimulants to and their consumption by minors. Social harm is caused by the consumption of even small amounts of alcohol by children and adolescents since it affects their physical, mental, and intellectual development. Moreover, the consumption of stimulants by young people is not a theoretical problem since the results of social research prove that "70% of minors consumed alcohol and half of them drink alcohol regularly, i.e. at least once a week."<sup>35</sup> Alcohol leads to an increase in crime and other pathologies, to poverty, and also reduces the chance of success in professional and family life. This consequence is equally important for an individual and for the entire society. In summary:

The protection of children's rights guaranteed by the Constitution and the requirement to protect public health and morality must be considered a value superior to the principle of the freedom to operate a business, even if the potential negative effects of alcohol consumption by minors will not occur in relation to the minor to whom business operators or their employees illegally sold an alcoholic drink.<sup>36</sup>

The most controversial case arousing public interest was initiated by an application of the Union of Jewish Religious Communities in the Republic of Poland and concerned the so-called ritual slaughter.<sup>37</sup> Ritual slaughter has been practiced for centuries by the followers of Judaism (the so-called *shechita*) and Islam (the so-called *halal*), and the purpose and rules thereof are determined by the applicable provisions of religious and customary law. One of the common features of slaughter carried out according to the rules of Judaism and Islam is that it is a ritual as part of which, in order to obtain (kosher) meat allowed for consumption, an animal must not be stunned prior to the procedure. Yet, Polish law (animal protection law) requires that an animal be stunned before being slaughtered in a slaughterhouse. In the opinion of the applicant, this directive violates the freedom of religion.<sup>38</sup>

---

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Judgment of the Constitutional Tribunal of 10 December 2014*, file ref. no. K 52/13. The Tribunal ruled that "art. 34 sec. 1 of the Act of 21 August 1997 on the protection of animals [...] to the extent that it does not allow animals to be slaughtered in an abattoir (slaughterhouse) according to specific methods required by religious rites, it is inconsistent with Art. 53 sec. 1, 2 and 5 of the Constitution of the Republic of Poland in conjunction with art. 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome."

<sup>38</sup> Bogusław Banaszak, "Prawo mniejszości narodowych do kultywowania własnej tożsamości kulinarnej," *Gdańskie Studia Prawnicze* Vol. XXXI (2013): 25; Andrzej Dziadzio, "Zakaz uboju rytualnego jako naruszenie konstytucyjnej zasady wolności religijnej. Kontekst współczesny i historyczny," *Forum Prawnicze* 1 (2014): 7.

The Constitution guarantees everyone the freedom of religion,<sup>39</sup> but its manifestation may be restricted for the defence of State security, public order, health, morals or the freedoms and rights of others (art. 53 sec. 5 of the Constitution). The Constitutional Tribunal took the position that the ban on ritual slaughter (i.e. the obligation to stun animals) limits the constitutional freedom to manifest religion. However, it had to answer the question whether that limitation is necessary to defend the security of the State, public order, health, the freedoms and rights of others, as well as to protect morality.

In the opinion of the Constitutional Tribunal, "it is impossible to claim that the rationale of safeguarding morality, which was largely forged by the Judaeo-Christian religion and tradition, could justify the contested restriction of the freedom to manifest religion."<sup>40</sup> Further, "morality is understood and explained in a number of ways."<sup>41</sup> In the legal sciences morality is construed as a system of moral standards recognized in a given society, relating to interpersonal relations. The matter of ritual slaughter should be analysed in the context of man's relationship to animals. The human-animal relationship does not fit into the traditional meaning and essence of morality. However, it may not be ruled out that in the future human behaviour towards animals will be assessed from the perspective of moral standards. Finally, the Constitutional Tribunal stated that an implicit order to stun an animal (prohibition of ritual slaughter) was not necessary to protect morality. That order was in fact an expression of concern for farm animals. The care and protection of livestock does not constitute, in the light of the Constitution,<sup>42</sup> sufficient grounds for restricting the freedom to manifest religion.

That ruling proved divisive for the judges, who filed 7 dissenting opinions. First of all, they disagreed with the constitutional limitation of the term "morality" to interpersonal relations.

According to the simplest and most common definition, morality is the art of distinguishing between good and evil. In these categories, the relations of a person to farm animals can most certainly be qualified in the context of ritual slaughter – from the point of view of morals, killing them in the manner which is

---

<sup>39</sup> The Constitution guarantees everyone the freedom of religion (Article 53 of the Constitution).

<sup>40</sup> *Judgment of the Constitutional Tribunal of 10 December 2014, supra note 37.*

<sup>41</sup> *Ibid.*

<sup>42</sup> Concern for animals is expressed in the Basic Law for the Federal Republic of Germany. See Carla Zoethout, "Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter," *Human Rights Quarterly* 3 (2013): 657. Article 20a Basic Law states: "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order", see *Basic Law for the Federal Republic of Germany*, adopted on 23 May 1949, last amended on 13 July 2017 // <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

the least cruel is indisputably more acceptable, and causing unnecessary suffering to animals is morally reprehensible.<sup>43</sup>

The human-animal relationship forms part of public morals, as confirmed by the results of opinion polls.<sup>44</sup> Judge Piotr Tuleja pointed out that: "the public morals clause renders it possible to extend constitutional protection to values that are not explicitly listed [...] in the Constitution and are universally recognized by society. Protecting animal rights is such a value."<sup>45</sup> Nevertheless, the Constitution protects the freedom of religion more effectively than the rights of animals and such freedom should be given primacy. In the opinion of Judge Sławomira Wronkowska, in constitutional terms "morality" represents "a set of standards of behaviour (or at least beliefs) generally accepted by the national community, prohibiting acts viewed as evil and prescribing acts considered good."<sup>46</sup> Today, behaviour of one towards another, as well as their behaviour towards animals is the subject of moral judgments. "[...] Our attitude towards animals is an important moral issue and it is significant to the extent that we expect the legislator to respond. This is evidenced by an increasing number of legislative acts regarding animal protection laid down by the authorities of particular countries, but also acts of international and EU law."<sup>47</sup> The issue of morality and religious freedom has been explained by Judge Mirosław Granat, for whom, first:

Under the rule of law [...], examination of morality of religion by the constitutional court is precluded as it would in effect subordinate religion to morality, i.e. morality would govern the evaluation of religious behaviour. The freedom of religion is beyond the jurisdiction of the constitutional court, as opposed to the aspects relating to manifestations of the freedom of religion. The word manifestation seems to be key in this context. Manifestation presupposes and entails social consequences. It may be subject to consideration with other constitutional values and does not mean that morality interferes with religious freedom.<sup>48</sup>

Second, morality refers to interpersonal relations but it does not ignore the relationship between people and animals. Human morality sets out standards of behaviour also towards animals.<sup>49</sup>

---

<sup>43</sup> *Judgment of the Constitutional Tribunal of 10 December 2014, supra note 37* (Judge Wojciech Hermeliński, dissenting).

<sup>44</sup> Poll results: 65% of Poles do not approve of ritual slaughter in Poland (see Centrum Badania Opinii Społecznej, "Opinie na temat dopuszczalności tzw. uboju rytualnego," *Wiadomości z badań* nr BS/70/2013 (Warsaw 2013, CBOS) (April 2019) // [http://www.cbos.pl/SPISKOM.POL/2013/K\\_070\\_13.PDF](http://www.cbos.pl/SPISKOM.POL/2013/K_070_13.PDF)).

<sup>45</sup> *Judgment of the Constitutional Tribunal of 10 December 2014, supra note 37*.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.* (Judge Sławomira Wronkowska, dissenting).

<sup>48</sup> *Ibid.* (Judge Mirosław Granat, dissenting).

<sup>49</sup> *Ibid.* See Carla Zoethout, *supra* note 42: 655-660.

The last case, which produced little response, concerned property rights, also subject to constitutional protection.<sup>50</sup> The relationship between public morals and state-owned agricultural property was acknowledged by the Constitutional Tribunal in a case initiated by the Regional Court. The facts of the case were as follows. The Agricultural Property Agency (hereinafter: the APA) brought an action before the Regional Court against a farmer (hereinafter: the defendant) for payment of a substantial amount of PLN 928,228. In the statement of claim the agency argued that the defendant had been using state-owned agricultural property from 1 January 2012 until 20 March 2013 on a non-contractual basis. For that reason, he was obliged to pay the above amount to the plaintiff. Pursuant to the challenged provision: "A person in possession of real property being part of the agricultural property stock without a legal title is obliged to pay the Agency remuneration for using the property in an amount equal to 5 times the amount of the asking rent that would be due for that property, were it the subject of a tenancy agreement following a tender."<sup>51</sup> In the opinion of the Regional Court, that provision is of a repressive nature due to such an excessive amount of remuneration. In fact, it was the amount of remuneration that was the essence of the constitutional issue. The rights (ownership rights) of the farmer, which under the challenged provision obliged him to pay an exorbitant amount, were seriously prejudiced. In the opinion of the Regional Court, the legislator limited his ownership of cash (impoverished him) in a disproportionate manner and the ownership right is subject to constitutional protection (art. 64 of the Constitution). However, such protection is not absolute and may be restricted, albeit in a manner consistent with the principle of proportionality.

The Constitutional Tribunal stated that the contested provision is consistent with the Constitution and does not infringe upon the principle of proportionality. That ruling was underpinned by "public morals", which permeate the structure of that principle. According to the Constitutional Tribunal, the Constitution of the Republic of Poland does not provide for preferential treatment of state-owned property in relation to private property (as opposed to the Constitution of 1952 which guaranteed special protection of private property). Nevertheless, state-owned property serves the needs of the entire society and may not serve the interests of a limited group of citizens. It must be treated as a component of the common good (art. 1 of the Constitution). "Private entities generally enjoy unrestricted freedom to dispose of the subject of ownership, including transfer, encumbrance or sale thereof to a freely selected entity.

---

<sup>50</sup> *Judgment of the Constitutional Tribunal of 16 October 2016*, file ref. no. P 123/15. The Tribunal ruled that "art. 39b of the Act of 19 October 1991 on the management of agricultural property of the Treasury [...] to the extent to which it applies to property owners in bad faith, is in line with art. 2, art. 64 sec. 2 in conjunction with art. 32 sec. 1 and art. 31 sec. 3 of the Constitution."

<sup>51</sup> *Ibid.*

Concurrently, disposing of public property is subordinated to the basic function which public property is to serve, namely to contribute to achieving public purposes.<sup>52</sup>

The amount of rent for the use of agricultural property set at a very high level is justified by public morals. If public morals encompass "moral standards adopted in Polish society, governing the rules of conduct in interpersonal relations,"<sup>53</sup> then the use of someone else's belongings is not and has never been accepted in Polish society. This remark should also refer to state-owned assets. "The challenged provision serves the purpose of preventing and eliminating appropriation of other people's assets and benefiting from them at the expense of the entire society."<sup>54</sup> State property is not ownerless, despite stereotypes created in the period of the PPR.

The Tribunal notes that in the light of the Public Opinion Research Centre (CBOS) survey results of 2012, as many as 52% of respondents do not feel responsible for common goods; as many as 64% of them believe that people in Poland generally do not respect public property (see the Communication on research *On common goods and public morals*, BS/155/2012). This proves that society continues to allow worse treatment of public property than private property. The Tribunal recognizes that in being guided by the protection of public morals, which require respect for and protection of the common good of all citizens, the legislator is particularly obliged to implement measures to prevent violations of State Treasury property and unlawfully deriving benefits from public property.<sup>55</sup>

In other words, public morals oppose non-contractual (illegal) use of agricultural land owned by the state, and, additionally, do not preclude collecting high remuneration for non-contractual use of such property. In the name of public morals, the legislator may collect high rent from a farmer who possesses and derives benefits from the land which belongs to the entire society. The farmer's behaviour is morally reprehensible, just as it is reprehensible to use someone else's property without the owner's consent.

## CONCLUSIONS

Instances of public morals as grounds for limiting personal rights or liberties rarely appear on the Constitutional Tribunal's docket. The rulings of the Constitutional Tribunal presented in this article allow the following conclusions.

The constitutional court does not conduct philosophical, moralistic or ethical discussions in search for the meaning of public morals. Judges tend to apply this

---

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

concept in an intuitive manner. They limit it to a folk understanding that may be articulated as follows: do good and avoid evil. Judges assign meaning to the public morals clause by referring to their own experiences or seeking insight into morality in public opinion polls, which may not be a reliable source of knowledge about what is good and what is evil (the primacy of the “will of the majority”).

Another conclusion is that the reasoning of the Constitutional Tribunal lacks consistency. On the one hand, it limits the public morals clause to interpersonal relations which do not include the attitude of humans to animals (ritual slaughter). On the other hand, it assesses humans’ behaviour towards things (property), deeming it morally reprehensible. In addition, the Constitutional Tribunal does not recognize the changes long occurring in society. Opinions have grown sensitive to the situation of animals, affording them legal protection (for example, a Polish citizen who sold fresh fish at the market by cutting their heads off with a cutter was sentenced to imprisonment by the court). The content of the public morals clause determined by the Constitutional Tribunal does not extend to the scope of humans’ attitude to animals, and in particular to slaughter for the purpose of obtaining food. The vast majority of Poles approve of and support legal protection of animals. The vast majority of Poles also have, it seems, an ambivalent attitude towards state-owned property. In addition, morality was annotated with the adjective “public” in the Constitution. This public nature clearly reverberates in the judgments on state-owned property and the sale of alcohol to minors. The assessment of the relationship between ex-spouses made by the Constitutional Tribunal on the basis of public morals may be legitimately questioned, as in our opinion that it is deprived of the public element.

A third point is that, if it is assumed that public morals constitute the relationship of acts to the standards of social ethics, then the question about such ethics seems to be crucial. Its suspension or the absence of consensus as to its standards, as it appears is the situation today, may pose a serious problem when assessing different situations at the meta-level of law. It surfaces in the jurisprudence of the Polish Constitutional Tribunal when it refers to the notion of public morals, which is also present in the Constitution. The absence of an unambiguous, clear, and common code of ethics one reason why the judges of the Constitutional Tribunal rely on their own intuition, experiences, etc., in such situations (which are fortunately few). Objectivization of those personal beliefs by referring to the results of sociological research, showing some majority in contentious issues, seems to be inadequate to the gravity of the situation.<sup>56</sup>

---

<sup>56</sup> Czesław Bartnik, *Dogmatyka katolicka* (Lublin: Wydawnictwo KUL, 1999), 333.

Two difficult cases await the judgment of the Constitutional Tribunal, each of which concerns major ethical and moral dilemmas. The first one relates to eugenic abortion, which is legal in Poland under certain conditions, while the second one involves relationships of homosexual couples, which are not currently subject to legalization. It remains an open question whether the Constitutional Tribunal will invoke public morals when ruling on those sensitive and socially divisive issues. Moreover, it also remains to be seen whether on that same basis it is able to resolve such morally challenging matters, given the absence of a coherent and established line of jurisprudence. Taking into account the jurisprudence to date, we can anticipate that the Tribunal will avoid the exercise of the public morals clause in matters that divide Polish society.<sup>57</sup>

### BIBLIOGRAPHY

1. Bakircioglu, Onder. "Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases." *German Law Journal* 7: (2007): 712–734.
2. Banaszak, Bogusław. "Prawo mniejszości narodowych do kultywowania własnej tożsamości kulinarnej." *Gdańskie Studia Prawnicze* XXXI (2013):19-26.
3. Bartnik, Czesław. *Dogmatyka katolicka*. Lublin: Wydawnictwo KUL, 1999.
4. Bosek, Leszek, and Marek Szydło. "Komentarz do art. 31 ust. 3 Konstytucji". In: Marek Safjan and Leszek Bosek, eds. *Konstytucja RP. Tom I. Komentarz do art. 1–86*. Warszawa: C. H. Beck, 2016.
5. Brzozowski, Wojciech. *Bezstronność światopoglądowa władz publicznych w Konstytucji RP*. Warszawa: Wolters Kluwer, 2010.
6. Buksiński, Tomasz. "Moralność publiczna i jej wpływ na funkcjonowanie sfery publicznej." *Zeszyty Naukowe Politechniki Poznańskiej* 74 (2017): 29–46.
7. Centrum Badania Opinii Społecznej. "Opinie na temat dopuszczalności tzw. uboju rytualnego." *Wiadomości z badań* nr BS/70/2013 (Warsaw 2013, CBOS) // [http://www.cbos.pl/SPISKOM.POL/2013/K\\_070\\_13.PDF](http://www.cbos.pl/SPISKOM.POL/2013/K_070_13.PDF).
8. Dąbrowski, Marcin. "Antywartości konstytucyjne. Wprowadzenie do problematyki." *Przegląd Sejmowy* 5 (2018): 23–38.
9. Dziadzio, Andrzej. "Zakaz uboju rytualnego jako naruszenie konstytucyjnej zasady wolności religijnej. Kontekst współczesny i historyczny." *Forum Prawnicze* 1 (2014): 6–13.

---

<sup>57</sup> Public morality in pluralistic society (diversity of views and experiences) creates the conventional morality. See Wojciech Sadurski, "Conventional Morality and Judicial Standards," *Virginia Law Review* 73 (1987): 367-373.



10. Fuller, Lon L. *Moralność prawa*. Translated by Roman Tokarczyk. Warszawa: Dom Wydawniczy ABC, 2004.
11. Garlicki, Leszek, and Krzysztof Wojtyczek. "Komentarz do art. 31 ust. 3": 55–101. In: Leszek Garlicki and Marek Zubik, eds. *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Vol. II. Warszawa: Wydawnictwo Sejmowe, 2016.
12. George, Robert. "The Concept of Public Morality." *The American Journal of Jurisprudence* 17 (2000). 17–30.
13. Greblier, Małgorzata. "Moralność publiczna jako wyznacznik treści pojęcia wolność gospodarcza." *Prawo Kanoniczne: Kwartalnik Prawno-Historyczny* 2 (2015): 163–178.
14. Hartman, Jan. *Etyka. Poradnik dla grzeszników*. Warszawa: Agora, 2015.
15. Kalisz, Anna. "Klauzula moralności (publicznej) w prawie polskim i europejskim jako przykład regulacyjnej, ochronnej oraz innowacyjnej funkcji prawa." *Principia* 57 (2013): 191–213.
16. Krąpiec, Mieczysław Albert. "Moralność": 384–390. In: Andrzej Maryniarczyk, ed. *Powszechna Encyklopedia Filozofii*. Vol. VII. Lublin: Polskie Towarzystwo Tomasza z Akwinu, 2006.
17. Mesonis, Gediminas, and Kazimieras Meilius. "Constitutional Conventions and the Theory of Relativity of Moral Norms." *Warszawskie Studia Teologiczne* XXVII (2002): 219–232.
18. Mooney, Christopher. "Public Morality and Law." *Journal of Law and Religion* 1 (1983): 45–58.
19. Nissen, Urlik, Svend Andersen, and Lars Reuter, eds. *The Sources of Public Morality: On the Ethics and Religion Debate: Proceedings of the Annual Conference of the Societas Ethica in Berlin, August 2001*. Münster: LIT, 2003.
20. Perrone, Roberto. "Public Morals and the ECHR." *University of Leicester School of Law Research Paper* 14 (2014): 1–19.
21. Piar, Daniel. "Morality as a Legitimate Government Interest." *Penn State Law Review* 117 (2012): 139–169.
22. Piechowiak, Marek. "Elementy prawnonaturalne w stosowaniu Konstytucji RP." *Przegląd Sejmowy* 5 (2009): 71–90.
23. Sadurski, Wojciech. "Conventional Morality and Judicial Standards." *Virginia Law Review* 73 (1987): 339–397.
24. Schopenhauer, Artur. *O wolności ludzkiej woli*. Translated by Adam Stögbauer. Warszawa, 1908 // <https://wolnelektury.pl/media/book/pdf/schopenhauer-o-wolnosci-ludzkiej-woli.pdf>.

25. Zoethout, Carla. "Ritual Slaughter and the Freedom of Religion: Some Reflections on a Stunning Matter." *Human Rights Quarterly* 3 (2013): 651–672.

#### **LEGAL REFERENCES**

1. *Basic Law for the Federal Republic of Germany*. Adopted on 23 May 1949, last amended on 13 July 2017 // [www.btg-bestellservice.de/pdf/80201000.pdf](http://www.btg-bestellservice.de/pdf/80201000.pdf).
2. *Judgment of the Constitutional Tribunal of 10 December 2014*. No. K 52/13.
3. *Judgment of the Constitutional Tribunal of 11 April 2006*. No. SK 57/04.
4. *Judgment of the Constitutional Tribunal of 16 October 2016*. No. P 123/15.
5. *Judgment of the Constitutional Tribunal of 5 September 2011*. No. P 26/09.
6. *Sekmadienis Ltd. v. Lithuania*. ECtHR, 2018, no. 69317/14.
7. *The Constitution of the Republic of Lithuania*. Adopted by the citizens of the Republic of Lithuania in the Referendum of 25 October 1992 // [www3.lrs.lt/home/Konstitucija/Constitution.htm](http://www3.lrs.lt/home/Konstitucija/Constitution.htm).
8. *The Constitution of the Republic of Poland*. Adopted on 2 April 1997, as published in *Dziennik Ustaw* No. 78, item 483 // [www.sejm.gov.pl/prawo/konst/angielski/kon1.htm](http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm).