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The Role of General Clause of (Public) Morals Based on Selected European Court of Human Rights' Judgments[1]

Abstract: (Public) morals is a specific example of a general clause that bridges the gap between legal norms and a wide array of non-legal rules. The indeterminacy of this clause allows the standard of morals to be construed with due consideration for various criteria, values, principles and local circumstances. At the same time, in a culturally diverse society, difficulties in translating ethical issues into the legal language come to light. Consequently, we have both national and international legislation in which the premise of (public) morals is the legitimate objective/aim for restricting certain freedoms and rights. In turn, judicial bodies such as the European Court of Human Rights, as described in this paper, encounter problems in interpretation and the need to use different interpretative methods to give the right meaning to this concept.
Keywords: ECtHR judgments, living together concept, margin of appreciation, morals (public morals) clause

Introduction

The starting point for the examination of the role of the (public) morals clause in law is a few basic assumptions. Firstly, it is difficult to construe a precise definition of morals which could be perceived as either a norm or a social fact. In consequence, determining the exact relationship between morals and law is problematic and for years has remained one of the most important problems in the philosophy of law.[2]

1 Publication financed under the program "DIALOG" of the Minister of Science and Higher Education in the years 2019-2022.
2 W. Lang, Prawo i moralność [Law and Morals], Warsaw 1989.

In the study of law, morals are defined as objectified, yet noninstitutionalised rules and principles of conduct and standards of judgment associated with the concepts of right and wrong. Moral norms thus constitute both the motives for people's own behaviour as well as the criteria for judging the behaviour of others.[3] Secondly, (public) morals is a general clause which, like any other general clause, is used by lawmakers deliberately and knowingly, so as to bridge the gap between legal norms and a wide array of non-legal rules.[4] "Morals" is therefore a vague term and this vagueness opens the door to elements of non-legal social axiology to be introduced into the legal system, that is for consideration to be given to certain criteria, values, principles and judgments that are not *expressis verbis* incorporated into the legal regulation. This process is needed in order to reconstruct the "full" legal norm from the source from which information can be derived about rights and obligations or which constitutes the basis for the determining legal consequences in the process of formulating authoritative decisions by competent bodies of public authority. This encourages the entities that apply the law to rely, in their legal decisions, on criteria offering them a greater freedom of interpretation than precise legal rules.[5]

The (public) morals clause is found in both national and international law, particularly in the field of human rights' protection. It is addressed not only to common subjects of the law or to the bodies applying the law, but also, and often above all, to the national lawmaker. It makes it possible to restrict or particularise human rights and to adapt them to the special nature of local conditions by bringing in non-legal values.[6]

"Morality", "morals" or "public morals" are referred to in numerous legislative instruments. The International Covenant on Civil and Political Rights recognises public morals to be admissible grounds for restricting many freedoms and rights.[7] Likewise, "the protection of morals" is one of the clauses that limit certain freedoms and rights enshrined in the European Convention for the Protection of Human Rights and Fun-

3 A. Kalisz, Klauzula moralności (publicznej) w prawie polskim i europejskim jako przykład regulacyjnej, ochronnej oraz innowacyjnej funkcji prawa, "PRINCIPIA" LVII–LVIII, 2013, p. 195.

4 A. Stelmachowski, Klauzule generalne w prawie cywilnym, "Państwo i Prawo" 1965, vol. 1, p. 5 et seq.; L. Leszczyński, Stosowanie generalnych klauzul odsyłających, Kraków 2001; L. Leszczyński, G. Maroń, Pojęcie i treść zasad prawa oraz generalnych klauzul odsyłających. Uwagi porównawcze, Lublin 2013.

5 L. Leszczyński, Tworzenie generalnych klauzul odsyłających, Lublin 2000, p. 10; E. Łętowska, Interpretacja a subsumpcja zwrotów niedookreślonych i nieostrych, "Państwo i Prawo" 2011, no. 7–8, p. 18.

6 A. Szot, Klauzula generalna jako ponadgałęziowa konstrukcja systemu prawa, "Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia", Vol. LXIII, 2, Section G, 2016, p. 293.

7 Such as the liberty of movement (Article 12(2)), freedom to manifest one's religion or beliefs (Article 18(3)), freedom of expression (Article 19(3b)), right of peaceful assembly (Article 21) and the right to freedom of association (Article 22(2)).

damental Freedoms (Articles 8 to 11).[8] National legislative instruments regulate this issue in a corresponding or similar way. By way of example, in the Constitution of the Republic of Poland of 2 April 1997, "protection of public morals" may be the reason for the limitation upon the exercise of constitutional freedoms and rights (Article 31(3)). "Morality" is one of the premises for an exception to the public nature of hearings (Article 45(2)), while the professed "moral principles" may justify a citizen's exemption from performing military service and being appointed to perform substitute service (Article 85(3)). Although the lawmakers have used the terms "morality", "morals" and "public morals", these concepts are regarded as being synonymous and stand for a body of rules of conduct, quite universally accepted as part of individual and collective conduct, based on the comprehension of the terms "morals" or "morality" recognised in a given society.[9] The Constitution of Ireland of 1 July 1937 also makes a number of references to morality, public order and morality and indecent matters.[10] Many other contemporary states invoke ethical norms in the form of limitation clauses in their constitutions as premises for limitations to the exercise of particular rights, and often in similar normative contexts, although not always with the use of the same wording. Thus, for example, limitations to the enjoyment of certain rights and freedoms may occur for the reasons of good mores (Article 7(3) of the Constitution of the Kingdom of the Netherlands), public order (Article 16 of the Spanish Constitution) or – much more generally – the constitutional order (Article 9 of the Constitution of the Federal Republic of Germany).

Incorporation into normative acts of notions that directly invoke morality or are associated with a system of ethical norms and, in a wide sense, with public order is, on the one hand, not at par with the concept of moral neutrality of law. On the other hand, it tallies with the concept of a system for the protection of human rights, both on a national as well as international level, as an instrument to guarantee a relative social order in the given political community, at a given time and place, as bolstered by the frequent addition of the adjective "public" to the notion of "morality" or "morals". In this sense, public morality is associated with either desirable or undesirable conduct in public that produces a public effect (i.e. taking place in a public environment). Accordingly, morality denotes a system of values that a given social group adopts as a reference point for their own conduct as well as for the conduct of others. Difficulties do, however, arise in identifying the general common values, particularly when

8 The right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10) and freedom of assembly and association (Article 11).

9 See L. Garlicki, K. Wojtyczek, comments to Article 31, (in:) Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warsaw 2016, Vol. II, p. 88.

10 See Article 40(6) (freedom of expression, freedom of assembly and freedom to form associations and unions), Articles 42(1), 42(3), 42(4) and 42(5) (relating to education), Article 44 (freedom of religion).

those values are to be shared by a large community with diverse historical, cultural, religious or nationality backgrounds.

Europe is an open environment to communities of different cultures with different axiological values. Migration, so visibly prevalent in recent years, is a common phenomenon on the European continent. Ensuring a peaceful coexistence of these numerous diversities therefore requires an increased effort, and these problems have been present in the political, social and legal discourse for years. States and their citizens are constantly faced with new challenges, of not only economic, but also cultural, nature. Diversity existing in the world should not be ignored. In Europe, these dilemmas have long been resolved by the European Court of Human Rights, which grapples with the Dworkinian "balancing of principles" in the attempt at their uniformisation, all while respecting the tolerance and recognition of multiple cultural and legal identities. In doing so, the Court relies on both "individual and collective" values and the principles of "uniformity and subsidiarity" in international law.[11] The issue of morals finds a special place in this discourse as it is a specific example of how judicial bodies fill in legal norms with concepts and principles from beyond the positive law system(s).

For the purpose of examining the problem which is the subject of this paper, the author has chosen to limit her scrutiny to issues connected with the freedom of thought, conscience and religion (Article 9 ECHR) and the freedom of expression (Article 10 ECHR). This choice was determined by certain factors, as discussed below.

Firstly, the above-mentioned freedoms are enshrined in those provisions of the European Convention in which the "protection of morals" appears as one of the limitation clauses on the exercise of rights and freedoms (Articles 9 and 10 in addition to Articles 8 and 11 with comparable limitation clauses). It is a special attribute of these rights and freedoms that their essence and the consequent protective mechanisms put in place to safeguard them are interfused. There can be no doubt that the freedom of thought and conscience referred to in Article 9 cannot be examined in isolation not only from the right to privacy protected under Article 8, but also from the freedom of expression guaranteed under Article 10. One can say that the relationship between these rights and freedoms is the "relation of complementarity".[12] The "religious" element enhances the protection, or causes a shift in emphasis between the desire to set universal standards and the readiness to respect the national "margin of appreciation" (discussed below). Articles 9 and 10 of the Convention have the advantage of flexibility that facilitates the creation of jurisprudential precedents and the application of an evolutionary interpretative approach, as well as the need to harmonise and work out compromises. It is quite clear from those judgments of the European

11 R. Dworkin, The Original Position, "University of Chicago Law Review", 1972–1973, p. 500.

12 *Ibidem,* p. 554.

Court of Human Rights in which the protection of morals is regarded by the Court as a premise to legitimise the objective of limitations in cases that have a worldview or religious connotation or are related to artistic creativity in the broadest sense of the term.

Secondly, decisions in these types of cases have allowed the Court to develop interpretation tools for tacking those issues in the Convention that pose a challenge on account of significant cultural differences of relevance to analysing the problem of morals, such as recognition that the Convention: (i) is a minimum standards document, which permits Member States being the States Parties to the Convention to be granted a certain "room for manoeuvre" (margin of appreciation) in the context of norms and principles applied by these States (Section 1) and (ii) a "living instrument"[13] which is being adjusted to the changing social, political and cultural contexts and, therefore, the formation of common minimum standards can proceed based on related concepts and phenomena (the "living together" concept) (Section 2).

1. The (Public) Morals Clause and the Margin of Appreciation of States Parties to the European Convention

1.1. In its assessment of admissibility of restrictions on the exercise of rights and freedoms, the European Court of Human Rights (ECtHR) examines whether three basic "tests" are met, namely the lawfulness (i.e. whether the interference was prescribed by law), legitimacy of the aim pursued (i.e. whether the interference meets one of the legitimate aims referred to in paragraph 2 of Articles 8 to 11, which include the "morals" discussed in this paper) and the "necessity" in a democratic society (i.e. whether the interference was "necessary in a democratic society"). "The objective is to consider whether the authorities have struck "a fair balance between the competing interests of the individual and of society as a whole". It is the most subjective part of the application of paragraph 2, involving subtle distinctions about the proportionality of measures taken by the State that limit or restrict human rights. There is an important relationship between "necessity" and "democratic society", of which the hallmarks are pluralism, tolerance and broadmindedness. The terms seems to be little more than a gloss on the word "necessity". It employs two other notions in this context, insisting that the measure in question be "relevant and sufficient". The interference must also respond to an assessment of its proportionality, something

13 L. Garlicki, Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, Comments to Article 1–18, vol. I, Warsaw 2010, pp. 482–483; Ibidem, The methods of interpretation, (in:) F. Melin-Soucramanien (ed.), L'interprétation constitutionnelle, Paris, Dalloz 2005, at 139–153.

that involves balancing the rights of the individual against the interests of the State and the society that it represents.[14]

In applying the "necessary in a democratic society" test, the Court relies on the "margin of appreciation" doctrine, which has developed over the years and remains well known and discussed in detail in legal scholars" writings.[15] The essence of this doctrine is that national authorities are granted a certain room for manoeuvre in fulfilling their obligations with respect to rights and freedoms under the European Convention on Human Rights. This stems from an assumption adopted by the ECtHR that the machinery of the protection of fundamental rights established by the Convention is subsidiary to the national systems safeguarding human rights.[16]

In certain categories of cases, the Court affords States Parties to the Convention a definite priority in deciding how rights and freedoms are to be respected. Firstly, the Court has observed that there is no European consensus on how to regulate a given issue (respect a given right). This is the case when the matter is to be determined based on the public morals clause. The Court noted that "the view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject".[17] The diversity of aspects that make up morals may also exist within the same State with different cultural, religious, civil or philosophical communities.[18] The margin of appreciation conception has found a particularly apt recognition in cases where morals interfere with the freedom of expression and the freedom of thought, conscience and religion.[19]

14 W.A. Schabas, The European Convention on Human Rights, Oxford University Press 2015, p. 438; Ch. Grabenwarter, European Convention on Human Rights. Commentary, Beck/Hart 2014, pp. 245, 266.

15 L. Garlicki, Wartości lokalne a orzecznictwo ponadnarodowe – „kulturowy margines oceny" w orzecznictwie strasburskim?, "Europejski Przegląd Sądowy", April 2008, p. 4.

16 *Handyside v. the United Kingdom*, Application no. 5493/72, 7 December 1976, para 48.

17 For example *Müller and others v. Switzerland*, Application no. 10737/84, 24 May 1988, para 35. This understanding of morals has been described as "*logique de flou*" by Koering-Joulin, Affaires de mœurs, (in:) M. Delmas-Marty (ed.), Raisonner la raison d'Etat. Vers une Europe des droits de l'homme, PUF, Paris 1989, p. 121.

18 S. Barbou Des Places, N. Deffains, Morale et marge nationale d'appréciation dans la jurisprudence des Cours européennes, (in:) S. Barbou Des Places; R. Hernu; Ph. Maddalon (eds.), Morale(s) et droits européens, Bruxelles 2015, p. 59 ;P. Muzny points out that this "*incertitude normative justifie l'autonomie des autorités étatiques*", La technique de proportionnalité et le juge de la Convention européenne des droits de l'homme. Essai sur un instrument nécessaire dans une société démocratique, PUAM, Marseille 2005, vol. II, at 402, § 538.

19 "*There is* no *consensus among Contracting States on what human rights individuals have*", G. Letsas, Two Concepts of the Margin of Appreciation, (in:) A Theory of Interpretation of the European Convention on Human Rights, Oxford 2007, at 10. The Court has used various terms to define the scope of the margin of appreciation, such as "a certain margin of appreciation" (*Otto-Preminger-Institut*, para 50); "a wider margin of appreciation" (*Wingrove*, para 58); "a wide

1.2. The scope of the margin of appreciation in the area in question is greatly influenced by the context and circumstances of the case in question and the approach to the given issue and its regulation in legal systems of the States Parties to the Convention.

In cases relating to freedom of expression, the margin of appreciation varies depending on the type (nature) of the sanctioned expression. Starting with the judgment in the case of *Wingrove v. the United Kingdom (1996)*[20], the Court took the view that a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (para 58). Determination of what constitutes an offence to religious feelings in an era of diverse beliefs and creeds varies significantly depending on the time and place of these transgressions.

There is, however, little scope for restrictions on addressing an issue of public interest, i.e. expressions aimed at initiating a public debate (as in *Wingrove*, para 58, incl. citations from other cases). Along the same lines, it follows from the *Giniewski v. France (2006)*[21] judgment that, when taking sanctioning measures, the national authorities must exercise utmost caution so as not to dissuade the press from taking part in the discussion of matters of legitimate public interest (para 54).[22] In the *Sekmadienis Ltd v. Lithuania (2018)*[23] ruling, a standard advertising campaign was the basis for according a wide margin of appreciation to the Lithuanian authorities.

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margin of appreciation" (*E.S.,* para 44; *S.A.S.*, para 83); "margin of appreciation limited – wider" (*Giniewski*, para 35). Other rights in respect of which states have been accorded a relatively wide margin of appreciation include, for example, title to property, electoral rights, and the right to respect for private and family life. Morale et marge nationale…, *op. cit.* at 18. Numerous cases are cited by authors of studies on the margin of appreciation, for example: E. Brems, The Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights, "Heidelberg Journal of International Law" 1996, vol. 56, pp. 243–256; R.St.J. Macdonald, The Margin of Appreciation, (in:) R.St.J. Macdonald, F. Matscher, H. Petzold (eds.), The European System for the Protection of Human Rights, Dordrecht 1993, pp. 85–122; A. Wiśniewski, Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka, Gdańsk 2008.

20 *Wingrove v. the United Kingdom*, Application no. 17419/90, 25 November 1996.

21 *Giniewski v. France*, Application no. 64016/00, 31 January 2006.

22 It is an established principle in the case law of the ECtHR that politicians must accept an increased tolerance of criticism. Somewhat on the margin, it is perhaps worth mentioning that in the *Vereinigung Bildender Künstler v. Austria* judgment (application no. 68354/01, 25 January 2007), the authorities forbade the applicant association from exhibiting the *Apocalypse* painting depicting well-known Austrian politicians "in a somewhat outrageous manner" (para 32). The Court concluded that, despite its erotic (although at the same time religious) tinge, the display contained satirical elements which enjoy a wider degree of tolerance in respect of criticism. The Court also considered that the painting could hardly be understood to address the politicians' private lives, but was rather a caricature of their public standing. It is worthy of note that in this case, the Court did not rely on any margin of appreciation arguments.

23 *Sekmadienis Ltd. v. Lithuania*, Application no. 69317/14, 30 January 2018.

Quite on the contrary, if it were found that the expression in question was intended to incite a debate of a public nature, to raise a topic of importance for the general public, it would considerably narrow the room for manoeuvre of the States Parties to the Convention.

Examining the circumstances under which the respective right or freedom has been violated, the ECtHR assesses whether state interference meets current and local social needs and whether it is proportionate to the legitimate aim pursued.[24] The Court does not rule *in abstracto* (in a vacuum), but takes into account the place and time of the occurrence in question. The Court's rulings on seemingly identical cases may therefore differ, even within the same State.[25]

The above determinants impacting the scope of the margin of appreciation endorse the commonly accepted thesis that, inasmuch as the European Convention has its roots in certain universal axiological assumptions and proclaims moral, social and cultural values common to all, it does not remain indifferent to the fact that the Contracting Parties are States with differing legal systems, inhabited by societies with diverse traditions, histories, cultures and religions. It is reflected in, among other things, the hierarchy of moral values and the willingness to tolerate differences. For this reason, a broader margin is accorded to national authorities in cases where there is no consensus among the States Parties to the Convention as to the importance and significance of the various interests to be protected, particularly in cases involving ethically and morally sensitive issues. An affirmative answer to the question whether a European consensus has formed in a given field leads to a definite narrowing down of the margin of appreciation and setting a direction for the States to follow with a view to protecting freedoms and rights common to the pan-European social and legal sphere.[26]

The basic premises for the exercise of the margin of appreciation have been communicated by the Court in the most important cases for the discussed subject and remain relevant in the present day. Firstly, a uniform European conception of morals cannot be determined, while the legal view of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in

24 *Wingrove v. the United Kingdom,* para 53, incl. citations from other ECtHR cases.

25 In the *Müller and Others v. Switzerland*, supra n 12, para 36, the ECtHR was not convinced by the argument that the author of the paintings, J.F. Müller, had exhibited them in other regions of Switzerland and in other countries, as the Freiburg authorities could, given the local circumstances, have decided to limit the exhibition.

26 K. Dzehtsiarou, European Consensus and the Legitimacy of the European Court of Human Rights, Cambridge 2015 and the cited literature; A. Wiśniewski, Znaczenie zasady konsensusu w kształtowaniu europejskich standardów praw człowieka, "Gdańskie Studia Prawnicze" 2011, vol. XXV.

principle in a better position than the international judge to give an opinion on the exact content of the requirements to "protect morals" as well as on the necessity of a restriction or penalty intended to meet them. Such determination is a reflection of local ideas and values.[27]

Secondly, in cases where freedom of expression encroaches on the sphere of religious feelings, the ECtHR holds it is not possible to discern throughout Europe a uniform conception of the significance of religion in society, and even within a single country such conceptions may vary according to time, place and context. For that reason it is not possible to arrive at a common definition and adopt identical rules of what constitutes a permissible interference, and their assessment may even relate to criteria of a purely local nature, i.e. applicable within an organisational unit smaller than a state, such as land, region, department, city, etc.[28] Likewise, there is no uniform European conception (*conception uniforme*) of the requirements of "the protection of the rights of others" (*Murphy*, para 67), particularly in relation to attacks on their religious convictions, especially in an era characterised by an ever-growing array of faiths and denominations (*Wingrove*, para 58). In the *Sekmadienis Ltd v. Lithuania (2018)*[29] ruling, the ECtHR maintained that there was no international or European consensus on the contents of morality (para 55).

On the other hand, in the *Akdas v. Turkey (2010)*[30] case, the Court attempted to build a European consensus by "neutralising"[31] the margin of appreciation afforded to States for the protection of morals as it saw another special value, namely the European cultural heritage. The case involved Apollinaire's novel *The Eleven Thousand Rods*, which contained erotic themes. The Court noted that it could not disregard the passage of more than a century from the novel's first publication in France, later followed by many other countries, in various languages, and its commendation by inclusion in the "*Pleiades*" of the most outstanding works, some ten years before its seizure. Thanks to the author's recognition and acclaim, he could have been regarded as one of the artists shaping the European literary heritage, which in the Court's eyes was the determining argument for the need to guarantee access to his works to a wide public, also in a language other than the original, which in this case was the Turkish language (para 30).

The attempt to establish whether a European consensus has formed in the given field and the search for a standard approach under the Convention stimulates the

27 *Handyside v. the United Kingdom,* supra n 11*,* para 48; *Müller and Others v. Switzerland*, supra n 12, para 35. This view has been reiterated in almost identical wording in other similar cases.

28 *Otto-Preminger-Institut v. Austria*, Application no. 13470/87, 20 September 1994, para 50; almost identical rulings in, for example*: S.A.S v. France*, Application no. 43835/11, 1 July 2014, para 130; *Leyla Şahin v. Turkey*, Application no. 44774/98, 10 November 2005, para 109.

29 *Sekmadienis Ltd v. Lithuania*, Application no. 69317/14, 30 January 2018.

30 *Akdas v. Turkey*, Application no. 41056/04, 16 February 2010.

31 See S. Barbou Des Places, N. Deffains, Morale et marge nationale…*, op. cit.,* p. 19.

Court to either make bolder assessments and conclusions or, quite to the contrary, become more cautious in its interpretation of the Convention, which is probably the most frequent approach. Accordingly, the margin of appreciation granted to the authorities of the States Parties is all the wider, the more difficult it appears to be to be able to reach a common position on the interpretation of the protection of freedoms and rights in the issue in question in accordance with the requirements of the Convention.[32] The essence of consensus thus lies in the ECtHR's recognition that there has been such a significant social, cultural or legal change in the given issue since the Convention was adopted that it substantiates a different approach by the Court to the violation of rights and freedoms. It thus allows the Court to benefit from another interpretation tool, that is the "living instrument" doctrine.[33]

It is quite hard, however, to resist the impression that the prevailing perception is that there is no uniform European approach in the field of protection of the freedom of expression and the freedom of conscience and religion, where morals play a crucial role. Even laconic acknowledgements that changes did place in this field are not significant enough to witness the emergence of a general consensus. Hence, paraphrasing the Court's deliberations, it can be said that the best-formed consensus in the field under consideration is the consensus that it is extremely difficult to reach a common position of the States Parties to the Convention.

2. The Minimum Common Standard of (Public) Morals and Related Concepts and Phenomena (the "Living Together" Concept)

2.1. The European Court of Human Rights does not only rule on individual rights and freedoms. The Court also attempts to develop minimum criteria for a minimum common standard of safeguarding human rights and freedoms, taking into account local (national) circumstances, traditions and standards. The margin of appreciation plays an important role in this area. Drawbacks of the application of this interpretation tool to morals[34] appear to be compensated by other methods of argumentation.[35]

The criteria for assessing legislation remain closely related to the purposes behind the adoption of the legislative rules. The catalogues of grounds that may substantiate restrictions of the freedoms expressed in Articles 9 and 10 of the European Convention are of a similar nature, and, in addition to safeguarding health and morals, also include other objectives such as public security, protection of public order

32 Dialogue des juges, Conseil de l'Europe 2008, pp. 18–19.

33 See K. Dzehtsiarou, European Consensus and the Legitimacy…, *op. cit.*

34 J. Gerards, Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights, "Human Rights Law Review", 2018, no. 18, p. 505.

35 J. Gerard defines this process an "*incrementalism*".

as well as the rights and freedoms of others. In a general sense, it corresponds to the classical "public reasons".[36]

Over the years, the Strasbourg Court has developed a certain "test" for assessing national measures against the aforementioned articles of the Convention. One of the tested elements is to assess the existence of a "pressing social need" (*besoin social imperiaux*; *Handyside,* para 48)[37] for the interference and whether that interference was proportionate to the objectives pursued.

The question of the public (collective) dimension of the protection of rights and freedoms draws on the famous concept of public morality developed by Patrick Devlin, who took the view that in every community there are certain moral standards, the observance of which is absolutely required by society as a whole. Violation of these standards, whether committed in complete privacy or in public, is not an attack aimed solely against the affected person, but against society as a whole. In the eyes of this British jurist, each society has its own unique moral structure, and must therefore provide conclusive answers to critical questions relating to ethical problems.[38] The lawmaker is not entitled to discretion in deciding what is right or wrong, exercising control over views of individual nations or attempting to achieve the effectively unattainable goal of legislating a true, indisputable morality. Its role is, in fact, to identify the existing basic social norms and to safeguard their observance.[39]

In *Otto-Preminger-Institut v. Austria*, the Court introduced a new category of expressions which are gratuitously offensive to others and which therefore "do not contribute to any form of public debate capable of furthering progress in human affairs" (para 49). It can therefore be assumed that it is a certain utilitarianism in the context of public debate or the lack thereof that is regarded by the ECtHR as the admissibility criterion for the potential restriction on the right to freedom of expression (artistic expression) in accordance with the spirit of mutual tolerance and the aim of protecting religious peace.[40] Notably, a few of the judges who sat on the case, namely Palm, Pekkanen and Makarczyk, filed a joint dissenting opinion in which they highlighted there would be no rationale for the existence of Article 10 if freedom of expression were to be exercised only in conformity with generally accepted opinion. The dis-

36 W. Sadurski, Reason of State and Public Reason, "Ratio Juris" 2014, vol. 27, no. 1, pp. 21–46.

37 In this judgment, the Court made an important analysis of the concept of "necessary", giving it an autonomous character (para 48).

38 P. Devlin, The Enforcement of Morals, New York 1975; idem, Morals and the Criminal Law, 1959.

39 P. Devlin, Democracy and Morality, 1961, (in:) P. Devlin (ed.), The Enforcement…, *op. cit.,* pp. 86–101. The similarities between Devlin's reasoning and the conclusions of the ECtHR's public morality jurisprudence have been highlighted by: K. Jesiołowski, Koncepcja moralności publicznej Lorda Patricka Devlina a orzecznictwo Europejskiego Trybunału Praw Człowieka, "Archiwum Filozofii Prawa i Filozofii Społecznej" 2020, no. 1, pp. 37–51.

40 J. Falski, Glosa do wyroku Europejskiego Trybunału Praw Człowieka z 25 października 2018 r. w sprawie E.S. vs. Austria, skarga nr 38450/12, "Przegląd Sejmowy" 2020, no. 4(159), pp. 215–230.

senting judges held that it should not be open to the authorities of the State to decide whether a particular statement is able to contribute to any form of public debate capable of furthering progress in human affairs, but did not mention who is able to make this decision. The dissenting judges also pointed out the dangers of protecting the interests of a powerful group in society.

In *E.S. v Austria*, the conclusion on the protection of the rights of others stemmed from the Court's assumption that the Convention States are required to ensure peaceful co-existence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance. The Court reiterated that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite hatred or religious intolerance. Incrimination of behaviour that may hurt religious feelings requires that the circumstances of such behaviour were capable of arousing justified indignation. The Court shared the assessment of the national courts that in this case, the applicant's statements were not phrased in a neutral manner aimed at making an objective contribution to a public debate. The applicant's remarks, based partly on inaccurate facts, were capable of arousing (justified) indignation. As regards the sanctions imposed by Lithuanian authorities in *Sekmadienis Ltd v. Lithuania (case 2018)*, where the complaint concerned the advertising of clothes using the images of Jesus and Mary, the Court took a different view. In this case the Strasbourg Court rejected the Lithuanian authorities' arguments in favour of protecting the religious feelings of the Catholic majority. The Court reiterated that freedom of expression also extends to ideas which shock, offend or disturb, while those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism.

2.2. In the context of matters of considerable social interest, the concept of *living together*, inspired by French rulings promoting the idea of "*vivre ensemble*", in society seems particularly interesting. It emerged predominantly in those rulings in which the protection of the rights of others clause was invoked in connection with the manifestation of beliefs by wearing clothes appropriate for the followers of a given religion or for performing other religious practices. The dilemmas were induced by the 2010 regulation banning face-covering in public places in France.[41]

The French regulation was not limited to the sphere of religion. Its focus was on concealment of the face, which was incriminated with a penalty (a fine of 150 euros and/or the obligation to complete a relevant civics course). In *S.A.S.*,[42] the Strasbourg Court acknowledged that the ban may have had a discriminatory effect against a cer-

41 *Loi n° 2010–1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public*. The Act defined "public space" as including "public roads as well as places open to the general public".

42 *S.A.S v. France*, Application no. 43835/11, 1 July 2014.

tain group of people and violated individual rights of the applicant.[43] However, the Court came to the conclusion that it was proportionate to the aim pursued, namely the intention to preserve the conditions of "living together" (*vivre ensemble*) as an element of the "protection of the rights and freedoms of others", which is necessary in a democratic society. Furthermore, in the light of the French State's arguments, the ban was objective, reasonable and proportionate to the aim pursued. At the same time, the Court did not share the opinions of third-party interveners who claimed that there was a European consensus against the ban.[44]

The French government's position was that the ban on face-covering in public areas was a response to practices considered by the authorities to be incompatible with elementary rules of social interaction in French society and, more broadly, with the requirement of "*vivre ensemble*". The State sought to protect the principle of interpersonal communication, which it perceived essential to the preservation of pluralism, tolerance and broadmindedness as the hallmarks of a "democratic society" (para 128). Lack of consent for wearing a full-face veil in public places was the choice society made. The Court did not assess whether this regulation was a desirable one (leaving a wide margin of assessment to the States). The Court did, however, note that a State which decides to do so runs the risk of contributing to the reinforcement of stereotypes against certain categories of the population and of encouraging intolerance where its duty is to promote tolerance.

Notably, although the case had a strong ethical and moral aspect, in its judgment the Court did not rely on the morals clause, but found the criterion of *vivre ensemble* to be an element of a limitation clause expressed in the Convention as the "protection of the rights and freedoms of others". The Court gave it a new meaning which was quite controversial from the point of view of the rights guaranteed under the Convention, as pointed out by dissenting judges. Judges Nußberger and Jäderblom did not agree with the sacrificing of individual rights to abstract principles and pointed out that the Court's case law is not clear as to what may constitute "the rights and freedoms of others" outside the scope of rights protected by the Convention. In the view of the dissenting judges, the very general, abstract and vague concept of

43 Although the ban affected mainly Muslim women, it did not have a religious connotation only, as it focused on the fact that the clothing resulted in the concealment of the face. This distinguished the *S.A.S.* case from *Ahmet Arslan and Others*, where it was solely a matter of religious dress, and not the covering of the face. In *S.A.S.* the Court emphasised that the wearing of religious dresses is an expression of cultural identity which contributes to the pluralism inherent in democracy. At the same time, the ECtHR acknowledged the variety of approaches to virtue and morals in the sphere related to the unveiling of the human body.

44 At about the same time, similar solutions were introduced in Belgium with the Act of 1 June 2011 on prohibiting clothing that cover or conceal one's face in whole or in part (*Loi du 1 juin 2011 visant a interdire le porte de tout vetement cachant totalement ou de maniere principale le visage*). Absolute bans on face-covering have also been imposed in Austria, Denmark, Bulgaria and two Swiss cantons. The Netherlands, Spain and Italy also introduced partial, local or by-law bans.

vivre ensemble does not fall directly under any of the rights and freedoms guaranteed within the Convention. It is essential to understand what is at the core of the wish to protect people against encounters with others wearing full-face veils. The majority speak of "practices or attitudes ... which would fundamentally call into question the possibility of open interpersonal relationships". The judges consented that *vivre ensemble* requires interpersonal exchange and it is also true that the face plays an important role in human interaction. According to the dissenting judges this idea cannot, however, lead to the conclusion that human interaction is impossible if the face is fully concealed.

In the light of the foregoing, it is important not to lose sight of an important factor in favour of the *vivre ensemble* conception promoted by the French authorities. In fact, the principle of secularism in France is one of the rudimentary republican principles that guided law-making and legal interpretation. Thus, on the one hand, the Republic should not recognise any religion, yet on the other hand, the State should at the same time guarantee the freedom to practise any religion, and even the obligation to respect any beliefs, including religious beliefs, as well as the equality of all the citizens regardless of their religion or other creed. According to the jurisprudence of the Constitutional Council, the exercise of one's beliefs is forbidden if it aims at liberating a person from the common rules governing relations between the spheres of the collective and the individual. It is *inter alia* for this reason that such behaviour may or even must be subject to some form of limitation in public spaces in France, that is in virtually every, apart from the strictly private, publicly accessible place where one's religious beliefs may potentially be manifested.[45] The Council of State, on the other hand, has regarded the ban on face-covering in public places as the minimum basis for mutual elementary requirements and guarantees of living in a society, which are the conditions for the exercise of other freedoms and which necessitate, where needed, the rejection of certain behaviours which are the manifestations of one's individual will. These fundamental pillars of the republican social contract can thus be the reason that, from the moment of entering a broadly understood public space, an individual cannot deny his or her belonging to a society or usurp the right to refuse showing her or his face to other citizens, thus preventing the person's identification.[46]

45 The decision of the Constitutional Council no. 2004–505 DC 19.11.2004 r. assessing the 2010 law on the face-cover ban (Decision of 7 October 2010, no. 2010–613 DC), the Council acknowledged that the purpose it sought to serve, i.e. the protection of public order, was legitimate and proportionate to the sanctions introduced. At the same time, the Council accepted the views (albeit not explicitly expressed in the Act) that the restrictions laid down in the Act were additionally a measure of counteracting violations of women's rights, particularly with regard to their freedom and equality. The scope of the "public order" notion thus embraced the criterion of the secularity of the public sphere, intended as a means of achieving the aim of *vivre ensemble*.

46 Etudes relatives aux possibilite d'interdiction du port du voile integral, La Documentation Francaise, Paris 2010, at 26 et seq., www.conseil-etat.fr, original citation: J. Falski, *op. cit.,* p. 53.

The Strasbourg Court invoked the *living together* conception in its later judgments,[47] although not always in reference to similar facts and circumstances. In *Osmanoğlu and Kocabaş v. Switzerland (2017)*,[48] it was the refusal of the Public Education Department of the canton of Basel-Stadt to exempt daughters of Muslim applicants from mixed swimming lessons at school that played the key role.

In this case the Court granted States a freedom to develop their curricular programmes "in accordance with their needs and tradition" (para 95). "Needs and tradition" becomes problematic when we consider the way in which "tradition" has been interpreted in previous case law, and most notably in *Lautsi v. Italy (2011)*. One of the critical questions was about the characterisation of the crucifix. In *Lautsi* the language of tradition secured the place of the crucifix within the "European" order. The crucifix is constructed as being a bearer of history, and its continuing legacy is now deemed a part of the heritage of the individual in European human rights.

2.3. It appears that the "living together" (*vivre ensemble*) conception has found solid ground amongst arguments in support of restrictions on rights and freedoms. In France, its birthplace, is has become an important element of the doctrinal con-

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The recent ruling of the Council of State on the rules relating to swimwear, applicable in municipal swimming baths of the city of Grenoble, is quite significant in this context. In fact, the new regulations corresponded to the rules promoted by Islam, that is, women were required to wear a garment commonly known as the "burkini" in public swimming areas. These regulations were challenged in the administrative courts and were subsequently passed on to the Council of State. Its ruling, which emphasises the neutral (secular) nature of public services and upholds the court's finding that the regulations are not compliant with the constitution, is very much rooted in France's republican tradition and the aforementioned principle of state secularism associated with it. The novelty lies in the fact that this principle has recently been supported by an additional regulation, i.e. the act of 24 August 2021 reinforcing respect for the principles of the Republic (loi n° 2021–1109 du 24 août 2021 confortant le respect des principes de la République. JORF no. 0197 of 25 August 2021). The enactment of this act stemmed from the need to intensify the process of rationing the religious beliefs manifesting behaviours. It resulted, *inter alia*, from relatively frequent acts of aggression and terrorism directed against French citizens and the French state. In another secular state, the protection of the rights and freedoms of others and the protection of public order have been recognised by the ECtHR as a necessary social need justifying the interference by the State in the form of introducing restrictions on the promotion of a religious symbol in a public space of a university (*Leyla Şahin v. Turkey*, Application no. 44774/98, 10 November 2005).

47 Similar to the *S.A.S.* case, the dilemmas surrounding the ban on veiling the face in public places have been at the core of the following judgments of 2017: *Belcacemi and Oussar v. Belgium*, Application no. 37798/13, 11 July 2017 (para 53) and *Dakir v. Belgium*, Application no. 4619/12, 11 July 2017 (para 56).

48 *Osmanoğlu and Kocabaş v. Switzerland*, Application no. 29086/1, 10 January 2017. See S. Trotter, 'Living together', 'learning together', and 'swimming together': Osmanoğlu and Kocabaş v. Switzerland (2017) and the construction of collective life, "Human Rights Law Review", 18(1), pp. 157–169.

ception of immaterial public order (*ordre public immaterial)*.[49] It is noteworthy that the issue of morals in the jurisprudence of French courts, particularly administrative courts, is examined precisely in the context of public order. Typically, if such an issue arises in a specific case, the courts would invoke immaterial public order when there is no other substantiation for the ruling.

In defining immaterial public order, emphasis is placed on the protection of an axiological system comprised of objective values which cannot be restricted by the principles of a system of individual rights and freedoms alone. The concept of immaterial public order thus refreshes an ideologically tinged debate as with its philosophical, social and political components, immaterial public order is a much broader issue than just a legal one. The concern is not only for an individual to be dominated by the State, but also that it is a moralistic State that relies on conceptions that are undefined and legally fragile (*juridiquement fragile*).

Conclusions

To summarise these deliberations, it is worth noting that there are still no clearly drawn limits to the possible interference of the lawmakers in the matter of (public) morals. The Convention does indeed set the minimum standards for the protection of human rights and indicates only in general terms that their limitations must necessarily exist in a democratic society. "Necessity" therefore represents the admissibility of interference with the rights of individuals on an exceptional basis, and this precludes an expansive interpretation of admissible actions by public authorities. Necessary measures are therefore those that meet the premise of a "pressing social need" and must be proportionate to the legitimate aim they are intended to achieve. The demonstration that these measures meet these criteria is the task of the State. The absence of the "pressing social need" premise implies a lack of recognition of necessity in a democratic society. The "necessity" in question has an autonomous meaning and evolves with the context in which conventions function in contemporary states and societies, thus contributing to the theory that the convention can indeed be deemed to be a "living instrument". The vagueness of this notion at the same time reveals dif-

49 In accordance with the national law, public order includes order, safety and health in the public (local self-government code). Local authorities have the duty to safeguard public order and the right to use administrative measures (police administrative: prohibitions, restrictions, etc.) under the control of courts. *Le Code général des collectivités territoriales* (L. 2212–1). This traditional catalogue of elements of public order has been expanded by the Council of State by adding respect for human dignity (*dignité de la personne humaine; CE, ass., 27.10.1995, Cne de Morsang-sur-Orge, no 136727: lancer de nains*) and the protection of public morals (*CE 18 dec., Ste 'Les films Lutetia' et Synd. Fr. des producteurs et exportateurs de films, no 36385: caractère immoral du film et circonstances locales; CE 30.09.1960, Sieur Jauffret: lieu de debauche; CE 8.06.2005, Cne de Houilles, no 281084: sex-shop*).

ficulties in making an objective assessment of what, when and under which circumstances the necessary protection of morals should be considered. The emphasis on the public aspect raises the fear of excessive moralism (moralising) by public authorities and the tendency to silence views that are contrary to their value system.

Since the *Handyside v. the United Kingdom* judgment, in which the ECtHR explicitly addressed the issue of morals, the Court has not changed its view that there is no common concept of morals in the European legal environment. Likewise, no uniform conception of the importance of religion in a society in Europe can be established at this point in time. Based on the (public) morals clause, this accords States a particular margin of appreciation to interfere in the rights and freedoms guaranteed under the Convention, viewed through the prism of national legal regulations and the distinct local conditions. According to the strand of the ECtHR's jurisprudence, national authorities are in a better position than an international judge to determine the exact content of the requirements or the necessity of restrictions. In the area of freedom of expression and freedom of thought, conscience and religion, a margin of appreciation is granted to States in many cases. The absence of a European consensus in these areas makes it possible for the national lawmakers to enjoy wide discretion.

The Court's jurisprudence is notable for its search for means to resolve problems with ethical overtones. This has allowed the Court to develop, based on the French judgments, the formula of "living together" (*vivre ensemble*), which is more flexible and perhaps better suited to the "public" aspect of morals. The concept of "living together" has been an important argumentative tool of the Strasbourg Court for some time now. The State seeks to protect the principle of interpersonal communication, which it perceives essential to the preservation of pluralism, tolerance and broad-mindedness as the hallmarks of a democratic society. This shows the protection of an axiological system comprised of objective values, which cannot be restricted by the principles of a system of individual rights and freedoms alone.[50] This in turn continues to necessitate difficult assessments of the extent of States' discretion in restricting individual rights and freedoms to protect society.

The necessity of balancing principles and recognising the interdependency and divergence between collective good and individual good reveals that this issue represents a special manner in which the ECtHR addresses the issue of morals. According a wide margin of appreciation to States helps in the balancing between safeguarding national values and respecting the Convention's requirements as regards protection

50 There are, however, voices in legal scholars' writings in the direction of abandoning the justification of the "protection of morals" by a social necessity, and placing emphasis on the need to protect the dignity of the individual or ensuring that the introduced restrictions do not result in the elimination of the essence of the rights of an individual. Jesiołowski, Koncepcja moralności publicznej…, *op. cit.,* p. 50. In this context the author points to, *inter alia*, ECtHR judgments of 6.03.2017, Yaroslav Belousov v. Russia (application nos. 2653/13, 60980/14); of 20.06.2019, Bayev and others v. Russia (application nos. 67667/09, 44092/12, 56717/12).

of freedoms and rights. Nonetheless, it also undercuts the universal nature of human rights' protection, undermines the solidity of the case law and permits not taking a position on sensitive issues. It is, however, of essence not to lose sight of other concerns highlighted by Judge Antonin Scalia, who said that in a democratic society the binding answer to that value-laden question should not be provided by unelected judges, unqualified to give the people's answer to the moral questions that are inherent in any a priori assessment of human rights.[51]

It seems, however, that in terms of morals, the diversity of cultures and values inherent to the States and societies falling under the ECtHR's jurisdiction will continue to be in favour of leaving a decisive role to national authorities in defining the principles of protecting fundamental rights and freedoms. And the Court will continue to assess and interpret it, as it has done so far, on *a casu ad casum* basis by taking into account the national regulations and the specific circumstances of the violations.

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