

## ECtHR: *ŽUREK v. POLAND* (Application No. 39650/18, 16 June 2022): Constitutional Crisis and the Judge's Freedom of Expression / Mateusz Wojtanowski

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**Abstract:** *The article is devoted to the analysis of the judge's freedom of expression in a constitutional crisis, using the ECtHR case of *Žurek v. Poland* as an illustration. The argument begins with a discussion of the facts of the case and the judgment. At this point, I argue that the category of discriminatory legalism is relevant to the facts of the case. Further, two interrelated problems are addressed, which are considered to be particularly relevant for the expression of the judge in the course of the constitutional crisis. These are: 1) the relevance of Article 10 in relation to speaking in one's professional (here: judicial) capacity, and 2) an attempt to determine whether the judge's opposition to a constitutional crisis is an exercise of his or her freedom or a duty. On both issues, I also present the position of Judge Wojtyczek, who challenged the majority views in his separate opinion (partly dissenting, partly concurring). I believe that the disagreement between Wojtyczek and the majority goes to fundamental philosophical-legal issues and can be described as a friction between the analytical and post-analytical approaches to law.*

**Key words:** *Freedom of Expression of a Judge; Constitutional Crisis; Human Rights; ECtHR; Post-analytical Philosophy; Legal modalities*

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## 1. INTRODUCTION

On 16 June 2022, the European Court of Human Rights, sitting as a Chamber, ruled in the case of *Žurek v. Poland*.<sup>1</sup> The applicant in this case, Waldemar Žurek, is a media-active judge who has been a vocal opponent of the legislative changes relating to the reform of the judiciary introduced by the illiberal political power in Poland. The relevant changes, it can be argued, were part of a process called the Polish constitutional crisis.<sup>2</sup> The Court held by six votes to one that there has been a violation of Article 6 § 1 of the

<sup>1</sup> ECtHR, *Žurek v. Poland*, app. no. 39650/18, 16 June 2022.

<sup>2</sup> It should be noted that during the editorial process, the illiberal political grouping that has governed Poland since 2015 has lost the parliamentary elections, paving the way for a possible end to Poland's constitutional crisis.

European Convention on Human Rights (right of access to court)<sup>3</sup> and unanimously that there has been a violation of Article 10 of the Convention (freedom of expression).<sup>4</sup> As regards the right of access to court, the applicant alleged that he had been denied access to a court to contest the premature and allegedly arbitrary termination of his term of office as a judicial member of the National Council of the Judiciary. As far as the freedom of expression is concerned, the applicant complained of the measures taken by the authorities in connection with the views that he had expressed publicly in his professional capacity concerning legislative reforms affecting the judiciary. It can be said that the ECtHR has generally recognised the applicant's position. Adam Bodnar, the former Polish Ombudsman, described this case as "a real milestone in relations with European institutions", which, although it is one among the rulings of the ECtHR and the CJEU in relation to the Polish constitutional crisis, is "of absolutely exceptional importance" (Bodnar, 2022).<sup>5</sup> Sharing the above assessment, the paper is essentially based on the case of *Zurek v. Poland*. I believe that this case helps to illustrate the key issues relating to the response of the judge to a constitutional breakdown. In this regard, my focus is on Article 10 (freedom of expression), leaving aside issues related solely to Article 6. It is not my intention to reproduce the exact structure of the Court's reasoning, but rather to refer to it in relation to certain selected problems. It should be emphasised that the work relates exclusively to proceedings before the ECtHR and not the proceedings before the CJEU, which also concerns Waldemar Zurek (see: Kozlová, 2023, pp. 72-80; Pech, 2023, pp. 48-50).<sup>6</sup>

As far as the question of a constitutional crisis is concerned, it can certainly be conceptualised in a number of ways. However, what seems to be crucial here is the category of politico-legal culture, understood as influencing, *inter alia*, readings of the legal text and constructions of legal professional culture (Jabłoński and Kaczmarek, 2019, pp. 16-21). It can be argued that a constitutional crisis means that the political-legal culture, understood as a fundamental factor in giving coherence to practices related to the law, is being called into question. The Polish constitutional crisis, the course of which has been described in the literature (see: Sadurski, 2019, pp. 58-161; Pech, Wachowiec and Mazur, 2021, pp. 5-17),<sup>7</sup> will be used in the course of the discussion as an example of this phenomenon. Over the last few years, the institutions designed to counterbalance political power, and until recently perceived as the flagship achievements of Polish liberalism, have become the government's mouthpieces. Importantly, the Polish judges' response to the constitutional breakdown is institutional rather than individual (Matthes, 2022, p. 473). This is a significant difference from other examples of judicial resistance reported in the literature (cf. Graver, 2018, p. 849). Although the article deals directly with judicial expression in relation to the problem of the constitutional crisis, it is also relevant in the context of the generally diagnosed increase in the importance of the issue of the

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<sup>3</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms (1953).

<sup>4</sup> The Court also unanimously decided that it was not necessary to examine the admissibility and merits of the complaint under Article 13 of the Convention (right to an effective remedy).

<sup>5</sup> Bodnar identifies numerous reasons in support of his position. The most important of these seems to be the observation that, prior to this ruling, European human rights standards were unclear as to whether judges should comment on government policy. The ruling sends a message to judges facing a constitutional crisis that it is legitimate to oppose political power. At the same time, Bodnar seems to imply that the ruling is highly symbolic, as it concerns a judge who is recognised as a key figure in the fight for the rule of law in Poland (there has been explicit recognition of this by the ECtHR, which is an exceptional situation for a judge) and who is known for his desire to bring the judiciary closer to society.

<sup>6</sup> CJEU, judgement of 6 October 2021, W.Ż., C-487/19, ECLI:EU:C:2021:798.

<sup>7</sup> As for the ECtHR's account of the Polish constitutional crisis, see: ECtHR, *Grzęda v. Poland* (GC), app. no. 43572/18, 15 March 2022, esp. §§ 14-28.

judge's expression (see: Kakhidze, Jimsheleishvili and Chitashvili, 2021, p. 15; Seibert-Fohr 2021, p. 100).

The argument begins with a discussion of the facts of the case and the judgment. At this point, I argue that the category of discriminatory legalism is relevant to the facts of the case. Further, two interrelated problems are addressed, which are considered to be particularly relevant for the expression of the judge in the course of the constitutional crisis. These are: 1) the relevance of Article 10 in relation to speaking in one's professional (here: judicial) capacity, and 2) an attempt to determine whether the judge's opposition to a constitutional crisis is an exercise of his or her freedom or a judicial duty. On both issues, I also present the position of Judge Wojtyczek, who challenged the majority views in his separate opinion (partly dissenting, partly concurring).<sup>8</sup> I believe that the disagreement between Wojtyczek and the majority goes to fundamental philosophical-legal issues and can be described as a friction between the analytical and post-analytical approaches to law.

## 2. FACTS OF THE CASE AND THE JUDGMENT

The applicant, Waldemar Żurek, is a judge at the Krakow Regional Court (*sąd okręgowy*, which is the second of three common court levels). He joined two leading Polish judges' associations – *Iustitia* and *Themis* – in 2001 and 2010 respectively, and was twice elected to the National Council of the Judiciary (*Krajowa Rada Sądownictwa* – "the NCJ"). Pursuant to Article 186(1) of the Polish Constitution, the latter institution shall safeguard the independence of courts and judges. The applicant has extensive experience as a spokesperson for judicial bodies, having acted in this capacity not only for the Krakow Regional Court and *Iustitia*, but also for the NCJ itself. In the context of the constitutional crisis in Poland, the applicant publicly expressed his views or commented in the media on various legislative reforms affecting the Constitutional Court, the NCJ, the Supreme Court and ordinary courts, pointing to the threats to the rule of law and judicial independence stemming from the Government's proposals. The applicant's activity has led to the public perception that he is one of the most important voices of a judiciary and has been praised by legal discourse and the liberal media.<sup>9</sup> The other side of the coin was the perception of an illiberal discourse, which consistently portrayed the applicant as a political activist who contravenes his obligations as a judge.<sup>10</sup> Moreover, Waldemar Żurek was also targeted by the smear campaign in the public media which has resulted in a wave of hate speech directed at him.

In this context, the authorities have taken a number of actions against the applicant. Without entering at this point into the doubts concerning their relevance to the case, submitted by Judge Wojtyczek,<sup>11</sup> as well as the lack of the full definition of the

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<sup>8</sup> In fact, it is also necessary to draw on Wojtyczek's separate opinion appended to *Baka v. Hungary* (GC), app. no. 20261/12, 23 June 2016 and – even though the case concerned MP – his separate opinion attached to *Szanyi v. Hungary*, app. no. 35493/13, 8 November 2016.

<sup>9</sup> See the accounts referred to in *Żurek v. Poland*, § 46, § 84 and § 185.

<sup>10</sup> As a digression, it is worth noting that the model of the "judicial culture of silence" to which the supporters of illiberalism sometimes refer is not their invention. Rather, they have exploited beliefs about the role of judges that were cultivated by the Polish legal discourse itself prior to 2015. At that time, a very restrictive, not to say oppressive, interpretation of the judge's expression was dominant. It was based on Article 178(3) of the Constitution of the Republic of Poland (1997), which stipulates that a judge shall not belong to a political party, a trade union or – and this is the key clause here – perform public activities incompatible with the principles of independence of the courts and judges.

<sup>11</sup> Separate opinion of Judge Wojtyczek, § 3.2. (ECtHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022).

ECTHR's own position,<sup>12</sup> it may be stated that the impugned measures under consideration are as follows:

1. applicant's dismissal from the position of court spokesperson;
2. audit by the CBA (Centralne Biuro Antykorupcyjne – the Central Anti-corruption Bureau) of the applicant's financial declarations;
3. inspection of the applicant's work ordered by the Ministry of Justice;
4. applicant's dismissal from his position as spokesperson of the Cracow Regional Court;
5. declassification of the applicant's financial declaration;
6. pending disciplinary proceedings against the applicant.

With regard to the nature of the first of these measures, the effect in question was produced *ex lege*, as a consequence of the newly adopted legislation which terminated the NCJ members term of office (arguably, with the view of weakening judicial independence<sup>13</sup>). Other actions concern the application or enforcement of law by authorities controlled or appointed by the executive, and the relevant question is their relationship to the law. Although some of the measures have been questionable in this respect, it seems that generally they had a legal basis.<sup>14</sup> At any rate, the crux of the case of *Żurek v Poland* is not that the authorities have acted in a completely arbitrary manner from a legal point of view. It was more about the instrumentalisation of the law – making use of it in such a way as to target perceived political opponents. The term "discriminatory legalism", coined by Kurt Weyland, is appropriate here (Weyland, 2013, pp. 23-25). The maxim of this notion is "For my friends, everything; for my enemies, the law!" This means that those who wield political power (interestingly, Weyland was originally writing about Latin American left-wing populists) use "formally legal authority in discretionary ways to promote their cronies and allies while punishing or intimidating critics and opponents in politics and society" (Weyland, 2013, pp. 23). In my view, this leads to an instrumentalisation of the law, because although the relevant actions are based on the specific provisions, the latter are often read in isolation, distorting their purpose, which can be discerned from the politico-legal culture of the community. I believe that this is what happened in the case in question. Although it can be argued that impugned measures were motivated by extra-legal motives, including informal orders from politicians, they found an alibi in specific provisions and could therefore be presented *pro foro externo* as lawful activity. The actions taken by the CBA against the applicant, started after his increased involvement in the debate concerning judicial reforms, seem to be particularly illustrative here. The CBA's venture of investigating the financial affairs of the applicant and his wife included gathering information from multiple banks/financial institutions and interrogations (including the questioning of the applicant's elderly parents and a man who had bought a tractor from him many years earlier). The "comprehensiveness" of the CBA's actions is demonstrated, among other things, by the fact that the land purchase, which took place twenty-two years before the audit, was also within the CBA's area of interest. The metaphor of discriminatory legalism, developed by Adam Bodnar, is appropriate here. He wrote of a light bulb that does not illuminate the entire room, which is in semi-darkness, but instead illuminates one corner with a strong, dazzling light (Bodnar, 2020).

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<sup>12</sup> ECHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022, § 209.

<sup>13</sup> ECHR, *Grzęda v. Poland* (GC), app. no. 43572/18, 15 March 2022, esp. § 348.

<sup>14</sup> The Court assessed that legality of applicant's dismissal from his position as spokesperson of the Cracow Regional Court was problematic. Nevertheless, it assumed that the interference was "prescribed by law" because, in the Court's view, the impugned interference violated Article 10 for other reasons (§ 215). For the applicant's view on this point, see § 165.

Referring to the list of impugned measures listed above, the Court appears to have considered the relevance of the following: the second, third, fourth (albeit with a caveat), fifth and sixth. As for the first one, it was excluded from the analysis (although again the ECtHR position is nuanced here).<sup>15</sup> In relation to the three-step test, the Court accepted, despite serious doubts, that the interference was "prescribed by law" and had a legitimate aim. It was the question of the "necessity in a democratic society" condition on the basis of which the ECtHR concluded that there had been a violation of Article 10.<sup>16</sup> What seems to be important in cases involving discriminatory legalism, the Court took into account the particular importance of the context and considered the sequence of events as a whole, rather than as separate and distinct incidents.<sup>17</sup> The paramount importance of freedom of expression on matters of general interest was also stressed.<sup>18</sup> Under these circumstances, the ECtHR unanimously held that there had been a violation of Article 10 (freedom of expression). However, as Judge Wojtyczek's separate opinion shows, there was a significant difference of opinion between this judge and the majority, which will be discussed below.

### 3. TWO SELECTED PROBLEMS

#### 3.1 *Speaking in One's Professional Capacity and Article 10*

According to the ECtHR "the impugned interference was prompted by the views and criticisms that the applicant had publicly expressed in exercising his right to freedom of expression". In this regard, the Court observed that "the applicant expressed his views on the legislative reforms in issue in his professional capacity as a judicial member of the NCJ and the spokesperson of this body".<sup>19</sup> As we can see, on the one hand, the ECtHR mentions the category of freedom of expression – which gives the very legitimacy to deal with the case on the basis of Article 10 – and on the other hand, it was also emphasised that the applicant was speaking in his professional capacity.<sup>20</sup> What comes to the fore here, as the Court itself points out, is the link between the case at issue and the case *Baka v. Hungary*. In the latter case, the applicant was required by law to comment on judicial reforms, but the ECtHR recognised that he was under protection of Article 10. The structure of the Court's reasoning in *Żurek v. Poland* again indicates that Article 10 applies to situations where a public official speaks in his or her professional capacity, which view is, however, contested.

In its submission, the Government pointed out that the dismissal of the applicant from the position of spokesperson of the court would, at the most, limit his ability to represent that institution publicly. According to the Government, the above is in no way connected with Article 10.<sup>21</sup> It was not surprising that judge Wojtyczek expressed a similar view in his separate opinion, since his earlier separate opinions had taken the

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<sup>15</sup> ECtHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022, § 208 and § 209.

<sup>16</sup> *Ibid.*, § 214-229.

<sup>17</sup> *Ibid.*, § 211.

<sup>18</sup> *Ibid.*, § 229.

<sup>19</sup> *Ibid.*, § 220.

<sup>20</sup> The same reasoning can be found in § 224, which echoes ECtHR, *Baka v. Hungary* (GC), app. no. 20261/12, 23 June 2016, § 171.

<sup>21</sup> ECtHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022, § 169.

same line.<sup>22</sup> The dissenting opinion attached to the case in question reads: "In my view, Article 10 does not apply to official speech of public office holders, it applies to utterances expressing the personal views of individuals". Wojtyczek explained that "[t]he applicant could either express his personal views (while speaking in his private capacity) or – when speaking in his professional capacity as spokesperson of the NCJ – had the obligation to present not his views but the position of this State organ on the legislative reforms in issue".<sup>23</sup> Reference should also be made to judge Wojtyczek's dissenting opinion appended to the case of *Baka v. Hungary*. As he stated "[t]he sphere of judges' [official – M.W.] speech cannot be regarded as a domain of personal choice, but instead as a field subject to precise legal obligations, which have been imposed in the public interest and which restrict the choices available to a judge".<sup>24</sup> Moreover, in his dissenting opinion attached to the case of *Szanyi v. Hungary* Wojtyczek stated that judges' "freedom of speech is limited in many ways and, in particular, by the duty to speak in defence of judicial independence".<sup>25</sup> I read the structure of Wojtyczek's argument as follows. It is based on the distinction between expressing one's views and speaking in one's professional capacity (here we limit the argument to the judicial one), which also seems to generally imply specific legal modalities: freedom for the former and duty for the latter. In his view, while the majority acknowledges that the applicant was under a duty to speak, it also accepts that Article 10 does not cover the relevant utterance. However, it should be added for the sake of clarity that judge Wojtyczek ultimately recognised that Article 10 did apply in the case in question (unlike in the case of *Baka v. Hungary*). This is because the relevant facts of the case included also a series of utterances which Wojtyczek considered as presenting the personal views of the applicant, expressed in his capacity as a citizen (referring to the list presented in the previous section, he took into account: the second, third and fifth).<sup>26</sup>

My position is not a centrist one. I support the general idea of the ECtHR. As it seems, what the Court is trying to say is that the discourse of freedom of expression and the discourse of duty are not completely separate universes, but can intertwine and enter into functional relationships. Even if a component of a factual situation, read in isolation, formally concerns a duty, the ECtHR reads it in the general context of a person's situation, which may lead one to see the connection of this element to the idea of freedom of expression. In contrast to Wojtyczek's attachment to abstract compartmentalisation, this is a contextual and holistic approach. I will make three arguments in support of the majority position. First, the very distinction between expressing one's views and speaking

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<sup>22</sup> It is also noteworthy that the problem under consideration was addressed in the recently enacted CCJE Opinion No. 25 (2022) on freedom of expression of judges (§ 9). The relevant point reads as follows: "The Opinion does not address questions concerning judges' reasoning in their judgments, as this is the performance of a judicial duty and not an exercise of an individual right". It is not clear, however, whether the authors intended to exclude the exercise of judicial duties as a whole (with the emphasis on the reasoning in the judgments) or whether it is only the reasoning in the judgments that is excluded. The message of the document as a whole is all the more obscured by the fact that in another paragraph (§ 61) the findings of the judgment of *Zurek v. Poland* are simply repeated.

<sup>23</sup> Separate opinion of Judge Wojtyczek, § 3.1. (ECtHR, *Zurek v. Poland*, app. no. 39650/18, 16 June 2022).

<sup>24</sup> Separate opinion of Judge Wojtyczek, § 7 (ECtHR, *Baka v. Hungary* (GC), app. no. 20261/12, 23 June 2016).

<sup>25</sup> Separate opinion of Judge Wojtyczek, § 3 (ECtHR, *Szanyi v. Hungary*, app. no. 35493/13, 8 November 2016).

<sup>26</sup> It is also worth noting that Wojtyczek's crusade against the majority seems to have a hidden agenda. What he is trying to do is to portray the majority as stretching recognised and highly institutionalised principles to extend the scope of the ECtHR's jurisdiction. Judge Wojtyczek is of the opinion that human rights are being used here as a pretext for interference in national conflicts between authorities. See in particular: Separate opinion of Judge Wojtyczek, § 18 (ECtHR, *Baka v. Hungary* (GC), app. no. 20261/12, 23 June 2016). In the context of the Polish constitutional crisis, the Court is generally criticised for breaking with previous jurisprudential patterns and treating cases as illustrating "something bigger" (cf. Leloup and Kosaf, 2022).

in one's professional capacity becomes problematic in the context of the identity of the person holding the office of judge. On the one hand, it is difficult to "extract" completely unofficial expressions of such a person. As a matter of fact, categories such as the judicial integrity<sup>27</sup> or the dignity of judicial office<sup>28</sup> potentially encompass all of the activities of the person holding the office of judge. Any of them may fall victim to the reasonable observer test (Wojtanowski, 2022), or the ECtHR's objective approach to the issue of impartiality.<sup>29</sup> According to Wojtyczek "It is important to stress that when acting in a private capacity an individual may undertake freely any actions which are not forbidden by law, and may pursue any interests that he or she wishes, including the most selfish ones".<sup>30</sup> As far as judges are concerned, due to the requirements of professional ethics, there does not seem to be a "private capacity in this sense. On the other hand, judges are not fully determined by the legal material in the course of their professional activity, which is related, *inter alia*, to the problem of the open texture of language (cf. Bix, 1993, pp. 7-35). Accordingly, it is not possible to perform the functions of a judge without involving the individual axiological sense (Jabłoński and Kaczmarek, 2019, pp. 20-21). In my view, both the dimension of the "judge as an individual" and the dimension of the "judge as an institution" should be recognised in judicial identity. It cannot be reduced to one or the other. The ECtHR rightly moves our political-legal culture in this direction.

Secondly, Wojtyczek sees the *Baka v. Hungary* case as an example of internal conflicts within the public authorities, not as a human rights issue.<sup>31</sup> This affects his understanding of the relevant part of *Żurek v. Poland*. Judge Wojtyczek's conceptualisation is incapable of perceiving the judge's speech in his or her professional capacity as an exercise of freedom of expression. Nevertheless, I am of the opinion that the logic of human rights, if understood as the protection of the individual against the public authorities, is at work here. Of all the public powers, the judiciary is recognised as the least dangerous (cf. Prebensen, 1998, p. 15). Its power to influence depends to a large extent on the respect for rulings by political authorities and the legal culture of society, rather than on its own instruments of coercion (incidentally, I believe that this is the reason why Article 10 § 2 explicitly mentions, among all the public powers, only the judiciary).<sup>32</sup> This is particularly evident under conditions of constitutional crisis and struggle between the political power and the judiciary. If we understand human rights as aimed at protecting the individual from Leviathan, then their historical rationale fits the case in question. In *Szanyi v. Hungary*, Wojtyczek himself pointed to distrust of those in power as the foundation of modern constitutional democracy, and to the role of human rights in protecting the individual from the state.<sup>33</sup> However, in applying these intuitions to the case of *Żurek v. Poland*, he seems to completely ignore the context of the constitutional crisis, which involves the possibility of a significant structural imbalance of power between the branches of the state. Wojtyczek writes as if his argument were related to the framework of checks and balances in a stable constitutional democracy.

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<sup>27</sup> See: CCJE, Opinion no. 3 (2002), § 50, ii; Bangalore Principles (2002), value 3.

<sup>28</sup> Basic Principles on the Independence of the Judiciary, § 8; Universal Charter of the Judge (2017), article 3-5; Bangalore Principles (2002), 4.2, 4.6, 4.11.4. Commentary on Bangalore Principles (2007), § 115.

<sup>29</sup> ECtHR, *Daktaras v. Lithuania*, app. no. 42095/98, 10 November 2000; cf. CCJE, Opinion no. 3 (2002), § 20.

<sup>30</sup> Separate opinion of Judge Wojtyczek, § 4 (ECtHR, *Baka v. Hungary* (GC), app. no. 20261/12, 23 June 2016).

<sup>31</sup> Separate opinion of Judge Wojtyczek, § 18 (ECtHR, *Baka v. Hungary* (GC), app. no. 20261/12, 23 June 2016).

<sup>32</sup> This part of the argument should not be read as a denial of the dangers associated with the judiciary as an element of the political system, since it too can fail to respect certain autonomies and disrupt the functioning of the separation of powers. I do not deny that is advisable to maintain a degree of suspicion towards the judiciary.

<sup>33</sup> Separate opinion of Judge Wojtyczek, § 2 (ECtHR, *Szanyi v. Hungary*, app. no. 35493/13, 8 November 2016).

Thirdly, the existence of an important link between speaking in one's professional capacity and expressing one's opinion, as well as between performing a duty and exercising freedom of expression, can be demonstrated by referring to the "chilling effect". The finding that the authorities intended to create the "chilling effect" is a diagnosis of the purpose for which the interference was committed. Of course, such a finding has legal significance.<sup>34</sup> As the Court stated in the case in question, referring to the measures taken by the authorities: "it appears that they could be characterised as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial independence".<sup>35</sup> It can even be argued *a fortiori* that if a judge faces reprisals for expressing a particular view that he or she is obliged to express (as in the case of Waldemar Żurek acting as a spokesperson for judicial body), he or she should all the more not express it if he or she is not obliged to do so. Measures of political power that are formally aimed at official speech can – from a functional point of view – affect the expression of one's opinion.<sup>36</sup> Furthermore, it is not only the applicant's freedom of expression that is at stake. The "chilling effect", although it applies directly to the applicant, also refers to a certain general social impact of the case.<sup>37</sup> In the context of the constitutional crisis, the point of the "chilling effect" is to sting the judiciary (for example, the audits carried out by the CBA concerned 5 judges out of a total of about 10,000 judges in Poland<sup>38</sup>), but to have a systemic effect, paralyzing the entire structure.

### 3.2 Confronting the Constitutional Crisis: Exercise of Freedom or Judicial Duty?

With regard to the judge's reaction to a constitutional crisis, it is worth considering the following two passages, which refer to both freedom and duty: "(...) it is evident that the applicant, acting as its spokesperson, had the right and duty to express his opinions on legislative reform affecting the judiciary";<sup>39</sup> "the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat".<sup>40</sup> In Wojtyczek's opinion, there is a contradiction here, since "Freedom of speech means *inter alia* freedom from any obligation to speak. Where an obligation to speak and to express certain views begins, the freedom of speech ends".<sup>41</sup> As far as the judge's reaction to a constitutional crisis is concerned, it should be noted that the issue of oscillation between freedom and duty is at no time new. It appeared in the case of *Baka*

<sup>34</sup> ECtHR, *Kudeshkina v. Russia*, app. no. 29492/05, 14 September 2009, § 99, § 100; ECtHR, *Baka v. Hungary* (GC), app. no. 20261/12, 23 June 2016, § 167.

<sup>35</sup> ECtHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022, § 227.

<sup>36</sup> It is Wojtyczek himself who seems to have discerned the possibility of the relation concerned: Separate opinion of Judge Wojtyczek, § 5, *in fine* (ECtHR, *Szanyi v. Hungary*, app. no. 35493/13, 8 November 2016).

<sup>37</sup> The impact of the chilling effect not only on the applicant, but also on others, has also been highlighted by the Council of Europe Commissioner for Human Rights (ECtHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022, § 107), the applicant (§ 167), the Polish Judges' Association *Iustitia* (§ 200) and the Court itself (§ 227).

<sup>38</sup> According to the submission of the applicant (ECtHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022, § 167).

<sup>39</sup> ECtHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022, § 220 *in fine*.

<sup>40</sup> *Ibid.*, § 222.

<sup>41</sup> Separate opinion of Judge Wojtyczek, § 3.1. (ECtHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022).

*v. Hungary*.<sup>42</sup> A variety of positions can also be found in international soft law.<sup>43</sup> Finally, the interesting accounts of third party interveners in the case in question should be mentioned as well.<sup>44</sup> There is no room here for a comprehensive analysis of these materials. However, it can be stated that the opposition of judges to unconstitutional legislation or to unconstitutional political practices is sometimes presented in discourse as an exercise of freedom of expression, and sometimes as a performance of a duty. Importantly, where reference is made to a duty, it is sometimes still unclear whether this is a legal duty or one deriving from another normative system.

To begin with, I agree that relevant passages of the judgment can be considered as disappointing in terms of their clarity. However, I believe that the majority position does not have to be read as a contradiction. As a matter of fact, we are dealing here with the fluid problem area. One can reasonably claim that both "freedom" and "duty" are relevant in this context, but they refer to different dimensions of the problem. In my view, we should make a distinction between the judge's general attitude to constitutional breakdown (the abstract dimension) and the specific situations in which the judge may find himself or herself in the course of his or her professional activities (the concrete dimension). With regard to the former, as I have argued above, the identity of the judge is to be deeply rooted in the individual concerned. Moreover, the participation of judges in the national discourse on the constitutional crisis allows the public to benefit from their expertise. It is therefore fair to say that the judge has a kind of general obligation to act in defence of the constitutional order, even outside a strictly professional context, which may mean speaking out on social media or taking part in demonstrations. However, in my opinion, we are talking here about an obligation arising from professional ethics, whereas from a legal point of view such actions would be an exercise of freedom of expression. Notwithstanding the above, there is the problem of the specific situations in which judges find themselves in the exercise of their professional activities. According to Amnesty International and the International Commission of Jurists, who made the submission as third-party interveners, "This right [to protect and enforce judicial independence – M.W.] became an imperative when judges spoke from a position where they had a duty to voice certain concerns, such as where they were designated as a representative or spokesperson for a judicial institution".<sup>45</sup> Nevertheless, I think that we should not think only of high-profile judges in this context, as this would create a risk of paternalism within the community of judges, i.e. implying that only judicial elites are reflective and capable of making responsible decisions. Indeed, in the course of adjudication, any judge may encounter threads that involve a constitutional crisis. When a judge decides on a case involving, for example, acts enacted by an illiberal political authority that are blatantly incompatible with higher-level regulations, or when a judge examines an unlawful practice of a political authority in a judicial review, the appropriate response should be captured as a legal obligation (besides being an ethical obligation). Perhaps provocatively, it can be argued that judges are simply fulfilling their standard

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<sup>42</sup> ECtHR, *Baka v. Hungary* (GC), app. no. 20261/12, 23 June 2016, §125, § 168; cf., to make reference to the judgement from another jurisdiction: Inter-American Court of Human Rights, *López Lone et al. v. Honduras*, 5 October 2015, § 173.

<sup>43</sup> CCJE, Opinion no. 18 (2015), § 41; Opinion no. 25 (2022), § 60, § 61; Special Rapporteur on the independence of judges and lawyers, Report on freedom of expression, association and peaceful assembly of judges (2019), § 90, § 102; ENCJ, Sofia Declaration on judicial independence and accountability (2013), vii.

<sup>44</sup> The Commissioner for Human Rights of the Republic of Poland (§ 182 of *Żurek v. Poland*); The Helsinki Foundation for Human Rights (§ 188); Amnesty International and the International Commission of Jurists (§ 193, 194); Judges for Judges Foundation and Professor L. Pech (§ 196, § 198).

<sup>45</sup> ECtHR, *Żurek v. Poland*, app. no. 39650/18, 16 June 2022, § 194.

professional responsibilities when they confront a political authority that enacts unconstitutional regulations or cultivates unconstitutional practices.

#### 4. CONCLUSION

After discussing the facts of the case and the ruling, the above remarks have focused on two aspects of the judgement that are crucial to the question of judicial expression in a constitutional crisis. First, the relationship between speaking in one's professional capacity and the category of freedom of expression proved to be an important issue. I agree with the approach adopted by the majority, strongly criticised by the Judge Wojtyczek, that official speech of the judge can be protected by Article 10, despite the fact that it is formally the performance of a duty. I have tried to show that, in the case of a judge, the idea of a clear distinction between professional and private capacity is generally beleaguered. We should not reduce the judge to either an "individual" or an "institution", since both of these aspects are important for judicial identity. In my opinion, when a judge is harassed by a political power during a constitutional crisis, he or she is "covered" by the idea of human rights protection, even if he or she is formally performing a judicial duty. This is all the more important in view of the "chilling effect". Secondly, the paper considered whether resisting a constitutional crisis should be treated as a duty of the judge. I think it is appropriate to speak of an abstract duty in this regard, but one that is ethical rather than strictly legal in nature. Notwithstanding this, in the exercise of his or her professional activities, a judge may find himself or herself in situations where an appropriate response to unconstitutional legislation or practice would be a legal obligation (e.g., while adjudicating or acting as a spokesperson for a judicial institution).

In the course of the argument, it became clear that the disagreement between the Judge Wojtyczek and the majority goes to some fundamental questions about how to think about the law and its interpretation. The former relies on highly institutionalised distinctions (expressing one's views v. speaking in one's professional capacity, or in terms of legal modalities: exercising freedom of expression v. performing a duty), giving them a dogmatic status. Judge Wojtyczek simply refers to these distinctions as "existing", reifying them and erasing their axiological and functional entanglement. The majority embraced a very different approach to thinking about legal modalities (even if it cannot adequately define its position and the judgement may appear opportunistic). Against the background of cases relating to judicial expression in conditions of constitutional breakdown, it recognised that the discourse of freedom of expression and the discourse of duty are not completely separate universes, but can intertwine and enter into functional relationships. In my view, it is the philosophy of law that is at stake in the dissension described above. I believe that we are dealing here with an illustration of friction between the analytical and post-analytical approaches to law, represented by Judge Wojtyczek and the majority, respectively. To put it in Rortian terms, this is an example of the contest between the entrenched and the new dictionary (Rorty, 1989, p. 9). The post-analytical approach is sceptical of attempts to reduce legal practices to universally applicable structures or patterns, supposedly established once and for all. Accordingly, it is also at odds with the slave-like conformity to the dichotomies (Bator, 2019, p. 23; Stambulski, 2019, p. 70). Responsible participation in legal culture may sometimes require not so much the application of pre-established criteria to facts, but rather imagination and sensitivity (cf. Bator, 2019, p. 37). The post-analytical way of thinking allows us to recognise the dynamics of culture, and thus to be better equipped to deal with new problems, such as a constitutional breakdown. I believe that Wojtyczek's analytical

approach – seeing an organ of the state where one should rather see a harassed human being – can lead to an alienation of the law in the manner of Kafka's *The Trial*. It should be emphasised, however, that the post-analytical approach is not a rejection of analytical tools, but changes the way they are used. It seems that the problem of legal modalities is illustrative here. According to the post-analytical approach, we should refer to them taking into account the relevant social structures and institutional landscape, which may lead to a rejection of the conclusions that would follow from adherence to abstract compartmentalisation.<sup>46</sup> Legal modalities are a product of history and have no divine guarantees. They are our tools, not our gods.

Finally, I am aware of the potential accusation that my argument has been shaped in too one-sided manner and that proponents of illiberalism have some important points in the current dispute over the shape of Polish and European culture. It is true that the Polish judiciary was plagued by significant problems before 2015. In my opinion, two of them were the most important. First, I would point to the paternalism of the judicial elite, which allows them to be ironically described as the *elohim* of ancient Israel (after Parau, 2012, p. 638, in the Romanian context) or platonic philosopher kings (after Sulikowski, 2012, p. 120). Secondly, it is important to note the underestimation of the social aspect of the law, causing its alienation (which helps to explain why protests in defence of the rule of law in Poland were disappointing in terms of their size). I am in agreement with the general diagnosis that the construction of liberalism in Poland has been, paradoxically, too insistent and too superficial (cf. Sulikowski, 2023, pp. 15-26; Mańko, 2019, p. 77). However, even if the Manichean interpretation of the struggle between good and evil does not fit the description of the current situation in Poland, the Virgilian statement about the cure that turns out to be worse than the disease does. In the words of Waldemar Żurek himself "The authorities are using the problems of the judiciary as a pretext to dismantle the justice system".<sup>47</sup>

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<sup>46</sup> It is worth referring to Scott Veitch, who shows that what from an orthodox legal perspective is supposed to be a right or a freedom can in fact be embedded in a set of duties (see, for example, Veitch, 2018, p. 106; Veitch, 2021, p. 77). The illustration analysed in the course of this paper, as I have tried to convince the reader, leads to the somewhat opposite conclusion - it invites us to see the logic of human rights protection where we are formally dealing with an obligation.

<sup>47</sup> ECHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 43.

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