„Krytyka Prawa", tom 14, nr 4/2022, s. 118–134, ISSN 2080-1084, e-ISSN 2450-7938, © 2022 Author.
This is an open access article distributed under the Creative Commons BY 4.0 license:
http://creativecommons.org/licenses/by/4.0

PAWEŁ SKUCZYŃSKI[1]

Three Models of Judicial Free Speech and Technological Challenges[2]

Submitted: 21.06.2022. Accepted: 11.10.2022

Abstract

The article deals with the normative patterns of communication of judges in a theoretical perspective. Their identification is thus taken as a universal problem, occurring in all legal cultures and regardless of current disputes concerning them. It is assumed that normative patterns of communication among judges are built on the understanding of the role of the judge and the place of the judiciary within checks and balances. Based on the assumption that the role of judges and the status of the judiciary have evolved, three successive historical models of judicial communication were proposed, i.e. the first model – impersonal, the second – self-restrained, and the third – accurate communication. The thesis was also put forward that the last of the models may prove to be inadequate in the face of contemporary challenges, resulting primarily from cultural changes driven by the development of new communication technologies.

Keywords: judges, communication, new technologies.

[1] Dr Paweł Skuczyński – Wydział Prawa i Administracji, Uniwersytet Warszawski (Polska); e-mail: p.skuczynski@wpia.uw.edu.pl; ORCID: 0000-0003-3817-0462.

[2] The research in this article has not been supported financially by any institution.

„Krytyka Prawa", tom 14, nr 4/2022, s. 118–134, ISSN 2080-1084, e-ISSN 2450-7938, © 2022 Author.
This is an open access article distributed under the Creative Commons BY 4.0 license:
http://creativecommons.org/licenses/by/4.0

PAWEŁ SKUCZYŃSKI

Trzy modele swobody wypowiedzi sędziów a wyzwania technologiczne[3]

Streszczenie

Artykuł dotyczy normatywnych wzorców komunikowania się sędziów w ujęciu teoretycznym. Ich identyfikacja jest zatem traktowana jako problem uniwersalny, występujący we wszystkich kulturach prawnych i niezależnie od toczących się wokół nich sporów. Przyjmuje się, że normatywne wzorce komunikacji sędziów nadbudowane są na rozumieniu roli sędziego i miejsca władzy sądowniczej w ramach podziału władzy. Wychodząc z założenia, że rola sędziów i status sądownictwa ewoluowały, zaproponowano trzy kolejne historyczne modele komunikacji sędziowskiej, tj. pierwszy model – bezosobowości, drugi – powściągliwości i trzeci – trafności. Postawiono również tezę, że ostatni z modeli może okazać się nieadekwatny w obliczu współczesnych wyzwań, wynikających przede wszystkim ze zmian kulturowych napędzanych rozwojem nowych technologii komunikacyjnych. Oparto się na ich interpretacji jako przejścia z epoki pisma do tzw. oralności wtórnej.

Słowa kluczowe: sędziowie, komunikacja, nowe technologie.

[3] Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

 DOI: 10.7206/kp.2080-1084.560

Introduction

The problem of freedom of expression is of particular interest today because of two opposing tendencies. On the one hand, increased political pressure on the judiciary in some countries and the activism of judges in the public sphere who oppose it, and on the other, political efforts to repress and silence this activism in the name of judicial self-restraint. It appears that traditional concepts of limited participation of judges in the public sphere seem inadequate. This can be seen both in the evolution of standards in individual countries[4] and in the growing jurisprudence of international courts.[5] Without underestimating the problems associated with the limits of judges' free speech and the need to protect their freedom of communication, I would like to present here a universalist approach. This means that the problem of judges` communication is not something new and has been related to the operation of the courts since they were formed as institutions responsible for the application of law. The approach to this problem has evolved along with the perception of the role of the courts. Thus, although there may be cultural differences and different communication styles of courts,[6] it is possible to attempt to develop some models of universal applicability.

Starting from the latter assumption and having to choose between two methodological perspectives of analysis: searching for ethical limits of judges' expression and their related dilemmas and trying to identify structural factors that make traditional patterns insufficient, the latter was chosen. This means that two aspects of the problem need to be distinguished. The first is structural. It is related to the fact that the patterns and limits of judicial expression depend on the position of the judiciary and its relationship to the other branches; or, even more broadly, on the relationship between social subsystems such as law, politics and the media, in particular the tensions and reconfigurations between them. The second aspect is cultural and consists in the fact that the position taken in the dispute about the limits of a judge's free speech is linked to a particular normative conception of legal culture and the values to be realised on its basis. To a large extent, it boils

4 See e.g.: Republican Party of Minnesota vs White from June 27th 2002 (536 U.S. 2002).

5 See e.g.: López Lone and others vs Honduras from October 5th 2015; Kudeshkina vs Russia form February 26th 2009 (29492/05); Baka vs Hungary from June 23th 2016 (20261/12).

6 M. Kurkchiyan, *Comparing Legal Cultures: Three Models of Court for Small Civil Cases*, "Journal of Comparative Law" 2010, 5(2), p. 169.

down to the problem of whether the court is to be merely a law-applying body or whether it is also to play the role of a participant in communication processes that co-shape legal culture.

Consequently, the discussion of communication models of judges will be linked to specific models of judicial power and the role of the judge and presented in evolutionary terms. It should be stressed that this communication will be understood broadly, i.e. as pertaining to various spheres: statements related to the essence of judicial service, i.e. adjudication, including statements made in relation to participants in the proceedings during the hearing as well as in oral and written opinions, and also statements outside the service, within the framework of the judge's participation in public life.

For judicial communication understood in this way, I chose as the key determining structural factor changes in the way the concept of the rule of law and the principle of the separation of powers are understood. As mentioned, this is not the only possible approach. However, the development of the concept of the checks and balances is closely related to judicial ethics, not least because the profession's patterns of behaviour – according to a widely held and somewhat standard view – are superimposed on social roles. The rule of law and the separation of powers determine the understanding of judicial power and consequently the role of the judge. Defining it, in turn, affects the framing of the judge's duties to serve, as well as the constraints on him or her in various spheres.

Of course, there is no single understanding of the separation of powers and there are many views on the nature of the judicial power. It is sometimes stated that in contemporary constitutionalism it is not even clear whether we are dealing with a legal principle or a political mechanism.[7] This is obviously not to relativise whether it is part of a particular constitutional order and whether it is implemented or not. Instead, the discussion of different interpretations occurring at the level of conception and practice clarifies many aspects of the disputes about the patterns and limits of judicial expression.

The understanding of the principle of the separation of powers includes the following elements: a) the division of the state's legal spheres of activity into law-making, administration and the administration of justice, b) in accordance with the division of the state's legal spheres of activity, the division of the state apparatus into corresponding groups of authorities, i.e. legislative, administrative, and judicial bodies, c) the organisational and personal separation of all groups of authorities, based on the principle of their relative equality and independence, d) the implementation by each group of authorities, first and foremost, of its own legal sphere

[7] Ch. Möllers, *The Three Branches: A Comparative Model of Separation of Powers*, Oxford 2012, p. 50.

 DOI: 10.7206/kp.2080-1084.560

of activity, combined with relatively little ability to interfere in the activities of the other groups.[8]

Within the framework of the concept of checks and balances thus understood, the last of the three has undergone fundamental evolution, in particular as regards the relationship of the judiciary to the other authorities. While various approaches are of course possible, for the purposes of defining the patterns and limits of judicial expression it seems most appropriate to distinguish between three historical models, which might be tentatively termed the 'impersonal judge', the 'reserved judge' and the 'communicative judge'. As these are merely models, they are based on idealisation and therefore do not exist in any pure form in reality.

Model 1: Impartiality as Impersonality

The first model refers primarily to the concept of the separation of powers as shaped in the oldest phase of the development of modern constitutionalism. It is usually associated with the views of Montesquieu, though one should rather speak of a certain image of his concept than allegiance to the author himself. There is no doubt, however, that much of his understanding of the separation of powers has been recycled in state systems, and the metaphor of the judge as the 'mouth of the law' has become part of legal culture. Associated with it is a particular vision of judicial ethics, including the patterns and limits of a judge's speech.

In this model, the separation of powers is largely understood statically. The very fact of functional and organisational separation of individual spheres of state activity is supposed to be a source of limitation of its power and have a guarantee dimension in relation to citizens. As a rule, the competences of the legislative, executive and judiciary do not overlap. If there are certain brakes in the relations between the authorities aimed at balancing them, they primarily concern the legislative and executive powers. The judicial power is not included in the balancing mechanisms. In particular, the courts are not called upon to exercise checks of legality over the activities of the other authorities.

Unlike the other authorities, the courts also do not permanently represent any social group. Thus, although at this stage of the development of the concept of checks and balances the assumption still familiar from the theory of the mixed system is made that the separation of powers corresponds to the division into social states and that only certain authorities have a popular character and thus possess what we could today call democratic legitimacy, this does not apply to the courts.

[8] R. Małajny, *Trzy teorie podzielonej władzy*, Warszawa 2001, p. 160.

They are therefore neutral towards social conflict. They also do not have to have a professional composition and can be appointed ad hoc.

All this means that the judiciary, on the basis of the model discussed, is regarded as non-political. Its task is exclusively to apply the law, i.e. to resolve disputes about the law in specific situations. The judicial power may therefore also be described as an applicative power, as opposed to the other powers which are clearly political in nature. The static nature of the division and the fact that the judiciary remains outside the balancing mechanisms means that the risk of judges entering the political sphere is negligible. Montesquieu says of the judiciary, among other things, that it is essentially 'invisible' and 'non-existent',[9] and it is why it was later called the least dangerous of the powers.

This understanding of the tripartition and the essence of the judicial power corresponds to a certain ethical standard of the judge. It is undoubtedly centred around ensuring the authority of an impartial arbiter. Two issues seem to be key here. On the one hand, this model requires judges to possess a set of virtues characteristic of the legal ethics tradition. They should therefore possess such constant character dispositions as honesty, disinterestedness, prudence or courage.

At the same time, they should be characterised by a particular sense of the dignity of the office they hold. This notion entails higher standards of conduct than in the case of other persons, and a prohibition on behaviour that might humiliate a judge or undermine confidence in him or her. Unworthy conduct is therefore any act or omission that undermines the personal authority of a judge and the judiciary as a whole. Although the criterion for assessing conduct here is largely external, the judge himself must be able to judge what is proper and what is not proper in view of the office he holds.[10]

On the other hand, as already mentioned, the judge should only be 'the mouth of the law'. This metaphor expresses not only, of course, a certain conception of the application of the law, but is also an element of the model of judicial ethics under the model in question. For if the law itself is to speak through a judge, his professional and public utterances should be limited to those that are strictly legal in nature. This means eliminating any expression of his or her own convictions and emotions, even if these are connected to the law itself and are views on what the law should be.

Translated into more concrete norms of behaviour, the judge should treat the parties impersonally, but with respect. The oral reasoning of the judgment and

---

9 Monteskiusz, *O duchu praw*, Warszawa 2002, pp. 172, 175.

10 M. Laskowski, *Uchybienie godności urzędu sędziego jako podstawa odpowiedzialności dyscyplinarnej*, Warszawa 2019.

 DOI: 10.7206/kp.2080-1084.560

the written opinions of the court should be as factual and professional as possible, and should be reported in legal language. Any attempt to translate them into everyday language or to use metaphors or other expressions intended to attract attention and facilitate perception, would conflict with the neutrality of the judge assumed here. The role of the judge is to make judgements, not to care about how they are perceived.

It can be said that the model in question involves a bureaucratic type of communication that is intended to ensure rationality and impartiality in the application of the law. Using impersonal phrases, the judge communicates with the public in a manner similar to the communication between the legislator and the addressees of legislation. In this way, he or she can actually perform the function of merely 'mouthing the law'.

At the same time, a judge should avoid active participation in public life, and in particular avoid becoming entangled in political disputes at all costs. The dignity and authority of a judge require at least a high degree of scepticism about his or her participation in public debate, including, for instance, participation in assemblies. This is essential for upholding the social authority of the judiciary.

It should be noted that this model is usually associated with a somewhat naive psychology, according to which not only should a judge not reveal his or her beliefs and communicate with the public in an impersonal manner, but by improving himself or herself in professional virtues and a sense of the dignity of the office he or she holds, he or she can reduce his or her extra-professional beliefs. In an ideal version, judges would thus form a kind of homogenous community, in which all would be equally 'transparent' in the public space.

Model 2: Impartiality as self-restraint

The second model is related to the spread of a dynamic view of the separation of powers or, to be more precise, to the extension of the mechanisms of balancing and mutual inhibition between the powers by including the judicial branch. As mentioned, originally checks and balances concerned primarily the legislative and executive branches. It was only later that there was a transition to a model in which the guarantee character of the judiciary did not consist only in its static separation from the other authorities of the state, but in the fact that one of the tasks of the judiciary is to create a counterbalance for them.

The formation of the model in question took place in the second half of the 19th century and the first half of the 20th century. In Europe, it must be associated primarily with the emergence of specialised organs of the judiciary, namely admi-

nistrative courts and constitutional courts, which have been given powers to exercise control over the legality of the actions of the other authorities. This model is thus intrinsically linked to the judicial control of the activities of public administration and the constitutionality of law-making. However, it does not exhaust itself in this, as a number of powers of common courts can also be qualified as counterbalancing mechanisms. Examples include the liability for damages of public authorities or the powers of criminal courts to control operational activities and pre-trial proceedings.

The status of the judiciary within the framework of the checks and balances thus understood remained specific. Just like other authorities, the judiciary must act on the basis and within the scope of its legal power *vis-à-vis* other branches. It may not exceed or abuse them. To do so would impermissibly encroach on administrative or law-making activities and, consequently, interfere in the political sphere. This in turn would mean violating the essence of the separation of powers. As a rule, the safeguard against such abuses and unauthorised interference is symmetry, in that each authority also has competences in relation to the others. It is thus about a mechanism of mutual balancing, not simply balancing.

The specificity of the judicial power within this mechanism is the need to guarantee the independence of the judiciary. It is a kind of meta-guarantee in relation to independence of an individual judge.[11] It implies a significant limitation of the powers of the legislative and executive powers in relation to the judicial power. It is therefore the introduction of a certain asymmetry in the relations discussed here. It is sometimes combined with and justified also by the 'weakness' and non-political character of the judiciary, which was mentioned under the previous model.

The model of judicial ethics built over such an understanding of checks and balances is consequently focused on ensuring that the judiciary remains in its intended role. Because of this asymmetry, judicial ethics may be the only guarantee here. It relies to a large extent on the self-restraint of judges in the exercise of their power. Impartiality is therefore understood here primarily as judicial self-restraint.[12]

This model abandons the naive psychology of the previous model and, influenced by legal realism, accepts that judges do not form a homogenous community. They have different social or political beliefs and adhere to different legal doctrines. To expect them to dispense with them would be inappropriate. They are therefore not required to be completely 'transparent'. In its fundamental sense, however,

[11] G. Ławnikowicz, *Idea niezawisłości sędziowskiej w porządku prawnym i myśli prawniczej II Rzeczypospolitej*, Toruń 2009, p. 65 ff.

[12] R.A. Posner, *The Meaning of Judicial Self-Restraint*, "Indiana Law Journal" 1983, 59, p. 10 ff.

 DOI: 10.7206/kp.2080-1084.560

judicial self-restraint implies an ethical capacity to control these beliefs and their relation to the service. It should be stressed that it is not the task of the judge to give up his own beliefs, but to acquire a self-awareness that will enable him to separate them from the performance of his or her task.

Controlling one's own convictions should consist above all in ensuring that they do not influence the rulings and are not presented when deciding cases, unless the law expressly authorises a judge to do so by granting him or her discretionary power in certain spheres. Even then, however, the judge must allow his or her own convictions to be expressed and reveal them cautiously and hesitantly. He or she is obliged to accept that the convictions and resulting decisions of the other branches – legislative and executive – are the product of a democratic process and he may interfere in them only to the minimum extent necessary. In this connection, judicial self-restraint is also sometimes referred to as a kind of respect or deference to democratically made decisions.

Translated into more concrete norms of behaviour, this model does not require the judge to communicate in a completely impersonal manner during the hearing or in the oral and written opinions. In departing from a completely formalised mode of communication, the judge should, however, be careful not to reveal his or her convictions and thus create the impression that they influence his or her judgments.

Limited public activity by judges is also permissible under this model. If such activity is related to the performance of judicial duties, speech on legal issues should be limited to abstract considerations and to explaining specific problems to citizens on the basis of legal knowledge. If there is a question of revealing one's own convictions and, for instance, making demands concerning legislation, this should be clearly stated. A judge should not criticise the policies pursued by other branches. He or she should not comment on specific cases, whether pending or likely to be pending, or on completed cases.

On the other hand, any activity unrelated to judicial service should be clearly demarcated from it and conducted in such a way as not to raise any doubts about the judge's impartiality. The public perception of his or her behaviour is the basic criterion here. In this, as well as in the other spheres indicated, there are therefore clear substantive limits to the judge's statements, which results from an understanding of impartiality as self-restraint and scepticism towards any judicial activism. They are therefore not limited, for instance, to the form of expression or whether it violates the dignity of others or not.

Model 3: Impartiality as Accurate Communication

The third model is related to the strengthening of the position of the judiciary within checks and balances and to the actual increase of its significance in the systemic practice. It is no longer conceived merely as a counterbalance to the other authorities, but has gained paramount importance in terms of guaranteeing individual rights. It has become the guardian of these rights and of the rule of law in general. This model is thus connected with the evolution of constitutionalism itself as a set of views on the role of the constitution in contemporary legal orders, and does not necessarily entail the introduction of new systemic solutions, including, for instance, a different shaping of the powers of particular authorities.

The changes in question took place in the second half of the 20th century, and in Europe they are primarily associated with the experience of totalitarian and authoritarian state. It became the explicit task of the judiciary to guard against a return to such dangerous tendencies. In the United States, on the other hand, they can be linked to the participation of the courts in dynamic social transformations. In particular, one can point to the so-called rights revolution and the participation of the federal Supreme Court in guaranteeing equal civil rights.

The emergence of courts and tribunals of an international character, both operating in the area of human rights and in the area of the integration of the legal orders, was also of great importance for the formation of the model in question. The European Court of Human Rights and the Court of Justice of the European Union are the most obvious examples in our legal culture. It should be noted that they escape the traditional understanding of the separation of powers as judicial bodies operating within international organisations before which states appear as parties.

An element that links the above examples is the participation of the courts in shaping the so-called legal standards, i.e. principles of law characterised by a certain level of protection of individual rights. Standards have an overwhelming influence on contemporary legal orders. They largely restrict the actions of the legislative and executive branches. They are not infrequently shaped by courts in an activist manner. Judgments handed down in the context of specific cases become opportunities to develop standards and gain ground-breaking character. As a consequence, the role of the judge has been modified and consists of much more than simply applying the law, as in the case of the earliest model discussed above. For instance, L. Green distinguishes three elements that make up the contemporary role of the judge: the duty to apply the law, the duty to develop the law and the duty to protect the law.[13]

[13] L. Green, *Law and the Role of a Judge*, [in:] K.K. Ferzan, S.J. Morse (eds.), *Legal, Moral, and Metaphysical Truths*, Oxford 2016.

 DOI: 10.7206/kp.2080-1084.560

The practice of developing the law through standards is of course not unfounded and finds justification in the structure of normative acts that are the basis for adjudication, such as constitutions or acts of international law. This is because their language is not precise enough to provide a clear boundary for the actions of the judiciary. The obligation to adjudicate in very complex cases with the open character of the language of the regulations often forces to perform such procedures as weighing values or referring to general practical arguments. Through such procedures, legal standards are shaped on the basis of legal rules.

The combination of these phenomena means that not only the legislator develops the legal system. To a large extent, this is done by the judiciary. This situation is sometimes referred to as *judicial supremacy* or *Richterstaat*. These terms are used both in the sense of accepting the model in question and in the polemical sense. In the case of the former, it is generally assumed that the increasing iuridisation of politics and the growing importance of the judiciary is an important civilisational achievement and safeguards against totalitarianism. The name *Richterstaat*, for example, is intended to express the contrast between the model in question and the 19th century concept of the *Gesetzesstaat*, *i.e.* the 'State of Laws', which can also be equated with a merely formal understanding of the legal state. The latter`s conception of the judicial power as limited to the functions known from previous models did not pass the historical test.

The use of these terms in a polemical sense, on the other hand, usually implies the reservation that the judicial branch does not have sufficient legitimacy to act as a co-creator of the legal order and to influence the actions of other authorities. This is because it has a decidedly professional rather than democratic character. Such polemics are usually not about accusing the judiciary of abusing its position or usurping it, but about showing that there is a gap between the extension of judges' responsibilities and the legitimacy of their authority. Purely legalistic legitimisation, referring only to the powers and positions guaranteed by the Constitution, is insufficient here.

The pattern of judicial ethics built over the discussed understanding of the role of the courts is focused around filling this gap. According to it, this can only happen through proper communication of the courts with all parties interested in their decisions. The model according to which a judge is only a moderator of communication occurring within a legal dispute should be rejected. He or she must also be an active participant in it, though, of course, so as not to become a party to the dispute itself. This is necessary because knowledge of the law itself takes place through communication, and communication which meets certain

ethical requirements.[14] Both passivity and excessive activity are therefore contrary to this pattern. Therefore, on its basis, impartiality can be equated with accurate communication. It can be said that: 'The execution and application of the law by the courts is a form of specific dialogue with society, in which the transparency of the institutions, their rules of operation and the way they communicate with the participants in the proceedings is very important.'[15]

For if courts weigh up values or justify their rulings by reference to general practical arguments, it is impossible to do so through completely impersonal communication or withdrawal. For impartiality can no longer be understood as 'axiological neutrality'.[16] But neither can they simply make arbitrary expressions of their beliefs. They must translate them into legal arguments. Miscommunication will therefore be both inadequate communication, for instance, omitting axiological or practical aspects of the case on one hand, and overly emotional communication on the other. Both one that is 'inadequate' and one that is 'excessive'. Just as the judiciary can legitimise itself through accurate communication, errors in communication can lead to its delegitimisation.

It should be emphasised that communication through jurisprudence remains fundamental in this pattern. As emphasised in the literature, the modern judiciary legitimises itself and its decisions through 'justificatory discourse'. The judge's apt and fair choice of arguments is a condition for his ruling to be accepted as valid. Judicial ethics therefore requires not only a kind of translation of strictly legal arguments into more comprehensible language, but also addressing the axiological and practical elements of the case. Communication in this respect must therefore be effective and provide the judiciary with the so-called result legitimacy, based on social recognition of the outcomes of its activities.

Communication concerning the participants in the proceedings, remains no less important. Here too, the model in question requires a departure from the impersonal patterns of communication. If the judge is to properly build a broad and convincing argumentation for his ruling, it must be based on a thorough knowledge of the positions of the parties and the material of the case. The course of interaction of citizens with courts is crucial for their legitimacy, if it is understood in social terms and not only in terms of legality.[17] Meanwhile, it seems that com-

---

14 P. Skuczyński, M. Zirk-Sadowski, *Dwa wymiary etyki zawodowej sędziów*, "Krajowa Rada Sądownictwa" 2012, 1, p. 14.

15 M. Safjan, *Etyka zawodu sędziowskiego*, [in:] E. Łojko (ed.), *Etyka prawnika. Etyka nauczyciela zawodu prawniczego*, Warszawa 2006, p. 52.

16 Z. Tobor, T. Pietrzykowski, *Roszczenie do bezstronności*, [in:] J. Stelmach (ed.), *Filozofia prawa wobec globalizmu*, Kraków 2003, p. 73.

17 S. Burdziej, *Sprawiedliwość i prawomocność. O społecznej legitymizacji władzy sądowniczej*, Toruń 2017, p. 76 ff.

 DOI: 10.7206/kp.2080-1084.560

pared to other areas of judges' communication this one is still neglected. As it is argued in the literature 'judges have failed […] to form a community belief in the desirability of daily, including informal, activity in this relationship.'[18]

Necessary for its development is something that can be described as active listening, which requires from judges a certain type of interaction and therefore interpersonal skills. These involve introducing a level of de-formalisation of communication such that it is possible for the court to recognise what the litigant in question actually wants to say, rather than, for example, 'what the court wants to hear.' Formal or impersonal communication denies the subjectivity of the parties.[19] It should be emphasised that this is independent of the design of the position of the court in a particular procedure and the degree of its inquisitorial nature. Thus, the judicial authority may try to create the so-called inclusive legitimacy, based on the participation of the interested parties in the process of reaching a decision.

It should also be added that the model in question assumes a link between the public activities of judges and adjudication, i.e. it assigns to them above all the role of educators. Interpreting legal problems, as well as the very position of the judiciary, is an essential element in legitimising the judiciary as a co-creator of legal order standards. However, the previous comments on the relevance of communication and the risk of counterproductive results remain valid. In other words, as in previous models, non-judicial activity must not compromise the impartiality of the court and the perception of it as impartial.

An important and new aspect that arises in connection with the model under discussion is communication between branches. Previous ones assumed either a structural absence of such a phenomenon or its avoidance due to judicial self-restraint. The role of the co-creator of legal standards requires a different approach. Undoubtedly, the control of the legality of the authorities` actions in the light of the legal standards creates the possibility to formulate their criticism in specific cases. Thus, if, for instance, a specific violation of the principle of legality by the public administration is the result of a public policy that is erroneous in the opinion of the court or if a specific correction of such a policy may contribute to a more complete implementation of a given standard, it is the task of the judge to make criticism in this respect.

A similar role may be attributed to the courts under the discussed model when it comes to commenting on faulty legislative solutions and formulating postulates to the legislator. Obviously, such criticism is of non-binding nature. Here, too,

---

18 A. Machnikowska, *O niezawisłości sędziów i niezależności sądów w trudnych czasach. Wymiar sprawiedliwości w pułapce sprawności*, Warszawa 2018, p. 366.

19 T. Romer, M. Najda, *Etyka dla sędziów. Rozważania*, Warszawa 2007, p. 125.

however, it must be pointed out that the issue of the accuracy of communication plays an enormous role, and both its absence and excess may lead to negative consequences in terms of public recognition of the role of the judiciary. In particular, the danger of breaching apolitical requirements if such criticism gives the impression of bias is significant.

The Technological Revolution and Contemporary Challenges for the Communication of Judges

Interestingly, the last of the discussed models may also already prove to be inadequate to the challenges of the present day. As mentioned, its source is the evolution of the position of the judiciary in constitutional democracies over the last few decades. Therefore, by its very nature, it does not take into account the social processes taking place in recent times. First of all, it is worth noting that the model of judicial ethics directed at the relationship between accurate communication and legitimacy captures the argumentation of the court as a kind of whole. It is supposed to constitute a certain coherent and internally connected argument, in its individual aspects convincing to different audiences. This is characteristic of a culture in which the text is treated as the primary means of communication. It is always a whole in which the parts remain in a close structural relationship and cannot be separated from it and interpreted autonomously.

Meanwhile, it is pointed out that as a result of technological changes, today`s communication through both traditional and electronic media goes beyond the logic of the text. The ongoing technical revolution connected with the emergence of new communication tools leads to profound social and cultural changes. As J. Goody claims, new technologies in communication do not provide new instruments for dealing with natural objects, but transform interpersonal and inter-institutional relations.[20]

The essence of the technology-driven turn in communication is a return to treating speech as the central case of communication, in a slightly modified form of course. It is therefore not a return to the pre-literacy era. The development of communication media leads to the accumulation of methods of communication and action rather than the elimination of some by the other.[21] Consequently, today's privileging of speech is referred to as the secondary orality of culture. According to W. Ong secondary orality is a phenomenon of post-literacy and it breaks with

[20] J. Goody, *The Logic of Writing and the Organization of Society*, Cambridge 1986, p. 10 ff.

[21] A. Mencwel, *Wyobraźnia antropologiczna*, Warszawa 2006, pp. 35–36.

 DOI: 10.7206/kp.2080-1084.560

the individualized introversion of the age of writing, print, and rationalism.[22] This has far-reaching consequences in that the focus on the comprehensive and coherent nature of speech is replaced by looser relations of a conversational nature. Thus, frequent changes of the topics of communication, its defragmentation consisting in interpreting the parts in isolation from the whole etc. become common phenomena. Short, attention-grabbing phrases that exist outside their context are more powerful than structured arguments.

This, of course, makes it considerably more difficult for the courts to control the communication. Carefully constructed argumentative statements can fail completely in comparison with short but succinct messages. They can often be 'picked out' or 'caught' by other participants of communication against the intention of the court, and then polemicised in the same way. They do not have to constitute the punch line of the whole. On the other hand, it is difficult to imagine a shift to such a 'conversational' way of communicating between the court and its surroundings. This would mean not only defragmentation of the legal discourse, but – as it seems – entry by judges into communication in other spheres of public life, governed by completely different principles.

This assessment may be confirmed by the fact that the intensity of contacts with the media and activity in social media very often leads judges to make expressions that can hardly be classified as legal views. Instead, they may be interpreted as personal or political assessments. This is mainly because this type of communication forces the expression of one`s own attitude to the issues at hand rather than an impartial legal point of view.[23] This is in line with the well-known principle that the forms of communication are not neutral and influence its content – the medium becomes the message.[24] This raises the problem of the negative impact of such a 'conversational' mode of communication on the legitimacy of courts.

This problem is further compounded by the increased interest in the functioning of the judiciary. In various documents, including codes of ethics, it is said that judges are therefore under constant public scrutiny. This is not something specific to the judiciary alone, as it is part of a wider phenomenon. It is sometimes referred to as monitoring democracy. The reason for its emergence is the ineffectiveness of the mechanisms of control over the actions of public authorities that are characteristic of a democracy based on representation, and thus primarily exercised by the parliament. These mechanisms are replaced by a dispersed but, at the same time, constant examination and publicising of various aspects of the activities of these

22 W.J. Ong, *Orality and Literacy: The Technologizing of the Word*, Routledge 2012, p. 204 ff.

23 See e.g.: Buscemi vs Italy from 16 September 1999 (29569/95).

24 M. McLuhan, *Understanding Media: The Extensions of Man*, Cambridge Mass. 1994, pp. 8–12.

authorities. This can be carried out not only by specialised control bodies but also by the non-governmental sector and, increasingly, by individuals.[25]

This is compounded by another transformation of contemporary communication related to the last issue, i.e. the implementation of monitoring activities by individual citizens. These are usually carried out from a completely external perspective, and are aimed at producing alternative understandings of the events in question than the expert ones. They also often aim to demonstrate that there are completely non-obvious connections between them, the existence of which is to be proven by a very detailed analysis of circumstances that are ignored by the traditional media. As a consequence, even minor events of a completely detailed character may become the basis for the creation of alternative understandings of a given situation, which will gain credibility due to placing them in alternative contexts. They will also be used to undermine the interpretative monopoly of institutions.[26]

Conclusions

Secondary orality and the focus on monitoring the action of public authority are the result of similar technological developments. Together, they can therefore mean that even around a single utterance a narrative that is persuasive to many people and carries weight can emerge. For the judiciary, this has serious implications. It means that it is very easy to trigger the process of its delegitimisation. On the one hand, all it takes is actually one statement to be understood contrary to its author's intentions, taken out of its context and placed in an alternative context. This may result in a desire to move away from the search for ways to communicate accurately through judgements and to take refuge behind models of restraint or impersonality. On the other hand, however, such a withdrawal from the processes of social communication and remaining only within the circle of inter-judicial dialogue is also not possible today. For such an attitude creates a comfortable space for the creation of various kinds of alternative narratives and rationalisations, and perhaps even condemns them. It will only deepen the alienation of judges from society. As a consequence, law will become an increasingly isolated and incomprehensible part of culture, and the meaning of lawyers' statements will be even more difficult

[25] J. Keane, *Monitory Democracy?* [in:] S. Alonso, J. Keane, W. Merkel (eds.), *The Future of Representative Democracy*, Cambridge 2011, p. 212 ff.

[26] M. Napiórkowski, *Władza wyobraźni. Kto wymyśla co zdarzyło się wczoraj?*, Warszawa 2014, pp. 60–70.

 DOI: 10.7206/kp.2080-1084.560

to grasp by citizens. It will then not be possible for the law to fulfil its integrating function in a pluralistic society, and for the courts to provide real conflict resolution.[27]

Bibliography

Burdziej S., *Sprawiedliwość i prawomocność. O społecznej legitymizacji władzy sądowniczej*, Toruń 2017.

Goody J., *The Logic of Writing and the Organization of Society*, Cambridge 1983.

Green L., *Law and the Role of a Judge*, [in:] K.K. Ferzan, S.J. Morse (eds.), *Legal, Moral, and Metaphysical Truths*, Oxford 2016.

Keane J., *Monitory Democracy?* [in:] S. Alonso, J. Keane, W. Merkel (eds.), *The Future of Representative Democracy*, Cambridge 2011.

Kurkchiyan M., *Comparing Legal Cultures: Three Models of Court for Small Civil Cases*, "Journal of Comparative Law" 2010, 5(2).

Laskowski M., *Uchybienie godności urzędu sędziego jako podstawa odpowiedzialności dyscyplinarnej*, Warszawa 2019.

Ławnikowicz G., *Idea niezawisłości sędziowskiej w porządku prawnym i myśli prawniczej II Rzeczypospolitej*, Toruń 2009.

Machnikowska A., *O niezawisłości sędziów i niezależności sądów w trudnych czasach. Wymiar sprawiedliwości w pułapce sprawności*, Warszawa 2018.

Małajny R., *Trzy teorie podzielonej władzy*, Warszawa 2001.

M. McLuhan, *Understanding Media: The Extensions of Man*, Cambridge Mass. 1994.

Mencwel A., *Wyobraźnia antropologiczna*, Warszawa 2006.

Möllers Ch., *The Three Branches: A Comparative Model of Separation of Powers*, Oxford 2012.

Monteskiusz, *O duchu praw*, Warszawa 2002.

Napiórkowski M., *Władza wyobraźni. Kto wymyśla co zdarzyło się wczoraj?*, Warszawa 2014.

Ong W.J., *Orality and Literacy: The Technologizing of the Word*, Routledge 2012.

Posner R.A., *The Meaning of Judicial Self-Restraint*, "Indiana Law Journal" 1983, 59.

Romer T., Najda M., *Etyka dla sędziów. Rozważania*, Warszawa 2007.

Safjan M., *Etyka zawodu sędziowskiego*, [in:] E. Łojko (ed.), *Etyka prawnika. Etyka nauczyciela zawodu prawniczego*, Warszawa 2006.

Skuczyński P., Zirk-Sadowski M., *Dwa wymiary etyki zawodowej sędziów*, "Krajowa Rada Sądownictwa" 2012, 1.

Tobor Z., Pietrzykowski T., *Roszczenie do bezstronności*, [in:] J. Stelmach (ed.), *Filozofia prawa wobec* globalizmu, Kraków 2003.

Zirk-Sadowski M., *Prawo a uczestniczenie w kulturze*, Łódź 1998.

[27] M. Zirk-Sadowski M., *Prawo a uczestniczenie w kulturze*, Łódź 1998, pp. 40–44.