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ARTICLE

Żurek v Poland – when judges become rule of law actors. Challenges and achievements of judicial mobilisation in Poland

Barbara Grabowska-Moroz[1]

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Abstract
The article analyses the main consequences of *Żurek v Poland*, decided by the European Court of Human Rights in June 2022. The Court developed its interpretation of Article 10 of the European Convention on Human Rights with regard to judges' public speech in dealing with judicial independence and the rule of law. In this context, the article discusses judicial mobilisation regarding the undermining of judicial independence in Poland and judges becoming 'rule of law actors' when rule of law backsliding threatens constitutional principles such as judicial independence or the separation of powers. It also discusses the role of judicial associations in coordinating such mobilisation.

Keywords Rule of law · Legal mobilisation · Judicial independence · Judges

1 Introduction

The central element of the rule of law backsliding in Poland concerns attacks on guarantees of judicial independence. Since 2018 the main decision-centre regarding these changes has moved to Luxembourg.[1] The Strasbourg Court joined this debate in

[1]Case C-216/18, judgment of the Court (Grand Chamber) of 25.7.2018, *LM*. The first preliminary references from the Supreme Court regarding judicial independence were issued in August 2018 – http://www.sn.pl/aktualnosci/SitePages/komunikaty_o_sprawach.aspx?ItemSID=233-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach.

✉ B. Grabowska-Moroz
Grabowska-MorozB@ceu.edu

[1] CEU Democracy Institute, Budapest, Hungary

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2021.[2] This shift – international courts becoming an important element of a domestic debate about judicial independence – was possible due to the courts' decisions and individual cases brought by individual judges affected by new laws. While Luxembourg decisions provide an interpretation of EU law, Strasbourg case-law consists of traditional human rights rulings, in which judges are applicants. *Żurek v Poland* [3] is one of those cases. On the one hand it dealt with the issue of removing a member of the judiciary council from his position. On the other hand, however, it shows what is meant by saying that the rule of law backsliding is affecting judges' lives.

This article in the first place analyses the ruling of the European Court of Human Rights in *Żurek v Poland* and concentrates on that part of the ruling dealing with the alleged violation of Article 10 ECHR. Additional comments deal with the issue of judges becoming 'rule of law actors' in the context of the rule of law backsliding. The article discusses the mobilisation of judges in Poland – what are their main achievements, what are the 'red lines' of such mobilisation, and what are the future challenges. The analysis regarding the judges' mobilisation is based partially on interviews carried out in August 2023 with civil society activists, attorney- at-law and academic scholars working with the issue of judicial independence in Poland.[4]

2 *Żurek v Poland* – the road to Strasbourg

Żurek v Poland concerns Waldemar Żurek, who was a spokesperson for the National Council for the Judiciary (NCJ) in Poland until 2018. As part of the 'judiciary reform' announced by the government, the law on the National Council for the Judiciary was amended in late 2017 and the next year the term of office of all National Council for the Judiciary judge-members was terminated despite clear constitutional provision.[5] According to the new law, new members were selected by Parliament, instead of judges. As the National Council for the Judiciary spokesperson until 2018, Waldemar Żurek was a firm voice of criticism against the attempts of the government to undermine the guarantees of judicial independence in Poland.

In August 2018, Żurek submitted his application to Strasbourg. It dealt with two issues: first of all, with the termination of his term as a member of the National Council for the Judiciary, secondly with an alleged violation of his rights under Article 10. In his application to Strasbourg Żurek argued that the authorities undertook several steps against him as a reaction to his critical stance on the ongoing 'reform of the

[2] B. Grabowska-Moroz, *Strasbourg Court entered the rule of law battlefield – Xero Flor v Poland*, Strasbourg Observer 15.9.2021, https://strasbourgobservers.com/2021/09/15/strasbourg-court-entered-the-rule-of-law-battlefield-xero-flor-v-poland/.

[3] Application no 39650/18, judgment of 16.6.2022.

[4] Stakeholders (S1, S2, S4, S6, S8) are experts on judicial independence and are affiliated with civil society organisations that deal with rule of law developments in Poland: the Civil Development Forum Foundation (FOR), Helsinki Foundation for Human Rights, Democracy Reporting International, INPRIS – Institute for Law and Society, Free Courts Initiative. Stakeholder S3 is an advocate specialising in litigation before the European Court of Human Rights. Stakeholders S5 and S7 are lawyers affiliated with Warsaw University.

[5] According to Article 187 para. 3 of the Polish Constitution the term of office of those chosen as members of the National Council of the Judiciary shall be 4 years.

judiciary': his financial declaration was reviewed by the Anti-Corruption Bureau (the CBA), tax authorities conducted their own fiscal audit, the Anti-Corruption Bureau had collected his bank data, Anti-Corruption Bureau officers visited the applicant's accountant in her office, asking for information about the applicant's tax returns; he was questioned by the Anti-Corruption Bureau. Based on an anonymous letter, the Minister of Justice ordered an inquiry into Żurek's work in the court in Kraków. Furthermore, he was dismissed from the position of spokesperson of the court in Kraków by the new president of the court (who had been appointed by the Minister of Justice). Five disciplinary proceedings were initiated against Żurek.[6]

In *Żurek*'s case the only final decision taken by the public authorities was the amendment of the law which removed him and other judge-members from the National Council for the Judiciary. All the measures applied against him were 'pending' and did not result in any final decision that would dismiss him from his judicial position. That is why the context of the whole situation was of major importance. It created a feeling that the public authorities were 'after him' and this feeling reached the level of 'chilling effect' not only for the applicant, but also other judges.

The first issue in the application (his removal from the National Council for the Judiciary) was decided by the European Court of Human Rights in a pilot judgment *Grzęda v Poland*[7] in March 2022. The Court applied the same standard in *Żurek v Poland*.[8] When it came to alleged violations of Article 10 ECHR, Żurek argued that 'the timing and accumulation of the measures' taken in relation to himself and his family 'had all been used instrumentally or even *ultra vires* in order to intimidate him'.[9] The Government argued that the measures were 'unconnected with the applicant's exercise of freedom of expression' and constituted 'neutral measures' that were applied to all judges.[10] The Court disagreed and found a link to exist between opinions expressed by the applicant and the measures undertaken by the public authorities.[11]

However, assessing whether interference[12] with rights under Article 10 was justified required considering the entire context of the case.[13] It was mainly a context of ongoing 'judicial reform', which, according to the Court, constituted a threat to judicial independence.[14] New legislative amendments had shaped the dynamics and

[6] By now, it is approximately twenty proceedings. https://www.prawo.pl/prawnicy-sady/sedzia-zurek-ma-kolejne-zarzuty,515426.html.

[7] Judgment of 15.3.2022, application no. 43572/18.

[8] The Court ruled that 'on account of the lack of judicial review (...) the respondent State impaired the very essence of the applicant's right of access to a court.' (*Żurek*, para. 150).

[9] *Żurek*, para. 163.

[10] *Żurek*, paras. 172 and 176-177.

[11] '[T]he Court considers that there is prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the impugned measures taken by the authorities in his case' (*Żurek*, para. 211). '[I]nterference was prompted by the views and criticisms that the applicant had publicly expressed in exercising his right to freedom of expression' (*Żurek*, para. 220).

[12] *Żurek*, para. 212.

[13] *Ibidem*.

[14] The Court stated that 'successive judicial reforms had been aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December

content of the ongoing public debate. Żurek, as spokesperson of National Council for the Judiciary, had taken part in this debate and had presented, on behalf of the National Council for the Judiciary, his arguments on the ongoing and draft changes. The Court underlined the importance of the office held by Żurek 'whose functions and duties included expressing his views on the legislative reforms which were to have an impact on the judiciary and its independence'.[15]

Despite the doubts regarding the legality criteria ('according to the law') and the existence of a 'legitimate aim', the Court decided to concentrate on checking whether the interference with rights under Article 10 had been 'necessary in a democratic society'.[16] The Court underlined that the measures constituted a 'strategy aimed at intimidating (or even silencing) the applicant'.[17] Furthermore, such a strategy had a 'chilling effect' on the applicant but also on other judges.[18] As a result, the Court decided that the measures taken against Żurek were not 'necessary in a democratic society'.[19] Judge Wojtyczek, who presents dissenting or concurring opinions to most of the Polish rule of law cases decided in recent years, suggested that Żurek's speech should not be decided under Article 10. Instead Judge Wojtyczek highlighted Article 8 ECHR as an adequate Convention provision in this case.[20]

3 Comment

3.1 'Silence is not always golden'[21] – judges' duty to speak out

If Żurek's case was only about his removal from the National Council for the Judiciary and an alleged violation of Article 6 of ECHR, then it would only be a follow-up of the *Grzęda v Poland* ruling of March 2022. If the case was just another freedom of expression case, one might think it was just a 'Polish version' of the *Baka* case.[22] However, the Court went a step further and expressed a clear judges' 'duty' under the Convention to speak out.

The Court referred to international documents in order to show the existence of special judicial responsibilities such as 'promoting and protecting judicial indepen-

2015' (*Żurek*, para. 210). In *Grzęda v Poland*, the Grand Chamber stated that 'as a result of the successive reforms, the judiciary – an autonomous branch of State power – was exposed to interference by the executive and legislative powers and thus substantially weakened' (*Grzęda*, para. 348).

[15] *Żurek*, para. 221.

[16] *Żurek*, para. 217.

[17] *Żurek*, para. 227.

[18] *Ibidem*.

[19] *Żurek*, para. 228.

[20] *Żurek*, partly dissenting, partly concurring opinion of Judge Wojtyczek, para. 4. See also A. Bodnar, *Real milestone*, 23.7.2022 https://adbodnar.substack.com/p/a-real-milestone.

[21] 'Judges have the duty to speak on matters that affect the judicial system because the public interest cannot be served by silence. Silence is not always golden' (I. R. Kaufman, Judges must speak out, New York Times 30.1.1982).

[22] *Baka v Hungary*, application no. 20261/12, judgment of 23.6.2016 (Grand Chamber).

dence'.[23] The Court underlined that Żurek was in a special position – he was a member of a judicial council and its spokesperson. Even though a similar approach would apply to any judge who 'exercises his freedom of expression with a view to defending the rule of law, judicial independence', the Court stated that such statements expressed 'on behalf of a judicial council, judicial association or other representative body of the judiciary' would be afforded 'heightened' protection.[24] Judge Wojtyczek in his dissenting opinion found that 'a special protection under Article 10 for judges, and an even stronger protection for judges belonging to judicial councils or professional associations, may trigger criticism from the perspective of the principle of equality'.[25]

Then the Court made a groundbreaking finding that judges' speaking publicly about judicial independence was not only a responsibility, but their duty. In *Baka*, the Court when analysing the status of the applicant found that '[i]t was not only his right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary'.[26] But there was no general passage about such a duty. It seems that in *Żurek*, the Court interpreted such duty as existing not only in domestic legislation but also in the Convention. The Court referred to the relevant international documents and recommendations to support this conclusion.[27]

Wojtyczek in his dissenting opinion in the *Baka* case had tried to analyse this duty and wrote that 'it may be assumed that it is not only a moral but also a legal duty', which 'serves a specific public interest', which is 'to protect the position of the judicial branch in its relations with the other branches of State'.[28] The UN Special Rapporteur saw things differently. In his 2019 report on freedom of expression, he stated that there was a 'moral duty to speak out' especially in the case of a 'breakdown of constitutional order'.[29] The way how the Court interpreted the source of this duty is interesting: it held that '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'. The Consultative Council of European Judges in their opinion of 2022 saw matters differently, opining that the duty to defend judicial power and its constitutional role 'flows from judicial independence'.[30]

[23] *Żurek*, para. 221.

[24] *Żurek*, para. 222.

[25] *Żurek*, Dissenting opinion of Judge Wojtyczek, para. 5.

[26] *Baka*, para. 168.

[27] This duty has been recognised, inter alia, by the UN Special Rapporteur on the independence of judges and lawyers: 'In situations where democracy and the rule of law are under threat, judges have a duty to speak out in defence of the constitutional order and the restoration of democracy. (para. 102 of 2019 *Report on freedom of expression, association and peaceful assembly of judges*).

[28] *Baka*, Dissenting opinion of Judge Wojtyczek, para. 7.

[29] Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/41/48, para. 90.

[30] CCJE Opinion No. 25 (2022) on freedom of expression of judges, CCJE(2022)4, Strasbourg, 2.12.2022, para. 61.

3.2 The judge as a 'rule of law actor' in times of the rule of law crisis

The *Żurek* case is also an interesting example of judges mobilising against the attacks on judicial independence in Poland. His position as a spokesperson of the National Council for the Judiciary was special, which the Court highlighted, but at the same the Court underlined that 'a similar approach would be applicable to any judge who exercises his freedom of expression (...) with a view to defending the rule of law, judicial independence or other similar values falling within the debate on issues of general interest'.[31] In the light of this passage, it is clear that a special (representative) function in the judiciary system is not a prerequisite to acting against attacks on judiciary or on the rule of law principle. However, according to the *Żurek* ruling, such a position (and the fact of speaking on behalf of constitutional body or professional association) gives 'heightened protection'.[32]

The facts of *Żurek v Poland* show what is possible in practice when the main state institutions are captured. It is especially visible with regard to the judiciary. As one of my interviewees said, 'the *Żurek* case showed what the meaning of exchanging presidents of the courts' (S3) in 2017 had been.[33] The exercise of influence on the part of the executive power on everyday work in common courts became easier. Of course, the human factor was crucial here as well. However, the law undermined the position of the court's president and made it depend to a greater extent on the Minister of Justice – who happens to be Prosecutor General at the same time.

Mobilisation among judges in Poland was a reaction to legislative amendments, which threatened the independence of the highest judicial institutions in Poland. The first major sign of this mobilisation consisted of mass protests co-organised by judicial associations in July 2017. Such events were unprecedented in the newest history of Poland but also constituted a new stage of judicial self-governance. It quickly turned out that judges may become true rule of law actors.[34] Judicial mobilisation in Poland is an ongoing process, so what 'rule of law actor' means in practice is a complex phenomenon. Some might perceive the resistance of judges as 'activism'.[35] However one needs to be aware that the word 'activism' might have a pejorative meaning (S2) – a person engaged in or advocating vigorous political activity; an active campaigner.[36] As the authors of Oxford English Dictionary highlight, the word 'activist' is frequently used with a qualifying adjective, which designates the sphere of activity, as political activist, social activist, animal rights activist, etc. In this context the term 'judicial activism' refers mostly to a creative reading of law and the

[31] *Żurek*, para. 222.

[32] *Ibidem*.

[33] B. Grabowska-Moroz, M. Szuleka, *It starts with the personnel. Replacement of common court presidents and vice presidents from August 2017 to February 2018*, Helsinki Foundation for Human Rights 2018.

[34] Oxford English Dictionary, s.v. "actor, n., sense 3.a", July 2023. <https://doi.org/10.1093/OED/5929114494> – A person who performs or takes part in an action; a doer, an agent.

[35] C.-Y. Matthes *Judges as activists: how Polish judges mobilise to defend the rule of law*, (2022) 38(3) East European Politics 468.

[36] Oxford English Dictionary, s.v. "activist, n., sense 2.b", July 2023. <https://doi.org/10.1093/OED/7584251173>.

taking 'brave' decisions as a court and has been discussed as such in the academic literature.[37] But this is only one type of possible 'judicial mobilisation'.[38]

Developments involving resistance to attacks on judicial independence in Poland go beyond 'legal mobilisation'.[39] Numerous types of 'judicial mobilisation' can be diagnosed. C. Matthes analysed recently *on-bench* and *off-bench* types of actions taken by judges in Poland.[40] The main difference is whether the action (or decision) is taken as a court (which are state institutions which issue decisions 'on behalf of the state') or as an individual citizen (judge), whose actions cannot be considered as state action. Another distinction would be between *negative* actions aimed at resistance against attacks on the judiciary and *positive* ones, such as grass-root events and campaigns aimed at education. Finally, mobilisation can be *collective* (for instance coordinated by judicial association) or *individual* (such as an individual application to the European Court of Human Rights).

Despite the various methods of mobilisation used by judges in Poland, the number of those truly active is perceived as rather low compared with the overall number of judges in the country. However, the Polish judiciary is still perceived as more 'active' than the Hungarian judiciary, where such mass protests by judges did not occur. It was suggested during interviews that the huge number of judges in Poland (approximately 10,000 judges) is also a strength of this profession (S4), despite the fact that the vast majority remains silent (S4, S7). Before the rule of law crisis, it was quite a common understanding of the role of a judge that being vocal in public (outside the courtroom) was antithetical to being a judge. It remains an ongoing dilemma that speaking in public about public issues such as reform of the judiciary might be perceived by some as undermining their appearance of independence (S1). Meeting the obligation to protect judicial independence is at the same time the main (legitimate) aim of judicial mobilisation in Poland.

3.3 Litigation – the role of preliminary references to the European Court of Justice and individual applications to the European Court of Human Rights in the wake of the 2015 judicial mobilisation in Poland

Judges have applied various methods, such as organising public protests,[41] domestic and international networking (involving participating in the work of domestic or international networks, inter alia European Magistrates for Democracy and Freedoms MEDEL) or education activities. However legal methods are perceived by judges as 'safer' for them.[42]For outside audiences, preliminary references to the European

[37] D. Kmiec, *The Origin and Current Meanings of 'Judicial Activism'*, California Law Review, vol. 92, no. 5, 2004, pp. 1441–77. JSTOR, https://doi.org/10.2307/3481421. Accessed 6.9.2023.

[38] J.A. Mayoral, A. Torres Pérez, *On judicial mobilization: entrepreneuring for policy change at times of crisis*, Journal of European Integration (2018), 40:6, 719-736.

[39] M. McCann, *Litigation and Legal Mobilization*, [in:] Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (eds), *The Oxford Handbook of Law and Politics* (2008; online edn, Oxford Academic, 2.9.2009), https://doi.org/10.1093/oxfordhb/9780199208425.003.0030, accessed 6.9.2023.

[40] C.-Y. Matthes *Judges as activists: how Polish judges mobilise to defend the rule of law*, (2022) 38(3) East European Politics 468.

[41] In July 2017 and the so-called '1000 Gowns March' held in Warsaw in January 2020.

[42] Matthes, p. 480.

Court of Justice are probably the main legal method used by judges in Poland to challenge the consequences of the reform of the judiciary. For sure, they cannot prevent it, since the element of time works in the government's favour. The adoption of new domestic laws occurs at a much faster rate than do challenges to them in an international legal forum since the former apparently does not involve any in-depth debate, in which judges and judicial associations could participate. That is why the vast bulk of 'judicial mobilisation' in Poland is 'legal mobilisation' involving among other things direct application of the Constitution (especially in cases concerning freedom of assembly; S2) or individual applications submitted to the European Court of Human Rights by judges affected by the judiciary reform.

The first preliminary reference regarding judicial independence in Poland was submitted to the European Court of Justice in August 2018 and brought fierce criticism from the government. Development of the case-law of the European Court of Justice[43] was probably one of the primary factors in 'transferring' the legal debate about the judiciary reform to EU level with the direct involvement of the courts. The involvement of the European Court of Justice was also a reaction to infringement cases initiated by the Commission in July 2018.[44] In infringement actions neither domestic courts nor judicial associations can submit their third-party observations. In the preliminary reference procedure, the domestic courts' role is crucial – they frame the questions regarding interpretation of the EU law involved in deciding pending cases. Wrong questions might bring wrong answers and lower the level of EU protection of judicial independence for instance.[45] One of the stakeholders described it as a 'Russian roulette' (S1). Rejecting the reference by the European Court of Justice might be used by the government and captured public media to run another smear campaign against judges who issued the preliminary reference or who criticised the judiciary reform. Another interviewee stated, however, that it is definitely worth paying such a high price, in the light of the outcome of the preliminary proceedings (S4), especially when compared with the Hungarian case study. From this perspective a higher number of judges in Poland might be one of the reasons why they are more active on the 'Luxembourg path' when it comes to litigating EU standards on judicial independence.

Opinions on the preliminary references from the Polish courts vary among stakeholders: from being chaotic (S1) to coordinated by judicial associations regarding (S8). Judges have definitely learnt more about the preliminary reference procedure in recent years, also thanks to awareness-raising actions, such as workshops organised by non-governmental organisations.[46] A preliminary reference concerning Judge

[43] See Case C-64/16, Judgment of the Court (Grand Chamber) of 27.2.2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*.

[44] Infringement actions initiated in 2018 dealt with the retirement age of the Supreme Court's, (C-619/18) *Commission v Poland* (*Independence of the Supreme Court*), and common courts' judges, (C-192/18) *Commission v Poland* (*Independence of ordinary courts*).

[45] Implementation of common standards regarding guarantees of judicial independence might differ in various Member States, for instance with regard to establishment and the role of council of judiciary.

[46] Workshops organised by Helsinki Foundation for Human Rights resulted in a handbook: (R. Grzeszczak, *Preliminary References in the Area of Human Rights. A Practical Handbook for Parties' Representatives*, HFHR 2019 – https://hfhr.pl/upload/2022/01/pytania-prejudycjalne-w-obszarze-praw-czlowieka-podre-cznik-dla-pelnomocniko-w-eng.pdf).

Żurek reached Luxembourg and this allowed the Court of Justice to discuss the status of judges appointed with a violation of law and possible remedies available for domestic courts.[47] Interestingly enough, judges newly-appointed by the new National Council for the Judiciary also use the making of preliminary references to legitimise themselves and their appointments.[48]

Another legal method applied by judges consists of individual applications submitted under Article 34 of the European Court of Human Rights. Surprisingly, most of the judges who submit their application to the European Court of Human Rights are represented by professional lawyers. It was suggested in the interviews that despite their proficiency in (domestic) law, litigating their own cases might be perceived as more difficult than deciding any other human rights case pending before them as a court, in which they could potentially refer preliminary questions to the European Court of Justice regarding judicial independence (S3). As Bojarski put it, judges are not accustomed to bringing cases about themselves and Civil Society Organization (CSO) activists are more experienced in strategic litigation than judges.[49] However, most of the stakeholders found that the preliminary reference procedure is more demanding than submitting an application to the European Court of Human Rights.

3.4 Discussion about (the limits of) judicial mobilisation in times of rule of law crisis

Judicial mobilisation involves out-of-the box thinking which judges are not used to and which are not trained for. It is particularly relevant in off-bench mobilisation which one of the stakeholders described as a 'gray zone' for judges (S2). The starting point of any off-bench mobilisation is improvement of communication, desperately needed in the judiciary. This has been seen as one of the reasons why the attack on judiciary was so easy – their ability to defend themselves was only theoretical due to their lack of an effective and understandable communication strategy. In the *Żurek* case, when the background and context was established in the judgment, the Court of Justice analysed the nature of Żurek's statements and found that they 'did not go beyond mere criticism from a strictly professional perspective'.[50]

In the light of *Żurek* as well as international standards, there is a duty of judges to speak out in defence of judicial independence, but at the same time they are required to secure a high standard in their public speech and avoid political statements.[51] A certain 'temperature of public dispute is not suitable for judges' (S5),

[47] Case C-487/19, judgment of 5.11.2021, *W.Ż.*; See R. Mańko, P. Tacik, *'Sententia non existens: A new remedy under EU law?: Waldemar Zurek (W. Z.)'*, (2022) 59 Common Market Law Review 1169, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/59.4/COLA2022076.

[48] B. Grabowska-Moroz, *'Judicial dialogue about judicial independence in times of rule of law backsliding: Getin Noble Bank'*, (2023) 60 Common Market Law Review 797, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/60.3/COLA2023052.

[49] Ł. Bojarski, *Civil Society Organizations for and with the Courts and Judges—Struggle for the Rule of Law and Judicial Independence: The Case of Poland 1976–2020* (2021) 22 German Law Journal 1377.

[50] *Żurek*, para. 224.

[51] Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/41/48, 29.4.2019.

that is why 'public engagement is skating on very thin ice' for them.[52] Meanwhile the post-2015 mobilisation of judges has brought many improvements in the field of their (public) communication. 'Judges go out to society and speak with a human voice, for the first time in decades.'[53] In this sense the situation is better than eight years ago (S4). Public protests have brought judges closer to citizens (S1). At the same time the language of judges is very professional and often anachronistic, which makes it difficult to reach young people (S4). That is why independent media have played a crucial role in showing to society the resistance of judges – not only as a platform for presenting a narrative opposing the government's propaganda, but also a proxy who explained highly complicated legal issues. Furthermore, judicial associations have learnt how to reach the media and make them interested in covering the 'reform of the judiciary'. That is why the role of judicial association in the judicial mobilisation in Poland is of fundamental importance (S6). Judicial associations can play a representative role for their members and as a formal entity can engage in education projects or domestic networking, such as the Committee of Defence of Justice (KOS) established in 2018 by thirteen non-governmental organisations engaged in rule of law defence in Poland.[54] Surprisingly, domestic mobilisation is perceived by judges as more challenging than actions taken at the international level.[55]

Judicial associations, especially 'Iustitia', the biggest one, are the face of the 'institutional resistance' of judges (S6), since the moment the National Council for Judiciary was captured by the political majority in 2018. It is not really certain to what extent the board of 'Iustitia' is able to coordinate on-bench judicial mobilisation. It is however highly probable that its large number of members allows 'Iustitia' to have quite a precise and broad picture of the situation in the judiciary and tendencies in case-law in rule of law-related cases. However, many disciplinary cases are coordinated by Wolne Sądy (the Free Courts Initiative), a grass-root organisation established by four lawyers, which represents judges before domestic and international courts.[56]

Interestingly enough, Polish associations seem not to litigate rule-of-law cases, as their Romanian or Portuguese partners have done, reaching the Kirchberg.[57] 'Iusti-

[52] Matthes, p. 480.

[53] J. Gwizdak, *A Grim Joke Four Judiciary Musketeers on Opposite Sides of the Barricade*, Visegrad Insight 4.5.2020 https://visegradinsight.eu/a-grim-joke-rule-of-law-poland/.

[54] KOS's major role was to coordinate the work of non-governmental organisations and their support to judges and prosecutors. It also runs an 'Archive of Repression' concerning judges and prosecutors (https://komitetobronysprawiedliwosci.pl/archiwum-represji/). Due to the high number of cases and their growing complexity the Archive has not been updated for a year, however. The main role of KOS is now to attract media attention and to organise press conferences and explain new developments in the field of the 'reform of the judiciary'.

[55] Matthes, p. 478. Judges were for instance hesitant to align with the Committee of Defence of Democracy (KOD), a social movement and organisation established in 2015. However as they put it, they 'profited from this protest spirit' (Matthes, p. 479).

[56] See B. Grabowska-Moroz, O. Śniadach, *The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland* (2021) 17(2) Utrecht Law Review 56; doi: https://doi.org/10.36633/ulr.673.

[57] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19, judgment of 18.5.2021, *Asociația "Forumul Judecătorilor din România"*. Case C-64/16, Judgment of the Court (Grand Chamber) of 27.2.2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*.

tia' submitted *amicus curiae* interventions to the European Court of Human Rights in several cases concerning judicial independence. Polish judges are also members of judicial associations which have decided to challenge the Council's decision concerning the awarding of post-COVID-19 EU funds to Poland.[58] Associations are also strongly involved in education initiatives, which are judicial collective and positive action (not strictly limited to resistance against 'reform of the judiciary').[59] Judges participate in music festivals where they organise moot-court hearings; they organise and attend meetings to discuss law; they engage in the 'Constitutional Week' organised by the Zbigniew Hołda Association; and they record podcasts.

However judicial mobilisation raises numerous questions about its limits and about 'red lines' which cannot be crossed by judges in their resistance to attacks on the judiciary: whether judges should participate in hearings organised by MEPs in the European Parliament; whether they should engage in campaigns together with political parties,[60] and whether they should prepare legislative drafts.[61] The last issue in particular gave rise to various different opinions from stakeholders: from those seeing it as a completely legitimate tool of mobilisation (S6), to those with doubts as to whether judges should engage in a policy-making activities (S2), to those offering a critical analysis of the actual legislative drafts presented recently by 'Iustitia' (S1).[62]

4 Conclusions

Żurek v Poland is definitely an important milestone in the development of the judicial independence case-law of the Strasbourg court.[63] The major added value of *Żurek* case is a clear application of Article 10 to his situation. Leaving such a 'legal harassment' outside the scope of Article 10 would definitely give fuel to authoritarian tendencies in Europe. 'Fight' for judicial independence in such populist legal and political environment can be considered as daunting if not dangerous.[64] The Convention is a living instrument which should be able to react to such developments in

[58] L. Bayer, *European judges sue Council over Polish recovery plan*, Politico 28.8.2022.

[59] Matthes, p. 473; See also M. Gersdorf, M. Pilich, *Judges and Representatives of the People: A Polish Perspective*, (2020) 16 European Constitutional Law Review, p. 350.

[60] Iustitia and Lex Super Omnia supported the 'Rule of Law Pact' signed by major political parties – https://oko.press/lewica-ko-i-psl-podpisaly-pakt-dla-praworzadnosci. It was suggested during the interviews that there was no consultation concerning the Pact with other non-governmetnal stakeholders (S2).

[61] Iustitia announced their recent legislative drafts in June 2023 during the Polish Lawyers Congress event in Gdańsk (*Kongres Prawników Polskich*) https://www.iustitia.pl/dzialalnosc/konferencje-i-szkolenia/4716-projekty-ustaw-przedstawione-podczas-obrad-iii-kongresu-prawnikow-polskich.

[62] The main criticism concerned was whether CJEU rulings had been read and applied correctly in the legislative draft presented by 'Iustitia'. A second question was whether producing a draft statute was the right approach to have taken and whether a 'white paper' would not have been a better option (S1).

[63] A. Bodnar, *Real milestone*, 23.7.2022 https://adbodnar.substack.com/p/a-real-milestone.

[64] A. Kozlová, *Poland's Rule of Law Breakdown Continued: Judge Żurek's Battle for Judicial Independence Within the European Human Rights Framework*. Review of Central and East European Law (2023), 48(1), p. 88.

order to protect the basic values on which the Convention was established: those of democracy, justice, freedom and the rule of law.[65]

Furthermore, the case brought by Żurek before the Supreme Court reached the Luxembourg court and gave rise to another important ruling, which could confirm Matthes' finding that judges' mobilisation has 'advanced integration through law'.[66] The role of judicial associations discussed in this article would not enhance the rule of law without individual judges having personally engaged in resistance, often paying high price for their on-bench decisions.[67] There is no doubt that the current state of the rule of law in Poland would be completely different if judges had not resisted the political attacks on the judiciary and the government's attempts to erode guarantees of judicial independence: the situation would be much worse (S2, S7). A large part of how the rule of law crisis unfolded was the result of the actions undertaken by judges (S4). In the light of latest developments, judicial resistance was definitely the right approach. Together with civil society organisations the judges managed to engage the EU institutions in taking action against 'judiciary reform' in Poland. The role of the judicial associations was strengthened in this context. Together with individual judges, they also became 'rule of law actors'.[68]

This is the first time in modern history of Poland that judges faced a real dilemma regarding their obligation to defend rule of law – they needed to answer the question what this obligation means in practice. They have never faced such a dilemma before (S5) and it is difficult to find similar historical examples of such a mobilisation (S6). One of the successes of this mobilisation is that it is still going on, despite the fact that it is limited to a handful of people (S6).

The rule of law crisis and ongoing polarisation 'sharpen political contours' (S4), which might have an impact on judges and how they perceive their role in solving this crisis. There is a notion of a 'struggle between good and evil' (S2), so one might think that criticising judges or judicial associations for their actions needs to await better times. Such criticism creates a high level of self-censorship among the stakeholders in their public comments regarding any potential mistakes of judicial mobilisation. A

[65] See Preamble to the Convention:

> 'Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend; Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.

[66] Matthes, p. 481.

[67] *Tuleya v Poland*, applications nos. 21181/19 and 51751/20, judgment of 6.7.2023; *Juszczyszyn v Poland*, application no. 35599/20, judgment of 6.10.2022.

[68] Jarosław Gwizdak, former judge, when analysing the role of associations admitted that 'such associations, or informal networks of important professionals, can play important roles, as watchdogs and orderlies, in the new world order'. However, he highlighted that 'a profound rethinking of an association's mission and values seems to be a necessary start, for Iustitia and any network wishing to be an important actor on the main stage'. (J. Gwizdak, *A Grim Joke Four Judiciary Musketeers on Opposite Sides of the Barricade*, Visegrad Insight 4.5.2020 https://visegradinsight.eu/a-grim-joke-rule-of-law-poland/).

'siege mentality' might not in this context be the best guiding principle in programming future judicial mobilisation. It creates a bad atmosphere to discuss the limits and challenges of this mobilisation. At the same time, judges remain an emanation of the state (S2) and their on-bench decisions are issued on behalf of the state.

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Declarations

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