

The Role of Democratic Thinking in Shaping of Legal Awareness and Legal Recognition

(Normativity versus Diversity)

(key words: constitutional consciousness/awareness, human and fundamental rights, court's role in HR protection, pluralism of lifestyles, recognition issue)

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part I (general)



Introduction

- ▶ I dare to start with quotation out of the **conference description**:

„Pluralization and diversification of normativity is a **sign of modernity** (...) the process of complication and differentiation of modern normativity also manifests itself in the **multiplicity of sources of law** and their multi-layered nature; in the variety of concepts of the *Rechtsstaat* and the *Rule of Law* and, finally, in the multi-level emergence and legitimisation of common public institutions. In these processes, cultural, ethnic, confessional, etc. **diversity tries to voice and affirm herself, to be recognized** and involved.”

Introduction

► As stated in [abstract](#) –

presentation conceptualises democracy as an institution anchored in a **cooperative social consciousness**, and thus as an ideal of free and open cooperative association between individuals who are afforded **rights of equal consideration and respect**. This is based on the assumption that by publicly affirming basic freedoms, citizens in a well-governed society express **mutual respect towards each other**, as reasonable and trustworthy individuals, and **recognise the value that all** citizens place on their own way of life. The institution capable of fostering such affirmation and recognition is **discursively agreed law**, based on the consensus of all co-operating citizens and guided by Habermas' "**constitutional patriotism**", which expresses the solidarity of citizens. Although "constitutional patriotism" underpins the validity of liberal democracy, it must also promote maximum goodwill towards difference, thus ensuring the most tolerant and flexible political system possible.

Introduction

In the light of ...

- the **application of law and interpretation level**
- the role of *potestas iudicandi*

[Potestas iudicandi may be (and is), to some extent, a response for needs of dynamic modern societies as well as a main actor for “**balancing values and principles**” – with certain limitations, however]



(Legal challenges and issues arising from pluralistic and multinormative world:

- minorities (all kinds)
- cross-identity issues
- migrations and multikulti
- AI and human/cyber teams (or hybrids...?)
- new legal entities → juridical persons
- ...

(Legal) philosophy :

- ▶ **dialogue** and the conception of **discourse** ethics derived from **Habermas** (*that can only be proceeded in the situation of idealized conversation characterized by **fair and equal treatment of all participants***), which resembles **Kantian ethics**, but relies on the dialogue paradigm rather than on monologues and assumes **solidarity** between the speaker and the listener (and *vice versa*)
- ▶ also **Alexy** deals with **dialectical argumentation**, to be viewed as a special case of moral argumentation. **Building upon Habermas' theory of discourse, Alexy defined an abstract dialectical protocol** – a set of rules governing the interaction of the participants in a dialogue – for carrying out moral discourse, and then identified what specific additions and refinements to such rules are required for dealing with legal issues.
- ▶ than we also have **Honneth**, with his theory that describes humans as beings that constantly seek recognition. In his **theory of recognition**, he argues that recognition is necessary for how we humans maintain a good relationship with ourselves, and for how we develop our **identity**. To achieve recognition, someone needs to do the actual recognising by others.



(Legal) **philosophy** :

- **Rawls'** justice and his concept of „the **Original Position behind a Veil of Ignorance**”. Behind this veil, you know nothing of yourself and your natural abilities, or your position in society. You know nothing of your sex, race, nationality, or individual tastes. Assumption, that **people choosing their principles from behind a “veil of ignorance,” without knowing their places in the social order and veil-of-ignorance reasoning leads to choices that favor the greater good in „social contract”**.
- **Fukuyama**: “Who am I, really?” The search for an answer produces feelings of *alienation and anxiety* and can only be relieved when one accepts that inner self and receives **public recognition** for it”.



(Legal) **philosophy** :

VARIETY OF ISSUES (to discuss)

- ▶ participation
- ▶ fairness as the essence of justice
- ▶ common grounds and constitutional patriotism
- ▶ legal consciousness (awareness)
- ▶ legal recognition
- ▶ ...



part II (case-law illustrations)



Normativity vs. Diveristy

- **Open borders and migrations, pluralism of lifestyles**, or the **development of information and medical technologies**, are reflected in the legal relations regulated by **various branches of law**, including in the norms governing matters falling within the **cognition of administrative courts – and also in legal practice**
- In particular, the **development of medicine**, medical techniques of assisted reproduction may **affect the shape of the modern family** through the appearance of children of same-sex couples (including male), and thus constitute a source of **challenges** for legislators, state bodies and representatives of the legal community, who must respond to the new phenomena. The aforementioned phenomena are also a source of **problems** for **courts** and for the **protection** of the rights of individuals (including such children) related to the interpretation of legal norms



Normativity vs. Diveristy

- This may result not solely with **controversial social behaviours and choices**, but also to **conflicts of laws**, both of normative and interpretative/practical nature, especially as different European states react (or do not react) otherwise.
- The root of such conflict is the “**competition**” of values (even „**fundamental principles of the legal order**”) protected by law, or rather their traditional or progressive understanding - the **hard cases**.

Legal problems
relevant to administrative justice (**e.g.**):

- **1. Citizenship issues** of the children [in relation to certification of citizenship of (foreign) birth certificate transcription]
- **2. Issues regarding transcription of a foreign civil status** (of the children) **documents**

conflict and/or competition of values such as the constitutionally protected **plurality of marriage** (Article 18 of the Polish Constitution) and **the right of every child to a nationality** (Article 24(3) of the ICCPR) and the **primacy of the interests of the child** (Article 3(1) of the Convention on the Rights of the Child).

Legal problems relevant to administrative justice:

- **3. Varia** [I. transcription or recognition of foreign marriage certificates issued by the authorities of countries where same-sex marriages have been legalised; II. partners' surnames; III. tax and insurance matters]

Here the position of the courts is uniform and formalistic, based on a narrow literal interpretation - DENIAL

- **E.g.:** Although the SAC of Poland decreed that **the constitution does not prohibit the possibility of same-sex unions**, it found that a transcript of the Portuguese marriage certificate of two gay Polish men could not be entered into the Polish civil register → **case II OSK 2376/19, 6 July 2022**

Legal problems
relevant to administrative justice:

- **1. Citizenship issues** of the children [in relation to certification of citizenship of (foreign) birth certificate transcription]
- **2. Issues regarding transcription of a foreign civil status documents** of the children
- shaping of the **jurisprudential line** (*acquis*)
- **divergencies in interpretation** what is contrary (or not) to the „fundamental principles of the legal order of the Republic of Poland”
- **judicial activism**

Legal problems
relevant to administrative justice:

- **1. Citizenship issues** of the children [in relation to certification of citizenship of (foreign) birth certificate transcription]
- **2. Issues regarding transcription of a foreign civil status documents** of the children

no need for Polish national law to provide for parenthood of persons of the same sex (**#full unification**), while Member State is obliged to issue identity documents that ensure the freedom of movement of the child with her parents (**SOME unification**) → **quite a Solomonic decision...**

SAC: judgment of 22 June 2021, II OSK 2608/19


- ▶ ... „Although the so-called law-making interpretation of the law applied by courts should be regarded as admissible, it constitutes an inadmissible interpretation *contra legem* (...) if the creative interpretation of legal provisions does not find legitimacy in the accepted interpretative directives. Indeed, judicial law-making acts must have their origin in the legal system. **Judicial activism** in an area constituting a constitutional matter (Article 18 of the Constitution of the Republic of Poland), which is precisely regulated by the provisions of the law - Article 1 § 1 of the Family Law Code - would constitute a manifestation of an impermissible *contra legem* interpretation. Such an action could violate the constitutional principle of the tripartite division of power (Article 10 of the Constitution of the Republic of Poland) and contradict the scope of jurisdiction of administrative courts expressed in Article 184 of the Constitution of the Republic of Poland.”

Legal problems
relevant to administrative justice:

- *Matters concerning the certification of Polish citizenship fall within the scope of cognitiion of administrative courts, as well as within **the jurisdiction of the European Court of Human Rights (ECHR)** as a matter partly - and **indirectly** - covered by the Convention regulation]*
- *This is not governed by EU law (but may govern **the legal consequences arising from the case** - e.g. the right to free movement of persons)*

case C-2/21 Rzecznik Praw Obywatelskich - *acquis de l'Union*

- „Art. 20 and 21 TFEU, read in conjunction with Articles 7 and 24 of the Charter of Fundamental Rights (...) [and directives] must be interpreted as meaning that, in the case of a minor child who is a citizen of the Union and whose birth certificate, issued by the authorities of a Member State, designates as that child's parents two persons of the same sex, the **Member State of which that child is a national (i) is obliged to issue to that child an identity card or a passport without requiring the prior transcription of a birth certificate of that child into the national register of civil status**, and is obliged to **recognise**, as is any other Member State, the document from another Member State that permits that same child to exercise without impediment, with each of those two persons, his or her right to move and reside freely within the territory of the Member States.”
- child's right to respect for private and family life (**Article 7, Charter**), and the right to have her best interests taken into account (**Article 24, Charter**), were relevant considerations



multicentrism/dialogue/**autonomy** vs unity of values

domestic jurisprudence

acquis conventionnel → the ECHR

acquis de l'Union → the CJEU

„multiplicity of sources of law”

- ▶ **ECHR preamble:** „...profound belief in **those fundamental freedoms which are the foundation of justice and peace in the world** and are best maintained on the one hand by an **effective political democracy and on the other by a common understanding** and observance of the Human Rights”
- ▶ **ART. 2 TEU** „The Union is founded on the values of respect for **human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common** to the Member States in a society in which **pluralism, non-discrimination, tolerance, justice, solidarity and equality** between women and men prevail.”



„multiplicity of sources of law (and values)”

- **“European identity” is a complex issue** (side issue/question: whether there has been at all – at any time – anything like common “European dream” ???)
- It seems that part of European dream is a **concept of individual freedom (#русский мир)** that lead to pluralism of lifestyles

“Constitutional patriotism” therefore requires a certain common minimum, to unite exclusive groups and communities guided by different lifestyles, while ensuring the protection of the rights of minorities and groups subject to discrimination



part III (conclusions)



Conclusions:

- ▶ although multiculturalism, pluralism, multcentrism are **no more the prevailing perspectives in Europe** and the concept of human rights has encountered with contemporary populism, nationalism and their outcomes – there are **some trends/standards that are hardly possible to be reversed**, even in quite conservative states and societies
- ▶ **democratic thinking IS the shaping of legal awareness and legal recognition**
- ▶ the European courts „**mediate**” contradictions between “European” and “domestic” identity
- ▶ Polish administrative courts „**mediate**” between **static and dynamic interpretation**

Conclusions:

- ▶ **tension between Normativity versus Diversity** as a part of **dynamic social life**
- ▶ **role of *potestas iudicandi*** in balancing such tensions and increasing „area of recognition”
- ▶ **„balancing of principles”**
- ▶ **grassroots** process of building a European identity through shaping and strengthening the citizens' constitutional consciousness, as well as through **integrating them around the principles and values**

Conclusions:

- **If we make more inclusive groups, we can improve the polarized situation of politics today** → one of the elements is **Innovation Function of Law** and touch of judicial activism in *Potestas Iudicandi*

Thank U for your attention

Dziękuję za uwagę 😊