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A Few Words About Judge's Freedom of Expression

ABSTRACT

The subject of the study is an extremely important and multifaceted issue concerning freedom of expression of judges. This matter is complex and although it was addressed by many scholars and in many rulings, the precise determination of the boundaries of freedom of expression in the case of judges is still not a simple task. The role of the author will be to analyse the title issue from the perspective of theory and practice of application of law.

KEYWORDS: *judge, court, freedom of expression, disciplinary responsibility, media*

Introduction

Judges operating under the rule of law have today more and more doubts as to whether they, as citizens, can fully exercise their rights and freedoms, including freedom of expression. Can they present their own views in the media and speak up at meetings, conferences or symposia? Is expression of a judge subject to restrictions, and if so, do these relate to their professional issues or also private life (Wróblewski, 2017, p. 29)?

The above questions seem very topical, not only for the Polish state, but also for many other European countries. They are closely linked to the

obligation to abide by the rules of professional ethics of judges and the consequences of their breach (cf. Wesel, 1998, p. 156).

The main aim of this study is to attempt to determine the kind of judge's expression which may be detrimental to the dignity of the office, the delimitation of the freedom of expression of a judge under the analysis of national and international law and standards of professional ethics. To depict the problem more fully, the study refers to a specific behaviour of judges, which is the subject of the assessment of international bodies and Polish disciplinary courts.

Research methods

Two research methods were used in the study: legal dogmatic method and legal comparative method In addition, a broad range of international and national case law on issues of freedom of expression of judges was invoked.

Judge's freedom of expression – legal grounds and ethical norms

To review the legal regulations defining the limits of the judge's freedom of expression,one sholud begin with Article 178(3) of the Constitution of the Republic of Poland (hereinafter: the Constitution). Pursuant to that provision, a judge cannot be a member of a political party, trade union or run a public activity contrary to the rules of independence of courts or judges (Morawski, 2006, pp. 6–23).

As regards this provision, it is assumed in the literature that "judges' statements are to be objective and restrained, this may largely restrict the possibility of public manifestation of one's own views. However, it must be recalled that Article 31 (2) of the Constitution states that no one shall be compelled to do that which is not required by law, and in paragraph 3 of the same article, that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order. Such limitations must not violate the essence of freedoms and rights. A judge, despite various restrictions imposed on him, does not cease to be a citizen

enjoying rights and freedoms enshrined in the Constitution, and one of them is freedom of expression contained in Article 54. Freedom of expression is guaranteed in Article 19 of the Universal Declaration of Human Rights (resolution 217A (III) of 10.12.1948 adopted by the General Assembly of the United Nations), in Article 10 of the European Convention on Human Rights (Dz.U.1993.61.284, as amended) and Article 11(1) of the Charter of Fundamental Rights of the European Union (OJ C 83 of 14.12.2007, p. 389). "Freedom of expression" usually means the possibility of expressing thoughts and views in a chosen form, either verbally or non-verbally. This can be done by word, by letter, in print, in the form of a work of art or in any other way, at your one's own choice." (Laskowski, 2019, chapter III, item 2; cf. Piotrowski, 2016, p. 20).

When analysing the problem of the limits of judge's freedom of expression, one should keep in mind the content of Article 107 § 1 of the Act of 27 July 2001. The law on the system of common courts (consolidated text: Dz.U. 2019.52 as amended., hereinafter: SCC) according to which a judge shall be liable to disciplinary actionfor professional misconduct, including a manifest and gross breach of law and violation of the dignity of the office (disciplinary misconduct). Moreover, a judge shall also be liable to disciplinary action for his or her conduct before taking up the function as judge if he or she by this misconduct has offended the state function held at that time or turned out to be incapable to perform the function of a judge (§ 2 of the provision).

Statements made by judges should also be analysed in terms of the possible violation of the dignity of the office from the point of view of the standards of professional ethics (Skuczyński, 2010, pp. 290–299). The following provisions of the Code of Professional Ethics for Judges and Associate Judges [Zbiór Zasad Etyki Zawodowej Sędziów i Asesorów Sądowych] (Resolution of KRS No. 25/2017 of 13.01.2017) should be specifically noted:

- § 3a – according to which a judge should avoid all kinds of personal contacts and business relations with natural persons, legal entities and other entities, and should avoid taking actions in the private, professional and public spheres that could give rise to a conflict

of interest and thus adversely affect the reputation of a judge as an impartial person and impair the trust in the judge's office;

- § 4 – according to which a judge should take care of the authority of his/her office, the interest of the court in which he works, as well as the interest of the justice system and the constitutional position of the judiciary;
- § 5(2) – according to which a judge should avoid any conduct that could impair the dignity of judge or undermine the trust in his or her impartiality,even if it is not included in the Code (cf. Kiener, 2001, pp. 97–98);
- § 23 – according to which a judge should use social media with restraint (more in: Foster, 2017, https. bostonbarjournal.com).

Undoubtedly, the scope of the judge's freedom of expression is also affected by regulations concerning the judge's immunity – Articles 80 and 81 SCC (Ohlenburg, 2000, pp. 29–36), the obligation to keep professional secrets – Article 85 SCC, and the requirement to submit all demands, submissions and complaints in matters related to the function only through official procedure – Article 89 § 1 SCC.

Judge's freedom of expression in international case law

Limits of the freedom of expression of a judge was a subject of opinion expressed many times by the European Court of Human Rights (hereinafter: ECtHR). Most often, the legal basis for decisions issued in this regard was the provision of Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Dz.U.1993.61.284 as amended.; hereinafter: the Convention), according to which "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities,

may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary" (paragraph 2 of the provision).

At this point, it is worth referring to the case *Kudeshkina v. Russia* (Application No. 29492/05), in which the ECHR ruled on the basis of the following facts. Olga Kudeshkina, a judge adjudicating in criminal cases, was appointed to sit on a case regarding the abuse of powers by a police officer. However, she was removed from sitting in the case and the case was handed over to another judge. In December 2003, Judge Kudeshkina gave several interviews in which she suggested that she was under pressure and that Russian courts were the subject of many political manipulations. Her statements in the media constituted grounds for instituting disciplinary proceedings against her, as a result of which she was dismissed from office (Laskowski, 2019, chapter 3, item 5).

In the judgment of 26 February 2009, the ECtHR stated that: "1. Article 10 applies also to the workplace, and that civil servants, such as the applicant, enjoy the right to freedom of expression. Employees owe to their employer a duty of loyalty, reserve and discretion. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion. Disclosure by civil servants of information obtained in the course of work, even on matters of public interest, should therefore be examined in the light of their duty of loyalty and discretion. 2. Public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question. 3.3. The the duty of loyalty and discretion owed by civil servants, and particularly the judiciary, requires that the dissemination of even accurate information is carried out with moderation and propriety. 4. An act motivated by a personal grievance or a personal antagonism or the

expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection. Political speech, on the contrary, enjoys special protection under Article 10. even if an issue under debate has political implications, this is not by itself sufficient to prevent a judge from making any statement on the matter" (Nowicki, 2010, p. 270).

Also worth noting is the ruling issued by the Inter-American Court of Human Rights in the case López Lone et al. v. Honduras (Inter-American Court of Human Rights, case of Lopez Lone et al. v. Honduras; http://www.corteidh.or.cr/docs/casos/articulos/seriec_302_ing.pdf (accessed on: 14.03.2018). The case concerned four judges who, during the coup d'état of 2009 in Honduras, protested against undermining the constitutional order of the state. These judges, being members of an association acting for democracy, issued public statements and took part in demonstrations, which resulted in instituting disciplinary proceedings against them, as a result of which they were dismissed from office. In the grounds for the judgment of 5/10/2015, the Court admitted that while there may be some restrictions on the political activity of judges in a democratic state, it is permissible be situation in which a judge, as a citizen who is a member of society, considers that he or she has a moral duty to speak out. The Court added that in the face of threat to democracy, judges may act as guardians of constitutional values. In conclusion, it argued that the disciplinary penalties against the judges were unfounded, and the exercise by them of freedom of expression was justified in the light of the circumstances of the case (Laskowski, 2019, chapter 3, item 5).

Of great interest is also the case Baka v Hungary (application no. 20261/12), which concerned the following facts. In the period 1991–2008, András Baka served as judge of the European Court of Human Rights and then returned to Hungary, where he was elected President of the Supreme Court of Hungary while at the same time acting as the head of the National Council of Justice. His term of office was to terminate in July 2015. According to the legislation in force in Hungary, Baka, when holding these positions, was obliged to give an opinion on legal acts concerning the judiciary. Following the 2010 elections, the new authorities in Hungary proposed a number of draft

amendments to the existing rules on the judiciary. Baka spoke out publicly multiple times, presenting a critical position towards the changes proposed. In December 2011, the Parliament adopted a law on transitional provisions to the new Constitution, providing for the creation of a new Supreme Court. The threshold for the age of compulsory retirement of judges has been lowered from 70 to 62 years, stating that the mandate of the President of the Supreme Court expires by operation of the law on the date of entry into force of the Constitution, i.e. 01.01.2012. Baka was unable to apply for re-election, as the candidate for the President of *Kúria* was required to have at least 5 years of service status as a judge in Hungary under the new rules. The applicant, as a former judge of the Court in Strasbourg, did not meet this requirement (Laskowski, 2019, chapter 3, item 5).

In the judgment of 27.05.2014, the ECtHR concluded that the premature termination of the mandate of President of the Supreme Court of Hungary, in view of his negative opinions on the legal changes adopted, constituted an infringement of freedom of expression. In this case, the Court found two infringements of fundamental rights. The first was the fact that the applicant had been denied access to a tribunal in order to challenge the shortening of his term of office, which the ECtHR considered unjustified interference with the applicant's rights under Article 6 (1) of the Convention. The second infringement concerned the applicant's right to freedom of expression, protected by Article 10 of the Convention. The Court found that the proposal to shorten the mandate of the President of the Supreme Court and the new criteria for the election of the President of the *Kúria* were lodged and adopted in a very short time as a direct consequence of criticism of the new regulations, expressed by the applicant. The ECtHR concluded that the legal solution adopted by the Hungarian Parliament and the formulation of new eligibility criteria for the president of the supreme judicial authority in Hungary, which automatically excluded the applicant's candidacy, constituted rather a form of "silencing an inconvenient judge" than the rational restructuring of the judiciary. Thus, they constituted an unlawful form of sanctions for inconvenient views of the judge, which clearly infringed the right to freedom of expression of the person concerned and

violated Article 10 of the Convention (Warecka, LEX 2019; Krzyżanowska-Mierzewska, 2016, p. 30).

Judge's freedom of expression in the case law of Polish disciplinary courts

An analysis of the case law of disciplinary courts may be helpful in an attempt to define the limits of freedom of expression of a judge. Due to the abundance of case law in this area, the discussion limited to selected decisions of the Supreme Court – the Disciplinary Court (see: Kubiak, Kubiak, 1994, p. 3; Laskowski, 2008, p. 50). When examining specific facts, individual statements of judges were verified in the context of their compliance or failure to comply with the requirements related to the dignity of the office held.

In view of the above, worth noting are the following views of the Supreme Court, compiled from a multitude of various factual states:

- "A judge acting as a party in a trial, just because he or she participates in the administration of justice and shapes the image of that system, should be a role model of dignified and reliable behaviour, limiting himself or herself to the necessary and exclusively substantive criticism of the actions of other participants in the trial (judgment of the Supreme Court of 21.04.2006, SNO 10/06, LEX no. 47031);
- "The professional ethics of judges requires restraint in showing emotions, especially when unjustified expression exposes other people to humiliation of their honour and dignity. Meanwhile, the defendant's behaviour resulted in unnecessary tensions in the workplace and in the involvement of the personnel of the Secretariat of the Criminal Department in stressful conflicts between judges" (judgment of the Supreme Court of 07.06.2006, SNO 25/06, LEX no. 470233);
- "The care of the dignity of the office cannot exclude the right of a judge, like any other human being, to engage in one's affairs. If a judge does so in a manner which does not breach generally applicable social and moral norms, he may not be charged for this" (judgment of the

Supreme Court of 26.06.2006, SNO 29/06, LEX no. 470236);

- The ethos of the profession of judge does not allow making references to other professions in order to mitigate the moral requirements imposed on judges" (judgment of the Supreme Court of 24.08.2006, SNO 54/06, LEX no. 470234);
- "Anyone who is incapable of critically assessing his or her manifestly reprehensible deeds, admitting them and apologizing to the aggrieved party, i.e. in other words, of acting in accordance with the imperative under § 5.3 of the Code of Professional Ethics for Judges, is incapable of administering justice, and thus of performing the responsibilities for which the judge has been appointed. (judgment of the Supreme Court of 14.02.2007, SNO 77/06, LEX no. 471825);
- "In this situation, it was necessary to consider which of the penalties, i.e. the one applied or the one proposed, would better meet the purpose of punishment, both from the point of view of individual and general prevention. Both these sanctions entail deprivation of the possibility of promotion to a higher judicial post for a period of five years, inability to participate in the presiding board of the court and to adjudicate in the disciplinary court during this period and to obtain the lost function (Article 109 § 3 SCC). Therefore, they contain, in contrast to the punishment of admonition or reprimand, a repressive element in the form of temporary suspension of the development of one's professional career. Although, as a rule, a transfer to another official position is a more severe penalty than the that applied, but in the circumstances of the case, the penalty of dismissal from the function of is equally painful for the defendant. It should be noted that the defendant works outside his place of residence. Thus, since he committed the offences in question outside the region where he performs his official duties, the authority of the judiciary was not directly undermined in this environment. Thus, from the point of view of general prevention, it was not necessary to transfer him to another region, especially as, for example, directing him to the court of his place of residence would not only be an ailment, but also a reward.

(judgment of the Supreme Court of 21.06.2007, SNO 34/07, LEX no. 471815);

- "1. The head of the department must take care of the work efficiency of the organisational unit he is in charge of, but he may not do it in a way that violates the principles of culture that are expected in the relations between the manager and the subordinate. 2. In any situation, even if provoked by improper behaviour of other people, a judge should behave with dignity, i.e. culturally, kindly, without using harsh words, floating, agitation, raised voice, without shouting and too emotional elements of expression" (judgment of the Supreme Court of 25.03.2009, SNO 13/09, LEX no. 707920);
- "1. "A judge should not only be characterized by a sense of justice, objectivity, duty and dignity, but also – self-control, restraint in criticizing one's superiors, the ability to control emotions, and above all – not to express them it in a way that is offensive to other people. Therefore, it is about reasonable moderation, tact and culture in all spheres of the judge's activity, both in his professional and non-professional relations. 2. The penalty of dismissal from office is the most severe of disciplinary punishments, it should be imposed for very serious disciplinary offences, in a situation of cumulation of aggravating circumstances with a subjective and objective character" (judgment of the Supreme Court of 01.04.2009, SNO 18/09, LEX no. 707922);
- "Any negative comments expressed by a judge against any nation are *a limine* unacceptable, as they may give rise to a finding of unequal treatment of defendants due to their nationality, which is in clear conflict with the fundamental principles of administration of justice" (judgment of the Supreme Court of 26.05.2009, SNO 40/09, LEX no. 1288890);
- "In both appeals, no real consequences of the disciplinary punishment were noticed, and the attitude of the judge who apologized to the victims and expressed remorse, and incidental character of the behaviour, with impeccable history of the judge's service (since 1996) and good performance of work, were not duly taken into account.

Moreover, a peculiar and not less painful punishment than disciplinary punishment was the fact that the accused judge was deprived of liberty as a result of his conduct, he was treated in a sobering-up station, which was undoubtedly noticed in the community of the judges of this region and certainly did not serve to build the authority and professional position of that judge in these circles" (judgment of the Supreme Court of 26.11.2009, SNO 82/09, LEX no. 1289005);

- "It is the social assessments and norms of conduct that dominate in society that determine whether a behaviour is offensive, not the subjective conviction of the allegedly insulted person" (judgment of the Supreme Court of 05.06.2012, SNO 26/12, LEX no. 1231618);
- "In any situation, even provoked by improper behaviour of other people, a judge should behave with dignity, i.e. culturally, kindly, without agitation and too emotional elements of expression. Undoubtedly, holding the office obliges a judge to a high degree of self-control, and in the courtroom he or she is bound by standards of conduct and expression that are higher than those applicable in other areas of public life" (judgment of the Supreme Court of 17.07.2012, SBO 35/12, LEX no. 1231627);
- "1. The dignity acquired upon assuming the office of judge is an attribute that ensures the authority of the court and the judge personally. It is an indefinable concept, but it is related to the judge's model of behaviour under legal provisions, professional ethics standards and other moral norms, written down and not written down in the code of professional ethics of judges. The dignity of the office of judge and the impeccability of character of each judge is associated with a defined standard of judge's conduct, which should constitute a model for others and which should arouse respect. 2. The model of conduct related to the dignity of the office binds the judge not only when performing official duties, but also outside the service. Judges are under careful observation in terms of the requirements arising from the duty to hold office with dignity. They are required to do so much more than an average member of society" (judgment of the Supreme Court of 22.06.2015, SNO 34/15, LEX no. 1747852);

- "A judge in an adjudicating panel does not act on his or her own behalf, but under the granted judicial authority issues rulings on behalf of the Republic of Poland. He has not only the right but also the obligation to assess, based on a sufficient factual basis, the actions and omissions, and character traits of persons taking part in court proceedings. Therefore, if the judge acts within the limits set by the law and in his or her statements and substantiations of judgments does not exceed norms adopted and generally accepted in contemporary society, depending on the type of case and the purpose of a given procedural act, and also the need for argumentation, then he/she does not commit an offence of defamation or insult" (resolution of the Supreme Court of 06.07.2016, SNO 25/16, LEX no. 2066020).

The above rulings, which are only a sample of the case law of the Disciplinary Court, does not in any way prevent a judge from attending a public debate. A judge is a citizen of the Republic of Poland, who must not be deprived of the rights and freedoms enshrined in the Constitution. As a rule, a judge is an expert in law whose public statements can bring tangible benefits.

On the other hand, the need for apolitical attitude and restraint of judges is being stressed, except for debates on legal acts related to the functioning of the judiciary, including threats to the independence of the judiciary. Hence, it seems that a judge may publicly comment on draft amendments in law, especially in the justice system. It is important that these statements are substantive and do not impair the dignity of the office.

Summary

An analysis of the limits of freedom of expression of judges carried out based on the provisions of the Constitution, SCC, the Convention, standards of professional ethics and the case law of international bodies and Polish disciplinary courts leads to certain conclusions.

It is beyond dispute that "a judge has the right to exercise the rights and freedoms, including freedom of speech, just like any other citizen. However, due to the specific nature of the office of judge, restrictions on the exercise of freedom of expression are allowed. In all statements, especially public, a judge has a special obligation to ensure dignity and social confidence in his or her impartiality and independence. From this point of view, it is crucial to meet the requirements of self-restraint, namely the obligation to avoid everything that undermines the above values (dignity, trust, impartiality and independence), as well as to avoid situations leading to conflicts of interest. From this perspective, it is important not only to care about the content, but also the form of expression (...). The media activity of courts and judges and their participation in public debate should be regarded as generally acceptable and beneficial from the point of view of society and interest of the justice system, the image of the judiciary and confidence. It is difficult to precisely delimit the boundaries of the participation of a judge in public debate, the freedom of which is the very core of the concept of democratic society, given that freedom of expression is a principle, while interference with freedom is an exception. The participation of a judge in the debate itself is not forbidden, and even from the social perspective is desirable in some areas of this debate (...). It should be assumed that, generally, a judge should not be isolated from society, he or she should take part in public debate, in particular by legal education and explaining the effects of the regulation being introduced or planned. In this respect, the principle of restraint must be considered a rule. In doubtful situations, it is rather better to refrain from speaking, than put the dignity or impartiality of the office of judge at risk. The restrictions on judges and the obligation of self-restraint imposed on them are less applicable in the case of public debates on judicial policy, preparation of legal acts on courts, the judiciary and the status of judges. It is generally permissible to participate in public debates on legal issues, and it is even desirable to point to weaknesses in regulation and to comment on them" (Laskowski, 2019, chapter 3,item 7).

When assessing a particular judge's statement in terms of a possible infringement of freedom of expression, it is necessary to take account of

the position of the judge concerned, the form of expression, the situational context and the severity of the disciplinary penalty that may be sentenced due to the statement.

By formulating his or her statements, a judge must always keep in mind the dignity of the office held. Although a judge may generally speak as other citizens, there are some limitations that cannot be fully precisely defined. Like in other various areas of life, a judge should also adhere to common sense, which in the case-law is equated with the principle of self-restraint.

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