



**Commentary to the judgment of the ECHR
of 16 June 2022 *Żurek v. Poland*, Chamber
(Section I), Application no. 39650/18
(on freedom of expression of judges)**

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Abstract. The commented ruling of the ECHR of 16 June 2022 in the case *Żurek v Poland* concerned the crucial issue of judges' freedom of expression. It is particularly significant in the context of the recent changes concerning the judiciary in Poland and the associated threats to judicial independence and the independence of judges, which were manifested, inter alia, by numerous disciplinary proceedings initiated against judges. The authors present the main facts and legal issues concerning the case, as well as the findings of the Court and the judgement. They also refer to other previous judgments relevant to this context. The authors fully endorse the position of the Court that a judge has not only the right but also a duty to speak out on the rule of law in case the reforms introduced in the country constitute a violation of the constitutional principle of a democratic state based on the rule of law.

Keywords: freedom of expression, rule of law, independence of judges, independence of judiciary, disciplinary proceedings, reforms of judiciary.

JEL Classification: K00, K38, K10.

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With regard to the standards of freedom of expression of judges in the context of Poland, it is important to note the judgment of the ECHR of 16 June 2022 in the case of *Żurek v. Poland*. On 10 October 2022, the Grand Chamber of the European Court of Human Rights in Strasbourg rejected the Polish government's request for a review of the case, and thus, the judgment of 16 June 2022 became final. It was delivered by a seven-judge Chamber composed of: Marko Bošnjak (Slovenia), Chairperson, Piotr Paczolay (Hungary), Krzysztof Wojtyczek (Poland), Erik Wennerström (Sweden), Raffaele Sabato (Italy), Lorraine Schembri Orland (Malta), Ioannis Ktistakis (Greece) and, insofar as it concerned Poland's violation of Article 10 of the ECHR, was taken unanimously. The complainant in the case was Judge Waldemar Żurek of the Cracow Regional Court, who had been a member of the National Council of the Judiciary for two terms of office and, until March 2018, spokesperson of the Council. Already in January 2018, Judge Waldemar Żurek was dismissed from his position as spokesperson for civil cases of the Krakow Regional Court, and in July 2018 he was transferred from the Second Civil Appellate Division to the First Civil Division (first instance). The applicant alleged that he had been denied his right of access to court in order to challenge the premature and allegedly arbitrary termination of his tenure as a member judge of the National Council of the Judiciary, but, most importantly for the scope of this study, he also raised in his application a violation of Article 10 ECHR through the measures taken by the authorities in relation to opinions he had expressed publicly in his office on legislative reforms affecting the judiciary. For a proper assessment of the judgment, it should be borne in mind that the applicant is a member of the main board of the Themis Judges' Association and has repeatedly spoken out in public debate, openly criticising the state of the rule of law in Poland and, in his view, the unconstitutional changes being introduced in the area of the judiciary, targeting the independence of the courts and the independence of judges. The judgment raises a number of issues that are exceptionally important from the point of view of the rule of law in Poland, however, in this gloss the authors will only address issues related to the freedom of expression of judges.

Firstly, the judgment is worth noting from the point of view of the ECHR's assessment of the constitutional situation in Poland. This is because it reiterated the position previously expressed in *Grzęda v. Poland* (Application no. 43572/18), in which the Court aptly noted that the entire sequence of events in Poland clearly indicates that successive judicial reforms were aimed at weakening judicial independence, starting with the serious irregularities in the election of judges of the Constitutional Tribunal in December 2015, through, in particular, the reconstruction of the National Council of the Judiciary and the creation of new chambers in the Supreme Court, to the expansion of the Minister of Justice's control over the courts and his increased role in the disciplinary liability of judges. In the Court's opinion, as a result of the successive reforms, the judiciary - an autonomous branch of state power - has been exposed to interference from the executive and the legislature and thus significantly weakened.

Secondly, the ECHR recalled the principles established in the case of *Baka v. Hungary* (Application no. 20261/12) relating to the freedom of expression of judges. This concerned the President of the Hungarian Supreme Court and the President of the National Council of the Judiciary, who had expressed his opinion on changes to the legal and constitutional regulations relating to the judiciary, as a consequence of which he was prematurely dismissed from his functions. Referring to this case, the Court recalled that this approach also applies when judges' freedom of expression is restricted in connection with their function, even though the judiciary is not part of the ordinary civil service. The Court held that public officials serving in the judiciary can be expected to show restraint in the exercise of the right to freedom of expression in all matters where the solemnity and impartiality of judicial authority is likely to be called into question [...]. The dissemination of even correct information must be done with moderation and in an appropriate manner [...]. The Court has, on many occasions, emphasised the special social role of the judicial authority, which, as guarantor of justice, a fundamental value in the rule of law, must enjoy public confidence if it is to carry out its tasks successfully [...]. For this reason, the judicial authorities, in the exercise of their judicial function, are obliged to exercise the utmost discretion with regard to the cases with which they deal in order to preserve their image as impartial judges [...]. At the same time, the Court emphasises that, having regard, in particular, to the growing importance of the tri-partite authority and of safeguarding the independence of the judiciary, any

interference with the freedom of expression of judges in a position such as that of the applicant requires careful consideration by the Court [...]. Moreover, issues concerning the functioning of the judiciary fall within the scope of the public interest, the debate of which normally enjoys a high level of protection under Article 10 [...]. Even if the issue to be debated has political implications, this is not a sufficient reason to prohibit a judge from speaking on the issue [...]. Questions concerning the separation of powers may involve, in a democratic society, very important issues about which the public has a legitimate right to be informed and which fall within the scope of political debate [...]. In the context of Article 10 of the Convention, the Court must take into account the circumstances and the general context in which the statements in question were made [...]. It must look at the interference complained of in the light of the case as a whole [...], paying particular attention to the position taken by the applicant, his statements and the context in which they were made. The "chilling effect" that the threat of sanctions has on the exercise of the freedom of expression cannot be forgotten either, particularly for other judges wishing to participate in the public debate on justice and the judiciary [...].

Importantly, however, and deserving of approval, in *Żurek v. Poland* the Court noted that a similar approach would apply to any judge who exercises his or her freedom of expression - in accordance with the above principles - in order to defend the rule of law, judicial independence or other similar values debated on issues of general interest. If a judge makes such statements not only on his or her personal behalf, but also on behalf of a judicial council, judicial association or other body representing the judicial community, the protection afforded to that judge will be enhanced. Of fundamental importance in the context of the topic of this paper, however, is the ECHR's recognition that the general right of judges to freedom of expression on issues concerning the functioning of the judicial system can translate into an analogous duty to speak out in defence of the rule of law and judicial independence when these fundamental values are threatened. Thus, a clear and pertinent thesis emerges from the judgment that every judge has a responsibility not only to promote and protect judicial independence, but also to address other issues related to the state of the rule of law, in particular such as the separation of powers or the independence of the judiciary. Extraordinarily important about the ECHR's statement is that it correlates the freedom of expression of judges, by obliging them to speak out on these issues, with the legitimate interest of the public to be informed about issues relating to the separation of powers, which may concern very important matters in a democratic society and which fall within the scope of political debate. Even if the issue being debated has political implications, this is not in itself sufficient to prevent a judge from commenting on it. It should be noted at this point that this position of the ECHR does not contradict the principle of apolitical nature of judges expressed in Article 178(3) of the Polish Constitution. Indeed, this provision does not prescribe the absolute apolitical character of judges, but only prohibits their membership in a political party and in a trade union and, importantly, prohibits conducting public activities that are incompatible with the principles of judicial independence and independence of judges. Thus, *a contrario*, such public activities which are compatible with the principles of independence of courts and independence of judges are permitted. The judgment of the ECHR thus refers to the content of this provision, indicating unequivocally that, when these values are at stake, judges move within the limits of public activity that is permitted, but even required of them, and which is thus certainly "compatible with the principles of judicial independence and the independence of judges".

As pointed out by the ECHR, this obligation has been recognised by, inter alia, the Consultative Council of European Judges¹, the UN Special Rapporteur on the Independence of Judges and Lawyers² and the General

¹ Point 41 CCJE Opinion No. 18 (2015) "The position of the judiciary and its relation with the other powers of state in a modern democracy"

² A/HRC/41/48: Independence of judges and lawyers - Report of the Special Rapporteur on the independence of judges and lawyers, par. 101 i 102

Assembly of the European Network of Councils for the Judiciary³. The Court further recalled in this regard, citing its previous case law, that given the prominent place the judiciary occupies among the organs of the State in a democratic society, and the importance attached to the separation of powers and the need to protect independence, the Court must be particularly sensitive to protecting a group of persons exercising judicial functions from measures that may jeopardise their judicial independence and autonomy (*Ramos Nunes de Carvalho e Sá v. Portugal* [WI], no. 55391/13; *Bilgen v Turkey*, no. 1571/07, and *Grzęda v Poland*, no. 43572/18).

Thus, applying the above standards to the case, the Court assessed that, given the accumulation of measures applied by the authorities, these measures could be regarded as a strategy aimed at intimidating (or even silencing) the applicant in relation to the views he had expressed in defence of the rule of law and judicial independence. The Court further noted that the applicant was one of the most emblematic representatives of the judicial community in Poland, who had consistently defended the rule of law and the independence of the judiciary. What deserves approval is the Court's literal assessment that the impugned measures undoubtedly had a "chilling effect" as they must have discouraged not only the applicant but also other judges from future participation in the public debate and expression of critical comments on legislative reforms affecting the judiciary for fear of possible sanctions.

However, the judgment under review must be seen in the context of the limits of the judges' freedom of expression, which is obviously not unlimited. This limit was defined by the ECHR, *inter alia*, in its judgment of 8 December 2020 (Application no. 33794/14) in case *Panioglu v. Romania*. The complaint was brought by a Romanian judge of the Bucharest Court of Appeal, who in 2012 published an article in the press in which she described the career of the First President of the Romanian Supreme Court, who had been a prosecutor during the communist regime, pointing out that as a "comrade prosecutor" she "rooted out enemies of the socialist order" and "hunted down women who had abortions". The complainant also referred to her life in poverty while "comrade prosecutor surfaced". The entire article was kept in a similar tone and the jibes contained in it were considered controversial or offensive by the national courts. Consequently, the Romanian Judicial Council initiated disciplinary proceedings against the applicant, who was eventually punished with a disciplinary sanction with an entry in her professional file for the violation of the code of professional ethics.

Before the Court, the applicant alleged that her right to freedom of expression, protected by Article 10 of the Convention on Human Rights, had been violated, but the Court disagreed with the applicant and did not confirm the violation of Article 10. In the grounds for its judgment, the Court recalled the importance of freedom of expression for the functioning of democracy and the need for careful scrutiny of restrictions on that right. It also acknowledged that the applicant had been subjected to a serious disciplinary sanction and that there had thus been an interference with her right to freedom of expression. However, the Court agreed with the Romanian Government that the interference at issue was "provided for by law" and foreseeable: the applicant, as a judge, should have known the requirements of the Code of Professional Conduct and foreseen that her statements would not be considered to comply with such standards. The Court went on to point out that the applicant's aim was to raise the question of the professional competence of a person who had worked as a prosecutor during the Communist regime and was now entrusted with the responsible task of leading judges and reforming the judiciary. However, the applicant also focused on the private life of her adversary. The Court recalled that public figures have to be more tolerant of criticism than the average citizen. On the other hand, however, judges are expected to exercise maximum discretion in order to protect public confidence in the judiciary. A judge must maintain the solemnity of the office. In view of the above, the Court considered that there was no reason to question the national authorities' assessment that the article in question had infringed the personal rights of the First President of the Romanian Supreme Court, as well as the reputation of the judiciary as such, especially in the absence of evidence provided by the applicant in support

³ See point VII Sofia Declaration On judicial independence and accountability 5th – 7 th June, 2013 2013

of her claims. The Court accepted that the national courts had correctly weighed the interests at stake in the case and that the disciplinary sanctions were not excessive. Thus, the interference with the applicant's freedom of expression was justified and proportionate and did not violate Article 10 of the Convention.

There are also restrictions in Polish law, from which it follows that a judge should not speak publicly on any matter. The rules of disciplinary responsibility of judges are set out in Chapter 3 of the Law on the System of Common Courts⁴. According to the original wording of Article 107 §1 of the Act adopted in 2001, a judge was disciplinarily liable 'for misconduct in office, including obvious and gross offence against the rules of law and offence against the dignity of the office (disciplinary offence)'. Problematic from the point of view of the constitutional principle of the judge's independence, however, were the changes that came into force in February 2020 under the amendment to the Act on common courts⁵ as it expanded the catalogue of disciplinary torts by further three types of disciplinary offences: refusal to exercise the administration of justice (point 1a), acts or omissions likely to prevent or significantly impede the functioning of the organ of the judiciary (point 2), actions that challenge the existence of a judge's official relationship, the effectiveness of a judge's appointment or the legitimacy of a constitutional organ of the Republic of Poland (point 3), public activities that are incompatible with the principles of judicial independence and the independence of judges (point 4)⁶.

Moreover, this issue is addressed by the Collection of Principles of Professional Ethics of Judges published in the resolution of the National Council of the Judiciary of 13 January 2017⁷. According to §2, a Judge should at all times be guided by the principles of integrity, dignity, honour, sense of duty and observe good morals. Paragraph 4, on the other hand, indicates that a judge should take care of the authority of his or her office, the good of the court in which he or she works, as well as the good of the administration of justice and the constitutional position of the judiciary.

A guideline in interpreting the above provisions should be the case law of the European Court of Human Rights, from which it is clear that a judge has the right and duty to speak out on the rule of law, respect for the Constitution and reforms in the administration of justice. Therefore, the judgment commented on is of particular importance because it not only confirms that the judicial reforms introduced in Poland violated the rule of law, but, together with the other judgments cited above, creates an important line of jurisprudence in relation to judges' freedom of expression. Moreover, in a situation where these values are endangered this is not only his or her right as a judge but also his or her duty. However, as indicated in the judgement concerning the Romanian judge, a judge should not exceed certain limits. The ECHR has therefore clearly confirmed that the status of a judge does not deprive a citizen of the protection of Article 10 of the Convention. Bearing in mind the importance of the tri-partite authority and the need to guarantee judicial independence, the Strasbourg Court also points out that any interference with a judge's freedom of expression must be subject to a specific analysis and assessment (see also *Harabin v. Slovakia*, Application No. 58688/11). When examining whether a judge's statements should be protected and

⁴ Act of 27 July 2001. Law on the system of common courts, unified text: Official Journal of Laws "Dziennik Ustaw" 2023, item 217, as amended.

⁵ Act of 20 December 2019 amending the Act - Law on the system of common courts, the Act on the Supreme Court and certain other acts, Official Journal of Laws "Dziennik Ustaw" 2020, item 190. Due to its repressive nature, this amendment was colloquially referred to as the 'muzzle law'. In the common perception, the purpose of this law was to introduce a chilling effect among judges involved in the defence of the rule of law in Poland who for example refused to rule with judges appointed by the new National Council of Judiciary, referred preliminary questions on judiciary issues to the Court of Justice of the European Union, or presented certain public statements.

⁶ The catalogue of disciplinary penalties was also extended. It originally included (from the mildest to the most severe): admonition, reprimand, removal from the occupied function, transfer to another place of service, and removal of the judge from office. In April 2018, the possibility of a reduction of basic salary by 5%-50% for a period of six months to two years was added and in February 2020, the 'muzzle law' introduced the possibility of imposing another fine of one month's basic salary of judges plus certain allowances.

⁷ Annex to Resolution No. 25/2017 of the National Council of the Judiciary of 13 January 2017 on the promulgation of the consolidated text of the Statement of Principles of Professional Ethics for Judges and Court Assessors.

whether there is an important public interest in doing so, the ECHR takes into account the position held by the person concerned, the content of the position he or she has made public, the context in which it was presented and the severity of the penalty imposed on him or her as a result of the statement. The fairness of the proceedings and the extent of the guarantees to which the judge is entitled in the event of national proceedings, such as disciplinary proceedings, are important in this regard. However, in the case *Żurek v Poland*, the Court made it clear that the judge's statements "did not go beyond mere criticism from a purely professional point of view" and were "clearly part of the context of a debate on matters of great public importance" and therefore interference with his freedom of expression was unjustified.

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