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# Judges as Legislators or Interpreters of the Law? On the Dangers of the Judicialization of Politics

Przemysław Kaczmarek*

## Abstract:

Who should judges be, and what is their role in society, especially in the times of political instability? In this article, I answer these questions from the point of view of two visions: the era of legislators and the era of interpreters, presented by Zygmunt Bauman. Recommending a vision of judges as interpreters of the law, emphasising the importance of civic education, is the aim of the article. This task is accomplished on the basis of the two lines of argumentation. First, I show the dangers of the political entanglement of judges. Some of the forms of this entanglement can be linked to a legislative attitude that is rationalised by a culture of silence in public life. I then show that the era of interpreters makes it possible to present judicial freedom of expression as an act of communication between the author and its audience. Appreciating the position of the audience is linked to civic education.

## Key words:

Judges, abusive judicial review, civic education, freedom of expression, constitutional crisis.

## Resumen:

¿Quiénes deben ser los jueces y cuál es su papel en la sociedad, especialmente en tiempos de inestabilidad política? En este artículo, respondo a estas preguntas desde el punto de vista de dos visiones: la era de los legisladores y la era de los intérpretes, presentada por Zygmunt Bauman. Recomendar una visión de los jueces como intérpretes de la ley, haciendo hincapié en la importancia de la educación cívica, es el objetivo del artículo. Esta tarea se lleva a cabo sobre la base de dos líneas de argumentación. En primer lugar, muestro

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* Przemysław Kaczmarek is a Professor, University of Wrocław, Faculty of Law, Administration and Economics. Significant achievements: a) President of the Polish Section of IVR (International Association for the Philosophy of Law and Social Philosophy) from 2018 to 2022, b) Board Member of the Polish Section of IVR (International Association for the Philosophy of Law and Social Philosophy) from 2022 to 2026, c) Board Member of The Institute of Legal Ethics (Warsaw, Poland). Email address: przemyslaw.kaczmarek@uwr.edu.pl ORCID: https://orcid.org/0000-0002-3436-4043

los peligros del enredo político de los jueces. Algunas de las formas de este enredo pueden vincularse a una actitud legislativa racionalizada por una cultura del silencio en la vida pública. A continuación, muestro que la era de los intérpretes permite presentar la libertad de expresión judicial como un acto de comunicación entre el autor y su público. La apreciación de la posición del público está vinculada a la educación cívica.

Palabras clave:

Jueces, revisión judicial abusiva, educación cívica, libertad de expresión, crisis constitucional.

## 1. INTRODUCTION

The judiciary is now a key centre for shaping social policy across jurisdictions (Shapiro and Sweet 2002, Hirschl 2004, 2023, Daly 2017). In this diagnosis, we are used to portraying judges as guardians of the law, whose efforts are directed towards strengthening the rule of law, and human rights as pillars of liberal democracy. The danger for such a vision is what Ethan Michelson called "political embeddedness", which consists in the institutional or personal entanglement of judges in the apparatus of political power (Michelson 2007). This is a danger we face especially in times of political instability, of which the constitutional crisis is one symptom. What this danger consists of, what it faces and, above all, how it can be prevented, are the questions I will try to answer. To do so, I will use the opposition: judges as legislators versus judges as interpreters of the law. Questioning the first vision – judges as legislators – and recommending the second view – judges as interpreters of the law – is the purpose of the article.

The task thus set will be accomplished in four stages. First, I will present the process of judicialisation of politics, which is part of judicial supremacy (point 2). In the next step, I will show some dangers, the key one of which is related to the assumption of a legislative role by judges (point 3). In critiquing this vision, I draw inspiration from two ideologies: the era of legislators and the era of interpreters, as presented by the Polish sociologist Zygmunt Bauman (point 4). Referring to them, I postulate a move away from the era of legislators to the era of interpreters. This is expressed in the presentation of judicial freedom of expression in the perspective set by the position of the interpreter of the law rather than its legislator (point 5).

An important context for the research is the constitutional crisis we have been facing in Poland since 2015. The associated political instability is also a challenge for judges, whose actions and attitude choices contribute to either a culture of public trust or a culture of distrust in the judiciary (Sztompka 2007).

## 2. WHAT IS THE JUDICIALISATION OF POLITICS?

The judicialisation of politics is a concept that exposes the increasing role of the judiciary in modern legal systems. This trend was initiated in the USA, particularly in light of the

activity of the Supreme Court. It has also left its mark on the position of the judiciary in the countries of Western Europe, Latin America, and then Central and Eastern Europe. We are therefore dealing with a global process that spans different legal systems and cultures.

The very notion of judicialisation of politics is understood as the penetration of the law into social practices, as well as the strengthening of legal activity in spheres that were hitherto reserved for the activities of the legislature and the executive. The judicialisation of politics thus illustrates the process of the growing position of the judiciary as a normative system shaping the social and legal order. This is reflected in the process of the courts becoming the bodies that resolve the dilemmas and problems of modern society in the Western world. This competence originally belonging to the legislature is increasingly becoming in the hands of judges. This is not the only change brought about by the judicialisation of politics. In this context, Ran Hirschl points to three processes (Hirschl 2006, 2011).

The first concerns the growing importance of rules of legal discourse, of legal logos in political debate. What is at stake here is not only their presence, but also the importance we attach, for example, to the formalisation of rules of conduct, and the codification of professional ethics in various social practices. In this view, the judicialisation of politics is a consequence of the juridification of social life. Technological changes, and the visualisation of law in public space, have contributed to the judicialisation of politics understood in this way. The coverage of court hearings on news channels also has the consequence that legal terminology becomes part of culture and social communication.

The second process is related to the constitutionalisation of human rights and the limitation of the interference of the legislative and executive powers in the private sphere of the individual. Today, it is the judiciary that determines policy on the protection of human rights. And judges are becoming, according to the dominant view, protectors to protect citizens from political power, identified with the centres of legislative and executive power. Such thinking is particularly evident in the jurisprudence of European courts and tribunals, where one can see the transfer of the prerogatives of shaping decisions from national, directly elected bodies to European and international courts and tribunals (Koncewicz 2020).

The third process, comprising the judicialisation of politics, involves shifting the resolution of fundamental social and moral problems to the courts. Hirschl refers to such situations as mega-politics. He includes cases that concern the electoral process, the activities of political parties, national identity, and transitional justice (Hirschl 2011). In the context of the judicialisation of politics understood in this way, judges are becoming increasingly responsible for deciding cases with high stakes for the political system as well as for society.

The three processes mentioned above basically describe two trends. The first concerns the increasing position of the courts vis-à-vis other organs of public power, especially the parliament and the centres of executive power. We can see this not only in the courts deciding fundamental constitutional or moral problems for society, but also in taking on the role of an entity that redistributes rights and defines the limits of the legislature's interference with individual rights. This process gained prominence after the Second World War in Western Europe and then, as a result of the political transition, in many Latin American countries, as well as in Central and Eastern Europe after the fall of the Berlin Wall (Hirschl 2023). The second trend, on the other hand, is a form of juridification

of social life, whereby legal thinking and its associated terminology influences the semantics of language in various social practices, especially in political culture (Vallinder 1994, Klug 2021).

With the above meaning of judicialisation of politics in mind, let us say that its main form is judicial control of the executive and legislative action. The attribution of such a function to the judiciary has its consequences in the relationship between the three centres of power: legislative, executive and judicial. One of these can be presented by referring to the thought of Torbjörn Vallinder, according to whom the legislature and the judiciary can be viewed as representing different rationales. The task of the courts is to protect the fundamental rights of citizens, while the goal of the legislature, on the other hand, is to look after the rights and duties of the majority of people in society. In this view, the judicialisation of politics means giving preference to the former interest at the expense of the latter (Vallinder 1994).

The judicialisation of politics can be traced to several causes. According to Heinz Kluge, one is the development of the administrative state in the first half of the twentieth century, followed by the spread of constitutional control and the associated role of the judiciary in the second half of the twentieth century (Klug 2021). Hirschl, on the other hand, sees the causes of the judicialisation of politics in three aspects: the development of human rights, judicial culture, and political culture (Hirschl 2011).

The first of these properties focuses on the global nature of human rights and freedoms (Klug 2021, Hirschl 2023). It manifests itself in the creation of a constitutional catalogue of subjective rights aimed at expanding the boundaries and protection of the private sphere. This task rests primarily with the courts and tribunals, which have included fundamental human rights as an object of jurisdiction. The most influential courts in this regard can include the Court of Justice of the European Union, and the European Court of Human Rights (Hirschl 2023). At the national level, a consequence of the constitutionalisation of subjective rights is the emergence of a number of specialised courts or tribunals, e.g. on sports law, and business law. Such developments have led to a modification of the role of judges, who are increasingly assigned functions that go beyond the obligations to apply the law (Green 2014). A manifestation of this is the attribution to judges of obligations to protect the law and improve the law. One mechanism for this function is the diffuse constitutional review exercised by ordinary court judges.

The second characteristic relates to the judicial culture, recommending that judges engage in the resolution of matters fundamental to society and the state system. In this culture, judges become architects of the social order (Scheppele 2012). As Agnieszka Bień-Kacała aptly points out, the direction of change towards judicial supremacy noted in Poland in the 1990s was almost unanimously welcomed – both in society and by political, economic, and legal elites – as an expression of the democratisation of social life (Bień-Kacała 2018b). Such an approach helped to perpetuate the belief in the momentous role of judges in shaping the socio-political order, which undoubtedly translated into judicial culture.

The third characteristic concerns political culture and focuses on the key organs of legislative and executive power. According to Hirschl, the process of judicial supremacy, involving the assumption of prerogatives previously held by parliament, is carried out with the consent and tacit approval of politicians. There may be many reasons for this

phenomenon. One of them is the recognition that the transfer of the adjudication of worldview, axiological issues to the courts is profitable for politicians, especially the ruling party, as it draws responsibility for the adjudication of difficult topics and consequently exposes public opinion, which may result in citizens' decisions at the ballot box. Reinforcing this argument, it can be said that courts – despite declining public trust – are still more respected than politicians, which helps to legitimise the decisions made (Hirschl 2011).

## 3. JUDGES AS FUNCTIONARIES OF POLITICAL POWER: THE CONTEXT OF THE POLISH CONSTITUTIONAL CRISIS

The judicialisation of politics can prove costly as David Landau and Rosalinda Dixon point out. They outline two types of "abusive judicial review" that contribute to the dismantling of liberal democracy (Landau and Dixon 2020). This activism can take the form of (a) weak activism – in which the courts legitimise authoritarian actions of the legislature or executive, or (b) strong activism, which describes the process of active participation of judges in the dismantling of liberal democracy (Landau and Dixon 2020).

The first is characterised by judicial activism, which involves legitimising the activities of authoritarian rule by either the legislature or the executive. The key point here is that this activity undermines "the democratic minimum core" e.g. laws encroaching on the essential content of individual dignity or liberty, favouring selected political groups in power struggles. In contrast, a strong abuse is that judicial activism violates the basic pillars of liberal democracy. In this case, the courts or the constitutional court acts to destabilise the democratic order, e.g. creating space for the enactment of a law that, under the guise of ordering the activities of the constitutional body, in reality skews its ability to act effectively in controlling public power (Landau and Dixon 2020).

The intensification of both mechanisms is witnessed in times of crisis of liberal democracy, observed, among others, in the countries of Central and Eastern Europe. As a result of this crisis, legislative and executive powers are taken over by political parties that openly challenge the achievements of liberal democracy as a pillar of the state's social and constitutional order. In such a situation, the courts may turn out to be the guardians of the existing constitutional order, but they may also choose the path of a body participating in systemic change. Landau and Dixon expose the latter situation. In order to depict it, the authors refer to the notion of a democratic minimum core (Landau 2013, Landau and Dixon 2020, 1323). They include in this core: the rule of law, and the protection of human rights including freedom of expression, freedom of assembly, and universal access to the right to vote. According to Landau and Dixon, a judicial decision is an abusive act if it has a negative impact on the values that make up the democratic minimum core (Landau and Dixon 2020). "In this sense, abusive judicial review can be conceptualized as one tool in the hands of antidemocratic political actors, alongside others such as formal amendment, sub-constitutional legal changes, and shifts in informal norms" (Landau and Dixon 2020, 1334). In such a case, political power, concentrated in the centres of executive power, can bring about systemic change by means of legal tools that pass the test of legalism but violate or undermine the democratic minimum core (Scheppele 2018).

Both activities mentioned – weak and strong abuse of judicial review – can be applied to Polish constitutional practice after 2015 (Landau and Dixon 2020). On 16 March 2017,

the Constitutional Tribunal declared the Law – Law on Assemblies, which gives preference to the institution of cyclic assemblies, over other assemblies, to be compatible with the Polish Constitution (Judgment of the Constitutional Tribunal of 16 March 2017, Kp 1/17). The preference lies in the fact that the organisers of cyclic assemblies have priority in choosing the place and time of holding the assembly. In addition, the municipal authority is obliged to issue a decision to prohibit another assembly to be held at the place and time where the cyclic assembly is planned (Florczak-Wątor 2017). The consent to organise cyclic assemblies is issued by the provincial governor, appointed by the ruling party, and obtaining such consent ensures for the next 3 years the exclusive right to organise an assembly in a given place. In this ruling, the Constitutional Tribunal confirmed the compatibility with the Constitution of the Republic of Poland of regulations concerning cyclic assemblies and the granting of special protection to them in comparison with other assemblies, i.e. non-cyclic ones. This is an example of weak engagement, in which laws or specific legal provisions that raise reasonable doubts from the point of view of the foundations of liberal democracy are deemed constitutional.

In contrast, we can speak of a strong commitment in the case of changes concerning the National Council of the Judiciary. In this regard, the Constitutional Court issued a judgment on 20 June 2017 declaring the current law regulating this body unconstitutional, which allowed the ruling party to make changes in such a way as to influence the appointment of judges (Judgment of the Constitutional Court of 20 June 2017, K 5/17). One of the most controversial solutions is the establishment of the election of judges to the NCJ by the parliamentary majority, and not by the judges' self-government, as before. The members of the NCJ prior to the amendment of the 2017 law were mostly elected from among the judges (15 out of 25 members), and after the amendments, out of the 25 members, 23 are elected by the political authorities, which resulted in the suspension of the NCJ from the European Network of Councils for the Judiciary (ENCJ 2012).

Polish constitutionalist Agnieszka Bień-Kacała, analysing the two aforementioned decisions of the Constitutional Tribunal, drew the following conclusion:

> From a court whose task was to protect the rights of the individual at its inception, through the guardian of the principle of the democratic state of law in the conditions of systemic transformation and after its completion with the enactment of the 1997 Constitution of the Republic of Poland, it has reached the function of legal justification of the will of the parliamentary majority. The cited rulings indicate that the Constitutional Court even goes beyond the role of an ally of those in power and becomes their servant, especially in politically 'sensitive' cases. (Bień-Kacała 2018a, 63)

Both of the mentioned forms of abuse of judicial practice: weak and strong can be attributed respectively to visions of the judge: a) depersonalised and b) activist. Both of these visions are present in the Polish debate on the role of the judge (Barcik 2017).

The former depicts the judge in an ivory tower. The metaphor indicated is intended to illustrate the judge's apolitical and impartiality, which is directed at taking into account the rationale of the statute law. In this vision, a judge is a person "ideally devoid of political convictions, worldview and socialist inclinations, not manifesting his or her religion and belief" (Barcik 2017, 38). In this view, the political power (executive and legislative) acting

on behalf of the citizens sets itself the task of defining the problems of justice and solving them, while the task of judges remains to adjudicate in a mechanical way. The application of the law thus becomes the implementation of parliamentary politics. This vision includes a reading of the principle of judicial restraint as depriving judges of the right to speak on changes to the law, especially those of a systemic nature or directly affecting the functioning of the judiciary. On the basis of this argumentation, it is considered that "any utterance of a judge, outside the form of procedural actions, has political overtones, as this is the nature of the public space, and therefore contradicts his or her independence and impartiality" (Machnikowska 2016, 189). In justifying such a view, it is pointed out that any other position of the judge than the one presented in the judgment and referring to the application of the law in a given case is fraught with potential charges of lack of objectivity and bias. In the presented vision, "an independent judge is a judge who is absent from the public space, independence is the same as apoliticality; this in turn should be reduced to an order to remain silent regardless of the content of the applicable law" (Laskowski 2019 175). According to Bartosz Pilitowski – President of Court Watch Poland, the vision of the impersonal judge is a consequence of legal education in Poland. According to him: "In the course of their studies they [judges] are taught that their role is to analyse a legal problem, evaluate it impartially, solve it, and determine a verdict with the intention that it will be upheld. The human being is forgotten in all this" (Świerczyńska-Głownia 2019, 72).

The second vision presents the image of an activist judge. Such a model, according to Barcik, is typical "for authoritarian states in which there is no tri-partition of power, the judge is merely a state official who is obliged to publicly support the official state ideology" (Barcik 2017, 38). In this view, judges become an extended arm of state power, pursuing rationales in the process of applying the law as expected by the political centre. This vision of the judge-activist can prove even more dangerous. It becomes so as a result of adopting the attitude of a legislator who decides on fundamental socio-political problems. One form of this is the role of the judge as a functionary supporting political power. Such an approach is characterised – firstly – by the marginalisation of legal and moral standards in the judge's role at the price of the implementation of party politics. Secondly, the undervaluing of dialogue with citizens, which is rationalised by the principle of judicial restraint. The vision of the political functionary is not the only image of the activist (Morawski 2006, Maroń 2020). Another face is the vision of the judge as a moral arbiter. Taking this view, judicial activism can include, at least, two forms. The first involves a commitment to supporting the legislature and the executive. The second form, on the other hand, consists of an axiological commitment, which is marked by treating individual morality as a reason to the exclusion of other rationales. In this case, performing the role of judge implies acting on the basis of one's own discretion, while rationalising the actions performed (in the eyes of the audience) as an action determined by the role.

I take both forms of abusive judicial review mentioned above as examples of abuse of the role of judges. In this context, I refer to Renate Mayntz, who, in delineating immoral behaviour in the professional role, presents two images of the performer. The first is to step into the role of a cog in the machine, and the second is to reject or far marginalize legal standards and follow a particular political idea while treating legal-institutional rationales instrumentally (Mayntz 1970). Mayntz defines such attitudes using the concept of amoral role (Mayntz 1970, 378).

## 4. WHO ARE JUDGES SUPPOSED TO BE: THE ERA OF LEGISLATORS OR THE ERA OF LAW INTERPRETERS?

From the above, I conclude that judges have a special responsibility in times of political instability (Barak 2016). I identify the sources of danger in the adoption of a legislative attitude. In outlining this attitude in more detail, let us refer to the two concepts that Zygmunt Bauman referred to as the era of interpreters and the era of the legislators (Bauman 1989, Kaczmarek 2011). Let us note at the outset that in Bauman's thought, the era of interpreters can be assigned to the ideology of liquid modernity and the era of legislators to the ideology of solid modernity. Solid modernity presupposes a coherent normative system that offers people ontological security at the price of scrupulous fulfilment of duties. According to Bauman, the transition from solid modernity to its liquid phase leads to a rediscovery of individual freedom. The individual becomes responsible for the choices he or she makes while dismantling the road signs that were inherent in the period of solid modernity. This freedom causes, or is likely to cause, anxiety for the individual. This situation is illustrated by the diagnosis of the risk society, in which it becomes a daily reality to be at the crossroads and to have to make choices (Bauman 1993).

The indicated resolution related to the ideology of solid versus liquid modernity has various consequences. One of these can be traced to the choice between the era of legislators and the era of interpreters that interests us. In the era of interpreters, it is assumed that the task of the interpreter is not to create reality on the basis of a specific centre, but to explain it, to explain it to society. Therefore, the search for a supra-community basis for the exercise of power over society becomes pointless (Bauman 1989). In the era of translators, the social role thus understood, searching for a communal basis, has been at the centre of theory, but not as an assumption, but as a problem. Hence, in answering the question of the social role to be performed by the intellectual nowadays, Bauman draws attention to the necessity of parting with the "Grand Theories", whose aim was to legitimise order, to recommend a single truth, and so on. (Bauman 1989, 140–141). The reaction to this, according to Bauman, can, however, be varied. On the one hand, it is possible to question reality by escaping into the next grand narrative; on the other hand, there may be a departure from the attitude that inscribes itself in the era of lawmakers. The consequence of this departure is the adoption of the role of the interpreter. It is characterised by the creation of a conversation in a situation of conflicting values. According to Bauman, the manifestation of the escape is the construction of an image of social practice according to the model presented by the era of legislators. Intellectuals, acting in the role of legislators, set the pattern of behaviour in social practice without exposing other possible variants of thought and action. This role of the intellectual, according to Bauman, can be fulfilled in two ways: "They can perform the legislators role, however, in at least two different ways: as *symbol-operators*, ideologists – as in models of Parsons's type; or as *expert designers*, technologists – as in Bentham's or similar models" (Bauman 1988, 27).

Exposing the importance of discourse in creating a picture of social practices, Bauman draws attention to the understanding of certainty of an action. The more the sense of certainty of action is shaped on the basis of a factor external to the subject, the more possible the process of neutralising moral responsibility becomes. Conversely, if the certainty of an action is conceived as a task to be fulfilled by the human being, moral responsibility ceases to be something illusory. An ideology based on the era of the legislator recommends normative projects that presuppose the presence of external points of support. This relieves

man of the dilemmas of decision-making. This unburdening can take two forms. The first involves relieving the individual of the dilemma of choice in a quantitative sense. In contrast, the second form – the more radical form – assumes that the dilemmas are invisible; they are obscured by the institutional structure. A different role is assigned to the expert by the ideology of the era of translators. In its light, the individual becomes responsible for the image of the institution in the public space; he explains, clarifies its operation to external observers. His responsibility thus increases.

In my view, the findings about the era of legislators can be applied to formulated claims about judges as legislators in robes (Hirschl 2004, 2023). Such a vision of the role of judges may prove dangerous especially in times of crisis of liberal democracy, as documented by Landau and Dixon's research. I, therefore, consider it reasonable to move away from a vision of judges as legislators who create the socio-political order to interpreters who, while participating in shaping the law, at the same time take on the responsibility of explaining the law as a mechanism for regulating social relations. The recommended change requires a move away from a culture of silence, rationalised by the principle of judicial restraint, to a culture of participation in public life. The underestimation of the importance of this participation and the related civic education was a sore point of the Polish political transformation that began after 1989 and the reason for the disappointed hopes of Polish society, which also contributed to the constitutional crisis (Safjan 2005, 2007). Judge Marek Safjan points out that:

> We have failed to convince a significant part of our society that the rule of law, the observance of the norms of the Constitution, including the guarantee of the separation of powers, are values completely independent of the political vision of the state and that these values ultimately translate into the condition and fate of every citizen of the Republic. We have erected the construction of a democratic state of law in the abstract, in a kind of social vacuum (...). (Safjan 2017, 32)

Marek Safjan's voice is not isolated, as indicated by the words of Supreme Court Judge Michał Laskowski:

> From the perspective of the events of recent years, it seems that this unsatisfactory legal awareness of Poles is the result of our collective negligence. In a properly functioning state, we did not notice the shortcomings, and society did not betray any special curiosity about how the law works. Today, it is very difficult to get our arguments across to the broad public. (Laskowski 2023, 5)

The above statements prove that we should not reduce the causes of the constitutional crisis only to the current political situation. It is worth noting at this point that in 2002 Marek Zirk-Sadowski, a legal theoretician and judge at the Supreme Administrative Court, presenting a dispute over the social role of judges, made the following diagnosis:

> This dispute manifests itself mainly in different ways of assessing the lawyer's responsibility for the content of the law applied. The general perception is that the quality of the law made is not good, but the expectation of greater activity of the courts prevails in public opinion (...). The demand for a change in lawyers' attitudes towards the law in the process of its application and the demand for their explicit assumption of responsibility for its content 'clashes' with radical

> positivism, which orders lawyers to take a mainly cognitive attitude towards the law. (Zirk-Sadowski 2002, 3, 6)

This way of rationalising action is supposed to relieve judges of the burden of resolving moral and cognitive dilemmas. What is responsible for this is not so much legal positivism as a conception of law but a certain type of mentality that finds legitimacy in the bureaucratic and hierarchical institutional structure (Graver 2015). This seems to be the mentality that Erich Fromm had in mind when he presented the mechanism of the "obfuscation of the case" (Fromm 1997, 233–234). This mechanism boils down to the construction in a society of the belief that only experts, with specific knowledge and competence, can make judgements about social practices. In this view, the law becomes subject to the jurisdiction of a few experts (judges or politicians: both options are possible), illustrating the choice between the supremacy of political power and judicial power, essentially depriving society of a public sphere.

In response to this, I propose to look at the role of judges as proposed by Aharon Barak. According to Barak, the role of judges is primarily: a) bridging the gap between law and society and b) protecting the constitution and democracy (Barak 2002/2003, 2006). According to Barak, the role of judges is not only reduced to the obligation to apply the law, but also includes the aforementioned bridging of the gap between law and the changing social reality and upholding democracy and constitutional values. In performing these tasks, judges become interpreters of the law for society.

The origins of a mandate understood in this way can be sought in the fiduciary relationship between judges and the state and society. The fiduciary relationship is characterised by (a) the discretionary power that professionals have over the beneficiary who has entrusted the power, (b) the dependence of the beneficiary on the professional who is to represent his or her interests, hence the aspect of vulnerability on the part of the fiduciary is emphasised, and (c) the trust on which the fiduciary relationship is based, presupposing the credibility of the professional and acting in favour of the beneficiary (Claassen 2023). In the perspective presented, judges, as public professionals, are subject to a double fiduciary relationship (Claassen 2023). The first concerns a relationship in which the public authorises the state to act on its behalf. As a consequence of this authorisation, the state transfers competence to judges. The second relationship reveals the relationship between judges and society, which is mediated by the state. The fiduciary relationship thus illustrates a relationship in which the public authorises the state to act on its behalf and, in turn, the state – on that basis – authorises professionals to provide public services.

## 5. JUDICIAL FREEDOM OF EXPRESSION IN THE ERA OF INTERPRETERS

In the vision presented, the role of judges is to build bridges, not walls, between law and society. This image refers back to the function of law as a social practice that mediates between different systems, taking into account their rationales. One aspect of the role of judges as interpreters of the law is civic education, the purpose of which is to inform the public about the governance of state power, to protect citizens from undue government interference, and to explain to people the basic mechanisms of the law.

I propose to look at judicial freedom of expression in the light of the era of interpreters, valuing citizens to whom the law is to be explained. In this view, the scope of judicial freedom of expression is important not only from the perspective of the performers of the role, but also the recipients of the expression. In this context, judicial expression can be presented as a response to expectations of the professional from specific social groups as well as society. In this view, the dialogical aspect becomes important, presenting judicial freedom of expression from the perspective of the speaker and the audience of expression. The speech act as a form of communication that involves both the speaker and the audience (Habermas 1986).

In order to present such a view of judicial freedom of expression, let us refer to the findings of Andrei Marmor. According to him, freedom of expression consists of two rights: the right to speak – focusing on the interest of the speaker and the right to hear – exposing the interest of society (Marmor 2018, Barak 1990). The right to speak by its scope encompasses the ability to express one's views, emotions, and attitudes, or to communicate with others or the public. In turn, the right to hear by its scope encompasses the accessibility of citizens to various types of content, and acts of communication in the public sphere. In this view, freedom of expression is intended to encourage individuals to become more informed citizens.

According to Marmor, the right to speak is strongly rooted in humanity, and the ability to communicate is an important aspect of being human (Marmor 2018). Linked to the right to speak is also the freedom to form relationships with other people. For this reason, too, the right to speak is a defining factor of a person's subjectivity, as well as the image that is shaped by various interactions, acts of self-expression, and communication. It can take place through speech (oral, written), body language, as well as music or other means of communication. For this reason, according to Marmor, the more one's ability to speak freely is restricted, the more one's field of subjectivity formation, self-expression, and influence on the social environment narrows (Marmor 2018).

The right to hear, on the other hand, correlates strongly with people's rights to obtain news from different areas of the public sphere. Marmor, as examples of such areas, mentions politics, social affairs, science, and culture. This list can also be supplemented with law, justice, or the activities of public authorities. The right to hear in the area of these fields can be justified in various ways (Marmor 2018). One argument is that the right to have information fosters more informed citizen participation in public life and choices. This right also justifies the value of experiencing, of knowing, which influences the process of becoming a civil society. In this sense, judicial freedom of expression can be justified by pointing to the function of access to information in the formation of civil society (Barak 1990). By virtue of their social role, we can expect judges to inform citizens about the policies of the law pursued by the centres of power or important matters for the functioning of the judiciary. At this point, I would like to stipulate that there is a difference between informing the public about judicial matters and activity that can be attributed to the character of practising politics along the lines of party politics.

From the point of view of judicial freedom of expression, it is possible to speak of a relationship between the right to speak, which is in the interest of the professional, and the right to hear, which emphasises the interest of the public. As a result of this relationship, freedom of expression imposes certain obligations on judges, related to the public interest.

In turn, accessibility to knowledge of the law, as an important mechanism of social relations, is a human right. Such a view implies that the right to speak and the right hear may be in different relations to each other. One view assumes that judicial freedom of expression can be considered as a moral obligation based on the obligation of one's role. This view, which exposes the interest of the audience, can also be considered in terms of institutional rationale, as it favours the legitimacy of judicial activity in the public space.

In the representation of judicial freedom of expression as a communicative act, a re-evaluation is apparent, treating freedom of expression in terms of the language of duty. Understood in this way, obligations can be an argument for limiting judicial freedom of expression as well as for expanding it. The sphere of activity of judges is crucial in this respect. While the courtroom binds the judge more strongly, the degree of this binding decreases when we move away from professional activity towards private life (Seibert-Fohr 2021).

## 6. Conclusions

The constitutional crisis we are facing in Poland, among others, is a time of particular responsibility not only for judges but also for academia. For this reason, I derive a few remarks that link thinking about judges as interpreters of the law.

The first one: the judiciary can play an important role in protecting the core values of liberal democracy. However, the opposite is possible. Such a danger increases especially in times of political instability, which can result in increased pressure on judges by political leaders (Graver 2015). When, in addition, this pressure gains support in a society disillusioned by unfulfilled hopes of state reform, submissiveness and disposition towards political power becomes more realistic. This attitude can take the form of automatism or cynicism. With this in mind, I propose a shift in thinking about the role of judges away from the vision of legislators towards interpreters of the law. In light of this shift, the civic education that judges can perform in various spheres of activity becomes important:

> 1) in the courtroom, e.g. in the form of an oral justification of the decision, which takes into account different types of audience, not only professional participants, but also parties to the trial, the public. This requires adapting the form of the message, and even its visualisation, to the audience to which a particular rationale is presented, the judgment of the court;
>
> 2) in the public sphere outside the courtroom, when judges explain to the public the mechanisms of the law or justice reforms, taking into account their consequences also for citizens.

Secondly, the change outlined above is linked to the participation of judges in civic education. The Polish experience after 1989 proves that neglecting this duty has its consequences. It creates fertile ground for criticism of the judiciary especially from populist positions that build their capital on resentment towards the legal elite. Civic education is a long-term process, as the German sociologist Ralf Dahrendorf reminds us. In describing the social and political changes in Central and Eastern Europe after 1989, this author used the metaphor of three clocks: political, economic, and civil society's clock. According to

Dahrendorf, the political clock beats the fastest because legislative changes can be introduced quickly into the legal order, sometimes even too quickly. The economic clock is already ticking at a much slower pace, as it requires building the right institutions to make the declared economic order a reality. The last clock – that of civil society – beats the slowest, as it concerns changes in public morality, the legal consciousness of society. And for this reason, it requires special interest also from the legal community. This lesson is currently being learned in Poland, as evidenced, among others, by the statement of the esteemed judge Marek Laskowski: "(...) there are moments to speak, because silence is sometimes unethical and unacceptable, despite the fact that for many years I have been saying that a judge should be restrained" (Machnikowska 2018, 410). This voice is not an isolated one. Such thinking responds to societal expectations of the judicial community that its representatives should be able to skilfully and convincingly participate in public debate, especially when issues directly concern the judiciary. As Anja Seibert-Fohr writes:

> Whereas judges have traditionally exercised restraint in public pronouncements, there is an increasing expectation nowadays that they explain their decision-making to the broader public. Moreover, judges, at times, participate in political debate; they express their views on legislative reforms and take a stance on issues related to the judiciary. (Seibert-Fohr 2021, 89–90)

Thirdly, the experience of the constitutional crisis shows that the law is too important a mechanism that shapes social relations to be left only to lawyers, judges, or politicians. For this reason, we should be suspicious of initiatives that aim to restrict the freedom of the media or the functioning of non-governmental organisations. The Polish constitutional crisis, differs from the Hungarian one also because there are free media, which inform citizens about changes in the judiciary and their consequences. Moreover, international organisations, NGOs, and associations have been involved in the Polish dispute over the rule of law, which has allowed the public, the citizens, to become interested in the dispute. The adoption of the vision of judges as interpreters of the law undoubtedly corresponds to the appreciation of the role of citizens in public life. This appreciation should be permanent, not only in times of constitutional crisis.

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