

Gambling Addiction: A Case for Public Morality or Science?

It was established that the numerous concerns relating to gambling can be summarised under two justification grounds: consumer protection and public order.¹ The first relates to gambling-related risks that may be of direct concern to consumers; primarily the addiction to games of chance and fraud committed by operators. The second term is more elusive and involves all other forms of crime that do not directly regard consumers but society as a whole (such as the interest in a clean financial market that is free of money-laundering and other criminal activities). Also, under the label 'public order', concerns are put forward that relate to the 'morality', or rather, 'immorality' of games of chance.

Some regard gambling addiction as an issue of public morality and others as an issue for science. The prism that is chosen impacts one's perception of gambling and of the addiction to games of chance.

The case law of the Court of Justice shows an *emphasis on public morality concerns*. Moral, cultural and religious factors are seen as co-responsible for the 'peculiar nature' of gambling.² Some governments went so far as to liken gambling to illegal products like drugs.³ Similarly, authors argued that the lack of agreement as to the morality of games of chance was the greatest obstacle to regulating gambling at EU level and used comparisons to abortion, prostitution or drug control.⁴ Indeed, the Court of Justice relied on such 'peculiar nature' of gambling and found the morality of games of chance 'at least questionable'.⁵ While authors noted that the argument of a 'peculiar nature' of gambling played an essential role in the gambling case law,⁶ *this argument has been uncritically accepted*.⁷ According to the Court of Justice, it would appear that people who engage in gambling are regularly not able to control their behaviour. As the Court of Justice highlighted, the 'human desire to gamble' needs to be confined

¹C-46/08 Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein [2010] ECR I-8149, para. 45; C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 (Joined Cases) Markus Stoss (C-316/07), Avalon Service-Online-Dienste GmbH (C-409/07) and Olaf Amadeus Wilhelm Happel (C-410/07) v Wetteraukreis and Kulpa Automaten-Service Asperg GmbH (C-358/07), SOBO Sport & Entertainment GmbH (C-359/07) and Andreas Kunert (C-360/07) v Land Baden-Württemberg [2010] ECR I-8069, para. 74.

²C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 59.

³Ibid., para. 32.

⁴Devaney, M., "Online Gambling and International Regulation: An Outside Bet", *Information & Communications Technology Law*, vol. 18, no. 3 (2009), p. 273-283, at 274.

⁵C-275/92 Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler [1994] ECR I-1039, para. 32.

⁶Doukas, and Anderson, "Commercial Gambling without Frontiers: When the ECJ Throws, the Dice is Loaded", at 240.

⁷*Ex multis*, Badura, P., "Verfassungsrechtliche und gemeinschaftsrechtliche Fragen einer Neuordnung des Glücksspielwesens in Deutschland" in *Aktuelle Probleme des Rechts der Glücksspiele - Vier Rechtsgutachten*, edited by Ennuschat, J., Munich: Verlag Franz Vahlen, 2008, at 45.

within controlled channels;⁸ even the mere ‘human pleasure in gambling’ can be a problem.⁹ Advocate General Gulmann referred to ‘gambling fever’.¹⁰ Moreover, it would appear that the Court of Justice *disapproved of certain ways in which people spend money in their leisure time*. Preventing people to ‘squander money on gambling’ was therefore accepted as a legitimate public interest objective.¹¹

Proceeds for public or charitable purposes are seen as providing some degree of justification. The Court approved the objective of preventing gambling from being ‘a source of private profit’.¹² It also found it legitimate to adhere to the view that it was “unacceptable to allow private profit to be drawn from the exploitation of a social evil or the weakness of players and their misfortune.”¹³

Terms such as social evil, questionable morality, squandering money, gambling fever, and activities of a special or peculiar nature do not seem to refer to an activity whose inherent risks could be addressed by appropriate regulation. Rather, it harks back to ancient times where risk-focused regulation attempting to minimise negative side effects of an activity¹⁴ did not exist and where gambling addiction was largely a matter for moral judgment. The words of Pastor Hopkins from New England are a testament of those times:

“Oh! It is foul [...] let the gambler know that he is watched, and marked; and that [...] he is loathed. Let the man who dares to furnish a resort for the gambler know that he is

⁸C-124/97 *Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)* [1999] ECR I-6067, para. 37. Similarly, the Belgium national lottery had, according to a Belgium court, “the objective of channelling man’s inherent compulsion to gamble” (C-525/06 *De Nationale Loterij NV v Customer Service Agency BVBA* [2009] ECR I-2197 (Order of the Court), para. 3). Furthermore, the Spanish government claimed that its policy of taxing winnings from games of chance was aimed to “discourage gambling in general.” Therefore, not the avoidance of *excessive* gambling but of *gambling itself* seemed to be the aim of the policy. It was, however, difficult to explain why winnings made with certain Spanish operators were exempted from taxation. The sums wagered with those operators covered more than 40% of the national market. C-153/08 *Commission v Spain* [2009] ECR I-9735, in particular paras 36, 67-76.

⁹Advocate General Trstenjak supported the wording of the German government in her opinion in C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH* [2010] ECR I-217, para. 93.

¹⁰Opinion of Advocate General Gulmann in C-275/92 *Her Majesty’s Customs and Excise v Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, para. 37.

¹¹C-243/01 *Criminal Proceedings against Piergiorgio Gambelli et alii* [2003] ECR I-13031, para. 67. Similarly, the rationale underlying Latvian municipal authorities’ refusal to issue (additional) gambling licenses was “the concern to prevent the public from being tempted to favour games of chance over other leisure opportunities.” C-470/11 *Garkalns SIA v Rigas dome* [2012] nyr, para. 10.

¹²C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289, para. 30.

¹³C-447/08 and C-448/08 (Joined Cases) *Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08)* [2010] ECR I-6921, para. 43.

¹⁴For a recent publication advocating an approach that regulates consumption while trying to discourage unhealthy forms or levels of consumption, cf. Bogart, *Permit but Discourage - Regulating Excessive Consumption*. For a freedom of choice driven approach, cf. Thaler, R.H., and Sunstein, C.R., *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Caravanbooks, 2008.

counted a traitor to his duty, a murderer of all that is fair, and precious, and beloved among us.”¹⁵

Historically, the perception of gambling and the addiction to the game were loaded by moral judgments. The moral perspective on gambling was heavily informed by religious convictions. The question today is whether the regulation of gambling and public health policy on gambling addiction should be based on religious and moral views rather than on empirical evidence from research.

It was noted in the introduction that the regulation of gambling became heavily influenced by religious convictions in the post-antique world. Christian religious leaders despised gambling and made the *regulation of gambling a matter for religious believes*. The aforementioned example of Pastor Hopkins is only one of countless examples as Part I demonstrated. In Luther’s view, gamblers failed to understand that God alone was steering their fortune and, by gambling, they effectively challenged God’s authority.¹⁶ Books of devils categorised gambling along with harlotry and drinking.¹⁷ Playing games was despised as idle and unproductive behaviour.¹⁸ As gambling was described as an immoral activity, people engaging in gambling consequently behaved immorally. The latter were grouped with thieves and robbers and described as cheats and felons. Those excessively involved in gambling were seen as degenerated. What could have possibly been the cause of the addiction to the game in this world view? The *moral deficiency* of the addict.¹⁹

These views contrast sharply with a scientific perspective on addiction. They also contrast more broadly with the *image of man* that we generally hold today. For decades, Western societies have been characterised by the enjoyment of individual liberties. Existentialists would even speak of a non-delegable responsibility to make individual choices. As Sartre phrased it: “L’homme est condamné à être libre.”²⁰

The question is whether the idea of gambling as a matter for public morality is in line with the spirit of the age in Europe. Religious concepts of gambling as sin, vice or otherwise morally reprehensible activity badly fit the image of man in Western societies. Nor does it fit well with the image of the *self-determined economic actor*

¹⁵Samuel Hopkins, pastor of the First Congregational Church, Montpelier, Vermont, The Evils of Gambling, sermon of 19 April 1835, cited in: Thompson, W.N., *Gambling in America: An Encyclopedia of History, Issues, and Society*, Santa Barbara (California): ABC-CLIO Inc., 2001, at 131.

¹⁶Buland, "Die Kultur des Spiels - Einige Aspekte zur Einführung", at 10.

¹⁷Ibid., at 11. Cf. also Schumacher, "„Des Teufels Spiel“ - Glücksspiel in Mittelalter und früher Neuzeit".

¹⁸Zollinger, *Geschichte des Glücksspiels: Vom 17. Jahrhundert bis zum Zweiten Weltkrieg*, at 283. Cf. further for this point Weber, *Die protestantische Ethik und der Geist des Kapitalismus, Archiv für Sozialwissenschaft und Sozialpolitik*.

¹⁹Potenza, "Gambling and Morality: A Neuropsychiatric Perspective", at 176 and the therein cited literature.

²⁰Sartre, J.-P., *L’existentialisme est un humanisme*, Paris: Nagel, 1946.

that the Court of Justice created in *Van Gend & Loos*²¹ and subsequent judgments of constitutional dimension. This consumer makes choices, enjoys rights and enforces them himself.²² Moreover, the reliance on religious and moral grounds in relation to gambling may be resisted by the European self-perception of a secular statehood based on constitutional patriotism.²³ When confronted with immigration, Europe likes to underline that its demands towards immigrants are not based on Christian claims but based solely on the constitutional order. It would appear that the Union legislator did not feel comfortable relying on the Christian heritage; instead, it chose to emphasise secular '*universal values*' both in the TEU²⁴ and in the Charter.²⁵

Nowadays, the aforementioned considerations make it hard to argue that gambling and the addiction to the game are still substantially a matter to be assessed from a public morality perspective. Nevertheless, there are legitimate concerns surrounding gambling. It may for instance be seen as immoral to draw financial profit from a consumer who suffers from a mental health condition, namely the addiction to gambling. Corporate social responsibility issues have received increasing awareness in recent times.²⁶ Yet, this kind of moral concern has a whole different quality than the initially described moral condemnation of gambling as such. The following model serves to illustrate this point.

Cases involving questions of morality essentially fall in *two categories*.²⁷ In the first category, the moral concerns regard the activity *as such*. These are 'core cases' of morality. In the second category, the moral concerns relate to the *detrimental consequences* that the activity potentially involves.

In the first category, the *activity itself* is seen as *immoral*. According to the value judgments of a society, certain behaviour is seen as morally reprehensible. As these

²¹C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR English special edition I, at II, B, 4th para.:

"The conclusion to be drawn from this is that the Community constitutes a new legal order of international law [...] and the subjects of which comprise not only Member States but also their nationals. [...] Community law therefore is also intended to confer upon them rights which become part of their legal heritage."

²²Cf. hereto the principle of direct effect as enshrined in *ibid.*, at II, B, 4th para.

²³For the concept of 'Verfassungspatriotismus', cf. Sternberger, D., *Verfassungspatriotismus*, Frankfurt a. M.: Insel, 1990.

²⁴TEU, Preamble, 3rd para.: "DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law."

²⁵Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, Preamble, 2nd para.:

"Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."

²⁶Gasser, U., "Responsibility for Human Rights Violations, Acts or Omissions, within the 'Sphere of Influence' of Companies" in *Human Rights, Corporate Complicity and Disinvestment*, edited by Nystuen, G., Follesda, A., and Mestad, O., Cambridge: Cambridge University Press, 2011, p. 107-131.

²⁷The next couple of paragraphs profited from a discussion with Prof. Mathias Kumm of New York University.

are clearly questions of morality, the respective answers may vary depending on influences of *geography, religion, culture and time*.

An example for this first category could be observed in the facts of the *Omega* case.²⁸ For good reasons, the Court of Justice considered that the German Basic Law was seeking to guarantee human dignity by prohibiting ‘playing at killing’ as a leisure activity. German society could find it morally reprehensible to run games that involve the “simulation of acts of violence against persons, in particular the representation of acts of homicide.”²⁹ An aspect that is often neglected in relation to the principle of proportionality in this decision is that the domestic authorities limited their prohibition to the ‘play at killing’ game, while all other games of the gaming hall remained permissible.³⁰

Likewise, a society may on the whole disapprove of nudity in public. It may find it reprehensible to walk around naked in town: the freedom of the individual to walk around naked ends where many others see such behaviour as reprehensible. In another geographical or cultural context, for instance a separate beach zone or in certain tribes, this may be seen differently.

Another example of this first category of inherently immoral activities is the prohibition of the import of pornographic products, such as explicit magazines, to say Saudi Arabia or Malaysia. An international legal order has an interest in respecting such kind of value judgments as it otherwise takes a big risk of hampering its acceptance.

By contrast, in the case of issues falling in the second category, the moral disapproval is not aimed at the activity as such, but at the *detrimental consequences* that the activity potentially involves. These are not core cases of morality. They regard issues in relation to which society wishes to eliminate or reduce the detrimental consequences associated with the activity. Gambling activities fall in this latter category. Considering the aforementioned image of man, it is hard to argue that games of chance *as such* are immoral or an activity that is morally reprehensible. *Yet, moral concerns may relate to the detrimental side-effects of gambling*: it is seen as immoral if a gambling operator uses an information bias for fraudulent practices on consumers; it is seen as immoral if an operator abuses the mental health condition of a person for its enrichment.

There is an essential qualitative difference between the two categories. The first category is necessarily dominated by *subjective* moral views. It is hard to imagine that science could play a significant role here - if any at all. Whether the majority view of a society finds it reprehensible to offer games in which people play at killing is primarily a moral question. By contrast, the second category does not in principle reject the activity as such but it recognises that there are *risks*. The important difference is that

²⁸C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609.

²⁹Ibid., para. 39.

³⁰Ibid., para. 39.

'risks' refer to observable 'facts'. And where facts can be observed, they can be scientifically studied. Gambling-related risks can therefore be assessed. They can be measured by epidemiological studies; regulatory interventions like prevention programmes can be evaluated.

These thoughts confirm that there are occasions when moral considerations can legitimately find their place in parliament and court rooms. For issues that do not constitute core cases of morality but touch upon the 'immorality' of detrimental side effects of the activity, science should be the appropriate advisor to regulators and other decision-makers.

Moral views on gambling and on other areas of risk regulation hold the potential to function as *barriers to an objective evidence-informed assessment*. Such perspective on gambling regularly 'colours' the gathering or interpretation of facts which in turn hampers an objective assessment of gambling-related risks. The question in this context is: Do the facts still shape the opinion or does the opinion shape the facts?

Collins described well how moral views on addiction issues *jeopardise a sound health policy*. A possible consequence of a moral perspective is that the person with a mental health condition, namely addiction, is treated inhumanly. He is not perceived as a person suffering from a disorder recognised in the medical literature. In the case of illicit substances, he is persecuted by the criminal justice system. If the addiction relates to licit products, his behaviour may not qualify as a criminal act. But from a religious and moral perspective, his behaviour may constitute a moral failure.

Another expression of a moral perspective is seemingly less dramatic. It nevertheless has far-reaching consequences for the regulation of health risks. Inaccurate perceptions of addiction issues are very common, even among decision-takers. Genuine public health problems are confused with moral issues regarding the limits of our liberal tolerance. Is it tolerable that drug addicts frequent public places? Public debates, often inflated by disproportionate media attention, on the limits of liberal tolerance lead at irregular intervals to the call for 'public order'.³¹

Collins noted that public policy towards addiction is regularly corrupted by covert ideological agendas inspired by puritanical moral views which can be joined by covert commercial protectionism. According to Collins, this leads to dishonest or simply incompetent state-sponsored bad research, serving to uphold prohibitionist public health policies. He argued that this type of sponsored research has, ironically, particularly grave consequences in democracies, given that these political systems are essentially based on governments driven by public opinion. The dissemination of suitable research findings combined with a puritan information agenda makes it

³¹For the two previous paragraphs, cf. the introductory remarks on the article by Collins in: Ross, D., and Kincaid, H., "Introduction: What Is Addiction?" in *What Is Addiction?*, edited by Ross, D., and Kincaid, H., Cambridge (Massachusetts): MIT Press, 2010, p. vii-xl, at ix. Cf. also Collins, P., *Gambling and the Public Interest*, Westport (Connecticut): Praeger Publishers, 2003. Professor Collins is the executive director of the National Responsible Gambling Programme in South Africa.

extremely hard to achieve a *rational and humane discussion on addiction policy*.³² As a result, there is a risk that addiction problems are dramatised and reduced to a seemingly easily identifiable cause. The call for ‘public order’ is the call to eliminate that cause. Yet, research on gambling addiction shows that these issues are complex as manifold factors interact in the process of developing addictive behavioural patterns.³³ In a ‘*value-loaded*’ atmosphere, a scientific perspective has a terribly hard stance.

As opposed to speeches calling for public order and the protection of morality, scientific research may appear as rather dry and certainly unemotional to the greater public. The strength of science lies precisely in this dryness. As Ross and Kincaid described:

“Scientific knowledge tends to undermine dramatic purity.”³⁴

The problem with risk regulation that is informed by moral views rather than empirical evidence is that it systematically fails to adequately address the concrete problems. As Ross and Kincaid noted, it took only statistically careful prevalence studies to show that the overwhelming majority of addicts eventually break their disordered behaviour without ever seeking clinical assistance - let alone angelic salvation.³⁵ These findings also demystified the primary role of institutionalised treatment and shifted the focus to *public education*.

Another example of a morality-informed policy could be found in a gambling case before the EFTA Court. It was noted that there are legitimate reasons to believe that it is immoral of operators to take financial advantage of a health condition from which a gambling consumer suffers. But there is an important qualitative difference in the following statement pleaded before the EFTA Court:

“The Defendants argue that [...] there is the moral imperative that private persons should not profit from the misfortune of others.”³⁶

The core idea is legitimate: one should not make a financial profit from the misfortune, such as the mental health condition of a gambling addict. However, this statement was used to justify the existence of a state monopoly. It would therefore appear that while it is morally inappropriate for private persons to profit from the misfortune of others, *e contrario*, it is acceptable for public authorities to do so.

In the jurisprudence of the Court of Justice, the *financial side of gambling is closely linked to the moral argument on gambling*. This can be seen in the criterion of ‘private profit from a social evil’ or in the requirement that gambling revenues could only be of

³²Collins, P., "Defining Addiction and Identifying the Public Interest in Liberal Democracies" in *What is Addiction?*, edited by Ross, D., Kincaid, H., Spurrett, D., *et al.*, Cambridge (Massachusetts): MIT Press, 2010, p. 410-433, at 411.

³³Cf. III. 5. a.

³⁴Ross, and Kincaid, "Introduction: What Is Addiction?", at vii.

³⁵*Ibid.*, at vii.

³⁶E-3/06 *Ladbrokes Ltd. v the Government of Norway, Ministry of Culture and Church Affairs and the Government of Norway, Ministry of Agriculture and Food* [2007] EFTA Court Report 86, para. 49.

‘incidental beneficial consequence’ but not the actual objective.³⁷ From a consumer protection perspective, it is questionable whether these are well-suited criteria. There is nothing wrong that gambling provides public authorities with revenue, directly or indirectly, by public operators, charities or by taxing private operators. The opposite may be true. If some of these earnings are *ear-marked for health programmes* relating to research, prevention and treatment of gambling addiction or general health issues, addiction-related harm may, ironically, be reduced by the use of these financial means. The starting point of responsible gambling policies is the acknowledgment by both public authorities and the industry of their obvious financial interests and that each assume their responsibility when permitting and offering an activity that is proven to involve health and other risks.³⁸

Furthermore, from the perspective of the gambling addict, the allocation of the gambling proceeds to ‘good causes’ such as sports or culture does not make a difference. What really matters for this person’s health is that a *sound risk regulation* is in place. The diagnostic criteria for ‘gambling addiction’ do not distinguish whether the addict gambles with operators whose proceeds go towards charitable causes or simply towards private profit.³⁹

It must be noted that the scientific perspective also contains a philosophical dimension as there is a profoundly *humanistic* aspect to it. It places the individual at the centre of reflection.⁴⁰ It does not take a judgmental approach. Gambling regulation that is truly informed by a scientific approach *aims at empowering the gambling addict*. Since many addicts express deviant social behaviour and subsequently suffer from self-loathing, the humanistic element consists in supporting them to *regain their dignity*. Emotional suffering is regularly at the beginning of the development of addictive behavioural patterns.⁴¹

From a moral perspective, engaging in drug addiction can be seen as a failure of character. What makes it worse for people suffering from gambling addiction is the fact that there is *no psychoactive substance that could be blamed* (in addition to the ‘weak character’) for the addict’s behaviour. This further encourages some people to adopt a judgmental moral stance towards gambling addicts. It is regularly neglected

³⁷C-447/08 and C-448/08 (Joined Cases) Criminal Proceedings against Otto Sjöberg (C-447/08) and Anders Gerdin (C-448/08) [2010] ECR I-6921, para. 43; C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289, para. 36.

³⁸Concurring with similar wording: Bogart, *Permit but Discourage - Regulating Excessive Consumption*, at 355 *i.f.*

³⁹Cf. III. 5. a.; cf. also post-field trial version of DSM-5 at: American Psychiatric Association, "DSM-5 Development - DSM-5: The Future of Psychiatric Diagnosis", available at: <http://www.dsm5.org/Pages/Default.aspx>.

⁴⁰Note in this context that the humanistic principle of placing the human being at the centre of reflection is prominently referred to in the Charter of Fundamental Rights of the European Union, OJ C 303, 14.12.2007, Preamble, at 2nd para.: “[The Union] places the individual at the heart of its activities.”

⁴¹Cf. III. 5. a. For a publication convincingly making this point, cf. Khantzian, E.J., and Albanese, M.J., *Understanding Addiction as Self Medication: Finding Hope behind The Pain*, Rowman & Littlefield Pub Inc., 2008.

that disordered behaviours are an *expression of deeper problems*, of an emotional suffering of the person concerned.⁴² Gambling addicts are not an exception.⁴³

⁴²Cf. III. 5. a. For a publication convincingly making this point, cf. Ibid.

⁴³This paragraph profited from a discussion with Dr. Richard LaBrie of Harvard Medical School.