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Are the European Courts neutral between conceptions of a good life? ECHR, CJEU, and the moral neutrality in action

<http://dx.doi.org/10.12775.SIT.2022.009>

In his article *Moral Argument and Liberal Toleration: Abortion and Homosexuality*,¹ Michael J. Sandel pointed out that justifications for and against moralistic laws may take two forms: sophisticated and naïve. Roughly speaking, the naïve way to make judgments depends on the previously assumed answer about the morality of the controversial social question at stake. On the other side, sophisticated justifications try to bracket the controversial issues and concentrate on the more general aspects of the case, which might be broadly accepted. For example, advocates of the sophisticated version will not solve the problem of legality of abortion (or homosexuality or any other controversial issue) by assessing its moral value, but rather they will state that it should be banned because the majority of society condemns it or they will convince that abortion should be legal because – apart from its morality – it is a women's right whether to bear a child or not.

¹ M.J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, "California Law Review" 1989, Vol. 77, No. 3, p. 521, <https://doi.org/10.2307/3480558>.

These kinds of justifications are intertwined with two major theories of democracy – procedural, according to which the decision must be seen as a result of the neutral and objective application of recognized rules, and constitutional, which aims at protecting individual rights that the constitution guarantees. The difference between sophisticated and naïve forms of justification may be demonstrated by the following scheme:

Naïve – moralistic	Naïve – non moralistic	Sophisticated – moralistic	Sophisticated – non moralistic
An act should be banned because it is truly immoral	An act should be legal because it is not truly immoral	An act should be banned because the majority of society finds it immoral and thus wrong	An act should be legal because – apart from its morality – its ban would violate the rights of the individual

In this paper, I will therefore examine the judgments of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) in the above-mentioned context. I will try to show that the European Courts seek to find the neutral and correct judgment using the sophisticated procedural form – an attempt which sometimes must be deemed to fail. Especially, I aim to undermine the assumption that it is always possible to be neutral among conceptions of a good life. Moreover, I hope to show that even if it is possible, it is not desirable.

1. The margin of appreciation...

An approach applied by the ECHR in most of its rulings concerning moral laws might be described as the improvement of the doctrine of the margin of appreciation. In the landmark case *Handyside vs the United Kingdom*² it was stated that “it is not possible to find in the domestic law of the various Contracting States a uniform

² *Handyside v. United Kingdom*, 7 December 1976, 5493/72.

European conception of morals”.³ Due to this fact, state legislators and judges are in principle entitled to introduce and apply moralistic laws (such as a seizure of the obscene book and a criminal fine for its publisher, which were at stake in this case), as long as they do not violate individual rights as described in the European Convention on Human Rights. They maintain a certain margin of appreciation in the area of legal provisions bound up with morals. To be sure: this margin is not to be understood as completely unrestricted. The ECHR, throughout its case law, has created the standards in the light of which domestic laws are to be analyzed.

First of all, restrictions upon individual liberties must be proportionate to the legitimate aim pursued. According to Art. 8, 9, 10, and 11 of the Convention, one of the aims that permit the limitation of individual freedoms is “protection of morals”. Secondly, the measures taken need to be “necessary in a democratic society” for such protection. As the Court noticed, the demands of democratic society presuppose the wide scope of pluralism, tolerance, and broadmindedness.⁴ Furthermore, the restrictions imposed must stay in compliance with the rights guaranteed by the Convention, so they cannot be diminished simply by the sheer force of state legislation.

But here the question arises: how should one interpret the term “morals” and the necessity of its protection? Now, the significance of the sophisticated and procedural justification comes out: the fact of moral pluralism and diversity enforces us to bracket the dangerous question about the true or correct moral values and to focus on neutral and procedural understanding of such terms instead. As it was stated in *Müller and Others vs Switzerland*,⁵ the adjective “necessary” implies the existence of a “pressing social need”.⁶ This means that the legislator does not overcome the margin of appreciation when he bans an act that is “at odds with

³ *Ibidem*, par. 48.

⁴ *Ibidem*, par. 49.

⁵ *Müller and Others v. Switzerland*, 24 May 1988, 10737/84.

⁶ *Ibidem*, par. 32.

the currently prevailing social morality”.⁷ Thus, by invoking social pressure, genuine social need,⁸ and the margin of appreciation doctrine, the ECHR puts aside the real nature of morals which might be unresolvable in the era of pluralism and deep social disagreement. For legal aspects, it is therefore only important to check the social convictions on a given moral controversy, and then to measure if the social pressure is high enough to justify the restriction on individual liberties. This is how the primacy of a conventional morality works.

The above-described method has been used by the ECHR in many cases. For instance, in *A, B and C vs Ireland*⁹ the Court decided that an absolute ban on abortion does not necessarily violate the right to privacy. The Irish government demonstrated that the limitation of abortion rights was justifiable in the light of “the profound moral views of the Irish people as to the nature of life [...] of the unborn”.¹⁰ The “pressing social need” in this case was inferred from the results of the 1983 referendum, after which Ireland acknowledged the constitutional right to life of the unborn.

Similarly, in *Stübing vs Germany*¹¹ the ECHR emphasized that it “must examine whether there existed a pressing social need for the measure in question”.¹² In this particular case, the Court referred to the judgment of the German Constitutional Court on this matter, and reiterated that “the imposition of criminal liability was justified by a combination of objectives, including the protection of the family, self-determination and public health, set against the background of a common conviction that incest should be subject to criminal liability”.¹³ The same conclusions might be found in the case of *Laskey, Jaggard and Brown vs the United Kingdom*¹⁴

⁷ *Ibidem*, par. 31.

⁸ *Ibidem*, par. 36.

⁹ *A, B and C v. Ireland*, 16 December 2010, 25579/05.

¹⁰ *Ibidem*, par. 241.

¹¹ *Stübing v. Germany*, 12 April 2012, 43547/08.

¹² *Ibidem*, par. 58.

¹³ *Ibidem*, par. 63.

¹⁴ *Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997,

which concerned sadomasochistic activities. As it was noticed: “the notion of necessity implies that the interference corresponds to a pressing social need”.¹⁵

It seems then that the Court has established a reasonable solution for moral conflicts in the context of legal dilemmas. The procedure is neutral and avoids value-judging. In the beginning, we should look if the European consensus in the matter of morals exists (i.e. whether there is “a uniform European conception of morals”), and if not – the state has a certain margin of appreciation which depends on pressing social need at given circumstances. At the final step, the decision is to be taken by comparing the social pressure and the potential detriments for an individual. If the pressure is exerted by the overwhelming majority, it may outweigh the negative effects on an individual.¹⁶

2. ...and its limits

This procedure undoubtedly has some practical advantages which cannot be easily rejected. But still, it is important to notice its serious shortcomings. The best way to do this is to look at the precedent. Thus, the problematic aspect of the case of *Dudgeon vs the United Kingdom*¹⁷ lies not in its conclusion but justification.

Mr. *Dudgeon* was a homosexual and his complaints were against the laws in Northern Ireland which had the effect of making certain homosexual acts between consenting adult males criminal

21627/93; 21628/93; 21974/93.

¹⁵ *Ibidem*, par. 42. Nevertheless, it may be noticed that the Court in this case concentrated mostly on the protection of health instead of morals.

¹⁶ I argue elsewhere that the ECHR's method of reasoning resembles to a certain extent Lord Patrick Devlin's position in his dispute with Herbert L.A. Hart, see: K. Jesiołowski, *Koncepcja moralności publicznej Lorda Patricka Devlina a orzecznictwo Europejskiego Trybunału Praw Człowieka*, “Archiwum Filozofii Prawa i Filozofii Społecznej” 2020, No. 22, pp. 37–51, <https://doi.org/10.36280/AFPiFS.2020.1.37>. For some critical remarks, see also: G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford 2007, pp. 120–130.

¹⁷ *Dudgeon v. the United Kingdom*, 22 October 1981, 7525/76.

offenses. These provisions, originally introduced in 1861 and 1885, were reviewed under Art. 8 of the Convention.

The Court indicated that these acts were passed to enforce the then prevailing conception of sexual morality. It was admitted that the aim to protect a particular understanding of morality might be regarded as legitimate upon the Convention. Nevertheless, the question was whether the contested provisions may be regarded as necessary in order to accomplish that aim.

To answer this critical question, again it was clearly stated that the Court is not concerned with making any value-judgment as to the existing morality.¹⁸ The ECHR ruled that there was a strong body of opposition to revising the laws at stake, stemming from a genuine conviction shared in the Northern Irish community that a change in the law would be damaging to the moral fabric of society.

On the other hand, the Court noticed that “As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence, an increased tolerance, of homosexual behavior to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied [...]”.¹⁹

Furthermore, in Northern Ireland itself, the laws prohibiting homosexual conduct were not in force as the authorities generally refrained from providing a criminal procedure for such acts. This fact was considered as proof that refraining from applying the impugned laws did not change the moral standards. Consequently, it cannot be fairly said that there was a pressing social need that might justify prohibitions. Moreover, on the issue of proportionality, the Court emphasized that justifications in favor of restrictions were outweighed by the detrimental effects on the individual. Finally, it was stated that Mr. Dudgeon has suffered

¹⁸ *Ibidem*, par. 54.

¹⁹ *Ibidem*, par. 60.

an unjustified interference with his right to respect for his private life.

For a contemporary reader, the conclusion seems probably right. However, it is necessary to look more accurately at its premises. As we have seen, there was a consensus on decriminalization as it was no longer considered to be necessary to treat homosexual practices as a matter to which the sanctions of the criminal law should be applied. This is not a categorical statement. One may ask: what if, at the moment of judging, the States of the Council of Europe were divided upon this question? Should just this mere fact affect the final decision?

Secondly, the Court found out that in Northern Ireland there was no profound and real pressing social need that may justify such severe restrictions on homosexuals. *A contrario*, it must be stated then that the “social need” may sometimes be high enough to justify the detrimental effects on the individual in such cases. If so, it is doubtful whether it is just.

These questions are not only theoretical or academic. It is important to note that the Supreme Court of the United States in the case of *Bowers vs Hardwick*²⁰ chose exactly this method of reasoning. The Supreme Court’s attachment to the majority sentiments and historical paradigms (“ancient roots” of the proscriptions against homosexuality) has led to the approval of laws criminalizing an act of sodomy. The reasoning applied was, at least to some extent, procedural, and – in Sandel’s terms – sophisticated.

In any case, it is not my intention to focus on the controversial aspects of the law concerning sexual minorities solely. The problem of justifications is not that narrow. To give another example: in the case of *Otto-Preminger-Institut vs Austria*,²¹ the ECHR was examining the sanctions for an anti-Catholic film. The Court remarked that “The Court cannot disregard the fact that the Roman Catholic

²⁰ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²¹ *Otto-Preminger-Institut v. Austria*, 20 September 1994, 13470/87.

religion is the religion of the overwhelming majority of Tyrolians”.²² On this premise, but not only this, it was decided that the seizure of the film was justified as “there was a pressing social need for the preservation of religious peace”.²³ Would the decision be different if the case was concerning the small religious minority so the offending materials could by no means affect the religious peace?

There is some evidence that the ECHR has similar doubts itself. In a recent case concerning (again) homosexuals – *Fedotova and Others vs Russia*²⁴ – the ECHR has shown its anti-majoritarian face. It was explicitly stated that: “The Court takes note of the Government’s assertion that the majority of Russians [80%] disapprove of same-sex unions. It is true that popular sentiment may play a role in the Court’s assessment when it comes to the justification on the grounds of social morals. However, there is a significant difference between giving way to popular support in favor of extending the scope of the Convention guarantees and a situation where that support is relied on in order to deny access of a significant part of population to the fundamental right to respect for private and family life. It would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority”.²⁵ The same remarks were made in other cases.²⁶

Unfortunately, apart from the possible rightness of the final judgment,²⁷ these statements generate new confusions regarding the Court’s views on moralistic laws. For if now the popular support

²² *Ibidem*, par. 56.

²³ *Ibidem*, par. 52.

²⁴ *Fedotova and Others v. Russia*, 13 July 2021, 40792/10, 30538/14 and 43439/14.

²⁵ *Ibidem*, par. 52.

²⁶ *Bayev and Others v. Russia*, 20 June 2017, 67667/09; *Beizaras and Levickas v. Lithuania*, 14 January 2020, 41288/15.

²⁷ The Court decided that Russia violated the applicants’ rights by not recognizing same-sex marriages or any other similar form of relationship for same-sex couples.

might be used in favor of extending the scope of the Convention, and not in making restrictions and limitations on individual rights, how one should understand the term “morals” on the Convention’s ground? As a consequence, it is not clear how legislators can justify restrictions and limitations on moral grounds as described in the Convention. It seems that the procedural and sophisticated rules are not as obvious as they were supposed to be and the ECHR will have to reconsider its own approach.²⁸

3. United in diversity

It should not be omitted that the second most important of the European courts – the Court of Justice of the European Union (CJEU) – has in principle adopted a similar sophisticated view on the moralistic laws and their admissibility. In *Regina vs Henn and Darby*²⁹ and *Conegate v HM Customs & Excise*,³⁰ the Court confirmed that the free movement of goods – the key liberty in the European law – could be restricted on grounds of public morality. In particular, “it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory”. This is why “it is not for the Court to substitute its assessment for that of the legislatures of the Member States”.³¹

²⁸ In 2015, in an article concerning the “homosexual propaganda laws”, P. Johnson argued that the ECHR’s approach requires significant evolution to better protect sexual minorities in Russia and elsewhere, ‘*Homosexual propaganda’ laws in the Russian Federation: are they in violation of the European Convention on Human Rights?*’, “Russian Law Journal” 2015, Vol. 3, No. 2, pp. 37–61, <https://doi.org/10.17589/2309-8678-2015-3-2-37-61>.

²⁹ *Regina v. Maurice Donald Henn and John Frederick Ernest Darby*, judgment of the Court of 14 December 1979, 34/79.

³⁰ *Conegate Limited v. HM Customs & Excise*, judgment of the Court (Fourth Chamber) of 11 March 1986, 121/85.

³¹ *Her Majesty’s Customs and Excise v. Gerhart Schindler and Jörg Schindler*, judgment of the Court of 24 March 1994, C-275/92.

Yet the scope of the potential prohibitions is not absolute. Considering in a nutshell³² all the requirements for domestic legislation that were created through the Court's decisions over the years, it may be indicated that:

- It is forbidden to apply the so-called double morality, i.e. the state is not allowed to prohibit the importation of certain goods on the ground that they are immoral, whereas the same goods may be manufactured freely on its territory,³³
- Restrictions must be based on objective considerations of public interest and proportionate to the legitimate objective; a measure is proportionate if it does not go beyond what is necessary in order to attain that objective,³⁴
- Admissibility of the applied measures is to be interpreted from the domestic, not international, perspective,³⁵
- Effectiveness of the EU law must be warranted so that the public morality cannot completely block the *effet utile* by invoking the public morality argument.³⁶

³² For more details, see M. Frischhut *Status Quo of Ethics and Morality in EU Law*, https://link.springer.com/chapter/10.1007/978-3-030-10582-2_3 (access: 29.09.2021).

³³ *Conegate Limited v. HM Customs & Excise*, judgment of the Court (Fourth Chamber) of 11 March 1986, 121/85, par. 20.

³⁴ *Staatsanwaltschaft Heilbronn*, judgment of the Court (Fourth Chamber) of 19 November 2020, C-454/19, 36; *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, judgment of the Court (Grand Chamber) of 8 September 2009, C-42/07, par. 58–59.

³⁵ According to the Court's opinion – the mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to reach a particular end (for instance: the protection of public morality), see: *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä)* and *Suomen valtio (Finnish State)*, judgment of the Court of 21 September 1999, C-124/97, par. 36.

³⁶ For example, with regard to an institution of same-sex marriages, the CJEU stated that: “Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognize such marriages, concluded in another Member State in accordance with the law of that state,

However, it is inevitable to look at how the terms such as “public morality” or “own scale of values” are interpreted by the CJEU. To this end the following remarks from the recent case,³⁷ which concerned the official registration of an allegedly immoral sign, should be helpful:

since the concept of “accepted principles of morality” is not defined [...], it must be interpreted in the light of its usual meaning and the context in which it is generally used. However [...] that concept refers, in its usual sense, to the fundamental moral values and standards to which a society adheres at a given time. Those values and norms, which are likely to change over time and vary in space, should be determined according to the social consensus prevailing in that society at the time of the assessment. In making that determination, due account is to be taken of the social context, including, where appropriate, the cultural, religious or philosophical diversities that characterise it, in order to assess objectively what that society considers to be morally acceptable at that time.³⁸

In the light of these declarations, the CJEU decided that the sign “Fack Ju Göhte” is not contrary to the widely shared moral convictions in German society in 2020 and for this reason, this trademark might be registered.³⁹

Notwithstanding, here for one more time, we may observe the problematic aspect of consistency of this view. If the feelings of the majority at a given time are to be decisive, it may be doubtful how to decide against the background of an intolerant or ignorant socie-

for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law”, see: *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, judgment of the Court (Grand Chamber) of 5 June 2018, C-673/16, par. 45.

³⁷ *Constantin Film Produktion GmbH v European Union Intellectual Property Office*, judgment of the Court (Fifth Chamber) of 27 February 2020, C-240/18 P.

³⁸ *Ibidem*, par. 39.

³⁹ According to Art. 7(1)(f) of Regulation No. 207/2009, trade marks which are contrary to public policy or to accepted principles of morality are not to be registered.

ty. For instance, it is not difficult to imagine a trademark directed against religious minorities in such a society. It seems that the sophisticated approach works well only provided that the scope is limited to morally acceptable options.

4. Honestly neutral?

So far I have examined the shortcomings of the value-neutral approach in the sense that it may lead to potentially undesirable results. Nevertheless, I suggest that in many cases it is difficult to be absolutely neutral at all. To discuss this matter one may study the case of *The Society for the Protection of Unborn Children Ireland Ltd (SPUC) vs Stephen Grogan and Others*⁴⁰ which concerned the highly controversial issue, namely abortion. One of the questions that were put before the Court was whether an abortion comes within the definition of “services” provided for in Art. 60 of the Treaty establishing the European Economic Community.

SPUC tried to convince the judges “that the provision of abortion cannot be regarded as being a service, on the grounds that it is grossly immoral and involves the destruction of the life of a human being, namely the unborn child⁴¹”. In reply, the Court noticed that “Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court’s first question”.⁴²

At the first glance, it seems that the Court has found a really neutral and uncontroversial way to resolve the case without making a judgement on any values. But if one wants to read its decision carefully and in an unprejudiced way, one may at least feel that there are some doubts about it.

⁴⁰ *The Society for the Protection of Unborn Children Ireland Ltd (SPUC) v Stephen Grogan and Others*, judgment of the Court of 4 October 1991, C-159/90.

⁴¹ *Ibidem*, par.19.

⁴² *Ibidem*, par. 20.

Primarily, it is good to start with the arguments of SPUC and more generally pro-life activists and philosophers. Usually their argumentation is built more or less on the following sequence of reasons:⁴³

1. The entity that is killed in an abortion is a human embryo (or fetus).
2. A human embryo (or fetus) is an independent, complete (though immature) organism that has genetic makeup characteristic to human beings.
3. Since it has these features, it is a member of a species *homo sapiens*, just like an author or a reader of this paper, but on an early stage of its development.
4. Intentionally killing an innocent human being is objectively and grievously immoral and thus prohibited.
5. No court can judge that intentionally killing an innocent human being (like a fetus, author, or reader of this paper) may be lawfully treated as a “service”.

Therefore, if the Court decided to treat abortion as a normal medical service (like, for instance, eye exam), it rejects the above-mentioned premises (or at least some of them). This, in turn, means that the Court is not completely neutral. By extension, it is difficult, when dealing with a legal problem, to consistently dispense with the question “whatever the pro-life arguments are or are not correct on the moral plane”. If they are correct, and abortion is equivalent to intentionally killing an innocent child, and if we believe that killing people should not be regarded as a service for remuneration, then those arguments would be salient, if not decisive, for the legal aspects of the case. Yet, by the Court’s final decision, it may be assumed that the judges found them, at least implicitly, not correct.

Sometimes it is also said that women’s liberty, which undoubtedly has a great value, cannot be constrained on such uncertain grounds like the status of an unborn child which is a matter of

⁴³ See: P. Lee, R.P. George, *The Wrong of Abortions*, in: *Contemporary Debates in Applied Ethics*, eds. A.I. Cohen, C.H. Wellman, Blackwell Publishing 2005, pp. 13–26.

controversy. Though, this form of argumentation, if taken seriously, may also help the pro-life side. As President Ronald Reagan noticed once: “If you don’t know whether a body is alive or dead, you would never bury it”.⁴⁴ It seems that every legislator or judge has his answers for this kind of questions. In turn, these answers determine his legal decisions, even if they are under the guise of technical or *prima facie* neutral words. Thus, it appears that there are some moral, political, or personal presupposed pre-judgments that deeply affect the legal rulings.

The advocate of the neutral principle may nevertheless insist that the Court did not touch the problematic aspects of abortion, and conclude that if there is no consensus on when life begins, this issue should be bracketed. This is why it is not necessary to include substantial considerations to answer the technical legal question. But the deficiency of such an approach has been already shown in the ECHR’s judgements analysis. Moreover, the historical perspective gives some good proof that social consensus is sometimes dangerous when treated as a conclusive factor. Merely 200 years ago the equal rights for Afro-Americans were a highly controversial issue and for sure no consensus existed. Stephen A. Douglas in a debate with Abraham Lincoln suggested – in a neutral manner – that if there was no consensus and no uncontroversial way to resolve the slavery problem, each of the states should be entitled to decide whether to permit slavery within their territories. It was in 1927 when Justice Oliver Wendell Holmes Jr. famously stated that “Three generations of imbeciles are enough” and the Supreme Court allowed states to forcibly sterilize residents in order to prevent “socially inadequate” people from having children.⁴⁵ Again, at that time there was no consensus about how to treat disabled people. It is then not clear why one should assume *a priori* that all the modern consensuses (or lack of them) are much wiser than the historical ones, and should be above any critical examination.

⁴⁴ D. D’Souza, *Ronald Reagan: How an Ordinary Man Became an Extraordinary Leader*, Simon and Schuster 1999, pp. 212–213.

⁴⁵ *Buck v. Bell*, 274 U.S. 200 (1927).

On the contrary, it is safer to think that our consensus will be challenged and finally rejected.

Furthermore, if one looks at the definition of neutrality given by the most prominent political philosopher of the 20th century, namely John Rawls, one will know that it is forbidden to do anything intended to favor or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it.⁴⁶ Yet, there are some doubts whether the Court did not give “greater assistance” to those who pursue comprehensive doctrine with the view that the life of a complete human being does not begin at the moment of conception.⁴⁷ Presumably, it was not even possible to give SPUC and its opponents’ equal assistance. The Court had to presume – even if implicitly, covertly, and reluctantly – whether their views are right or not.

It is possible to counter-argue that the pro-life position is not “reasonable” in Rawls’ terms, and the only view that meets the public reason requirements, as described in his *Political Liberalism*, is a pro-choice one. As a consequence, only pro-choice justification⁴⁸ is allowed in liberal and democratic regime. It is an opinion that Rawls defends by himself. But these explanations are convincing only if one agrees with such a narrowly defined vision of the public reason. As critics⁴⁹ rightly suggest, this vision is not free of controversies.

⁴⁶ J. Rawls, *Political Liberalism*, Columbia University Press 1993, p. 193.

⁴⁷ For example, S. Hennette-Vauchez states that Grogan gave big support to the idea of women’s reproductive rights, see: *The Society for the Protection of Unborn Children v. Grogan: Rereading the Case and Retelling the Story of Reproductive Rights in Europe*, in: *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, eds. F. Nicola, B. Davies, Cambridge University Press 2017, pp. 393–417.

⁴⁸ At least in the form that was approved in the Supreme Court of U.S. ruling *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁹ R.P. George, *Law, Democracy, and Moral Disagreements*, “Harvard Law Review” 1997, Vol. 110, No. 7, pp. 1388–1406, <https://doi.org/10.2307/1342176>; J. Finnis, *Public Reason, Abortion, and Cloning*, “Valparaiso University Law Review” 1998, Vol. 32, No. 2, pp. 361–382. Chantal Mouffe openly states that, by appealing to strict public reason requirements, Rawls gets caught in a circular form of argumentation, see: *The Limits of John Rawls’*

In this context, it may be emphasized that it is true that argumentation in favor of a ban of abortion is sometimes formulated in religious statements and dogmas which should be seen as unreasonable because they are not accessible for all citizens. Yet the form of argumentation may be completely different. It can be grounded on a biological basis concerning the status of a fetus which is accessible and widely recognized by all reasonable citizens. What is more, it can be grounded on moral judgements, apart from the biological status of a fetus, as Don Marquis indicated in his famous essay.⁵⁰ At least it does not seem unreasonable to take Amy Gutmann's and Dennis Thompson's position and declare that both pro-choice and pro-life arguments are rational to a respectful level.⁵¹

To say all this is not to ultimately decide whether the Court's ruling in the *Grogan* case was correct or not. It is just to present doubts about whether the Court's decision was honestly neutral. Either way, it was not neutral for disputing parties for sure. And – as some scholars suggest – it is not clear why, when examining the problem of neutrality, one should not take as decisive the law-addressee perspective instead of the perspective of the law-giver.⁵²

5. Conclusions

This paper aimed to shed some critical light on the principle of neutrality, the idea of an actual consensus, or narrowly-defined public reason. Two claims were defended: 1) sometimes it is not possible (or it is extremely difficult) to be honestly neutral between

Pluralism, "Theoria: A Journal of Social & Political Theory" 2009, Vol. 56, No. 118, pp. 3–4.

⁵⁰ D. Marquis, *Why Abortion is Immoral?*, "The Journal of Philosophy" 1989, Vol. 86, No. 4, pp. 183–202, <https://doi.org/10.2307/2026961>.

⁵¹ A. Gutmann, D. Thompson, *Democracy and Disagreement*, Harvard University Press 1996, pp. 73–79.

⁵² See for example, M. Dudek, *Autonomia, neutralność i indyferentność moralna prawa a jego uspołecznienie*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2014, Vol. 76, No. 4, p. 77.

conceptions of a good life; 2) even if it is possible to be neutral, it is not always desirable. Hopefully, these theses may cast doubt on neutrality and its presumed uncontroversial nature, even if they might be overthrown.

To sum up, it is more accurate to state that the European Courts are not neutral but self-restrained. Therefore, the Courts are not neutral when they declare in a binding way that abortion is a medical service or that the relationship of a homosexual couple may fall within the notion of “family life” in the same way as the relationship of a heterosexual couple.⁵³ By such declarations, they appeal to concrete moral values and reject the competing ones which at the same time are not to be declined simply by judging them as unreasonable. Still, the Courts may be self-restrained in the sense that they merely set standards in a multicentric legal system⁵⁴ and do not force each state to change their domestic laws in the sphere of morals. The CJEU is entitled to rule that abortion is a normal medical service carried out for remuneration but is not entitled to order every EU member to offer such service on their territories.

In any event, if the fundamentals of the neutral principle were not undermined here, it is still sensible to think about its limits.

STRESZCZENIE

Czy sądy europejskie są neutralne wobec różnych koncepcji dobrego życia? ETPCz, TSUE i moralna neutralność

W artykule staram się wykazać słabe strony metod uzasadniania wyroków w sprawach dotyczących moralności. Twierdzę, że główną metodą stosowaną przez Europejski Trybunał Praw Człowieka oraz Trybunał Sprawiedliwości Unii Europejskiej jest podejście proceduralne, nawiązujące do zasady

⁵³ Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, judgment of the Court (Grand Chamber) of 5 June 2018, C-673/16, 50 and judgments cited there.

⁵⁴ E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, “Państwo i Prawo” 2005, No. 4, pp. 3–10.

neutralności. W swojej krytyce korzystam z ustaleń Michaela J. Sandela, poczynionych przy analizie orzecznictwa sądów amerykańskich. Zauważam, że w niektórych sprawach proceduralna neutralność musi być przez sądy porzucona w celu zachowania materialnej sprawiedliwości.

Słowa kluczowe: neutralność; orzecznictwo; moralność; europejskie sądownictwo

SUMMARY

Are the European Courts neutral between conceptions of a good life? ECHR, CJEU, and the moral neutrality in action

In this article, I try to find the weaknesses of the methods of reasoning applied by the Courts in cases concerning moralistic laws. I argue that the main method used by the European Court of Human Rights and the Court of Justice of the European Union is a procedural approach that refers directly to the principle of neutrality. In my critique, I rely on the findings of Michael J. Sandel, made in his analysis of the American case law in the area of morals. I suggest that, at least in some cases, procedural neutrality must be abandoned by the Courts in order to preserve substantive justice.

Keywords: neutrality; case law; morals; European courts

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