Dynamism and deliberativeness in the interpretation of law on the example of cases concerning LGBTQ rights[1]

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ABSTRACT

The article illustrates the numerous contexts and multifaceted nature of the right to citizenship, to have a correct civil status record, or to benefit from tax reductions or exemptions on the same basis as other citizens, e.g. those in heterosexual unions. It shows how complicated it has become to adjudicate on matters that, in view of the subject matter, should be relatively clear and predictable. Reflexive interpretation of law makes it possible to take into account its non-eliminable changeability, as well as the fluidity of the meaning of terms and phrases used in legal texts – factors which oblige the interpreter to refer to extra-linguistic contexts of interpretation, i.e. to functional and systemic arguments. The author considers that it is not possible to reach an adequate understanding of the current legal context without analysing the social and cultural context, especially when considering pluralism of values as the *modus vivendi* of a democratic society.

KEYWORDS:

deliberativeness, LGBTQ, fundamental rights, identity, hard cases, interpretation of law

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1. Introduction

I would like to begin my reflections on the topic indicated in the title with the straightforward assertion that the development of modern society has led to the boundaries of social life becoming significantly widened. This fact clearly influences the way law should be interpreted, particularly in cases where it is necessary to move away from the traditional or even modern views of social processes and the legal institutions related to them (such as the family, marriage, gender). Such difficult cases require adopting a position of reflexive modernity and the application of deliberative thinking in the resolution of social disputes, including legal ones. Here deliberativeness denotes the necessity to think carefully, to consider, to deliberate, or even to debate the understanding of a given legal concept, phrase, or legal institution, and consequently to take a sophisticated and multifaceted decision when applying the law. Thus, in terms of meaning, the deliberative application of law reaches back to its classical, ancient roots, i.e. the *dia-logos* taking place in the Athenian Agora (Juchacz 2006; 2015, 101). Such a stance requires an in-depth reformulation of existing and sometimes ossified meanings. This necessarily entails taking into account changing social and cultural contexts, including the implications of diverse pluralisms and multiculturalism. The sensitivity indicated as necessary here is obviously one that rules out hiding behind a positivist vision of law; on the contrary, when dealing with difficult cases a necessary link between law and morality becomes absolutely indispensable (Cern & Wojciechowski 2011).

2. The modern identity crisis

There is now a widespread conviction that modernity has undermined the importance of community: the reference group that had always provided the individual with a stable framework for action and a sense of belonging. This has given rise to the view that it is no longer possible to form group identities. A more far-reaching view has also come to be articulated, namely that the individual has become isolated and excluded from the nucleus of community life. This phenomenon now concerns not only outsiders, who

have always been alienated, by definition, but also those who, for various reasons, do not fit within the broadly accepted definition of 'normality'.

At first glance, it seems that despite the modern or post-modern fascination with the atomistic vision of the individual, with their powerful agency and unique beauty, the mainstays of community nonetheless endured – in such institutions as the family, marriage, religious community, neighbourhood and social stratum – and continued to perform integrative social functions. The role of these institutions was manifested primarily in the fact that they provided the individual with a much-needed sense of security and stability in societies undergoing incessant transformation.

The reflexive stage of modernisation has exacerbated this situation by asserting that community or authentic social bonds have not disappeared, but have rather taken the form of difficult, conflicting coexistences between the individual, the community and society. A tension has emerged between, on the one hand, the conflicting impulses emanating from social identity and, on the other, the sphere of unique characteristics that make up the singular personality of the individual. A contradiction has arisen: between the external definition of ourselves provided by our environment and the internal desire to know our own nature; or, put another way, between the need to belong to a social group and the need for independence and self-realization.

As a result, identity has become fluid, fragmented and decomposed, a kind of syncretic collection of various elements. Moreover, identity appears to be negotiated, contextualized and dispersed (Foucault 2005, 361). As a result, we are in the midst of an identity crisis, preceded by a crisis of the subject, which is connected to the loss of one's own identity in the circumstances of a changing social reality, the inability to find one's own style of functioning in a community; a disturbed or reduced identification with the values of the community, due to which the subject derives an incoherent self-image. This is the result of the atomization of life, which, according to some authors, means that the only available subject is decentralized, incoherent and incidental, and the difference-based identity of such a subject is the result of discourses, signifying processes and social relations that are particularistic, relativizing and contingent (Fuss 1995, 10).

Post-modern philosophy emphasizes that identity is constructed and articulated through difference and exclusion, rather than being a manifestation of sameness, continuity, recurrence or naturally established

unity (Butler 1993, 22; Hall 1996, 16). Anthony Giddens also emphasizes the voluntaristic and subjective dimension of human action; in this conception subjects independently create the structural framework in which they operate. Giddens assumes that human beings are characterised by a considerable degree of autonomy and reflexive self-awareness (Giddens 2001, 197). In other words, identity is a cultural creation that is chosen ~~rather~~ than acquired.

3. The decisions of the Supreme Administrative Court on LGBT issues

With the above context borne in mind, it is worth noting three categories of cases that have been adjudicated by the Polish Supreme Administrative Court, all of which revolve around problems of identity and identification. These cases concerned the citizenship of children born to and raised by same-sex parents, and the transcription of their birth certificates, when at least one of the parents had Polish citizenship, but their union, which had been concluded abroad, had no legal effect in Poland. The transfer of a foreign birth certificate to the Polish register of civil status, and proceedings concerning the confirmation of Polish citizenship of a child born abroad, with at least one of whose parents having Polish citizenship, are in fact functionally linked matters. The third category concerns tax and legal issues in same-sex unions. In these cases, there is a conflict and/or rivalry between such values as constitutionally protected different-sex marriage (Article 18 of the Constitution of the Republic of Poland), the right of every child to citizenship (Article 24(3) of the International Covenant on Civil and Political Rights), the primacy of the interests of the child (Article 3(1) of the Convention on the Rights of the Child), equality before the law and the prohibition of discrimination (Article 32 of the Constitution of the Republic of Poland), and the absolute exclusivity of the law in the cases listed in Article 217 of the Constitution, i.e. the determination of the structural elements of taxes and other public imposts, i.e. those subject to taxes, the rates of taxation, the principles for granting relief and remissions, and the categories of taxpayers exempt from taxation.

3.1. The transcription of civil status records

The first of the identified problems concerns the refusal to transcribe a child's foreign birth certificate because persons of the same sex are entered as parents (the judgment of 17 December 2014, II OSK 1298/13, Supreme Administrative Court of Poland, 2014)[1]. In the opinion of the administrative courts and administrative authorities examining this case, the provisions of the Family and Guardianship Code precisely regulate issues pertaining to the origin of the child, i.e. they specify that the mother is the woman who gave birth to the child, while the provisions on paternity, regardless of the way it is established, in each case mention a man. Furthermore, Article 18 of the Polish Constitution unequivocally stipulates that only a union between a man and a woman is legally recognised by the State, and only such a union enjoys the protection and care of the Republic of Poland. On these grounds, it was held that the transcription of the birth certificate in question into Polish civil status records would be in conflict with the legal order in force in the Republic of Poland.

The administrative courts of both instances stated that the refusal of transcription does not contradict the regulations of international law and European Union law. Reference was made, in particular, to the position expressed in the judgment of the European Court of Human Rights (ECtHR) of 15 March 2012 in the case of Gas and Dubois v. France, 2012 (application No. 25951/07), concerning the refusal to adjudicate on the simple adoption of the biological child of one of the partners in a registered civil partnership. In that judgment, the Court held that the question of a violation of Article 14 ECHR arises when there is a difference in treatment between persons in comparable situations. Such a difference is discriminatory when it has no objective or reasonable justification. The ECtHR pointed out, however, that the Contracting States enjoy a margin of appreciation in deciding whether and to what extent differences in otherwise analogous situations justify different treatment, including differences in legal treatment. Finally, the Court did not consider that there had been a violation of Article 14, in combination with Article 8, of the Convention.

The Polish Supreme Administrative Court (NSA) also regarded the cassation appeal alleging a violation of Articles 7 and 21(1) of the Charter

[1] The case is pending before the European Court of Human Rights (A.D.-K. and others v. Poland, 2015, application No. 30806/15) based on the allegation of violation of Article 8 and Article 14 of the European Convention on Human Rights.

of Fundamental Rights of the European Union as erroneous and unjustified as to the facts. In the NSA's view, the Provincial Administrative Court's dismissal of the complaint against the decision refusing to enter the birth certificate of the applicants' child in the register of births did not in any way violate the right to respect for their private and family life. The NSA found it indisputable that the subject of the proceedings in the case was neither the applicants' family life, nor their private life, but issues concerning the formal conditions required for a given entry being made in the birth register. As the NSA pointed out, neither the decision of refusal nor the contested judgment of the court of first instance in the justification of its decisions questioned or violated the two abovementioned rights, but they instead highlighted the lack of legal grounds in national law that would have allowed the entry to be made in accordance with the application. According to the NSA, it could not be inferred from the facts of the case that the refusal to enter the child's birth certificate into the birth register was based on discrimination, in particular on grounds of sex or belief, any other opinion or sexual orientation, or on any of the other grounds listed in Article 21(1) of the Charter of Fundamental Rights. The sole reason for the refusal to enter the certificate was the fact that its entry in accordance with the application would be contrary to the law in force in the territory of the Republic of Poland. Moreover, in the case there was no legal possibility to enter in the birth certificate, next to the child's mother, a person of the female sex instead of (or in place of) the child's father.

This legal issue was considered so important that it was considered by an expanded panel of the Supreme Administrative Court. Thus, in a resolution of 2 December 2019, ref. no. II OPS 1/19, a panel of seven judges of the Supreme Administrative Court (2019) ruled that: "The provision of Article 104(5) and Article 107(3) of the Act of 28 November 2014 Law on Civil Status Records (Journal of Laws 2014, item 1741, as amended) in connection with Article 7 of the Act of 4 February 2011 on Private International Law (Journal of Laws of 2015, item 1792) does not allow the transcription of a foreign birth certificate of a child in which persons of the same sex are entered as parents".

The case considered by the Supreme Administrative Court concerned a slightly different factual situation, namely the transcription of a foreign civil status record in which the parents were indicated as being of the same sex, and not bi-sexual parents who remained married. The Court stressed that in the case in question there were no doubts as to the acquisition of Polish

citizenship by the applicant's child or parental rights by the child's mother. It held that it was not the refusal to transcribe the child's birth certificate that could itself give rise to State liability for a violation of the Convention, but rather the effects of this refusal and the absence of protection from the negative consequences of the lack of transcription. Those effects would, however, be assessed in separate, individual proceedings, for example in connection with a possible refusal to issue an identity card. For this reason, the arguments raised by the applicant – asserting that the interests of the child had not been taken into account and that the protection of children's rights under the Convention on the Rights of the Child and the Constitution had been violated – should be taken into account in the event that transcription were refused in those subsequent proceedings. Refusal of transcription on the grounds of infringement of the principles of the Polish legal order is not tantamount to a violation of the constitutional and international obligation of the public authorities to take into account the best interests of the child, since a foreign birth certificate, even without its transcription, is exclusive evidence of the events stated therein and the applicant's child may rely on such a certificate in administrative and judicial proceedings concerning his or her rights.

It is worth noting that the courts in the cases cited consistently avoided cultural or world-view considerations, opting to hide behind formal issues. This observation is important because the decisions were based on statutory, constitutional, international and EU regulations, hence broader, axiological argumentation would obviously have been appropriate. However, the court's deliberations, despite the fact that they concern the good of the child and his or her protection, as well as the public-policy clause, are conducted in a very positivistic manner. There were no arguments that could be described as deliberative, i.e. referring to natural law aspects, considering a pluralistic view of the analysed legal regulations, human dignity, the discriminatory character of the applied regulations – all of which would certainly have changed the meaning of the reconstructed legal norm.

Another example is the judgment Supreme Administrative Court of Poland (2018) of 10 October 2018, ref. no. II OSK 2552/16, in which the appealed judgment of the court of first instance and the preceding decision of the administrative body were repealed. In this case, the direct reason for the refusal of the Polish administrative authorities to transcribe a birth certificate drawn up in the United Kingdom was the fact that both in the section

'mother' and in the section of the certificate described as 'parent' the names of two women had been entered.

The adjudicating panel, without questioning the legitimacy of applying the public-policy clause in general, pointed out that "the concept of public policy as a justification for derogating from the basic act of providing a transcription must be interpreted narrowly, referring in detail to the realities of the case at hand and carefully assessing the real and serious threat to one of society's fundamental interests in the particular case". In doing so, it referred to the established case law of the Court of Justice of the European Union (CJEU): the judgments in Case C-438/14 *Bogendorff von Wolffersdorff*, paragraph 67, and Case C-193/16 E v Subdelegación del Gobierno en Álava, paragraph 18.

One of the more significant arguments that influenced the consideration of the cassation appeal was the amendment and the resulting current regulation of the Law on Civil Status Records (the new Act of 28 November 2014 on the Law on Civil Status Records entered into force on 1 January 2015). As noted by the Supreme Administrative Court, in the amended Law "the legislator has deliberately and consciously introduced the institution of obligatory transcription in order to prevent situations in which a citizen of the Republic of Poland is not issued with documents confirming identity", which may "lead to preventing the realization of rights related to the possession of Polish citizenship acquired, as in the case at hand, by operation of law by a minor (e.g. lack of access to the health care system, education, etc.)". Thus formal considerations were ultimately decisive here too.

3.2. Cross-border problems associated with citizenship

The second category of cases is even more characteristic since it concerns the certification of the citizenship of children whose foreign birth certificates list same-sex parents. In the case in question, the certification of Polish citizenship was refused on the basis of an American birth certificate, with the argument that the certificate did not establish who the parent of the minor M. S.-H was. The minor M., together with his twin brother S., was born on 26 September 2010 in the United States as a result of a surrogacy agreement and the use of genetic material from O. Z. S. In the foreign (American) birth

certificate, O. Z. S. (holding Polish and Israeli citizenship) and D. H. (citizen of Israel) appear as the parents of M. and S[2].

In the view of the adjudicating panel, the decision to refuse recognition of the legal effects stemming from the foreign birth certificate, and thus the refusal to certify Polish citizenship, was based on law, since Polish law understands the term "parents" to mean only a father and mother, i.e. persons of different sexes, and because "surrogate motherhood contracts" were unknown in Polish law, it was not possible to recognize the effects. Under Polish law, the mother is the woman who gave birth to the child, and it is presumed that the father – that is, the second parent – is her husband, if the child was born while the couple were married. The genetic origin of the child is not relevant. The child's biological (though not genetic) mother in this case was K.S.C., married to D.T.C. The recognition of O. Z. S. as the child's father (even if he is indeed the father in genetic terms) would have led to the recognition that the other parent – and therefore the child's mother – is D. H., who is of the male sex, which would have been contrary to Polish law.

The NSA referred to the public-policy clause as being of vital importance on the international level, since it guarantees "the protection of the domestic legal order against infringements thereof by giving effect (recognition) to a decision which does not correspond to the fundamental principles of the legal order", and since the applicant's foreign birth certificate indicates two men as the applicant's parents, and thus recognizes the surrogacy contract, it "contradicts the fundamental principles of the legal order of the Republic of Poland". The above – in the opinion of the panel – therefore prevented the foreign birth certificate of the applicant from having legal effect in the case ref. II OSK 2372/13.

It is worth recalling that a similar issue has already been decided by the European Court of Human Rights, which, in *Mennesson v. France* (application no. 65192/11, in particular § 96 and § 99), in *Labasse v. France* (application no. 65941/11); *Foulon v. France* (application no. 9063/14), and in *Laborie v. France*

[2] The judgment of the Supreme Administrative Court of 6 May 2015 in the case II OSK 2372/13 and of 10 October 2018 in the case II OSK 2552/16, as well as the proceedings before the ECtHR on this issue in the case Schlittner-Hay v. Poland (application nos. 56846/15 and 56849/15, joined for joint consideration). In their application to the ECtHR, the applicants in case nos. 56846/15 and 56849/15 alleged that the refusal to confirm Polish citizenship violated the children's right to respect for private and family life (Article 8 ECHR) and the prohibition of discrimination due to discrimination on the basis of sexual orientation (Article 14 ECHR).

(application no. 44024/13), held that the uncertain situation of children born to a surrogate mother regarding the recognition of their nationality, in this case French, was likely to have negative repercussions on their personal identity and thus constituted a violation of their right to respect for private life. In *Mennesson*, the Court held that the refusal to recognize the legal parent-child bond (which also affected the child's nationality) was incompatible with the principle of the best interests of the child, derived from Article 3(1) of the Convention on the Rights of the Child, and also constituted an overstepping of the limits of the margin of appreciation granted to States Parties in relation to Article 8 of the same Convention. The cited line of the ECtHR's case law concerned the legal relationship between a child born to a surrogate mother and the biological father.

Furthermore, in the first Advisory Opinion issued on 10 April 2019 on the basis of Protocol XVI to the Convention (which entered into force on 1 August 2018), the Court returned to the case of the *Mennesson* family, in which two children – born in California to a surrogate mother as a result of the fusion of gametes of the biological father (Mr. Mennesson) and an anonymous donor – were denied recognition of a legal parent-child relationship in relation to both the biological father and his wife, Ms. Menneson, the intended mother, who nevertheless had no genetic link to the children. In the case of Mennesson v France (2014), the Court found there had been a violation of the children's right to respect for their private life, and emphasized that biological parenthood (in this case paternity) is a component of an individual's identity. As a result of this judgment, paternity was recognized and national law was amended, but did not regulate the possibility of entering on the birth certificate the data of a child born abroad to a surrogate mother, to the extent that the foreign birth certificate identifies the child's 'intended mother' as the legal mother. The only way provided by national law for the 'intended mother' to establish a legal mother-child relationship is the possibility for her spouse (the biological father) to adopt the child.

In its advisory opinion, the ECtHR stated that, in the light of Article 8 of the Convention on the Rights of the Child, national law must provide for the possibility of legal recognition of the relationship between a child born of a surrogate mother and a woman entered on a foreign birth certificate as the mother. However, that recognition need not consist in registering the woman as the child's mother in the civil-status records. The State may provide for other legal measures to that end – such as, for example, allowing the woman to adopt the child – provided that those measures are effective, expeditious

and carried out in accordance with the best interests of the child. The Court reiterated that in matters concerning children the principle of the best interests of the child must always be applied. The refusal by a State to recognize a relationship between a child born of a surrogate mother and a woman entered on a foreign birth certificate as his or her mother adversely affects the child's rights. The child may be deprived of his or her sense of identity, of the right to acquire the mother's nationality, to inherit from her, to maintain contact with her after a possible divorce from the child's father, and may face difficulties in obtaining a right of residence in the mother's country of residence. National law should therefore provide for other legal forms of recognition of the relationship between the child and the intended mother. It does not matter whether the child was conceived using her ova, although if that is the case, the need for formal recognition of the parent-child relationship is even clearer.

As in the first category of cases, the Polish Supreme Administrative Court's rulings in similar cases lack any axiological analysis that tackles issues associated with the pluralism of values or pluralism of worldviews. The considerations boil down to a recapitulation of the existing legal situation and reference to the cases in question, without any attempt at an actual reconstruction (contextualization) of the idea behind the public-policy clause or the fundamental principles of the legal order. And yet, as John Gray puts it: "There is a foundation of universal values, but paradoxically it is not fixed once and for all" (Gray & Wildstein 2000, 171).

3.3 The consequences of a same-sex relationship in the tax and legal sphere

The third category of cases concerns the refusal to write off a tax arrears due to the acquisition of an inheritance from the applicant's deceased partner (the judgment of 5 September 2018, II FSK 2426/16)[3]. The applicant and his

[3] The case is the subject of a complaint filed to the European Court of Human Rights, Meszkes v. Poland (application no. 11560/19). There are also other proceedings pending before the Court in the similar case of Formela and Others v. Poland (application no. 58828/12 and 3 other applications), brought by two Polish nationals married in the United Kingdom, concerning matters of civil rights, tax law and social security, inter alia, the issues of determining the amount of donation tax from the person with whom the recipient is in a civil partnership, and determining the amount of income tax from individuals who are in a civil partnership.

partner concluded an agreement in the form of a notarial deed establishing them as each other's heirs in the event of one of their deaths. After the death of his partner, the applicant applied to the Head of the Tax Office for remission of the tax arrears in inheritance and donation tax, but this was refused. The Court noted that "the reasoning presented in the grounds of the cassation appeal refers not to the interpretation or manner of application of Article 67a § 1 of the Tax Ordinance Act (the TOA) of 29 August 1997 (i.e. Journal of Laws of 2015, item 613, as amended, hereinafter: the TOA), but in essence boils down to the allegation of the discriminatory nature of the tax exemption regulated in Article 4a(1) of the Act of 28 July 1983 on inheritance and donation tax (Journal of Laws of 2018, item 644). The issue of the basis of statutory tax falls beyond the scope of the present case. However, contrary to the position of the author of the cassation appeal, the institution of reliefs in repayment of tax liabilities cannot be used to undermine the legitimacy of tax assessment or to question the statutory scope of taxation. Its sole purpose is the possibility of waiving tax collection in situations justified by 'important interests of the taxpayer' or 'the public interest'". In consequence, the NSA stated that the refusal to grant the requested relief to the taxpayer under Article 67a § 1 of the Tax Ordinance should be regarded as lawful.

Here, the position adopted by the SAC is strictly based on legal doctrine. In effect, the court avoided the problem of discrimination that lies at the heart of the case, yet the principle of non-discrimination is one of the general principles of EU law and was an important substantive element in the case[4]. The fundamental issue at stake is the equal treatment of heterosexual and homosexual couples in the field of tax law, and this was clearly the basic point of the case in question. Of course, it required in-depth analysis, for example involving a comparison of the situations of heterosexual cohabiting persons and those in same-sex unions, or consideration of what was behind the introduction of a particular tax exemption or allowance.

[4] Cf. the judgment of the Court of Justice of the European Union of 19 January 2010 in the case C-555/07 Seda Kücükdeveci v. Swedex GmbH&Co. KG. The philosophical and legal consequences of this judgment are discussed in Cern and Wojciechowski (2013).

4. Deliberativeness as a requirement of dynamic legal interpretation

The above presentation of jurisprudence reveals several extremely important issues. Firstly, it is impossible to interpret certain concepts correctly without knowledge of the case law, not only of national courts (in particular, the Supreme Administrative Court), but also of European courts. The case law cited above illustrates the numerous contexts and multifaceted nature of the analysed institutions that are fundamental from the point of view of civil rights, such as the right to citizenship, to have a correct civil status record, or to benefit from tax reductions or exemptions on the same basis as other citizens, e.g. those in heterosexual unions. It shows how complicated it has become to adjudicate on matters that, in view of the subject matter, should be relatively clear and predictable. It is not my intention to evaluate the presented case law, but only to point out that an opportunistic attitude based on hiding behind formal or legalistic considerations, or the superficial weighing of various values and conflicting goods, is simply untenable.

The point of departure must be the derivational theory of interpretation[5], in which the decoding of a legal norm implies a never-ending process of updating and contextualizing, linked to sensitivity and reflexive thought on the part of the interpreter (in particular the person applying the law). Reflexive interpretation of law makes it possible to take into account its non-eliminable changeability, as well as the fluidity of the meaning of terms and phrases used in legal texts – factors which oblige the interpreter to refer to extra-linguistic contexts of interpretation, i.e. to functional and systemic arguments[6].

This postulate becomes extremely important when interpreting cases such as those referred to above, since it is not possible to reach an adequate understanding of the current legal context without analysing the social and

[5] For more on the assumptions behind this concept see, inter alia, Zieliński (2006, 95 ff).; Choduń and Zieliński (2009, 86 ff.).; Choduń (2018, 95–141).

[6] Jabłoński, Kaczmarek (2020, 59 ff.). In this context, the authors aptly note that two features are important for reflexivity thus understood: self-awareness of the jurist and interpretative practice, and self-reflexivity perceived as the ability to revise assumed reasons and problematize the recommended course of action. They also assert that "the quality of legal interpretation depends not only on the attitude of the jurist, but also on the interpretive culture that recommends a particular course of action".

cultural context, especially when considering pluralism of values as the *modus vivendi* of a democratic society. In this vein, John Gray, in particular, argues that the current task of contemporary social and political thought is to remodel liberal tolerance so that it allows a *modus vivendi* to be found in a more diverse world. In his view, this *modus vivendi* resembles the concept of justice as impartiality, because no system that seeks to impose a single point of view on society can count on legitimacy under pluralism. In contrast to John Rawls, however, he notes that the problem of justice cannot be separated from the collision of values resulting from the diversity of lifestyles. Referring to Thomas Hobbes, Gray argues that competition between primary goods in social life is endemic and consequently challenges Rawls's thesis that primary goods do not come into conflict with each other (Gray 2001, 213).

The author of *After Liberalism* refers to two liberal traditions in this regard. Thus, on the one hand, liberal tolerance is seen as an ideal – the best consensus on the best way to live, while on the other hand, in the context of multiculturalism and the pluralism of values, today there is a widespread conviction that people can achieve self-fulfilment in many different ways (Gray 2001, 1)[7]. Gray is convinced that contemporary liberalism should aspire to seek out conditions that allow for the coexistence of different ways of life. This conclusion is based on his interpretation of Hobbes's thought, according to which tolerance is not intended to achieve consensus, but rather to ensure peace, and therefore its fundamental purpose is to facilitate coexistence. This is combined with a defence of cultural pluralism, expressed in the right to choose one's culture autonomously. The right to belong to a culture of one's own choice corresponds to the liberal principle that the individual identity of subjects can only develop if they participate in a cultural group to which they have decided to belong, and which therefore represents their own values and forms of life (Honneth 2000, 323).

Aspects of cultural, philosophical, religious or sexual pluralism influence our deliberative or reflexive interpretation of the law. This is also manifested in the need to take into account the category of facticity in the process of interpretation (Cern & Wojciechowski, 2011, 191). In *Being and Time*, Martin Heidegger modified the notion of sensuality in such a way that, to

[7] Gray (2001, 1 ff.). He points out that the representatives of the first concept, i.e. searching for an ideal form of life, are John Locke, Immanuel Kant, John Rawls and Friedrich A. Hayek, while the second, an expression of peaceful coexistence, are Thomas Hobbes, David Hume, Isaiah Berlin and Michael Oakeshott.

this day, it still plays an important role in various fields of philosophical consideration, including social ones. Heidegger drew on Wilhelm Dilthey's research demonstrating the methodological peculiarity of the humanities (*Geisteswissenschaften*) and gave the notion of sensuality a broader meaning: while the natural sciences employ the category of explanation in their methodology, the fundamental category for the humanities is the category of understanding (which in Dilthey's case has clear psychological provenance). Thus, in Heidegger's conception, facticity started to mean not only the appearance of something at a certain time and in a certain space, but it also indicated accidentality, contingency – in the medieval connotation: the non-necessity of certain phenomena (including human existence, the formation of such and not other social or political institutions, etc.). Facticity became a constitutive definition of the human being's existing in the world and interpreting it from a certain historical-cultural-social perspective.

Understanding, being the essence of interpretation, requires constantly starting over, making an effort to determine even that which seemed obvious. This is also due to the temporality and historicity of meanings, which are transmitted between generations and reinterpreted in new conditions of life. Michel Foucault notes that "historicism always implies a certain philosophy, or at least certain methodology, of living comprehension (in the element of the Lebenswelt), of interhuman communication (against a background of social structures), and of hermeneutics (as the re-apprehension through the manifest meaning of the discourse of another meaning at once secondary and primary, that is, more hidden but also more fundamental)" (Foucault 2005, 407). In this way, states of affairs ('positivities') that were differently shaped by history can nonetheless interact with each other, and their modes of cognition can overlap, thus making it possible for their contents to be interpreted.

After all, that is why legal texts that were introduced hundreds of years ago still manage to retain their binding status. Such documents would be useless if we treated them as having some objective, direct meaning forever given in advance, since that would merely be the meaning ascribed to them by a particular generation of jurists, although of course the importance of historicism cannot be denied. Historicism partly reveals what lay behind a given positivity (e.g. the intention of the legislator), and thus finitude is possible to grasp, if historicism sought "the possibility and justification of concrete relations between limited totalities, whose mode of being was predetermined by life, or by social forms, or by the significations of language" (Foucault

2005, 407). Otherwise, it would be impossible to explain the historicity of law, the development of legal texts, and the chain of interpretation. Only a creative, social understanding of language explains this phenomenon.

This philosophy of understanding and interpreting law undermines the objectivity of interpretation, rejects the myth of law as an objective and external objectivity, as well as the myth of the lawyer as a subject who cognizes law from an external position, and who lacks the ability to influence the normative dimension of culture (Stelmach 1995, 69). Hermeneutics asserts that law is constituted in the act of understanding; it does not exist before interpretation, because it is only in the process of interpretation and reaching a legal decision that law is realized. The metaphor of the hermeneutic circle leads to the thesis that there is no beginning of the determination of meanings, no starting point, and thus, as a result, each fragment of the text makes sense only if it is referred to the whole situation and culture, the moment of history in which it is read. Hermeneutics does not turn the text into a fetish – it is only a starting point, a canvas for dialogue, even if it is linguistically clear.

It therefore seems reasonable to conclude that giving consideration to the individual's sense of identity should be an inherent element in the process of interpreting law. Of course, another problem arises at this juncture, when we recognize that modernity is characterized by a constant preoccupation with the state of one's own psyche, the monitoring of interpersonal relations and emotions, the search for and crystallization of identity, the striving for self-discovery, accompanied by disorganizing processes which testify to a change in the nature – or even the disappearance – of earlier, traditional forms of social or community life. We are faced with a clash of different lifestyles, languages, traditions, religions and discourses, with transformations of the division of labour, demographic fluctuations, economic and ecological disasters, and pandemics. This causes a sense of crisis of one's own identity, defensive reactions leading to the fragmentation, decomposition and disappearance of the social sphere, and a simultaneous glorification of mass culture and social media, as new means, forms and aims of self-definition and identification.

In this context, attention is sometimes drawn to the compensatory and adaptive character of the tendency to privatise life, growing investment in intimate relations, and the defeatist withdrawal from public life[8]. Here the

[8] Strzyczkowski (2012, 9). This author points out that we are faced with the considerable popularity of various concepts emphasizing the motives of narcissism, hedonism or self-realization in the contem-

views of Richard Sennett are particularly representative: he argues that contemporary narcissism entails preoccupation with one's own identity to the extent that it abolishes the boundary between the subject and the external world, and social reality is only treated as meaningful insofar as it contributes to one's own needs and aspirations.

In the process of applying law, a clash becomes apparent, making it necessary to balance certain reasons and goods, which are sometimes conflicting. The psychologization of life has in fact led to the creation of an intimate society in which "behavior and issues which are impersonal do not arouse much passion; the behavior and the issues begin to arouse passion when people treat them, falsely, as though they were matters of personality" (Sennett 2002, 6). Consequently, narcissism, as a kind of social fashion, is responsible for rendering interpersonal relations shallow. It leads to a distortion of sensitivity, which makes it difficult to know oneself or the Other. Sometimes cognition is simply impossible, namely when autonomy or independence come into play. Today, revealing one's personal business – such as sexual orientation, past experiences, religious views, family histories – is not a sign of courage, is not an act of overcoming trauma; it has to be viewed instead as being in full conformity with the confessional society and the culture of individualism. The question arises as to whether this kind of behaviour or public display deserves legal protection. Sennett speaks of an erosion of external reality in which social life breaks down into individual, intimate perceptions of the world. He is convinced that individuals are thereby deprived of full-fledged social relations.

When adjudicating on cases such as those cited above, one cannot avoid analysing and weighing up the phenomena, problems and values identified. For here we are dealing with a peculiar antinomy, since on the one hand a judgment should take into account the pluralism of values and *modus vivendi*[9], and, on the other hand, it should protect the values of the community and limit the atomistic character of liberal concepts, which are grounded in the conviction that the subject – as an individual, autonomous and rational being – precedes ontological social relations, or can even ignore them. Such a balanced approach is not possible without adopting the deliberative decision-making process characteristic of the dynamic, derivational model of legal interpretation.

porary model of personality. See also Giddens (2001, 226–232).

[9] It is important to bear his criticism in mind. Cf. Polanowska-Sykulska (2008; 2017, 162 ff).

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