

## **Strategies of Justification in Resolving Conflicts of Values and Interests. A Comparative Analysis of Constitutional Argumentation in Cases of Animal Sacrifice**

### **Abstract**

Understood as reasons and rationale given by courts in rendering their decisions (DiMatteo 2015; Gudowski 2015), justification is of great importance when resolving morally sensitive issues. In such cases, judges are tasked with finding solutions to fundamental conflicts of incommensurable constitutional principles, which are inherently open-ended, general and in need of interpretation. Constitutional courts rely on different models of constitutional review depending on a given legal system and culture. However, their overarching goal is to consider ways of resolving conflicts and their justifications arising from a clash between constitutionally protected rights and interests and other values deemed worthy of protection by legislatures. The question addressed in this paper is how a constitutional court can resolve conflicts and communicate motives behind its decision in morally sensitive issues and how evaluative language is instrumental in achieving this strategic goal. Two cases are compared in which judges resolve a conflict between freedom to exercise religion and the animal welfare. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the US Supreme Court addressed the constitutionality of animal sacrifice for religious purposes. In Poland, the Constitutional Tribunal in its decision (K52/13) ruled for the admissibility of ritual slaughter. Adopting the methodology of Corpus-Assisted Discourse Studies (CADS), this paper demonstrates that while the argumentation in the Polish decision is heavily axiological, with Polish judges using value-based language to engage in fundamental values and principles, the US Supreme Court judges avoid broad, abstract reasoning by resting the argumentation on low-level and medium-level principles (Sunstein 2018) translated into concrete rules and standards.

### **Keywords**

justification; constitutional argumentation; animal sacrifice; values; incompletely theorized agreement, pragmatic argumentation, value hierarchies

### **Introduction**

Justification plays a central role in public, institutional discourse. Decision-making in virtually any sector, whether private or public, is expected to be supported with reasons. Indeed, it would be difficult to imagine meaningful and relevant social and institutional interactions without providing motives for decisions made or adopted standpoints. Nowhere seems the requirement for providing justifying arguments more conspicuous than in the legal sphere, especially in professional court practice. It is part of the rule of law that legal decisions must be justified. However, there are no explicit legal norms regulating judicial justification and one of the main problems addressed in the study of legal argumentation is “the question which standards of soundness the argumentation should meet” (Kloosterhuis 2013: 72). From the perspective of legal theory, argumentation in legal decisions is usually discussed within three dominant traditions: the logical, the rhetorical and the dialogical (Feteris and Kloosterhuis 2013; see also Feteris 2017 for an overview of theories on the justification of judicial decisions). These approaches share a primary interest in evaluating judicial justification based on criteria ranging from formal (the decision must rest on a logically valid argument) and material (facts, norms, interpretations of norms, etc.) to context-dependent aspects of acceptability (the effectiveness of the argumentation for the audience to which argumentation is addressed). How-

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ever, much less attention has been given to the linguistic dimension of the justification when reconstructing real life argumentation in legal decisions. In this paper, I argue for combining the argumentative approach to legal justification with the study of value-laden language to account for the strategies adopted by constitutional court judges to gain acceptance for their decisions.

It is in the nature of constitutional adjudication that judges are faced with the task of resolving conflicts involving competing principles, values and interests (Virgílio Afonso da Silva 2011). It is generally acknowledged that decisions in such fundamental and morally sensitive issues should be acceptable not only from a legal but also from non-legal—e.g., political, social, moral, or economic—points of view. The multiplicity of viewpoints entails a multiple, composite legal audience comprising not only the fellow judges ('the bench'), lower court justices, litigants, legal community, legislators, or government officials, but also news outlets and the public (Perelman & Olbrechts-Tyteca 1969; see also Romano and Curry 2020 for a more detailed discussion of the concept of audience effect). If the decisions concern morally sensitive issues, such as abortion, euthanasia, or same-sex marriage, they are bound to receive intense media attention evoking a range of emotive responses from the audiences. Viewed from that perspective, judicial decisions operate to mediate disputes in a diverse society. Designed to account for a judicial decision-making process, legal justification offers an indispensable tool that can be used by judges to meet the requirement of soundness by having their decisions based both on the contents of arguments and the acceptance of the argumentation by the audience(s) to which it is addressed (Perelman and Olbrechts-Tyteca 1969). To achieve this, judges need to construct their justifications selecting appropriate linguistic and rhetorical means. Since morally sensitive decisions are essentially value judgments, judges must demonstrate that the choices made and the values used to justify the decision are not arbitrary but they are fair and in accordance with the law. The aim of this paper is to demonstrate how language is instrumental in achieving this strategic goal. In doing so I compare the use of evaluative, value-based language in two justifications given by courts from two different legal systems and cultures for decisions resolving a very similar type of conflict.

To this end, I examine two cases in which judges resolve a conflict between freedom to exercise religion and animal welfare. In *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), the Supreme Court of the United States addressed the constitutionality of animal sacrifice for religious purposes. It voted unanimously to strike down a set of local ordinances prohibiting the practice because they specifically targeted the Santeria religion. In Poland, the Constitutional Tribunal in its decision (K52/13 2014) ruled for the *Act on the Protection of Animals* to be unconstitutional inasmuch as it banned and penalised the killing of animals in a manner required by religious rituals. Both cases address the fundamental conflict between the freedom of worship and the right of the state to exercise some control over how faith is practiced in order to minimize the suffering of animals. The courts resolve the dispute by giving priority to the freedom of worship but they construct the rationale behind these decisions in radically different ways.

To prepare the ground for the analysis, I first outline models of constitutional review in USA and Poland and the position of legal justification in each. Then I explain the concept of evaluative language and its relevance to justification. The data and methods adopted in this study are described before presenting and discussing the results of the analysis.

## 2. Constitutional review in USA and Poland

It is often thought that constitutional courts should be examined separately from supreme courts. However, it is not uncommon to compare the caselaw and the mechanisms of European constitutional courts with supreme courts functioning in countries belonging to the common law tradition, especially regarding the Supreme Court of the United States (Kelemen 2018). What these courts have in common is the power of constitutional review. In continental Europe, the centralised model of

constitutional review came into being after World War I<sup>1</sup>. In keeping with the model advocated by Kelsen (Vinx 2007), a specialized body was to be established outside the regular judicial structure to review the constitutionality of legislative acts and provide a “constitutional defence” against unconstitutional legislative actions. Just as most European countries, Poland also established its own constitutional court, the Constitutional Tribunal in 1982. The Tribunal is uniquely empowered to set aside legislation that does not comply with the Polish constitution. According to Garlicki (2007, p. 57), the Polish system of judicial review relies on three basic procedures: abstract review, legal questions referred by ordinary or administrative judges deciding individual cases, and constitutional complaints that are filed with the Constitutional Tribunal once appellate procedures have been exhausted.

The role of the Supreme Court of the United States (SCOTUS) is complex since it acts as the highest appellate court, the final arbiter of the law and it also exercises the power of judicial and constitutional review by invalidating legislation or executive actions which have been found to be in conflict with the Constitution. In the case of procedures before the US Supreme Court, parties not satisfied with the decision of a lower court can petition the U.S. Supreme Court to hear their case. The primary means to petition the court for review is to ask it to grant a *writ of certiorari*.<sup>2</sup> It is worth pointing out that the Court is usually under no obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and could have precedential value.

Perhaps most importantly, in the context of the present analysis, the Constitutional Tribunal exercises ‘abstract review’, which means that the question of constitutionality does not arise from actual litigation. The court “compares two normative texts and assesses their compatibility without regard to their concrete application” (Kelemen 2018, p. 14)<sup>3</sup>. In contrast, in the US model of constitutional review, the focus is on resolving a specific issue with the constitutional conformity of a given legislative act often treated as largely as incidental. Keleman (2018: 14) argues that the nature of judicial review could be the main factor behind the difference between the style of argumentation of constitutional courts in Europe and the style of common law supreme courts. In other words, the style of argumentation can be influenced by the extent to which judges engage in abstract reasoning and decision-making.

### **3. Legal justifications in the institutional contexts of the US Supreme Court and the Constitutional Tribunal decisions**

When discussing the institutional and professional contexts of the two cases, it is also instructive to view legal justification as the textual product created by two different judicial institutions. Understood as the reasons and rationale given by courts in rendering their decisions (DiMatteo 2015; Gudowski 2015), legal justification reflects the disciplinary and organizational culture of a given justice system.

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<sup>1</sup> [https://www.venice.coe.int/SACJF/2006\\_02\\_Venice\\_Strasbourg/report\\_mazak.htm](https://www.venice.coe.int/SACJF/2006_02_Venice_Strasbourg/report_mazak.htm) (last viewed 17 of January 2023).

<sup>2</sup> The term *writ of certiorari* refers to a request made by the Supreme Court through its order a lower court to send up the record of the case for review. More detailed information about the procedures can be found at the US Supreme Court website <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last viewed 20.04.2021).

<sup>3</sup> The European model also allows for ‘concrete review’, initiated by an ordinary judge and leading to a concrete controversy. However, even this type of case is treated in an abstract and formal way disregarding the specifics of a particular case (Sweet 2003; see also Koszowski 2019, p. 220).

The macrostructure of Tribunal decision		The macrostructure of SCOTUS opinion
Segment 1	komparycja (heading)	Headnote
Segment 2	tenor (disposition of the case)	Procedural history
Segment 3	justification	Holding
Part 1	historyczna [historical]	
Part 2	na rozprawie [at the trial]	
Part 3	uzasadnienie prawne [legal justification]	Opinion

Table 1: The macrostructure of the Polish SC judgment

Table 1 shows a basic similarity between the two organizational formats. There is some overlap in terms of the specific segments. Both include sections which identify the court, the names of the parties, etc. Both announce the final ruling, i.e. disposition of a case (or holding in US judicial discourse) and refer to decisions taken by lower courts and the legal standpoints adopted by institutional actors. They differ regarding the extent to which justification itself is structured. The structure of legal justifications given by the Constitutional Tribunal in Poland reflects the Polish court practice which distinguishes between two major elements: the historical and the legal (Rzucidło-Grochowska 2017). The first two parts (referred to as Part I: *historyczna* ‘historical’ and Part II: *na rozprawie*, literally ‘at the trial’, combined correspond to what is known as ‘procedural history’ in common law jurisdictions. It is Part III, *uzasadnienie prawne* ‘legal justification’ which should be seen as the justification proper (see Goźdź-Roszkowski 2020 for a more in-depth discussion of the macrostructure of the decision and the rhetorical structure of legal justifications). In contrast, the SCOTUS justifications do not follow a fixed organizational format. It is worth pointing out that in both institutional contexts, judges exercise considerable discretion in choosing how to present their reasons for the decision.

#### 4. Value-based lexis and argumentative discourse

The analytical focus in this paper is on value-based lexis, understood as lexemes indicating major argumentative premises (*topoi*), values and argumentation schemes. According to the classical legal rhetoric (Frost 2016), *topoi* (also known as *loci*) are places where available legal arguments can be discovered. In a legal context, the *topoi* or topics are generally accepted legal values which judges choose carefully to gain the acceptance of a legal audience. Legal *topoi* usually draw upon general legal principles, such as *fairness* or *equity* (Feteris and Kloosterhuis 2013). They are regarded as fundamental to the legal and social order. Value-based lexis offers a way of identifying and reconstructing argumentation based on value judgment. In such cases, lexemes are used to refer to values, value hierarchies and legal *topoi*; all of which can be employed by arguers as starting points or common points of departure for constructing argumentation schemes to gain the approval of a legal audience. According to Perelman (1976), the choice of particular values, whether abstract or concrete, and the subsequent hierarchical ordering must be justified and explained. The justification is realized by applying various forms of argument in order to convince the audience that the decision is sound and legally correct. This study is based on the assumption that values can be treated as sources or premises for argument in a value judgment and analysing value-based lexis and their collocates should help identify specific strategies of argumentation used by judges in the two cases.

#### 5. Data and Method

The study reported in this paper uses the methodology of Corpus-Assisted Discourse Studies (Partington et al. 2013) to scrutinize argumentative discourse in two judicial decisions. This approach is eclectic and combines analytical techniques used in corpus methodology with discourse analysis (Goźdź-Roszkowski 2021). As the first step, the quantitative technique of extracting keywords is

applied to identify a list of statistically salient lexis that is potentially used in the justifications to reference values. Extracting keywords involves comparing two lists. One list is based on the words from the focus corpus i.e., the one under investigation, relative to a reference corpus. The focus corpus comprises two judicial decisions analysed in this paper. More specifically, the court opinion in *Church of the Lukumi Babalu Aye v. City of Hialeah* totalling 18,173 words and the majority opinion in Constitutional Tribunal decision designated as *K52/13* (23,303 words). The computing of keywords involved using the reference corpora of Supreme Court opinions and Constitutional Tribunal decisions (both compiled by the author) and comprising 108 US documents, totalling 1,270,049 words and 86 Polish documents, totalling 971,219 words. One hundred keywords were considered of which 50 are provided as Table 2 and 3.

The lexical items are then analysed using a discourse approach that examines and interprets the discourse surrounding the target item to identify its function. This part of analysis is aided by scrutinizing the relevant concordance lines and referring to the entire text of the justification. These analyses were carried out using the *Sketch Engine* software. The interpretative part of the analysis relies on Perelman's Legal Argumentation Theory (1976) which specifies argument forms (e.g. *argumentum a contrario*, the teleological argument) which judges tend to use to justify their choices and decisions.

#### 4. Identifying the 'aboutness' of argumentation. Value-based Lexis as Keywords

The keyword technique is commonly used to highlight what lexical items are statistically salient in the focus corpus, Keywords provide a quick and effective way of knowing the 'aboutness' of a given text or texts (see, for example Baker 2004). The 50 keywords shown in Table 2 can be grouped into a few semantic and functional categories providing useful starting points and insights into the general characteristics of the argumentation used in both cases. However, the main aim is to identify lexis referencing values and general principles around which the justification has been constructed. We start with an overview of keywords in the SCOTUS justification.

Lemma		Frequency			Lemma		Frequency	
		Focus	Reference				Focus	Reference
1.	hialeah	78	0	26	hybrid	6	4	
2.	santeria	53	0	27	religious	147	152	
3.	free exercise	29	0	28	cruelty	25	25	
4.	sacrifice	86	5	29	unconstitutionality	4	3	
5.	slaughter	30	1	30	killing	23	27	
6.	animal	145	28	31	church	24	29	
7.	mayor	17	2	32	exemption	26	35	
8.	ritual	25	4	33	city	155	227	
9.	ceremony	6	0	34	applicability	26	37	
10	animals	6	0	35	religion	73	113	
11	underinclusive	12	2	36	ordain	4	5	
12	orisha	5	0	37	catholic	4	5	
13	ritualistic	5	0	38	scholarship	4	5	
14	hog	5	0	39	wine	4	5	
15	polygamy	5	0	40	worship	5	7	
16	slaughterhouse	5	0	41	neutral	32	56	
17	neutrality	57	20	42	register	8	14	
18	ordinance	160	62	43	formally	10	18	
19	prosecution	4	0	44	consumption	12	22	
20	encyclopedia	8	2	45	god	4	7	
21	religiously	7	2	46	scrutiny	23	53	
22	non-religious	5	1	47	cattle	4	8	

23	secular	14	6	48	governmental	38	91
24	kosher	4	2	49	unnecessarily	6	17
25	meat	5	3	50	target	18	55

Table 2: Fifty keywords extracted from the court opinion of *Church of the Lukumi Babalu Aye v. City of Hialeah*

As can be seen in Table 2, some keywords are self-evident referencing location (*Hialeah*), institutional actors and instruments involved in the case (*Mayor, ordinance*), others are directly related to the object of adjudication (the subject matter); i.e. religion (*Santeria, ritual, ceremony, orisha, church, Catholic*) and animal (*animal, hog, cattle*). The last category of keywords, i.e., animals, is discussed in the context of *killing, slaughterhouse* and *sacrifice*, which are also keywords<sup>4</sup>.

However, there are also some keywords pointing towards the legal basis for the ensuing reasoning. The third most key word is free-exercise, which refers to the First Amendment's Free Exercise Clause. First Amendment of the US Constitution safeguards freedoms concerning religion, expression, assembly, and the right to petition. It prevents legislatures from both prioritizing one religion over others and also restricting an individual's religious practices<sup>5</sup>. The protection of religious practices is enshrined in the Free Exercise Clause, which protects not only religious beliefs but also actions made on behalf of those beliefs. It is therefore not surprising that the concept of free exercise is central to the case, as the question addressed by the US Supreme Court boils down to whether the city of Hialeah's ordinance, prohibiting ritual animal sacrifices (arguably viewed as an action, based on the religious Santeria belief), violated the First Amendment's Free Exercise Clause<sup>6</sup>. Thus, it can be assumed that it is the principle of religious freedom that is adopted as the major *topos* and the starting point for the court's argumentation, as illustrated in Example 1 below (emphasis in bold added):

- 1) **The principle** that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Cf. *McDaniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978); *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828 (1953). Concerned that this **fundamental nonpersecution principle** of the **First Amendment** was implicated here, however, we granted certiorari. 503 U.S. ---, 112 S.Ct. 1472, 117 L.Ed.2d 616 (1992).

However, there are other keywords which turn out to be crucial to the argumentation made in the court opinion and these include 'applicability', 'neutral', 'neutrality', 'underinclusive', 'unnecessarily' and 'scrutiny'. To appreciate the relevance of these and other keywords, it is instructive to consider the summary of conclusions reached by the Court and reproduced below from the website of the Oyez, a free law project from Cornell's Legal Information Institute (LII), Justia, and Chicago-Kent College of Law. The keywords have been italicized<sup>7</sup>:

The Court held that the *ordinances* were neither *neutral* nor generally *applicable*. The ordinances had to be justified by a compelling *governmental* interest and they had to be narrowly tailored to that interest. The core failure of the *ordinances* were that they applied exclusively to the *church*. The ordinances singled out the activities of the *Santeria* faith and suppressed more *religious* conduct than was *necessary* to achieve their stated ends. Only

<sup>4</sup> The keyword list does not include keywords referring to past cases of precedential value, such as 'cantwell', e.g. *Cantwell vs. Connecticut*.

<sup>5</sup> [https://www.law.cornell.edu/constitution/first\\_amendment](https://www.law.cornell.edu/constitution/first_amendment) (last viewed 9th January 2023).

<sup>6</sup> <https://www.oyez.org/cases/1992/91-948>; last viewed 5th January 2023).

<sup>7</sup> It should be noted that the keywords are lemmas so the specific word forms found in the text may vary.

conduct tied to *religious* belief was burdened. The ordinances *targeted* religious behavior, therefore they failed to survive the rigors of strict *scrutiny*.

The presence of keywords associated with *scope* and applicability is evident of the Court's strategy to examine the texts of the challenged local law to determine whether it meets the criteria of neutrality and general applicability. The court opinion points to the Smith Test <sup>8</sup> as the testing method. The two-part test specifies that the government may burden religious practice if a law is 'neutral' and generally 'applicable.' In addition, as the opinion clarifies, a law failing to satisfy these requirements must be justified by a 'compelling governmental interest' and must be 'narrowly tailored' to advance that interest.

Thus, the keyword overview provides a useful overview of the starting point and main argumentation lines adopted in the SCOTUS court's opinion. The court opinion will first analyse whether the ordinances meet the neutrality and the general applicability requirements. Then it will apply the compelling interest standard to determine whether the local government (the city council) has chosen a narrowly tailored and the least restrictive means to achieve a compelling governmental objective. We now turn to consider keywords identified in the Polish case.

Lemma	Frequency		Lemma	Frequency	
	Fo-cus	Ref.		Fo-cus	Ref.
1. zwierzę 'animal'	416	139	26. podczas 'during'	43	160
2. ubój 'slaughter'	332	63	27. szczególnie 'special'	76	826
3. rytualny 'ritual'	200	13	28. gospodarski 'farm'	33	1
4. religia 'religion'	131	24	29. człowiek 'human'	46	328
5. religijny 'religious'	113	75	30. rada 'council'	88	1214
6. żydowski 'Jewish'	92	4	31. żywność 'food'	29	5
7. wyznanie 'faith'	90	18	32. poddawać 'subject'	29	48
8. wolność 'freedom'	207	1375	33. koszerny 'kosher'	26	0
9. uśmiercać 'kill'	70	37	34. tradycja 'tradition'	27	24
10. metoda 'method'	74	159	35. przewidywać 'provide for'	45	422
11. wnioskodawca 'petitioner'	148	1175	36. generalny 'general'	82	1238
12. wyznaniowy	70	129	37. wymagać 'require'	58	730
13. dokonywać 'carry out'	87	431	38. praktykować 'practise'	24	6
14. rzeźnia 'slaughterhouse'	56	4	39. cierpienie 'suffering'	23	5
15. mięso 'meat'	52	0	40. związek 'union'	115	2172
16. obrzęd 'ritual'	52	4	41. sumienie 'conscience'	23	20
17. zakaz 'prohibition'	75	360	42. legitymacja 'legitimacy'	25	68
18. konwencja 'convention'	70	301	43. według 'according to'	33	265
19. ogłuszyć 'deafen'	49	6	44. polski 'Polish'	54	787
20. rozporządzenie 'regulation'	137	1393	45. bezwzględny 'total'	24	90
21. ochrona 'protection'	175	1995	46. prokurator 'attorney'	80	1463
22. uzewnętrznić 'manifest'	42	5	47. stwierdzić 'find'	74	1317
23. judaizm 'Judaism'	39	0	48. przewidzieć 'provide for'	47	672
24. moralność 'morality'	38	29	49. dopuszczalność 'accessibility'	33	332
25. wyznawca 'believer'	36	2	50. wyłącznie 'exclusively'	37	438

Table 3: Fifty keywords extracted from the Constitutional Tribunal justification

There is a considerable overlap between the two sets of keywords. The Polish text uses lexis denoting institutional actors and legal instruments (e.g. *wnioskodawca* 'petitioner', *rozporządzenie*

<sup>8</sup> The test was introduced in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990).

‘regulation’, *konwencja* ‘convention’, religion and faith (*religia* ‘religion’, *judaizm* ‘Judaism’, *wyznanie* ‘faith’, *obrzęd* ‘ritual’, etc.), The object of adjudication, i.e. the admissibility of ritual slaughter, is discussed using keywords such as *ubój* ‘slaughter’, *rytualny* ‘ritual’, paying attention to the method of killing (the keywords *uśmiercać* ‘kill’, *ogłuszyć* ‘deafen’, *rzeźnia* ‘slaughterhouse’, etc. However, there is also a distinct category of keywords that appear to indicate abstract concepts: *wolność* ‘freedom’, *ochrona* ‘protection’, *człowiek* ‘human’, as in *godność człowieka* ‘human dignity’, *moralność* ‘morality’, *sumienie* ‘conscience’ and *tradycja* ‘tradition’.

These keywords represent likely candidates for legal *topoi* and the starting points for the ensuing argumentation. They seem to suggest a predominantly axiological basis for the Constitutional Tribunal’s argumentation. A strong presence of value-indicating lexis might also suggest that the justification will rely on weighing and balancing as a form of argument to address the issue of competing values and principles (Alexy 2002).

### 5. Pragmatic argumentation as a general strategy in SCOTUS justification

It is only at the beginning of the court opinion that judge Kennedy invokes the ‘high’ and ‘more abstract’ principle that prevents government from enacting laws that could suppress religious belief or practice (508 U.S. 520, par. 1). It is the fundamental non-persecution principle of the First Amendment which stands for the essential commitment to religious freedom. The invoked principle becomes only more specific as the argumentation progresses (emphasis in italics added in all examples):

- 2) In our Establishment Clause cases we have often stated the *principle* that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.

There is certainly huge persuasive potential in relying on abstract and universal values because they help to elicit agreement from a universal audience (Perelman & Olbrechts-Tyteca 1969). However, they are effective as long as their content does not need to be specified and then an argument based on such value must match the expectations of a specific audience. If the court opinion relies on values as starting points in argumentation in this case, it does so sparingly and it soon moves on to consider medium and low-level principles and standards. These usually adopt the form of rules and standards:

- 3) We turn next to a second requirement of the Free Exercise Clause, the *rule* that laws burdening religious practice must be of general applicability.
- 4) In this case we need not define with precision the *standard* used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum *standard* necessary to protect First Amendment rights.

As can be seen, the court’s reasoning remains focused on the ordinances and the scope of their applicability. It is not concerned with extra-legal values or issues, for example, those related to public morals. In addressing the major constitutional law question of whether the ordinances failed to comply with the free exercise clause, the US court looked into the scope of their application. Indeed, general applicability was linked expressly to neutrality. As the court opinion made it clear “failure to satisfy one requirement is a likely indication that the other has not been satisfied” (508 U.S. 520). Importantly, the court admitted of the possibility that either requirement could not be met. In that case, the law should demonstrate a ‘compelling governmental interest’ and “it must be narrowly tailored to advance that interest” (ibid.). The thrust of the Court’s reasoning goes into determining the scope of the challenged ordinances. As we have seen in the previous section, this is reflected in several keywords and evaluative lexis associated with the notion of ‘scope’: ‘underinclusive’, ‘overinclusive’, ‘narrowly’, ‘narrow’, ‘overbroad’. The following excerpt from the court opinion illustrates this use (emphasis in italics added):

- 5) First, even were the governmental interests compelling, the ordinances are not drawn in *narrow terms* to accomplish those interests. As we have discussed, see *supra*, at 16-18, 21-24, all four ordinances are *overbroad* or *underinclusive* in substantial respects. The proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by *narrower* ordinances that burdened religion to a far lesser degree. The absence of *narrow tailoring* suffices to establish the invalidity of the ordinances (508 U.S. 520).

As can be seen, the assessment of the scope is carried out using dichotomous and evaluative lexis (*overbroad* and *underinclusive*). It should be noted that the adjective *narrow* is used in its technical sense connected with standard of review, a test applied in cases of discriminatory laws. This means that, placed under strict scrutiny, the government must prove it has chosen a narrowly tailored means to achieve a compelling governmental objective. Crucially, the government must demonstrate that it has chosen the least restrictive means of achieving its compelling government objective<sup>9</sup>. And that is exactly what the Court found lacking in this case.

Strong pragmatic concerns can also be found in the way the court pays attention to the consequences of applying the law enacted in the ordinances. In its opinion, the court evaluates the professed goals of the legislation by pointing out their unfavourable consequences:

- 6) Respondent claims that Ordinances 87-40, 87-52, and 87-71 advance two interests: protecting the public health and preventing cruelty to animals. *The ordinances are underinclusive for those ends. They fail to prohibit non-religious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential.*

In Example (6), the Court shows that the negative consequences result from the legislator's omission and failure to ensure the proper scope of the enacted law. However, there are also instances where the Court attributes negative consequences directly to the contested legislation:

- 7) We need not decide whether the Ordinance 87-72 could survive constitutional scrutiny if it existed separately; it must be invalidated because *it functions*, with the rest of the enactments in question, *to suppress* Santeria religious worship.
- 8) It becomes evident that these ordinances *target* Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the *effect of a law* in its real operation is strong evidence of its object.

The ordinance is assessed on the basis of its legal effect. Worth noting is the use of the word *target* which in this context connotes negative conduct on the part of the local authorities. There are as many as 18 instances where different forms of the lemma *target* are used. They function as a means to further assess negatively the scope of the application which results in unfair and discriminatory treatment:

- 9) There are further respects in which the text of the city council's enactments discloses the improper attempt to *target* Santeria.

The focus on consequentialist reasoning is a familiar technique in legal argumentation (Carbonell 2013). It is typically used for showing legal and/or non-legal consequences. The former are associated with consistency and coherence within the legal system, while the latter are examined with regard to implications in the extra-legal social reality. It appears that in this case, it is the latter consequences that the court focuses on.

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<sup>9</sup> <https://www.wneclaw.com/conlaw/standardssofreview.html> (last viewed 10th January 2023)

## 6. A hierarchic ordering of abstract and specific values as a general strategy in the Constitutional Tribunal justification

In contrast to the SCOTUS justification, there is a distinct class of keywords in the Polish opinion which reveals strong axiological concerns by referring to high values and theories. It is the principle of freedom of conscience and religion that should be viewed as the legal commonplace and the starting point for the ensuing argumentation. Its importance and justification is clearly reinforced by the Tribunal, as illustrated in Example (10) relying on value-based language:

- 10) Wolność wyznania, określana w polskim porządku konstytucyjnym wolnością religii, jest fundamentalną (podstawową) wolnością człowieka. Już wstęp do Konstytucji podkreśla znaczenia wiary jako źródła prawdy, sprawiedliwości, dobra i piękna. [Freedom of religions is a fundamental (basic) freedom of man. The preamble to the Constitution emphasizes the importance of faith as a source of truth, justice, good and beauty]<sup>10</sup>.

The references to freedom of religion and to the divine sources of ‘truth’, ‘justice’, ‘goodness’ and ‘beauty’ are followed by invoking ‘human dignity’ as a transcendental value that forms the axiological bedrock of the entire constitutional order (K52/13, par. 225). Invoking human dignity is a standard practice in human rights cases (see, e.g. McCrudden 2008) but in this case, it is used as the sole basis for recognizing the freedom of religion as the governing idea. This enables the court to establish a hierarchy of values. A hierarchic ordering of values can be seen in rejecting animal welfare as a specific value relevant to the present case:

- 11) Niemniej wartość w postaci troski o dobrostan zwierząt gospodarskich podczas uboju nie została wskazana w art. 53 ust. 5 Konstytucji i art. 9 ust. 2 Konwencji jako przesłanka, która mogłaby uzasadniać konieczność ograniczenia wolności religii (wyznania). [The value of caring about animal welfare is not mentioned in Art. 53, Section 5 of the Constitution and in Article 9, Section 2 of the Convention as a premise that could justify the limitation of the freedom of religion].

It should be noted that, unlike its US counterpart, the Polish court applies a comparative approach by referring to the European Convention on Human Rights and the EHRC caselaw to place the freedom of religion alongside the freedom of conscience and the freedom of thought, all three forming the cornerstone of any rule of law democracy. What bears upon the final decision in this case is that the freedom of religion is also understood as a freedom to manifest one’s religion and the state cannot evaluate religious beliefs or the means through which it is expressed (K52/13, par. 236). The Tribunal concedes that ritual slaughter is indeed a form of manifestation of a religion. It uses a linguistic argument to point out the connection between the etymology of the Polish word *rytual* (Eng. ritual) and established forms of religious practices (K52/13, par. 250). The Tribunal concludes that under the Polish constitutional order, animal slaughter using methods required by religious rituals is protected as a freedom of religion safeguarded by art. 53, section 1 and 2 of the Constitution.

As can be judged from this account, the Tribunal’s conclusion is supported solely by invoking high and abstract values of truth, justice, good and beauty, followed by human dignity, freedom of religion and the rule of law. However, there are other, more specific values considered in the context of weighing and balancing as the main form of argumentation used by the Tribunal to compare values and principles as a constitutive step in the process of reaching and justifying its judicial decision<sup>11</sup>. In general, balancing is about “determining the priority among competing demands or requirements

<sup>10</sup> All the English translations are literal to keep as close as possible to the Polish source texts and are provided by the author.

<sup>11</sup> The terms ‘balancing’ and ‘weighing’ are treated in this paper as synonymous and are also understood as referring to the so-called principle of proportionality common in European constitutional courts’ reasoning (see Virgilio Afonso da Silva 2011).

according to their importance in the concrete case” (Sieckmann 2013, p. 191) and it has its roots in the so-called ‘theory of principles’ proposed in Alexy (2002). Alexy argues that weighing and balancing is necessary in case two principles collide. Weighing and balancing involves determining the importance of the principles relevant to the case and judging whether the importance of satisfying one principle justifies the detriment or non-satisfaction of the other (Feteris 2017).

In the case before the Constitutional Tribunal, the judges asserted that a freedom to manifest a religion may be limited only through a legislative enactment and only if such limitation is necessary in order to protect public safety, order, health, morality or the freedom and the rights of other people (K52/13, par. 259). In keeping with the general principle of proportionality, the judges had to determine whether the principle of a freedom of religion could be ‘balanced away’ in favour of concerns over public health and morals. While the health concerns were dismissed by the Tribunal as irrelevant due to strict sanitary regulations (K52/13, par. 274), more space was devoted to the impact of ritual slaughter upon public morals.

Arguments against any negative impact of ritual slaughter are strictly axiological. Asserting that Polish society attaches considerable importance to religion and the freedom of its manifestation, the Tribunal concluded that freedom of religion is not only enshrined in the constitution and the Convention but it is also a fundamental value in the Polish society (K 52/13, par. 287). Further, the Tribunal’s stance on public morality was supported in the justification by reference to the Constitution preamble and the values originated with the Judeo-Christian tradition. In other words, the Tribunal argued that moral norms shared by the majority of society are more likely to elicit respect for the freedom of religion rather than its limitation through a total ban on ritual slaughter. In the Tribunal’s view, the challenged provision (Art. 34, Section 1 of the Law on Protection of Animals) places excessive and disproportionate limitations on manifesting a religion. Further, the law incorrectly weighs the proportion between the constitutional value of animal protection and welfare and the freedom of religion, especially in light of severe penal sanctions that the law introduced. Referring to the decision of the German Federal Court of Administration (3 C 30.05 dated 23 of November 2006), priority is afforded to constitutional provisions guaranteeing freedom of religion rather than animal protection.

## **7. Discussion and Conclusions**

The analyses provided in this paper have demonstrated that in affording priority to freedom of religion, the courts resort to radically different strategies of justification. The main difference concerns the level at which reasoning and justifying constitutional arguments is conducted. The Constitutional Tribunal’s justification rests on highest values invoking abstract concepts and generalisations (‘truth’, ‘justice’, ‘goodness’ and ‘beauty’), as well as specific values used as legal principles (‘human dignity’, ‘freedom of religion’, ‘the rule of law’, ‘public morality’). Most of these concepts are open-ended and hard to specify and the Tribunal leaves them largely undefined except when referring to its own previous decisions in which they are mentioned. Adopting the strategy of a hierarchic ordering of abstract and specific values enables the Constitutional Tribunal to deny animal welfare the same level of protection. The strategy involves weighing and balancing the principle of religious freedom and the value of animal welfare and protection. Animal welfare as posited as a value that does not justify the interference with the higher value of religious freedom. The justification concludes that protecting animals against unnecessary suffering is irrelevant for public morality because it is not socially harmful.

In contrast, judicial reasoning in the US opinion uses the principle of freedom of religion, enshrined in First Amendment, only as a starting point to indicate the governing idea that steers the justification towards the desirable solution. The court shies away from engaging in abstract reasoning to invalidate a law enacted by the local legislature. Instead, Justice Kennedy, who drafted the court opinion, chooses to base the argumentation on low-level and medium-level principles translated into

concrete rules and standards. The Court is intent on seeking a solution to resolve a conflict between two incommensurable principles. It does so very pragmatically by referring to the specific circumstances of the case and analysing the legal and social effects triggered by the contested local law. In terms of linguistic means, the US Supreme Court opinion relies consistently on a set of evaluative lexical items in the semantic domain of ‘scope’ to express the evaluating function of the contested local law provisions (e.g. *underinclusive*, *overinclusive*, *narrowly*, *narrow*, *overbroad*). In addition, evaluative lexis is used to construct the negative assessment of the effect of the local law.

The difference between the strategies could be explained in light of the concept of ‘incompletely theorized agreement’. Sunstein (2007) uses this concept to account for the phenomenon of reaching agreements despite the existence of diverse values. He argues that “people can often agree on constitutional practices, and even on constitutional rights, when they cannot agree on constitutional theories. In other words, well-functioning constitutional orders try to solve problems through incompletely theorized agreements” (2007, p. 3). In the context of adjudicating hard, morally-sensitive cases, this means that judges are capable of agreeing on the (un)constitutionality of a given practice even when the theories, concepts or values that underpin their judgments may radically differ. In the actual judicial decision-making, judges could agree not only on the outcome, but also on its rationale by offering low-level or mid-level principles. As could be seen in Section 6, low-level or mid-level principles assume the form of rules or standards derived from or referring to rules at a higher level of abstraction and generality and their application helps to avoid engaging in large-scale theoretical conflicts. Broad and abstract reasoning is something that American judges try to avoid because finding a compromise in a case where both parties invoke highest values and abstractions can be extremely difficult.

The expressive function of law means that judges through their decisions have a role in reflecting and communicating particular ways of valuing human goods. To achieve any degree of success with their audiences, arguments have to proceed from premises that are acceptable to the multiple audiences. In modern, well-functioning democracies, this means not only legal audiences (the fellow judges (‘the bench’), lower court justices, litigants, legal community, legislators, but also government officials, news outlets and the public. As American Supreme Court Justice Oliver Wendell Holmes famously stated “General principles do not decide concrete cases”<sup>12</sup>. While this aphorism was clearly intended for the US common-law model of judicial review, it could be construed as a warning that high-level principles and abstractions inevitably pose the risk of connoting divergent and incompatible ideological stances that could hinder the process of finding a compromise and common ground in any decision-making process.

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<sup>12</sup> *Lochner v. New York*, 198 U.S. 45, 76 (1905)

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