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Towards Greater Freedom of Expression for Judges. The Rejection of a Culture of Judicial Silence and Its Benefits for Liberal Democracy*

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The current study asserts that the rejection of a culture of judicial silence is beneficial to the architecture of liberal democracy, as judicial expression outside a courtroom assists in maintaining a balance between its components. On the one hand, this can create defence mechanisms against the alienation of the law from society (which appropriately appreciates the democratic component), while on the other, it aids in the actualization of the constitutionally determined role of the judiciary within the political system (safeguarding the liberal element). The discussion, which is essentially based on an analysis of international soft law, commences by examining two areas pertaining to judicial expression outside a courtroom: public discussion on the law and generally understood social life involvement. Subsequently, the limits of judges' expression during such activities are analysed, and three proposals for their definition are put forward. As a next step, the paper highlights the diversity of judges as relevant to the problem at hand. The work concludes by outlining its findings, which also include the potential risks associated with the proposed project.

Keywords: freedom of expression of a judge, soft law, liberal democracy, public sphere, civil law tradition, CEE countries, Poland, constitutional crisis.

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Introduction

The traditional belief posits that "judges speak through their judgments". This phrase can be seen as a banner for the notion of a culture of judicial silence, which implies a very restrictive perspective on the judges' freedom of expression. The legitimacy of such a culture is based on the reference to unquestionable judicial standards, albeit read in a peculiar manner. Specifically, in relation to the question of whether a judge may speak, they are considered as *erga omnes* arguments or conversation stoppers. Here, I refer to such standards of judicial conduct as the requirements of independence, political neutrality, impartiality or maintaining the dignity of judicial office. The following motives are also sometimes absolutized, resulting in a very limited picture of judicial expression: the need to avoid being disqualified from proceedings, the requirement to maintain professional secrecy, the necessity of transmitting specific information through official channels and the inability to engage in discussion under equal conditions in public discourse. The culture in question is also linked to such themes in the discourse on the role of judges as the comparison of a judge's vocation with priesthood, or the perception of a judge as monastic in many of its qualities.[1]

Meanwhile, "[J]udges are increasingly inclined to speak to the media, to partake in social media and to express their views in matters related to society".[2] It is even possible to come across the argument in the literature that "A traditional and, until recently, official view was that judges must not become involved in public discourse outside of courtroom. Today, however, this approach has changed".[3] I would say that this traditional approach has currently been challenged, but it is difficult to assert that there is a consensus on this issue in the Euro-Atlantic countries. A debate still continues in the relevant area and this article aims to contribute to it. The paper seeks to argue that the rejection of a culture of judicial silence is beneficial to the architecture of the liberal democratic state. This rejection means giving judges greater freedom of expression outside a courtroom (understood as a metaphor for strictly professional activities) – essentially, to strengthen a judge's expression in two types of activity: participation in public discussion on the law, and generally understood social life involvement. The limitations of the article preclude providing an extensive analysis of the concept of liberal democracy, but Britannica's account can be taken as a point of departure: '[A] form of democracy in which the power of government is limited, and the freedom and rights of individuals are protected, by constitutionally established norms and institutions".[4] For our purposes, it is essential

[1] Referred to in UNODC, Commentary on the Bangalore Principles of Judicial Conduct (2007), para. 31. Available: https://www.unodc.org/conig/uploads/documents/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf [last viewed 28.04.2024].

[2] *Seibert-Fohr, A.* Judges' Freedom of Expression and Their Independence: An Ambivalent Relationship. In: The Rule of Law in Europe. Recent Challenges and Judicial Responses, *Elósegui, M., Miron, A., Motoc, I.* (eds). Springer, 2021, p. 100.

[3] *Kakhidze, T., Jimsheleishvili, M., Chitashvili, I.* Limits of Freedom of Expression of Judges. Tbilisi, Transparency International Georgia, 2021, p. 15. Available: https://transparency.ge/en/post/limits-freedom-expression-judges [last viewed 28.04.2024].

[4] *Munro, A.* Liberal Democracy. In: Britannica (27 June 2023). Available: www.britannica.com/topic/liberal-democracy [last viewed 28.04.2024]. The need to supplement political power with a stabilizing framework is also often referred to as constitutionalism (*Sajó, A.*, Limiting Government. An Introduction to Constitutionalism. Central European University Press, 1999) or rule of law (*Tamanaha, B. Z.* On the Rule of Law. History, Politics, Theory. Cambridge, 2004, pp. 114–122). The relationship between the concepts of liberal democracy, constitutionalism and the rule of law is not the subject of this article.

to highlight the duality of logics that liberal democracy seeks to unite. It consists, firstly, of a political power with a democratic mandate and, secondly, of a stabilizing expert factor, closely tied to the field of law (i.e. mainly judges and civil servants of public administration). One can speak here, respectively, of a democratic component and a liberal component within the architecture of liberal democracy. The former is designed to reflect the expectations of the public towards social institutions, while the latter is to ensure adherence to constitutional axiology that limits government and protects individual freedoms and rights.

I would like to assert that the rejection of a culture of judicial silence is beneficial to the structure of liberal democracy, as judicial expression outside a courtroom assists in maintaining a balance between the previously mentioned components. Throughout this paper, I will contend that properly conducted rejection of a culture of judicial silence serves as a safeguard against the domination of both the liberal and the democratic elements. On the one hand, this can create defence mechanisms against the alienation of the law from society (which appropriately appreciates the democratic component), while on the other, it aids in the actualization of the constitutionally determined role of the judiciary within the political system (safeguarding the liberal element).

International soft law established under the auspices of the United Nations, the Council of Europe and other institutions will form the basis of the suggested redefinition of the judge's freedom of expression. The subject of the work is soft law, which does not mean that the importance of other documents (e.g. recent ECHR case law) is undermined. A familiar theme in jurisprudence is the problematic status of the materials concerned. According to Anthony Aust "There is no agreement about what is "soft law", or indeed if it really exists".[5] Within the context of this study, I consider the relevant international soft law to be a valuable resource for comprehending the historical experiences of the Euro-Atlantic countries and for identifying patterns of the liberal democratic politico-legal culture.[6] However, the literature has pointed to the risk that these documents present a perspective that privileges the viewpoint of judges, since the actors who develop soft law are often judges themselves.[7] In my opinion, it is true that some passages of the relevant documents can be seen as a manifestation of judicial nostalgia for supremacy (the desire to wholly eliminate politicians from judicial councils serves as an example[8]). Also relevant are the diagnoses of critical jurisprudence that intake of Western legal patterns in the countries of Central and Eastern Europe (CEE) can lead to their perception

[5] *Aust, A.* Handbook of International Law. Cambridge University Press, 2010, p. 11.

[6] The term "politico-legal culture" refers to the political morality of a given society, which provides a fundamental axiological framework for law-related practices. It is crucial to differentiate this concept from juristic culture, which encompasses the knowledge and skills of a lawyer in a strictly professional context, primarily relating to legal interpretation. See: *Jabłoński, P., Kaczmarek, P.* The Limits of Juristic Power from the Perspective of the Polish Sociological Tradition. Berlin: Peter Lang, 2019, pp. 17–21.

[7] *Leloup, M., Kosař, D.* Sometimes Even Easy Rule of Law Cases Make Bad Law. ECtHR (GC) 15 March 2022, No. 43572/18, Grzęda v. Poland. European Constitutional Law Review, Vol. 18, 2022, pp. 774–775. Available: https://www.cambridge.org/core/journals/european-constitutional-law-review/article/sometimes-even-easy-rule-of-law-cases-make-bad-law/A62008F4A8E2B774D7A4BAC4CB8E209D [last viewed 28.04.2024]. For discussion of externally motivated influence over judicial reform in CEE, with a focus on Romania, see: *Parau, C. E.*, The Drive for Judicial Supremacy. In: Judicial Independence in Transition, *Seibert-Fohr, A.* (ed.). Springer, 2012.

[8] CCJE, Opinion No. 10 on Council for the Judiciary in the service of society (2007), para. 23. Available: https://rm.coe.int/168074779b [last viewed 28.04.2024]; IAJ, The Universal Charter of the Judge (1999, thoroughly revised in 2017), Art. 2–3. Available: https://www.unodc.org/res/ji/import/international_standards/the_universal_charter_of_the_judge/universal_charter_2017_english.pdf [last viewed 28.04.2024].

as something foreign and imposed[9] or even artificial, as declared by elites rather than actually internalized by society.[10] Nevertheless, I believe that in the context of the problem analysed in this paper soft law provides important takeaways to be gleaned. In any case, it ought to be considered as a tool for argumentative discourse, with its validity stemming from persuasive reasoning rather than predetermined authority.

As for the original motivation for writing this text, it was prompted by the cultural patterns of expression of a judge in Poland. One could argue that Polish legal culture serves as a noteworthy example of embracing the culture of judicial silence. It will not be controversial to suggest that tendencies towards restricted judicial expression were rife in Poland prior to the constitutional crisis that began in 2015.[11] Polish judges interviewed about responding to the constitutional breakdown were able to say that "We are not trained to talk to the public"; "[W]e were told the only way to express your idea is the written verdict".[12] The primary basis of such views had been a very strict – not to say oppressive – reading of Article 178(3) of the Constitution of the Republic of Poland (1997), which states that "A judge shall not belong to a political party, a trade union or" – and this clause is crucial here – "perform public activities incompatible with the principles of independence of the courts and judges".[13] I think that the situation described above contributed to the imbalance within the liberal-democratic framework of this state. Nevertheless, it could be argued that other CEE countries can face similar problems due to the diagnosis of their hyper-positivist or ultra-formalist legal style and ideology.[14] Furthermore, the observations within the article can hold relevance to continental Europe as a whole, as illustrated by the reluctance of continental judges to proclaim that "the real source of judicial power is the public acceptance of the moral authority and integrity of the judiciary".[15] I interpret this instance during the drafting of the Bangalore Principles of Judicial Conduct[16] as a symbolic rejection by continental judges of the notion that the sources of judicial power are social. Finally, as this paper draws on the liberal-democratic tradition, it may be considered relevant to that tradition as a whole, despite the customary belief that common law judges are better equipped to handle the problems discussed here. Accordingly, four provisional circles can be delineated, each successive one narrower than the previous one, with the relevance of the problem of the culture

[9] *Mańko, R.* Delimiting Central Europe as a Juridical Space: A Preliminary Exercise in Critical Legal Geography. Acta Universitatis Lodziensis. Folia Iuridica, Vol. 89, 2019, p. 77.

[10] Cf. *Sulikowski, A.* Postliberal Constitutionalism. The Challenge of Right Wing Populism in Central and Eastern Europe. Routledge, 2023, pp. 15–23.

[11] Cf. *Kryszkiewicz, M.* Interview with *Skuczyński, P.*, Polish legal scholar – Nie będzie powrotu do kultury milczenia [There will be no return to a culture of silence], published in Dziennik Gazeta Prawna, 8 November 2022, where the term "culture of silence" was used in relation to the communication behaviour of Polish judges before the constitutional breakdown.

[12] Cited after: *Matthes, C.-Y.* Judges as activists: how Polish judges mobilise to defend the rule of law. East European Politics, Vol. 38, No. 3, 2022, p. 478. Available: https://www.tandfonline.com/doi/full/10.1080/21599165.2022.2092843 [last viewed 28.04.2024].

[13] According to Bogusław Banaszak, a renowned Polish constitutionalist, the relevant provision was violated when a judge expressed support or opposition for: a specific solution put forward by a political party, a candidate for a state position, or a method of exercising powers by a public authority. The provision was also purportedly breached when a judge engaged in public activities for a particular charitable organization (*Banaszak, B.* Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Commentary]. Warsaw, C.H. Beck, 2012, pp. 892–895.

[14] *Mańko, R.* Delimiting Central Europe, p. 76.

[15] Commentary on the Bangalore Principles, p. 8 (drafting history part).

[16] Bangalore Principles of Judicial Conduct. 2002. Available: https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf [last viewed 28.04.2024].

of judicial silence increasing with each successive circle, *ex hypothesi*: 1) liberal-democratic states; 2) states following the civil law tradition; 3) CEE states; 4) Poland.

The discussion commences by examining two areas pertaining to judicial expression outside a courtroom: public discussion on the law and generally understood social life involvement. Subsequently, the limits of judges' expression during such activities are analysed, and three proposals for their definition are put forward. As a next step, the paper highlights the diversity of judges as relevant to the problem at hand. The work concludes by outlining the findings, which also include the potential risks associated with the proposed project.

1. Judicial expression outside a courtroom

1.1. Public discussion on the law

1.1.1. Discourse over regulations or policies affecting the judiciary

In the course of the discussion on the participation of judges in the public debate on the law, four problems will be examined. The first issue pertains to the involvement of judges in the discourse over regulations or policies affecting the judiciary. As stipulated in para. 9 of Magna Carta of Judges, "The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)".[17] An earlier CCJE document, its Opinion No. 3, para. 34 noted that "[J]udges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system".[18] The Commentary on the Bangalore Principles points out that the presence of judges in the specified area is advisable even though the political implications are very plausible:

> *There are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice or the personal integrity of the judge. However, even on these matters, a judge should act with great restraint (para. 138).*

Summarizing this issue, there exists a need for judges to partake in discussions regarding the structure and function of the judiciary, as well as the status of judges. This is not just a matter of strictly legal questions (concerning legal provisions), but of shaping the relevant policies accordingly. The issue discussed is widely covered in international soft law, which is to be associated with the concept of the external independence of the judiciary. The engagement of judges in the discussion of matters that directly impact them serves precisely to make this idea reality.

1.1.2. Widely understood legal education

The next area of public discussion of the law is widely understood legal education. According to para. 4.11.1 of the Bangalore Principles, 'Subject to the proper performance of judicial duties, a judge may write, lecture, teach and participate

[17] CCJE, Magna Carta of Judges (Fundamental Principles) (2010). Available: rm.coe.int/2010-ccje-magna-carta-anglais/168063e431 [last viewed 28.04.2024].

[18] CCJE, Opinion No. 3 on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (2002). Available: https://rm.coe.int/16807475bb [last viewed 28.04.2024].

in activities concerning the law, the legal system, the administration of justice or related matters". In fact, as identified in the Commentary on the Bangalore Principles, there are two problems here. In para. 157 of this document we find the subject of strictly legal education (educating future officials and attorneys), while the preceding paragraph refers to the participation in legal education of community at large. It is worth quoting this paragraph in its entirety:

> *A judge is in a unique position to contribute to the improvement of the law, the legal system and the administration of justice, both within and outside the judge's jurisdiction. Such contributions may take the form of speaking, writing, teaching or participating in other extrajudicial activities. Provided that this does not detract from the discharge of judicial obligations, and to the extent that time permits, a judge should be encouraged to undertake such activities (para. 156).*

In this regard, the Non-Binding Guidelines on the Use of Social Media by Judges from 2019 points out that such undertakings may include the use of social media in addition to other forms of communication (para. 8).[19] Significantly, within the Commentary on the Bangalore Principles, the subject of legal education of the public appears in the context of explaining the social benefits of judicial independence (para. 44) and the judiciary's role in the government's structure (para. 152, *in fine*). It is thus about explaining the significance of judges in the framework of a liberal democracy. Also worth mentioning is Principle 10 of the Istanbul Declaration on Transparency in the Judicial Process from 2020: "The judiciary should initiate and/or support outreach programmes designed to educate the public on the role of the justice system".[20] The explanation of this principle correctly emphasizes the need for judges to take proactive measures. This issue was also previously raised in CCJE Opinion No. 7 (2005), where attention was drawn to the need for additional channels of contact with the public. In light of its para. 15,

> *This is no longer to be limited to delivering decisions; courts should act as 'communicators' and 'facilitators'. The CCJE considers that, while courts have to date simply agreed to participate in educational programmes when invited, it is now necessary that courts also become promoters of such programmes.*[21]

In contemporary society, diverse sectors such as media and politics propagate their own views on the law and judicial inaction can result in significant costs.

1.1.3. Problem of weaknesses in the law

The next issue is pointing out weaknesses in the law (both in regard to existing laws and proposed legislation). According to the Commentary on the Bangalore Principles, para. 139 "A judge may participate in a discussion of the law for educational purposes and point out weaknesses in the law". Further the relevant paragraph delves into the matter of proposed legislation (*ex ante* dimension of weaknesses in the law):

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[19] UNODC, Non-Binding Guidelines on the Use of Social Media by Judges (2019). Available: https://www.unodc.org/res/ji/import/international_standards/social_media_guidelines/Social_Media_2020.pdf [last viewed 28.04.2024].

[20] Republic of Turkey Court of Cassation, Istanbul Declaration on Transparency in the Judicial Process (2020). Available: https://www.unodc.org/res/ji/import/law_on_administration_of_justice/istanbul_declaration_implementation/istanbul_declaration_implementation.pdf [last viewed 28.04.2024].

[21] CCJE, Opinion No. 7 on justice and society (2005). Available: https://rm.coe.int/1680747698 [last viewed 28.04.2024].

> *In certain special circumstances, a judge's comments on draft legislation may be helpful and appropriate, provided that the judge avoids offering informal interpretations or controversial opinions on constitutionality. Normally, judicial commentary on proposed legislation or on other questions of Government policy should relate to practical implications or drafting deficiencies and should avoid issues of political controversy. In general, such judicial commentary should be made on behalf of a collective or institutionalized effort by the judiciary, not of an individual judge (para. 139).*

It seems that two points can be extracted here. Firstly, the relevant topic must be approached from an appropriate perspective (that aligns with the judge's competence: see section 2 of the current article). Secondly, the question arises as to whether an individual judge can afford to raise the issue in question, or if it would be more fitting for an institutional voice to do so.

1.1.4. Challenge of responding to a constitutional crisis

As a final aspect, the challenge of responding to a constitutional crisis should be noted. On the one hand, this is a specific area, perhaps at a different level from those previously mentioned. On the other hand, this problem may also be related to the expertise of the judges, which is of benefit to the public. A decade ago, there appeared to be insufficient consideration of the matter in question. However, it has now been tackled in several documents. For example, the Report of the Special Rapporteur on the independence of judges and lawyers of 2019 reads: "In situations where democracy and the rule of law are under threat, judges have a duty to speak out in defence of the constitutional order and the restoration of democracy' (para. 102).[22] Nonetheless, I would like to defend today's soft law from the possible allegation of opportunistically altering its standpoint for the purposes of political battles against illiberalism. The vigorous commitment to the judiciary's independence (presented, however, in more general terms), persistently remained throughout. For example, according to CCJE, Opinion No. 3, para. 16: "Each individual judge should do everything to uphold judicial independence at both the institutional and the individual level'. This suggests that even in cases of the system's collapse, the individual judge should serve as a donjon.

To summarize this section, two fundamental functions can be attributed to the participation of judges in public discussions on the law. The first concerns the relationship of the judiciary to the public (which relates to the proper recognition of the democratic element in liberal democracy). In this case, it is about "translating" the law to the so-called ordinary citizens, to render the obscure principles of legal

[22] Special Rapporteur on the independence of judges and lawyers, Report on freedom of expression, association and peaceful assembly of judges, 2019. Available: https://digitallibrary.un.org/record/3806309/files/A_HRC_41_48-EN.pdf?ln=en [last viewed 28.04.2024]. See also the following illustrations: ibid., paras 61 and 90; CCJE, Opinion No. 25 on freedom of expression of judges (2022), paras 60 and 61. Available: https://rm.coe.int/opinion-no-25-2022-final/1680a973ef%0A%0A [last viewed 28.04.2024]; IAJ, The Universal Charter of the Judge, preamble; ENCJ votes to expel Polish Council for the Judiciary (KRS) (ENCJ site, 28 October 2021). Available: https://www.encj.eu/node/605 [last viewed 28.04.2024]. Cf. Judgement of 23 June 2016 of the European Court of Human Rights [GC] in case Baka v. Hungary, No 20261/12, paras 125 and 168. Available: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-163113%22]} [last viewed 28.04.2024]; Judgement of 5 October 2015 of the Inter-American Court of Human Rights in case López Lone et al. v. Honduras, para. 173. Available: https://www.corteidh.or.cr/docs/casos/articulos/seriec_302_ing.pdf [last viewed 28.04.2024]. Meanwhile, not everything is clear in the light of the above material. The uncertainty consists of whether the duty of a judge to face a constitutional crisis, which is commonly referenced, is of a legal or ethical nature.

discourse easier to digest and comprehend by explaining their objectives, e.g. by showing the principle of judicial independence as beneficial to citizens. The second function pertains to the interplay between the judiciary and political power (which concerns the need to safeguard the liberal element of the system). The participation of judges in the public discussion of the law – the presence of their voice – has the potential to promote the preservation of the constitutionally defined role of the judiciary as contributing to a system of checks and balances.

1.2. Social life involvement

Having considered the public debate on the law, I turn to the problem of the participation of judges in society in a broader sense. Acts of international soft law strongly emphasize the importance of this problem, indicating that the judge should be in touch with the life and problems of his or her community. I believe that even domestic legal cultures within which quite distinct views are currently held may find some cautious inspiration in the materials referred to below. Merely asserting that judges should be responsive without equipping them with appropriate institutional preparations (i.e. recognition of the need to interact with the public) is not a viable solution. The advantages cannot be attained without incurring certain expenses and hazards.

To begin with, Basic Principles on the Independence of the Judiciary (1985) stated in para. 8, as a first soft law document, that "In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly;". Nevertheless, this document goes on to note that the relevant rights must be confronted with appropriate judicial standards: "provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".[23] This presents the challenge of striking the appropriate balance between the two dimensions of a judge's identity – as a member of the community and as an official. According to para. 1.2 of the Bangalore Principles, "A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate". However, the Commentary on the Bangalore Principles makes a concerted effort to reject an absolutist interpretation of these words. After quoting the clerical associations with the profession of judge (cited in the introduction to this paper), it was stated there that:

> *While a judge is required to maintain a form of life and conduct more severe and restricted than that of other people, it would be unreasonable to expect him or her to retreat from public life altogether into a wholly private life centred on home, family and friends. The complete isolation of a judge from the community in which the judge lives is neither possible nor beneficial (para. 31).*[24]

[23] Basic Principles on the Independence of the Judiciary. 1985. Available: https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary [last viewed 28.04.2024].

[24] A similar structure – a linguistically vague rule that can be read very strictly and a note that embraces a rather moderate interpretation – can also be found in the European Charter on the statute for judges (1998). Available: https://rm.coe.int/16807473ef [last viewed 28.04.2024]. According to para. 4.3 of this document, "Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence". However, the explanatory note adopts an interpretation of this rule that aims to prevent judge from becoming "a social and civic outcast".

The authors of the referenced document seem to suggest that the judge's isolation pattern is more of a tribute to an institutional fiction than something that is actually achievable. Importantly, they do not stop there, pointing out that contact with the community is also necessary for the proper functioning of justice: "Indeed, knowledge of the public is essential to the sound administration of justice. A judge is not merely enriched by knowledge of the real world; the nature of modern law requires that a judge "live, breathe, think and partake of opinions in that world"" (para. 32).[25] A similar point is also present in para. 27 of the CCJE, Opinion No. 3, ("Judges should not be isolated from the society in which they live, since the judicial system can only function properly if judges are in touch with reality") and in para. 9 of the concluding remarks of the ICJ document entitled "Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly" ("[T]he administration of justice, while based on the law and the evidence before a judicial decision-maker, should nevertheless be informed by awareness and engagement with the community and society").[26]

It is worth emphasizing the way in which the argumentation is structured in the documents referred above. This is not to say that contact with the public is postulated "despite the exercise of a judicial function" (because of the importance of the private dimension of the judge's identity). On the contrary, it is precisely "because of the exercise of a judicial function". It can be argued that the contact with the public proves to be useful in the course of performing the tasks described in the previous point – when judges explain the logic of the law to non-lawyers. However, it is striking that international soft law underlines the importance of participation in social life for strictly professional activities. The ICJ conclusion quoted above points to the importance of awareness and engagement with the community and society for the administration of justice (as based on evidence and interpretation of the law). The Commentary on the Bangalore Principles also states that "Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in the light of common sense and experience. Therefore, a judge should, to the extent consistent with the judge's special role, remain in close contact with the community" (para. 32). The same paragraph contains a suggestion that the impact of the judge goes beyond the context of individual cases and may involve and influence important social issues:

> *Today, the judge's function extends beyond dispute resolution. Increasingly, the judge is called upon to address broad issues of social values and human rights, to decide controversial moral issues and to do so in increasingly pluralistic societies. A judge who is out of touch is less likely to be effective (para. 32).*

It is therefore not unfounded to say that participation in social life is useful for judges, among other things, in determining factual state and interpreting the law (especially in the course of extra-linguistic reasoning).

To conclude this point, judges' involvement in social activities enhances their awareness of the viewpoint of the ordinary citizen, leading to greater responsiveness both in the interpretation of the law and in public discussions. This is a valuable contribution to meeting democratic expectations. It is also worth adding that

[25] Here, reference to Opinion 1998-10R of 18 November 1998 of the Supreme Court of Wisconsin, Judicial Conduct Advisory Committee.

[26] ICJ, Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly (2019). Available: https://www.icj.org/wp-content/uploads/2019/02/Global-JudgesExpression-Advocacy-SRIJL-2019-Eng.pdf [last viewed 28.04.2024].

recognizing the importance of the judge's awareness of different social opinions and expectations does not mean that he or she must always succumb to these influences. However, even if the law should reject social expectations, the judge should be aware of their existence (e.g., in order to be able to refer to them in the justification of the sentence).

Regarding participation in social life, one specific issue that deserves a digression is the involvement of judges in social media. Importantly, this phenomenon was at early stage when such classics as the Bangalore Principles and CCJE Opinion No. 3 were written. Nevertheless, according to the Use of Social Media by Judges, older soft law material is relevant to the issue of "digital life" (para. 2). The above document identifies both risks and opportunities associated with the use of social media by judges. It should be stressed that the latter also exist. As Mustafa Saldırım put it:

> *[S]ocial media, despite all its risks, can create opportunities for judges and justice institutions in terms of improving the public's understanding of justice, recognising the importance of judicial duty and understanding individual rights. Judges, individually and collectively, should take advantage of these opportunities offered by social media.*[27]

2. The limits of judges' expression outside a courtroom

Making claims that judges should participate in public discussions on the law and engage with the social fabric of their community require reflection on the limits of expression in these domains. Therefore, I will offer three propositions that may be useful in this context.[28] My aim, however, is not to abstractly delineate the boundaries of the judges' activity, but rather to provide torches to help navigate the areas concerned. Furthermore, these proposals are not mutually exclusive.

2.1. Public vocabulary

Firstly, it is worth recalling the division between the public sphere and the private sphere, assuming that they are related with separate vocabularies in the sense of Richard Rorty, i.e. they are distinct symbolic universes with dissimilar discourse standards. As Paweł Jabłoński put it: "Private and public dictionaries are two different universes, constructed with different goals in mind. The goal of the former dictionary is self-creation, while the latter is a tool in social benefit".[29] From this perspective, the judge should be guided by the requirements of the public vocabulary. Proposing own visions of ideal life or "axiological fantasies" that reflect the judge's personal autonomy is not the point here. Instead, the goal is to provide practical guidance that can be embodied in social institutions. In this context, the aspirations defined by Bernard Yack as "longing for total revolution" and "demand that our autonomy

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[27] *Saldrim, M.* Freedom of Expression of the Judge Within the Framework of Court of Cassation Codes of Conduct (2023, typescript of the speech from the conference: The Judge's Freedom of Expressing His/Her Thoughts and Its Problems, Maltepe University, Istanbul, 19.09.2023, translated by Seda Dural). See also: The Use of Social Media, para. 10, where the distinction between institutional and individual use of social media is presented.

[28] Notwithstanding, they may also prove to be useful in the strictly professional sphere.

[29] *Jabłoński, P.* Towards Post-Analytical Theory of Law. On the Consequences of Richard Rorty's Metaphilosophy. In: A post-analytical approach to philosophy and theory of law, *Bator, A., Pulka, Z.* (eds). Peter Lang, 2019, p. 106.

be embodied in our institutions"[30] can be seen as a negative point of reference. The presentation of utopian political projects has its place in the architecture of liberal democratic society (to mention the Rortian "agents of love" as being able to perform this function[31]) but, in my opinion, judges are not in that role. There is no question that the public dictionary criteria refer – *nomen est omen* – to the judge's engagement in the public discussion of the law. However, to some extent they also apply to general participation in social life. If a judge misbehaves in the private sphere, he or she may be subject to disciplinary action or disqualification from the proceedings. The judge represents a unique profession, as he or she continues to embody an institution even outside his or her professional sphere.

2.2. The reasonable observer test

The second proposition is the reasonable observer test, which has gained significant traction in international soft law.[32] This approach is based on the analysis of expression from the viewpoint of an idealized observer. It is therefore, firstly, a perspective "external" to the judge. Secondly, this viewpoint is enhanced by a set of normative guidelines intended to heighten the test's objectivity.[33] The basic idea behind the reasonable observer test is that it is the public perception of a judge's expression, rather than his or her intentions, which holds significance.[34] The test aims to establish whether a judge abides by judicial standards such as impartiality, political neutrality and independence. The instrument in question is therefore relevant not only to the public debate on the law, but also to a broadly understood participation in social life. This is because such participation also has the potential to compromise the aforementioned standards.

2.3. Focus on procedural law issues

The third proposal refers to the division between substantive and procedural law issues. Against this background, there is a call for the judge to speak rather on the latter (or, to put it more generally, the judge should not speak of the ends of society but of the means by which those ends are to be achieved). As Lech Gardocki, the former First President of the Polish Supreme Court, wrote years ago, "I would

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[30] *Yack, B.* The Longing for Total Revolution: Philosophic Sources of Social Discontent from Rousseau to Marx and Nietzshe, Princeton University Press, 1986, p. 385, cited after *Rorty, R.* Contingency, Irony, and Solidarity. Cambridge University Press, 1989, p. 65.

[31] *Rorty, R.* Objectivity, Relativism, and Truth. Vol. 1, Cambridge University Press, 1990, p. 206.

[32] See: CCJE, Opinion No. 1 on standards concerning the independence of the judiciary and the irremovability of judges (2001), para. 12. Available: https://rm.coe.int/1680747830 [last viewed 28.04.2024]; CCJE, Opinion No. 3, para. 28; Bangalore Principles, paras 1.3., 2.5. and 3.1.; Commentary on the Bangalore Principles, para. 106. Cf. generally *Wojtanowski, M.* Judges' Freedom of Expression and the Reasonable Observer Test in International Soft Law. Relevant Documents, the Operationalization of the Test and the Scale of Expectations Placed on It. Krytyka Prawa. Niezależne studia nad prawem, Vol. 14, No. 4, 2022. Available: https://journals.kozminski.edu.pl/system/files/Wojtanowski.pdf [last viewed 28.04.2024].

[33] The ontological status of these demands is up for debate. Is it something empirical – linked to the real views of the society members – or rather purely idealistic? I believe that the Commentary on the Bangalore Principles, para. 32, appreciates the former aspect by linking the "reasonable person test" to the need for contact with the public (described in section 1.2 of this paper). Cf. *Hill, J. B.* Anatomy of the Reasonable Observer. Brooklyn Law Review, Vol. 79, issue 4, 2014, p. 1453, who notes, however, that "[T]he reasonable observer heuristic is fundamentally misunderstood by courts and scholars who urge that the reasonable observer should take on the characteristics of real human being".

[34] Cf. Commentary on the Bangalore Principles, para. 111: "What matters is more not what a judge does or does not do, but what others think the judge has done or might do".

compare it to the situation of a carpenter who, if not asked, should not comment on whether a wardrobe should be large or small, glossy or matt. But on the subject of the tools he uses in his work, he can certainly have a lot of interesting things to say".[35] It seems, however, that separating procedural from substantive law issues can sometimes prove difficult, if not deceptive. It should be added that the relevant proposal is more about public discussion of the law than about social life participation.

3. Another aspect of the issue: diversity of judges

As far as judges' expressions outside a courtroom are concerned, a different kind of problem should also be raised. In the case of public discussion of the law, the scale of participation depends on the type of judge under consideration. For instance, it is relevant whether a judge holds a specific position within the court (such as the president or spokesperson), acts in an institutional entity (like national council of judiciary or association of judges), or is a judge of a higher court. Crucially, when certain types of judges are involved in public discussion of the law, the relevant legal modality can change: this involvement is not (orthodoxly understood) freedom of expression, but rather the performance of a judicial duty. For example, spokesperson judges are required to state the position of their institution, and some particularly high-profile judges are under duty to comment on law-related matters. This raises the weighty question of whether interference in such professional expression can be assessed under the freedom of expression regulations, such as art. 10 ECHR.[36] The answer of the ECtHR's majority in the cases of Baka v. Hungary[37] and Żurek v. Poland[38] was a yes, which was the subject of opposition by Judge Wojtyczek, as evidenced by his dissenting opinions annexed to those judgments.[39]

4. Conclusion

In the international soft law analysis presented above, I contended that the culture of judicial silence – epitomized by the phrase "judges speak through their judgments" – should be abolished. With respect to the postulated activities of judges, participation in the public debate on the law is the most prominent, as judges have legal expertise that can be of benefit to society. In this regard, four specific areas can be distinguished:

1) discourse over regulations or policies affecting the judiciary;
2) widely understood legal education;
3) problem of weaknesses in the law;
4) challenge of responding to a constitutional crisis.

One can reasonably argue that, by virtue of judicial training and professional experience, the enhancement of a judge's expression in law-related areas can be derived from the very core of the judge's identity. Therefore, the view of the judge's function as a mere restriction of expression in comparison with the ordinary citizen

[35] *Gardocki, L.* Naprawdę jesteśmy trzecią władzą [We really are the third power]. Warsaw, C.H. Beck, 2008, p. 39.
[36] Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
[37] Baka v. Hungary.
[38] Judgement of 16 June 2022 of the European Court of Human Rights in case Żurek v. Poland, No 39650/18. Available: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-217705%22]} [last viewed 28.04.2024].
[39] Cf. also CCJE, Opinion No. 25, para. 9.

is erroneous and inadequate. One can speak of a general ethical obligation towards the judge to be active in the fields concerned. In the course of my work, however, I have also addressed the generally understood social life involvement of judges. In this context, it is recommended to dismiss the model of the judge being entirely isolated from the activities of ordinary social life.

The repudiation of a culture of judicial silence is beneficial to the liberal democratic state as its structure requires the elements provided by judicial expression outside a courtroom. It must be emphasized that the basis of the project proposed here stems from public needs rather than an appreciation of the private dimension of the judge's identity[40] – maintaining a balance between the liberal and democratic components of liberal democracy. In my view, strengthening the freedom of expression of a judge does justice to both of these elements. As for the liberal component, participation of judges in the public debate on the law should contribute positively to the interaction between the judiciary and political power. The presence of judges in the field concerned will help to preserve the constitutional role of the judiciary as a contributor to a system of checks and balances. A liberal democratic society necessitates the judges who are actively involved in the public sphere to prevent political power from taking over the state. Nevertheless, it is not only a question of acting in times of constitutional breakdown, but also of effectively translating the legal aspects of state functioning in times of stable constitutional democracy. It is not an aberration of the political system, but rather its beneficial component, that judges operate in the public sphere outside the courtroom. In respect to an adequate appreciation of the democratic component of liberal democracy, participation of judges in public discourse on law acts as a medium to enhance the understanding of legal principles and increase legal awareness among citizens. Also relevant in the context of democratic needs is the second issue discussed in relation to judicial expression outside a courtroom, namely participation in social life. The judiciary's connection with the reality and comprehension of the wider community can cultivate the growth of relevant sensitivity, valuable for both the professional practice of law enforcement and participation in public legal discussions. This potentially offers a factor in countering the alienation of the judiciary from the society.

With regard to the (hard) legal support for enhancing judicial expression proposed in this text, it is particularly worth noting such legal mechanisms as the special protection of judges under Article 10(2) ECHR or the guarantees of judicial independence enshrined in the constitutions of Euro-Atlantic states.[41]

Nonetheless, rejecting a culture of judicial silence comes with certain risks. Consequently, three suggestions have been noted for outlining the boundaries of a judge's expression outside the courtroom – understanding that none of these proposals should be overestimated:

1) relying on public vocabulary criteria (in Rortian sense);
2) reasonable observer test;
3) focusing on procedural-legal matters.

[40] See, however, the Commentary on the Bangalore Principles, para. 140.

[41] See e.g. Art. 178–181 of the Constitution of the Republic of Poland (1997) (covering issues such as: prohibition of external pressures, conditions for work and remuneration, appointment for an indefinite period, irremovability, special type of retirement and immunity from criminal cases). In the past, these guarantees appeared to be interpreted as implying that judges have privileges and are expected to remain silent. However, an alternative conclusion can now be drawn.

While propositions one and two are applicable to both public discussions on the law and participation in social life, proposition three is more appropriate to public discussions on the law. It is, however, important to formulate some additional specified comments addressed to the judicial community. Firstly, there is the issue of striking the appropriate balance concerning judges' involvement in public discussions on law. On the one hand, there is the risk of excessively audacious statements by low-level judges (prioritizing media attention and acquiring symbolic capital for themselves over the interest of the judiciary). On the other hand, it is equally important to consider the danger of paternalism whereby solely the judicial elite actually engage in the public debate on the law. Secondly, judges should exercise caution to ensure that their expert opinions on legal matters do not transform into an excessive effort to strengthen the judiciary. It appears that the use of doublespeak, where the term "judicial independence" should actually be interpreted as "judicial supremacy", is not merely a speculative danger.[42] Thirdly, in the context of judges' participation in society, it is important to note that the postulate of "bringing the judge closer to public" can lead to judgments that are overly responsive to social expectations and therefore present a threat to the autonomy of the law. The judge must consider various rationales, not just responsiveness, and avoid being a mere conduit for social expectations. Fourthly and finally, it should be acknowledged that, regardless of preparation and formal qualifications, not every judge is necessarily predisposed to speak out in public debate for the benefit of public perception of the judiciary.

Summary

The work focused on an analysis of international soft law with the aim of seeking a rationale for rejecting a culture of judicial silence epitomized by the phrase "judges speak through their judgments". The discussion commenced by examining two areas pertaining to judicial expression outside a courtroom: public discussion on the law and generally understood social life involvement. Subsequently, the limits of judges' expression during such activities were analysed, and three proposals for their definition were put forward. As a next step, the diversity of judges was highlighted as a phenomenon relevant to the problem at hand. The article concluded by outlining its findings.

With respect to the postulated activities of judges, the participation in the public debate on the law is the most prominent, as judges have legal expertise that can be of benefit to society. One can reasonably argue that, by virtue of judicial training and professional experience, the enhancement of a judge's expression in law-related areas can be derived from the very core of the judge's identity. In this regard, four specific areas can be distinguished:

1) discourse over regulations or policies affecting the judiciary;
2) widely understood legal education;
3) problem of weaknesses in the law;
4) challenge of responding to a constitutional crisis.

Two fundamental functions can be attributed to the participation of judges in public discussions on the law. The first concerns the relationship of the judiciary to the public (which relates to the proper recognition of the democratic element in liberal democracy). In this case, it is about "translating" the law to the so-called ordinary

[42] Cf. *Parau, C. E.* The Drive for, *passim*.

citizens, to render the obscure principles of legal discourse easier to digest and comprehend by explaining their objectives, e.g. by showing the principle of judicial independence as beneficial to citizens. The second function pertains to the interplay between the judiciary and political power (which concerns the need to safeguard the liberal element of the system). The participation of judges in the public discussion of the law – the presence of their voice – has the potential to promote the preservation of the constitutionally defined role of the judiciary as contributing to a system of checks and balances.

As for the generally understood social life involvement, it enhances judicial awareness of the viewpoint of the ordinary citizen, leading to greater responsiveness both in the interpretation of the law and in public discussions. This is a valuable contribution to meeting democratic expectations. It is also worth adding that recognizing the importance of the judge's awareness of different social opinions and expectations does not mean that he or she must always succumb to these influences. However, even if the law should reject social expectations, the judge should be aware of their existence (e.g. in order to be able to refer to them in the justification of the sentence).

The reflection recognized that there are risks in rejecting a culture of judicial silence. Consequently, three suggestions have been noted for outlining the boundaries of a judge's expression outside the courtroom – understanding that none of these proposals should be overestimated:

1) relying on public vocabulary criteria (in Rortian sense);
2) reasonable observer test;
3) focusing on procedural-legal matters.

I have subsequently recognized the diversity of judges as an important aspect in the context of judicial freedom of expression.

To sum up, it is asserted that the rejection of a culture of judicial silence is beneficial to the architecture of liberal democracy, as judicial expression outside a courtroom assists in maintaining a balance between its components. Whilst this can create defense mechanisms against the alienation of the law from society (which appropriately appreciates the democratic component), it aids in the actualization of the constitutionally determined role of the judiciary within the political system (safeguarding the liberal element).

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