

Sometimes Even Easy Rule of Law Cases Make Bad Law

ECtHR (GC) 15 March 2022, No. 43572/18, *Grzęda v Poland*

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INTRODUCTION

It is a well-known maxim in the legal world that hard cases make bad law. Yet, this familiar phrase has long been turned upside down as well, as cases that are – by and large – not too difficult may also lead to judgments that are unconvincingly argued or poorly structured. It is especially disheartening to find such judgments in areas where the stakes are high, and even more so when the judgment has been issued through a more authoritative composition, such as a grand chamber.

The *Grzęda* judgment unfortunately checks all of those boxes. *Grzęda v Poland*¹ was the first Grand Chamber judgment of the European Court of Human Rights on the rule of law crisis in Poland, a topic that has been occupying Europe, together with its two main supranational courts,² for several years now. The case concerned, in essence, the right of access to a court for Mr Grzęda to

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²For a recent, but already in some points outdated, overview of the European case law, see D. Kochenov and L. Pech, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (SIEPS 2021).

European Constitutional Law Review, 18: 753–779, 2022

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doi:10.1017/S1574019622000335

challenge the *ex lege* termination of his mandate as a judicial member of the National Council of the Judiciary (*Krajowa Rada Sądownictwa*). The Grand Chamber, by 16 votes to 1, found a violation of Article 6(1) ECHR. While the outcome of the judgment can certainly be agreed with, the Court's reasoning fails to convince on several key points. When one reads the judgment, the feeling that remains is that the Court seemed to have wanted to make this case about more than it was, thereby diluting the clarity of its own legal reasoning.

This case note will discuss those points in more detail and critically analyse the Court's reasoning and the broader consequences that can be drawn from the judgment. After specifying the facts of the case and summarising the judgment itself, this case note examines four separate issues. First, it critiques the Court's reasoning relating to the right of access to a court, and the way in which the majority refines and applies the two *Eskelinen* criteria – whether access to a court has been expressly excluded and whether this exclusion is based on objective grounds in the state's interests. Second, it examines what consequences can be drawn from the *Grzęda* judgment for the principle of judicial independence in the Court's case law. Third, it situates this judgment within the broader topic of judicial self-governance and argues that the Grand Chamber's reasoning is normatively flawed. Fourth, it argues that the *Grzęda* judgment creates a well-delineated but important opening concerning the right to challenge legislation *in abstracto* before the Strasbourg Court. In doing so, the Court deviates from decades of established case law and ventures into previously uncharted territory.

FACTS OF THE CASE

The case of *Grzęda* must be situated within the broader system of reforms of the Polish judicial system orchestrated by Jarosław Kaczyński and his Law and Justice government. These reforms have already been discussed countless times by a plethora of political, judicial, academic and advisory actors and this case note is not the place to repeat all of that in detail. Suffice it to say that as a key component of its wide-scale reform, the government introduced some fundamental changes to the composition of the National Council of the Judiciary via a 2017 legislative amendment.³ The most important of those changes was the fact that the 15 judicial members of the National Council of the Judiciary (out of a total of 25) would no longer be elected by the assemblies of judges from among their members, but would be appointed by parliament. The same law immediately

³For further details, see A. Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition', 19 *German Law Journal* (2018) p. 1839.

also prematurely terminated the terms of office of those judicial members who had been elected under the previous system, among them Mr Grzęda.⁴

The Polish government justified the reforms by the need to increase the efficiency of the administration of justice, to enhance the accountability of the judiciary which was allegedly weakened by the previous system of co-optation and promotion of judges decided by the judges themselves, and to make the election of the members of the National Council of the Judiciary more democratic. Part of the justification for this amendment was given by the Constitutional Tribunal which – in a composition including two of the Justices whose election was vitiated by grave irregularities⁵ and as a response to a case lodged by the Minister of Justice/Prosecutor General – held that the previous system of individual elections of the judicial members of the National Council of the Judiciary violated Article 187 of the Polish Constitution.⁶ According to the Constitutional Tribunal, the fact that that provision made mention of the phrase ‘term of office’ in the singular, but used ‘elected members of the NCJ’ in plural, meant that all elected members should have one joint term of office. In order to comply with this interpretation, the government decided to prematurely terminate the mandates of the sitting members – whose individual terms of office did not overlap – and to organise elections in the Parliament for the new members. Those new members would have one joint term of office, starting on the day after the elections.

Mr Grzęda had originally been elected in January 2016 for a four-year term of office, which was set to end in January 2020. As a consequence of the abovementioned legislative amendment, his term of office was terminated *ex lege* on 6 March 2018, the day on which the *Sejm* elected the new members of the National Council of the Judiciary. He did not receive any official notification regarding the termination of his mandate. He brought his case before the Strasbourg Court, claiming a violation of Article 6(1) ECHR, since he had been denied access to a Polish court in order to contest the premature and allegedly arbitrary termination of his term of office.

JUDGMENT OF THE COURT

The Grand Chamber started off its reasoning with the applicability of Article 6 ECHR. It reiterated the general principles in this regard, namely that Article 6(1) ECHR is applicable, in its civil limb, when there is a dispute over a civil right, which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The

⁴Grzęda, *supra* n. 1, paras. 52 and 54.

⁵ECtHR 7 May 2021, No. 4907/18, *Xero Flor w Polsce sp.z o. o. v Poland*.

⁶Judgment of the Polish Constitutional Tribunal of 20 June 2017 (no. K 5/17).

dispute in question must be genuine and serious and must be directly decisive for the right in question. When the dispute in question takes place between the state and a civil servant – a term which is interpreted broadly so as to include judges as well⁷ – the Court has held ever since the Grand Chamber judgment of *Vilho Eskelinen*, that such a dispute will in principle be regarded as civil in nature, except when two cumulative conditions are met. First, the state must have expressly excluded access to a court for the post or category of staff in question and second, that exclusion must be justified on objective grounds in the state's interest.⁸

When the Grand Chamber applied those general principles to the case of *Grzęda*, it essentially looked into two questions. First, whether Mr Grzęda could rely on a right recognised under domestic law and, second – if that was indeed the case – whether that right was of a civil nature. In what follows, the Court's argumentation on both those questions will be set forth. Yet, since every step of the Court's reasoning will be discussed in detail in the commentary below, this section will suffice with a more general description of the judgment.

As to the first of those two questions, the Court's starting point was Article 187(3) of the Polish Constitution, which states that members of the National Council of the Judiciary are elected for a four-year term of office. The Court recalled that while the Convention in principle does not guarantee a right to hold a public post, such a right may very well exist at the domestic level. It was satisfied that this was the case for Mr Grzęda, since Article 187(3) of the Polish Constitution provided for and therefore protected the four-year term of the elected members of the National Council of the Judiciary.⁹ Yet, instead of stopping its considerations there, it then pointed out that the security of tenure of elected judicial members of the Council had not been called into question until the current parliamentary majority introduced a bill in order to reform the National Council of the Judiciary. The Court then discussed in detail the diverging case law between the former and the newly composed Polish Constitutional Tribunal on the matter. After several more paragraphs on why it was not persuaded by the arguments of the Government, the Court eventually held that it was satisfied that, having regard to Article 187(3) of the Polish Constitution, there was in fact an arguable right in domestic law for a judge elected to the National Council of the Judiciary to serve a full four-year term of office.¹⁰ It thus concluded that there was a genuine and serious dispute over a right, namely to serve the full four-year term of office.

⁷ECtHR 23 June 2016, No. 20261/12, *Baka v Hungary*, para. 104.

⁸ECtHR (GC) 19 April 2007, No. 63235/00, *Vilho Eskelinen v Finland*, para. 62.

⁹*Grzęda*, *supra* n. 1, para. 270.

¹⁰*Ibid.*, para. 282.

The second question was then whether that right was of a civil nature. As mentioned above, when the case concerns civil servants, including judges, that question must be answered bearing in mind the two conditions set out in the *Eskelinen* test: whether access to a court has been expressly excluded; and whether this exclusion is based on objective grounds in the state's interests. The Grand Chamber held that it was appropriate to further develop this test, especially the first of those two conditions.¹¹

Turning to the first condition, the two parties offered opposing interpretations of domestic law. The applicant argued that the first condition had not been fulfilled since no provision of Polish law had expressly excluded access to a court. The Polish government, conversely, argued that the first condition had been met, since Polish law had never provided for any form of appeal or remedy regarding the expiry, termination or renunciation of the office of members of the National Council of the Judiciary. The Grand Chamber found it opportune to use this case to further refine the first *Eskelinen* condition. It acknowledged that a straightforward application of the first condition would not be entirely apt in every situation. Consequently, it was prepared to accept that the first condition can also be regarded as fulfilled when, even without an express provision to that effect, it has been clearly shown that domestic law excludes access to a court for the type of dispute concerned. Thus, the first *Eskelinen* condition may also be satisfied when the exclusion in question is implicit, in particular where it stems from a systemic interpretation of the whole of the applicable legal framework. Yet, after that entire run-up which creates an important new understanding of the first *Eskelinen* criterion, the Court held that the question of whether this implicit exclusion was present in the case at hand could be left open since, in any case, the second condition had not been met.¹²

Shifting its attention to the second *Eskelinen* criterion, the Court reiterated the importance of the rule of law. In order for the national legislation that excludes access to a court to have any effect under Article 6(1) ECHR in a particular case, it should be compatible with the rule of law, meaning, *inter alia*, that it should be based on an instrument of general application. According to the Court that was not the case here, since the 2017 amendment was directed at a clearly identifiable group of 15 people. It reiterated here that laws that are directed against specific people are contrary to the rule of law.¹³

Furthermore, the Grand Chamber found it important to stress that its examination of the second *Eskelinen* criterion should take due account of the fact that the case of *Grzęda* was closely related to issues of judicial independence. The very

¹¹Ibid., para. 288.

¹²Ibid., paras. 289-294.

¹³With reference to: ECtHR (GC) 22 December 2020, No. 14305/17, *Selahattin Demirtaş v Turkey* (No. 2), para. 269; *Baka*, *supra* n. 7, para. 117.

raison d'être of the National Council of the Judiciary was to safeguard judicial independence in Poland. In that context, the Court repeated the importance that is attached to the principle of judicial independence in the Convention framework and the special role that the judiciary plays as a guarantor of justice in a state governed by the rule of law. Given the important role played by judicial councils, the Grand Chamber was of the opinion that similar considerations should apply for judges who are serving a mandate in such a body, because of their status and in view of the need to safeguard judicial independence. It considered that judicial independence should be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to other official functions that a judge may be called upon to perform that are closely connected with the judicial system.¹⁴

After several more paragraphs on the importance of safeguarding the independence of judicial councils, the Grand Chamber then examined the fundamental changes that took place in the manner of electing the National Council of the Judiciary's judicial members. In doing so, the Court again delved into the case law of the Polish Constitutional Tribunal. It further relied on the case law of the Supreme Court and the Supreme Administrative Court in order to conclude that those changes in the manner of electing the National Council of the Judiciary's judicial members, considered jointly with the early termination of the terms of office of its former judicial members, meant that the independence of that body was no longer guaranteed.¹⁵ Finally, it addressed the general issue of judicial reform in Poland. It stressed that while the Convention allows Contracting Parties to reform the judiciary, such reforms cannot undermine the independence of the judiciary or its governing bodies. It then stressed the importance of judicial independence for the proper functioning of a Convention system based on subsidiarity.¹⁶

On the basis of all the foregoing, the Court concluded that the second *Eskelinen* criterion had not been fulfilled and that the exclusion of access to a court could not be justified on objective grounds in the state's interests. As a consequence, the right in question was civil in nature and Article 6(1) ECHR applied.¹⁷

Turning, finally, to the merits of the complaint, the Court repeated its general principle that the right of access to a court is not absolute, but may be subject to limitations that pursue a legitimate aim, are proportionate with that aim, and do not impair the very essence of that right.¹⁸ It then repeated that the whole

¹⁴Grzęda, *supra* n. 1, para. 303.

¹⁵Ibid., paras. 310-322.

¹⁶Ibid., paras. 323-324.

¹⁷Ibid., paras. 325-334.

¹⁸Among others: ECtHR (GC) 5 April 2018, No. 40160/12, *Zubac v Croatia*, para. 78; *Baka*, *supra* n. 7, para. 120.

sequence of judicial reforms in Poland were aimed at weakening judicial independence and pointed out that the European Court of Justice as well as the Court itself had been critical of these reforms in many judgments. In that light, the Court found that the lack of judicial review had impaired the essence of Mr Grzęda's right of access to a court and found a violation of Article 6(1) ECHR.¹⁹

COMMENTARY

As the first Grand Chamber judgment on the Polish rule of law crisis, the *Grzęda* judgment was highly anticipated. The case furthermore touched upon several other topics that are important or novel to the Court's case law. When one reads the judgment in detail, it is indeed surprising how much can be found in it, given the – all things considered – rather well-circumscribed core question of the removal of judicial members of a judicial council by way of legislative amendment. It is perhaps because of this that the judgment feels so poorly focused. While reading, it is difficult to shake the feeling that the Court wanted to make this case about more than it was and tried to use its Grand Chamber formation to send a clear signal to the Polish authorities concerning the judicial reforms in their entirety.

However, the *Grzęda* case did not seem like the right case to do this and one can wonder why exactly this case – out of the dozens that are pending before the Court regarding the rule of law crisis – was relinquished to the Grand Chamber.²⁰ The result is a judgment that lacks in focus and overall fails to meet the clarity in legal reasoning that one can (or must) expect of the Grand Chamber.

The right of access to a court (for judges)

The right of access to a court has been a particularly active strand of case law in the last few years. This seems to be especially the case for the right of access for domestic judges. For them, that right is one of the few Convention rights that they can rely on – in the absence of more direct options such as a subjective right to invoke their judicial independence – to challenge measures that affect their status or career. The right of access to a court has thus become an increasingly relevant right in rule-of-law related cases. This not only becomes clear from the *Grzęda* case, but also from

¹⁹ *Grzęda*, *supra* n. 1, paras. 335-350.

²⁰ See also the concurring opinion of judge Lemmens and – more explicitly – the dissenting opinion of judge Wojtyczek.

other recent cases such as *Żurek*,²¹ *Broda and Bojara*,²² *Gumenyuk*,²³ *Bilgen*,²⁴ *Eminağaoğlu*,²⁵ *Baka*²⁶ and to a certain extent *Loquifer*.²⁷

Yet, this recent case law is not particularly easy to disentangle and is quite dense overall.²⁸ It would thus have been helpful for the Grand Chamber to step in and authoritatively bring some clarity to the matter. Yet, the *Grzęda* judgment did not do that. As pointed out by judge Lemmens in his concurring opinion, not only did the Court fail to seize the opportunity brought by the case, the majority opinion even contained some confusing applications of the established principles.²⁹

As was mentioned above, an application regarding the right of access to a court can essentially be divided into three distinct steps: (1) is there a right? (2) if so, is this right of a civil nature (the *Eskelinen* test)? and (3) if it is, has Article 6(1) ECHR actually been violated? For each of those three steps the Grand Chamber has made some odd choices which seem to disregard – or even implicitly run counter to – the principles that were established in recent case law and, all things considered, fails to provide a convincing reasoning.

As to the question whether Mr Grzęda could rely on a right to serve the full four-year term of his mandate, the Court's starting point was that Article 187(3) of the Polish Constitution provided for and therefore protected the four-year term of elected members of the National Council of the Judiciary.³⁰ A few paragraphs further on, the Court reiterated that, having regard to that provision of the Constitution, domestic law provided elected judges with an arguable right to serve their full term of office.³¹ One could expect that those considerations sufficed to conclude that Mr Grzęda could rely on a right, at least an arguable one. In previous cases, like *Broda and Bojara*, *Loquifer* and *Baka*, the existence of such a provision in domestic law, establishing a certain mandate for a predetermined term, indeed sufficed to find an arguable right, clear and simple.³²

However, rather than simply stop there and consider this matter solved, the Court then spent several pages dismissing all the counterarguments by the

²¹ECtHR 16 June 2022, No. 39650/18, *Żurek v Poland*.

²²ECtHR 29 June 2021, Nos. 26691/18 and 27367/18, *Broda and Bojara v Poland*.

²³ECtHR 22 July 2021, No. 11423/19, *Gumenyuk v Ukraine*.

²⁴ECtHR 9 March 2021, No. 1571/07, *Bilgen v Turkey*.

²⁵ECtHR 9 March 2021, No. 76521/12, *Eminağaoğlu v Turkey*.

²⁶*Supra* n. 7.

²⁷ECtHR 20 July 2021, Nos. 79089/13, 13805/14 and 54534/14, *Loquifer v Belgium*.

²⁸See for a recent article that discusses this case law, M. Leloup, 'Not Just a Simple Civil Servant: The Right of Access to a Court of Judges in the Recent Case Law of the ECtHR', *European Convention on Human Rights Law Review* (forthcoming).

²⁹Concurring opinion of judge Lemmens, para. 3.

³⁰*Grzęda*, *supra* n. 1, para. 270.

³¹*Ibid.*, para. 282.

³²See also ECtHR 2 November 2021, No. 44595/15, *Buzoianu v Romania*, para. 32.

Polish government. In doing so, it ventured into particularly contentious regions of the interpretation of the Polish Constitution, including the case law of the Constitutional Tribunal. Because of this, it was also forced to take a side on the diverging interpretations between the Supreme Court and Constitutional Tribunal of Poland, which in turn made it raise doubts about the legality of the Constitutional Tribunal in its current composition. As also pointed out by judge Lemmens, all of this goes much further than needed.³³

It is not immediately apparent why the Court found it necessary to discuss the matter so exhaustively. One potential reason could be that judgment K 5/17 of the Constitutional Tribunal made clear that Mr Grzęda was appointed for a term of office in a way which was not originally intended by the Constitution. Understood that way, the interpretation by the Tribunal would essentially invalidate Mr Grzęda's right and as such the Court had to find a way around it.³⁴ Yet if that is indeed the reasoning of the Court, it does not immediately seem to be very well supported by the rest of the judgment. At three separate points in its reasoning, it referred to the text of Article 187(3) of the Polish Constitution in order to point out that it provided at least an arguable right to complete the four-year mandate.³⁵ Nowhere does it link the 'arguability' of that right to the validity of the individualised system of appointment that was prescribed in Polish legislation and which was found to be unconstitutional by the Constitutional Tribunal in its 2017 judgment. On the contrary, at the end of its reasoning, the majority opinion indicated that the 'arguability' of Mr Grzęda's right to finish the four-year mandate, starting at his 2016 election, could not be affected by subsequent developments.³⁶ Thus, if one reads the judgment, it would seem that the content of Article 187(3) of the Polish Constitution sufficed on its own to provide Mr Grzęda with an arguable right, similar to those in earlier judgments. While the nature and scope of the right guaranteed by Article 187(3) of the Polish Constitution may certainly be the topic of debate,³⁷ it is strange that the Court spent so much time refuting all other substantive arguments of the Polish government concerning the existence rather than mere 'arguability' of the subjective right of judicial members of a judicial council to a four-year term of office.

Turning then, to the question of whether the right in question was of a civil nature, the Grand Chamber found it necessary to further develop the first *Eskelinen* criterion, since it was not entirely apt in all situations. It held that the first criterion may also be fulfilled when the exclusion is of an implicit, rather

³³Concurring opinion of judge Lemmens, paras. 4-5.

³⁴We thank the reviewer for pointing this possibility out to us.

³⁵*Grzęda*, *supra* n. 1, paras. 268, 278 and 282.

³⁶*Ibid.*, para 285.

³⁷See the dissenting opinion of judge Wojtyczek, para. 4.

than an explicit, nature, provided that it stems from a systemic interpretation of the applicable legal framework.³⁸ One should really not underestimate the gravity of that statement, as it nuances – arguably even overturns – many years of established case law. Ever since the judgment of *Vilho Eskelinen* itself, the Court has been very clear on the fact that national law must have expressly excluded access to a court for the post or category of staff in question.³⁹ There are many cases to be found in which the Court concluded that the first *Eskelinen* criterion had not been met because no provision in domestic law ruled out access to a court, at least not expressly.⁴⁰ In fact, it has admitted itself that in the majority of its cases, it did not find the *Eskelinen* test fulfilled since there was no express exclusion.⁴¹

The Grand Chamber's new approach in *Grzęda* thus marks an important lowering of the threshold for states to try to refute the applicability of Article 6(1) ECHR in disputes concerning civil servants. In itself this is not necessarily a bad evolution as it arguably better respects the spirit of the domestic legal framework. It is not uncommon that domestic legislation does not intend to provide for judicial review for certain disputes, without, however, explicitly excluding such an option. By also allowing the exclusion to follow implicitly from the entirety of the legislative framework, the Court now creates an opening for such situations.

Yet, in a very peculiar turn of events, after establishing this new understanding of the first *Eskelinen* criterion, the Grand Chamber did not pursue the matter any further, since it found that, in any case, the second criterion was not met. Nevertheless, one may have expected that the question whether the first condition of the *Eskelinen* test had been satisfied in Mr Grzęda's case was exactly one of the main reasons why this case was brought to be decided by the Grand Chamber, so it could clarify and unify the methodology for applying the first condition of the *Eskelinen* test in future cases concerning the rights of a person who is employed in a 'public service'. By shying away from this issue, the Grand Chamber failed to provide any guidance on how to apply this understanding in concrete cases. As pointed out by judge Lemmens, it equally left open the important question about the temporal aspects of this issue, namely whether account should be taken of the remedies that were available before the 2017 amending legislation or those available after. As he mentioned, the former would indeed seem like the most convincing option. The applicant would be left with little protection if the legislative amendment that allegedly interfered with the applicant's right could at the same time expressly or implicitly refuse access to a court and as such lead to the

³⁸ *Grzęda*, *supra* n. 1, para. 292.

³⁹ *Vilho Eskelinen*, *supra* n. 8, para. 62.

⁴⁰ See, for some examples, ECtHR 12 July 2022, No. 76985/12, *Fumal v Belgium*, para. 17; *Buzoianu*, *supra* n. 32, para. 39.

⁴¹ *Bilgen*, *supra* n. 24, para. 70.

inapplicability of Article 6(1) ECHR. This also seems to be the point of view taken by the Court in the later judgment of *Gloveli*.⁴² Yet, by evading this matter, the Grand Chamber neglected to give any guidance on those important and difficult questions, leaving the various sections of the Court that will deal with subsequent cases on the matter, as well as the national courts, to chart their own course.

As mentioned above, the second *Eskelinen* criterion requires that the exclusion of access to a court be justified on objective grounds in the state's interests. According to the prevailing case law, two separate possibilities exist here. Either the Contracting Party shows that the subject matter of the dispute at issue is related to the exercise of state power, or that it has called into question the special bond of trust and loyalty between the civil servant and the state. As far as the first option is concerned, there is little to find in the judgment, or in the European Court of Human Rights' case law in general for that matter. There are not many judgments in which the Court has clearly clarified what must be understood as the exercise of state power. While in older case law the Court seemed to still accept that disputes concerning judges could be seen as disputes about the exercise of state power,⁴³ more recent jurisprudence seems to grant less leeway. The Court now mostly reiterates – also in cases concerning judges –⁴⁴ that the mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. This was also the short – perhaps even curt – response from the Grand Chamber in the *Grzęda* judgment.⁴⁵ Since the Polish government did not invoke the second option – the bond of trust and loyalty – one could expect that the matter was handled and that the second criterion had not been met. However, the Court then spent over 30 paragraphs on the rule of law, the importance of judicial independence, the existing international standards in that regard, the legislative amendments in Poland, and the judgments of the Polish Supreme Court and Constitutional Tribunal, only to then – rather abruptly – come to the conclusion that the second criterion had not been met. When one reads the judgment, it is not very clear why all those considerations were required to conclude that the exclusion of access to a court was not justified by reasons in the state's interests, or that they even necessarily led to that conclusion. As pointed out by judge Lemmens, the reasoning

⁴²ECtHR 7 April 2022, No. 18952/18, *Gloveli v Georgia*, para. 46. With reference to: *Baka*, *supra* n. 7, para. 116. See in the same sense the concurring opinion of judge Lemmens in the *Grzęda* judgment, para. 8.

⁴³ECtHR 19 October 2010, No. 20999/04, *Ozpinar v Turkey*, para. 30; ECtHR (dec.) 26 May 2009, No. 22412/05, *Nazsiz v Turkey*; ECtHR (dec.) 11 December 2007, No. 3964/05, *Apay v Turkey*; ECtHR (dec.) 9 July 2002, No. 62584/00, *Harabin v Slovakia*.

⁴⁴*Bilgen*, *supra* n. 24, para. 76.

⁴⁵*Grzęda*, *supra* n. 1, para. 296.

here took the Court far away from the mere examination of whether the right invoked by Grzęda was a civil one.⁴⁶

It would seem that those considerations could easily have been avoided if the Court had relied more directly on its recent case law. In several recent judgments, the Court has discussed the issue of the bond of trust and loyalty between judges and the state. In those cases, it held that the employment relationship of judges with the state must be understood in the light of the specific guarantees essential for judicial independence.⁴⁷ Rather than loyalty to the holders of power, they are beholden only to democracy and the rule of law. In those other cases, those considerations sufficed for the Court to conclude that the exclusion of judicial review of disputes about the career and status of judges had not been justified by objective reasons in the state's interests.⁴⁸ In *Grzęda*, the Court expanded this reasoning from disputes about the career and status of judges in their adjudicatory role to their other roles as well. It held that, given the importance of judicial councils, the same considerations should apply as regards the tenure of judges who are elected to serve on such councils because of their status and in view of the need to safeguard judicial independence. It continued by saying that judicial independence should be understood in an inclusive manner and apply not only to a judge in his or her adjudicating role, but also to other official functions that a judge may be called upon to perform that are closely connected with the judicial system.⁴⁹ That paragraph can actually be seen as the key consideration in the entire judgment. By making a bridge between the adjudicating role and other official functions of a judge, the abovementioned case law on the bond of trust and loyalty between judges and the state would seem to apply equally to Grzęda's mandate in the National Council of the Judiciary, leading to the conclusion that his removal could not be seen as serving an objective ground in the state's interest.⁵⁰

Turning then, finally, to the merits of the case, the same sort of remark can essentially be made. In most cases concerning the right of access to a court, the mere fact that domestic law provided no possibility to obtain a judicial review sufficed for the Court to find that the essence of that right had been violated.⁵¹ Again, however, the Grand Chamber devoted several paragraphs to the principle

⁴⁶See para. 13 of his concurring opinion.

⁴⁷This happened for the first time in *Bilgen* and *Eminağaoğlu* and was later confirmed in cases like *Broda and Bojara* and *Gumenyuk*.

⁴⁸See *Bilgen*, *supra* n. 24, para. 79; *Eminağaoğlu*, *supra* n. 25, para. 80; *Broda and Bojara*, *supra* n. 22, para. 122; *Gumenyuk*, *supra* n. 23, para. 66.

⁴⁹*Grzęda*, *supra* n. 1, para. 303.

⁵⁰See also the concurring opinion by judge Lemmens, who made similar remarks, without, however, relying on the extra step that the Court introduced in para. 303.

⁵¹Among others: *Gloveli*, *supra* n. 42, para. 59; *Bilgen*, *supra* n. 24, para. 97; *Loquifer*, *supra* n. 27, para. 97.

of judicial independence and the general context of the Polish judicial reforms. At the same time, it did not mention anything on the seemingly inevitable conclusion to be drawn from the finding of a violation, namely that Grzęda should then have had the right to challenge the 2017 legislative amendment, something that would arguably contradict decades of clear case law. This point was also raised by judge Wojtyczek in his dissenting opinion and we will turn to it later in this case note.

All things considered, the *Grzęda* judgment is unnecessarily verbose, at times confusing and at some points simply unconvincing. Many of the points that the Court struggled with could have been avoided by relying on principles that had already been established in recent case law. The right of access to a court is not an easy strand of case law and the *Eskelinen* test almost inherently requires the Court to delve into the domestic legal framework and national jurisprudence. It is no wonder that that might lead to very technical discussions on what national law does and does not say and it is understandably not easy for the Court to do this. Yet, that is exactly why it is so striking that the Court chose not to take a road that would have avoided those contentious issues. As a matter of fact, the *Żurek* judgment, which came out a couple of months later, can be seen as a case in point that the *Grzęda* case could be dealt with in a more concise and convincing manner. That case was essentially a carbon copy of the *Grzęda* case, in which another judicial member of the National Council of the Judiciary complained about the loss *ex lege* of his mandate in the council.⁵² Unsurprisingly, the Court's first section faithfully followed the principles that the Grand Chamber had set out a few months earlier in *Grzęda*, but it applied them in a much more succinct manner. For each of the three steps mentioned above, the Chamber was considerably more brief than the Grand Chamber and threw much of the unnecessary ballast in its reasoning overboard. Generally speaking, it is to be hoped that *Grzęda* does not reflect how the Court will deal with such applications in the future, but will be remembered as an overambitious Court, trying to give a clear message regarding the Polish judicial reforms, but choosing a bad case for doing so.

The judgment's implications for the principle of judicial independence

While the *Grzęda* case only concerns a complaint about the right of access to a court, the principle of judicial independence is omnipresent in the judgment.⁵³ The Grand Chamber spends ample time reminding everyone of the importance of that principle, not only for individual judges, but also for judicial councils. As such, the *Grzęda* judgment brings some important developments to the case

⁵²*Żurek*, *supra* n. 21.

⁵³The word independence alone appears 365 times in the judgment.

law on judicial independence. In what follows, this case note will point to three such developments.

The first – and perhaps most significant – addition to the jurisprudence is the expansion of the principle of judicial independence from the adjudicatory role of judges to other official functions that they may be called upon to perform that are closely connected to the judicial system.⁵⁴ The Court argued that, given the important role played by judicial councils, the same considerations should apply as regards the tenure of judges, who are elected to serve on those councils because of their status and in view of the need to safeguard judicial independence. It seems that the Court found inspiration for that point of view in the opinions of the Consultative Council of European Judges.⁵⁵ Yet, this ‘inclusive’ vision of judicial independence goes further than the membership of a judicial council. There is a wide variety in functions that judges may be tasked to perform outside of their traditional adjudicatory role. This can range from the membership of bodies of judicial governance, such as judicial councils, appointment committees, or disciplinary bodies, over discussions with the political branches about the budget of the judiciary, to commenting on draft legislation that may affect the judiciary – which was the case in *Baka* and *Žurek*.

In *Grzęda*, the Grand Chamber gave a welcome reminder that the duty to respect judicial independence does not stop at the core adjudicatory task of judges, but also has a role to play in those more ancillary aspects of the judicial function. Yet, in this regard it is noticeable that the Court takes pains to limit its reasoning to the judicial members of the judicial council and one might wonder whether the same would hold true for non-judicial members. And if not, how that distinction can be justified? Does the Court then not introduce two separate classes of council members? The even more intriguing question, already highlighted above, is what ‘other official functions’ of a judge, beyond their membership in a judicial council, require the same degree of protection as the adjudicative role. The position of a court president? Anything else? The Grand Chamber provides no guidance on these vexing issues.

This brings us to a second point, namely the independence of judicial councils. The Court spent many paragraphs on the importance of safeguarding those bodies from encroachment by the legislative and executive powers, again with reference to international soft law instruments. It also repeated that it is recommended that no less than half of the members of such councils should be judges

⁵⁴*Grzęda*, *supra* n. 1, para. 303.

⁵⁵It referred to two such opinions: Opinion no. 24 (2021) of the Consultative Council of European Judges on the Evolution of the Councils for the Judiciary and Their Role in Independent and Impartial Judicial Systems; Opinion on the Draft Act on the NCJ submitted by the President of Poland.

chosen by their peers, though without reference to any of its earlier case law in which it had expressed such a view.⁵⁶ Importantly, the Court then made clear that while the Convention itself does not require member states to establish a judicial council, when they do create such a body, the Contracting Parties are under an obligation to ensure its independence from the political branches of government. In what can only be seen as a thinly veiled dig at the Polish government, the Court put it even more sharply and said that while states are free to adopt a judicial council model as a means of ensuring the independence of judges, what they cannot do is instrumentalise that body to undermine their independence.⁵⁷

It is certainly not the first time that the Court has made mention of standards of independence for judicial councils. Nevertheless, in the past it did so virtually exclusively in cases where such councils have disciplinary powers and where a domestic judge, as the applicant, complains about a violation of his or her right to a fair trial by an independent and impartial court or tribunal during the disciplinary proceedings.⁵⁸ In *Grzęda*, however, the Court discusses the independence of judicial councils in a much more abstract way, stressing the importance of such bodies for judicial governance and the independence of the judiciary in its entirety. It does so by pointing out the key role of the National Council of the Judiciary for the appointment and promotion of judges and making the connection between the integrity of the appointment process and the requirement of judicial independence.⁵⁹

The third development in the case law relates to the idea of subsidiarity. At the very end of its assessment of the second *Eskelinen* criterion, the Court considered it appropriate to emphasise the importance of the principles of subsidiarity and shared responsibility, especially now that Protocol 15 has officially entered into effect. The principle of subsidiarity imposes a shared responsibility between the Contracting States and the Court, with national authorities and courts having to interpret and apply domestic law in a manner that gives full effect to the

⁵⁶See ECtHR 9 January 2013, No. 21722/11, *Oleksandr Volkov v Ukraine*, paras. 110-112; ECtHR 9 February 2021, No. 15227/19, *Xboxhaj v Albania*, para. 299; ECtHR 21 June 2016, Nos. 55394/13, 57728/13 and 74041/13, *Ramos Nunes De Carvalho e Sá v Portugal*, para. 79.

⁵⁷*Grzęda*, *supra* n. 1, para. 307.

⁵⁸See, among others, *Oleksandr Volkov*, *supra* n. 56; ECtHR 31 October 2017, No. 147/07, *Kamenos v Cyprus*; ECtHR 5 February 2009, No. 22330/05, *Olujić v Croatia*. See for another example where it was about the power of the French judicial council to appoint judges, ECtHR 18 October 2018, No. 80018/12, *Thiam v France*.

⁵⁹*Grzęda*, *supra* n. 1, para. 306 and para. 309. See recently also ECtHR 23 June 2022, No. 19750/13, *Grosam v Czech Republic*.

Convention.⁶⁰ It then stressed that the Convention system cannot function properly without independent judges and that the Contracting Parties thus have the crucial task of ensuring the independence of their judiciary.⁶¹

While this connection between the idea of subsidiarity and the importance of safeguarding the independence of the domestic judges has already been made in legal literature,⁶² it is a novelty in the Court's case law. It is difficult not to see the influence of current President Spano shine through here. In a well-known 2018 article, he argued that the ideas of subsidiarity and process-based review can only be granted if the national decision-makers are structurally capable of fulfilling that task and if the foundations of the domestic legal order are intact. As such, states that do not respect the rule of law and do not ensure the impartiality and independence of their judicial systems, cannot expect to be afforded deference under process-based review.⁶³ In a later article he wrote that it is self-evident that the principle of subsidiarity within the Convention system is devoid of any meaningful content if the member states do not secure in law and practice the existence of independent, impartial and effective courts so as to safeguard fundamental rights.⁶⁴ With the judgment of *Grzęda*, those important ideas have now obtained some footing in the case law of the Court.

When one takes a look at the three aspects of the case that have just been pointed out, it becomes apparent that they all point in a similar direction. They move away from the right of the individual to an independent and impartial judge and look at judicial independence in a more structural way, permeating the domestic judiciary in its entirety. While it is certainly too soon to say that *Grzęda* has created an enforceable general duty on states under the Convention to guarantee the independence of the judiciary on an abstract, structural level, and a subjective right for judges to their independence, it may be an indication that the Court is willing to move more in that direction. If that is indeed the case, that would undeniably be a major evolution in the Court's case law. As the case law stands now, the right to an independent court is there only for the parties to a

⁶⁰See recently also ECtHR 21 September 2021, Nos. 74209/16 a.o., *Willems and Gorjon v Belgium*, para. 64.

⁶¹*Grzęda*, *supra* n. 1, para. 324.

⁶²See M. Leloup, 'Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR', 17 *EuConst* (2021) p. 394 at p. 415-416; F. Krenc and F. Tulkens, 'L'indépendance du juge. Retour aux fondements d'une garantie essentielle d'une société démocratique', in R. Chenal et al. (eds.), *Intersecting Views on National and International Human Rights Protection: Liber Amicorum Guido Raimondi* (Wolf Legal Publishers 2019) p. 397.

⁶³R. Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law', 18 *Human Rights Law Review* (2018) p. 473 at p. 493.

⁶⁴R. Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary', 27 *European Law Journal* (2021) p. 211 at p. 223.

dispute and cannot be relied on by judges themselves to try to enforce their own independence. That is the reason why domestic judges, such as Grzęda, must rely on other Convention rights to indirectly safeguard their independence, such as the right to private life,⁶⁵ the freedom of expression,⁶⁶ and more recently also the right of access to a court.⁶⁷ If the Court were to read such a structural obligation for the respect of judicial independence in the Convention, it would offer domestic judges a more direct route via which to protect their independence, thereby greatly increasing the effectiveness of the Court in rule of law cases.⁶⁸ Arguably, the Convention already offers a sufficient legal basis for such a structural understanding of judicial independence. When one combines Articles 1, 13 and 35 of the Convention, it is clear that all Contracting Parties are required to provide for effective domestic remedies on their territory for Convention-related complaints. The Court has furthermore repeatedly clarified that a remedy is only effective if it is independent.⁶⁹ While Article 13 ECHR does not require a remedy to be of a judicial nature,⁷⁰ in practice it is the judiciary that will provide the required remedy under that provision in the overwhelming majority of the cases. Taken together, those provisions can be understood as containing an obligation for all Contracting Parties to guarantee a structurally independent judiciary, in order to provide the applicants with the required effective remedies.

The Strasbourg Court and judicial self-governance

As stressed above, while the Court has addressed judicial councils in its previous case law, in *Grzęda* it went much further and resorted to several general remarks on their composition and role that may have far-reaching repercussions for domestic judicial governance well beyond Poland.⁷¹

⁶⁵See, for example, ECtHR (GC) 25 September 2018, No. 76639/11, *Denisov v Ukraine*; *Ozpinar*, *supra* n. 43.

⁶⁶*Baka*, *supra* n. 7; *Żurek*, *supra* n. 21.

⁶⁷Among others: *Bilgen*, *supra* n. 24; *Broda and Bojara*, n. 22.

⁶⁸In this respect it is interesting to point to two communicated cases: ECtHR (communicated) 30 April 2021, No. 13278/20, *Biliński v Poland*; ECtHR (communicated) 23 May 2022, No. 46453/21, *Synakiewicz a.o. v Poland*. In these cases, the Court itself asked the parties whether Art. 6(1) of the Convention can be interpreted in such a way as to recognise a subjective right for judges to have their individual independence safeguarded a respected by the State.

⁶⁹ECtHR 22 February 2022, No. 54547/16, *Shirkhanyan v Armenia*, para. 134; ECtHR (dec.) 18 May 2021, No. 37442/19, *Umoru v Italy*, para. 43; ECtHR 30 March 2004, No. 66561/01, *Merit v Ukraine*, paras. 62-63.

⁷⁰ECtHR (GC) 10 July 2020, No. 310/15, *Mugemangango v Belgium*, para. 131.

⁷¹So far, only Judge Pinto de Albuquerque had engaged in such abstract assessment of judicial councils in his concurring opinion in the Grand Chamber judgment of *Ramos Nunes de Carvalho S v Portugal*.

More specifically, the Grand Chamber's understanding of judicial councils rests on five arguments. First, the very *raison d'être* of judicial councils and their main task is safeguarding judicial independence.⁷² Second, judicial councils must be protected against encroachment by the legislative and executive powers.⁷³ Third, no less than half of the members of such councils should be judges.⁷⁴ Fourth, these judicial members of judicial councils should be chosen by their peers.⁷⁵ And finally, judicial members of judicial councils should enjoy the same protection as in their judicial function.⁷⁶

In fact, all five of those arguments are problematic. This is even more troubling since – as was pointed out above – only the last argument was necessary to decide the *Grzęda* case. The lengthy discussion of the first four arguments was unnecessary *obiter dictum*. To make things worse, the majority makes these far-reaching conclusions on judicial governance when it discusses whether the right invoked by the applicant is one of a 'civil' nature, rather than in the merits of the complaint.⁷⁷

Let us look at these arguments in reverse order. The fifth claim that, given the important role played by judicial councils, the same considerations should apply as regards the tenure of judges, who are elected to serve on those councils because of their status and in view of the need to safeguard judicial independence, is controversial. While considerations of judicial independence are pertinent regarding the non-adjudicatory roles of judges as well, that does not automatically mean that judges should enjoy the same level of judicial independence for such extrajudicial activities, even if they concern administration of justice in the broad sense. That is also reflected in many jurisdictions that allow for revocation of appointed or elected members of the judicial council by the appointing or electing body.⁷⁸ In Poland itself, it was not only the relevant assembly of judges that could prematurely terminate the term of office of a judicial member of the National Council of the Judiciary (albeit only in the pre-2011 era);⁷⁹ the President of the Republic could also at any time dismiss the individual he appointed to the

⁷²*Grzęda*, *supra* n. 1, para. 300.

⁷³*Ibid.*, paras. 300, 304, 305, 307, 308 and 319.

⁷⁴*Ibid.*, para. 305.

⁷⁵*Ibid.*, para. 305.

⁷⁶*Ibid.*, para. 303.

⁷⁷See the polite criticism of judge Lemmens in his concurring opinion, paras. 13 and 16.

⁷⁸Note that the ban on revocation of judicial members (or even non-judicial members) of a judicial council does not diminish the self-governing nature of such judicial council, if judges have the parity or majority on such council, because it is the numerical superiority of judges that matters and that still allows them to control the council. Moreover, in most jurisdictions, members of judicial councils serve relatively short renewable terms, which makes them accountable to their constituencies.

⁷⁹*Grzęda*, *supra* n. 1, para. 283.

Council.⁸⁰ The recent 2020 constitutional amendment in Slovakia also stipulated that all nominating bodies, from all three branches of government, may recall 'their' members of the Slovak judicial council.⁸¹ The fact that the European Court of Human Rights decided not to address this issue, despite it being crucial for an accurate understanding of the role of judicial councils, is a major flaw in the Grand Chamber judgment,⁸² because if a term of a judicial council member cannot be shortened by a statute after debate in the Parliament, it is difficult to argue that it can be revoked by her nominator immediately.

Moreover, since the Court took pains to limit its reasoning to the judicial members, it created a dangerous dichotomy between judicial and non-judicial members of the judicial council. If the role of the judicial council as a whole is to protect judicial independence, then all members of the judicial council should enjoy the same security of tenure, perhaps with the exception of the *ex lege* members of the judicial council whose membership in a judicial council is derived from other functions.⁸³ This distinction between judicial and non-judicial members is not persuasive and actually even runs counter to the position of the Consultative Council of European Judges⁸⁴ and *de facto* also the Court's own position in *Loquifer*.⁸⁵

The third and fourth arguments are interrelated. In contrast to what the European Court of Human Rights claims, relying on various supranational standards,⁸⁶ there has never been consensus that no less than half of the members of judicial councils should be judges.⁸⁷ Several important examples in Europe, such as the French *Conseil Supérieur de la Magistrature* and the Portuguese *Conselho Superior da Magistratura* only have a minority of judges. There is actually an emerging consensus that judicial councils with a majority of judges yielded problematic results in many jurisdictions in Central and Eastern Europe, as such

⁸⁰See Art. 8(1) of the Act on the NCJ of 2011 as amended; Śledzińska-Simon, *supra* n. 3, p. 1849. Unfortunately, this 'feature' of the Polish judicial council has not been acknowledged by the Court.

⁸¹See Art. 141a(2) of the Slovak Constitution.

⁸²See, *mutatis mutandis*, judge Lemmens in his concurring opinion, para. 8 *in fine*.

⁸³In the Polish scenario, these *ex lege* members were the First President of the Supreme Court, the Minister of Justice, and the President of the Supreme Administrative Court.

⁸⁴Opinion no. 24 (2021) of the Consultative Council of European Judges on the Evolution of the Councils for the Judiciary and Their Role in Independent and Impartial Judicial Systems, para. 37.

⁸⁵*Loquifer*, *supra* n. 27. In that case, a non-judicial member of the Belgian High Council for the Judiciary challenged the lack of possibility of judicial review of a temporary suspension measure of her mandate, taken by the general assembly of the council.

⁸⁶*Grzęda*, *supra* n. 1, paras. 305 and 312.

⁸⁷*Cf* ENCJ's position referred to in *Grzęda*, *supra* n. 1, para. 206.

councils are prone to judicial corporativism.⁸⁸ The concept of judicial councils composed of a majority of judges thus has been increasingly questioned not only by governments with potentially sinister intentions, but also in good faith by scholars⁸⁹ and civil society in several transitional democracies.⁹⁰ Even the Venice Commission started to acknowledge that public confidence in the justice system would suffer if a council for the judiciary is perceived to act out of self-interest, self-protection and cronyism.⁹¹ The fourth argument, that judicial members of judicial councils should be chosen by their peers, also lacks universal support in Europe. For instance, in Spain, judicial members of the *Consejo General del Poder Judicial* are elected by the Parliament. While these two requirements can still be read as mere ‘recommendations’ and thus not becoming an ECHR obligation imposed on all contracting parties, the majority clearly gives it a significant normative weight in the operative part of the judgment.⁹²

This brings to the fore the first and second arguments by the Court. It is understandable that the European Court of Human Rights, in responding to the Polish judicial reform, emphasises that judicial councils must be protected from being interfered with by the legislature and the executive. However, the Court will sooner or later realise that judicial councils should be independent not only from the political branches of State power, but also from the judiciary. The Polish scenario is only one of the many possible ways to rig a judicial council. Experiences from other Contracting Parties tell us that a judicial council can also be captured from within by problematic judges,⁹³ or deeply entangled in judicial

⁸⁸For an overview, see D. Kosar, ‘Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe’, 19 *German Law Journal* (2018) p. 1567.

⁸⁹See S. Spáč et al., ‘Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia’, 19 *German Law Journal* (2018) p. 1741; M. Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge University Press 2012); P. Castillo-Ortiz, ‘Councils of the Judiciary and Judges’ Perceptions of Respect to Their Independence in Europe’, 9 *Hague Journal on the Rule of Law* (2017) p. 315.

⁹⁰See for example ANTAC, ‘Recommendations towards ensuring accountable and independent judicial governance in transitional societies’, (<https://drive.google.com/file/d/1Jd9a3LiCn3bafOQPQyDQXoYrEo-1vJiv/view>); ANTAC, ‘Judicial governance in transitional democracies: lessons learnt’, (https://drive.google.com/file/d/1KJR7OcXiPRYFLXLONFNWwP196m3zjh_/view), both visited 3 November 2022.

⁹¹Venice Commission, CDL-AD(2022)010, ‘Opinion on the December 2021 amendments to the organic law on common courts’, para. 61.

⁹²*Grzęda*, *supra* n. 1, paras. 305 and 312.

⁹³See among others: Spáč et al., *supra* n. 89; S. Spáč, ‘The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia’, 67 *Problems of Post-Communism* (2020); N. Tsereteli ‘Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia’s Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions’, 47(2) *Review of Central and East European Law* (2022) p. 167.

corruption and nepotism.⁹⁴ The European Court of Human Rights itself has a long line of case law concerning internal judicial independence,⁹⁵ which it should have referred to in *Grzęda* to emphasise explicitly that judicial councils must be protected against interference emanating from all three branches, including the judiciary.

Finally, while many judicial councils have been created to protect judicial independence, it is not their only aim and should not overshadow its other goals, i.e. enhancing judicial accountability, increasing the efficiency of the judicial system, improving the quality of justice, and ensuring the legitimacy of the judiciary.⁹⁶ Some of these other goals (the so-called ‘new public management’ values) may collide with the classic ‘rule of law principles’ such as judicial independence.⁹⁷ Judicial councils have been increasingly called to balance these two groups of values. Such careful balancing becomes almost impossible if judicial independence is perceived as the major goal of judicial councils. Instead, the European Court of Human Rights should treat judicial independence as one of the many values protected by judicial councils and a value that can be overridden by competing values, if necessary and justified.

It is thus clear that the European Court of Human Rights opted for a judge-centred understanding of judicial councils. The big question is whether the five abovementioned requirements for judicial councils stipulated in the *Grzęda* judgment apply only to the Polish scenario (where the constitution explicitly stipulates the aim of a judicial council and determines that judges have a clear majority therein) or more generally. The judgment is a little confusing on this point, as it does not say what the European Court of Human Rights itself means by judicial self-governance,⁹⁸ nor what the Polish Constitutional Tribunal actually meant by

⁹⁴For instance in Ukraine: M. Popova and D. Beers, ‘No Revolution of Dignity for Ukraine’s Judges: Judicial Reform after the Euromaidan’, 28 *Demokratizatsiya: The Journal of Post-Soviet Democratization* (2020) p. 113. The Court itself touched upon it in the Grand Chamber’s *Denisov* judgment, *supra* n. 65.

⁹⁵J. Sillen, ‘The Concept of “Internal Judicial Independence” in the Case Law of the European Court of Human Rights’, 15 *EuConst* (2019) p. 104.

⁹⁶See for example: Venice Commission, CDL-AD(2022)010, *supra* n. 91, para. 61; M. Urbániková and K. Šipulová, ‘Failed Expectations: Does the Establishment of Judicial Councils Enhance Confidence in Courts?’, 19 *German Law Journal* (2018) p. 2105; Castillo-Ortiz, *supra* n. 89.

⁹⁷E. Mak, ‘The European Judicial Organisation in a New Paradigm: The Influence of Principles of “New Public Management” on the Organisation of the European Courts’, 14 *European Law Journal* (2008) p. 718.

⁹⁸According to the most recent scholarship, judicial self-governance is a matter of degree and captures the extent to which judges and courts participate in judicial governance: K. Šipulová et al., ‘Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary’, *Regulation & Governance* (2022), OnlineFirst. A more traditional

judicial self-governance when it explicitly rejected conceptualisation of the Polish judicial council as a body of judicial self-governance,⁹⁹ nor which conception is actually relevant. We must wait for another judgment to clarify what requirements for judicial councils apply to other countries beyond Poland. That said, it is important to stress that a judge-centred conceptualisation of judicial councils has been increasingly challenged by scholars as well as non-governmental organisations on both normative and empirical grounds.¹⁰⁰

In sum, the European Court of Human Rights, relying too much on often obsolete soft law standards, adopted a judge-centred conception of judicial councils endorsed by various European supranational bodies. One may counteract that there is no other viable conceptualisation of a judicial council. But yes, there is. The recent scholarship on 'fourth branch' institutions¹⁰¹ and the reconceptualisation of judicial councils as 'fourth branch' or guarantor institutions¹⁰² seems to be the most promising way to limit politicisation of, as well as corporativism in, judicial councils. The takeaway lessons from the recent roundtable of the Venice Commission are already moving into this direction.¹⁰³ However, the Court ignored this new scholarship and stuck with the old-fashioned view of judicial councils promoted by judges via their supranational soft law bodies.

understanding is that a judicial self-governance body is a body dominated by judges chosen by their peers. The ECtHR does not elaborate on this concept in detail.

⁹⁹Note that when the Polish Constitutional Tribunal held that the National Council of the Judiciary is not a body of judicial self-governance, it did so in a peculiar setting. The judgment of the Polish Constitutional Tribunal of 20 June 2017, no. K 5/17 (referred to in *Grzęda*, *supra* n. 1, paras. 40 and 300) was issued when the Tribunal had already been captured. This judgment no. K 5/17 refers to the earlier 'pre- Kaczyński' era judgment of the Polish Constitutional Tribunal of 18 February 2004, no. K 12/03 (see also Śledzińska-Simon, *supra* n. 3, p. 1847-1849). The latter judgment No. K 12/03 held that the National Council of the Judiciary is not a self-governance body (because it is not composed by judges exclusively) akin to the regional assemblies of judges (that were composed exclusively of judges), but it still called the Council 'the highest representation of the judicial community' (Judgment No. K 12/03, § 40). The interpretation of these two judgments is deeply contested in Poland and we cannot delve into more details here.

¹⁰⁰See the literature *supra* nn. 86-91.

¹⁰¹See recently: M. Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* (Oxford University Press 2021); T. Khaitan, 'Guarantor Institutions', 16 *Asian Journal of Comparative Law* (2021) S40.

¹⁰²See for example: E. Bulmer, 'Independent Regulatory and Oversight (Fourth-Branch) Institutions', (International IDEA Constitution-Building Primer 2019), (<https://www.idea.int/sites/default/files/publications/independent-regulatory-and-oversight-institutions.pdf>), visited 3 November 2022, at p. 6 and p. 12; O. Kadlec et al., 'Judicial Councils as Guarantor Institutions – Towards a Post-Partisan Understanding of Judicial Governance', (unpublished manuscript, on file with authors, 2022).

¹⁰³Venice Commission, CDL-PI(2022)005, 'International round table on shaping judicial councils to meet contemporary challenges'.

Finally, the Court should be aware that its *Grzęda* judgment has not only *ex post* effects, concerning the Polish use and abuse of its judicial council and other countries that have already adopted a judicial council model, but also *ex ante* policy effects for those countries that are considering the introduction of a judicial council. If the Court stipulates overly stringent criteria concerning judicial councils, the latter countries will be better off sticking to their current model of judicial governance, even if it is suboptimal. In fact, one wonders how the Court wants to transplant the *Grzęda* principles into the Minister of Justice model of judicial governance, which still applies, for instance in Austria, Czechia and Germany. Shall the European Court of Human Rights in the future review judicial appointments of ordinary judges by the executive in those countries? Or, for instance, even the selection of Justices of the German Federal Constitutional Court by the German Parliament? If so, by what standards?

To be sure, this is not to say that judicial councils are necessarily wrong. Even consolidated democracies have recently switched to this model of judicial governance. Most recently, Ireland is heading into this direction.¹⁰⁴ This section only argues that the Court should stay away from far-reaching abstract pronouncements on the design of judicial councils without conducting its own comparative analysis of their functioning, including their pitfalls and failures, and without acknowledging specifics of each judicial system. A judicial council is not an 'one-size-fits-all' institution. Depending on the scope of powers of judicial councils and the level of judicial corruption, it might make sense to have a majority of judges on such councils in one country but not in another. This also means that the European Court of Human Rights should not rely on soft law standards of various supranational bodies to such an extent as in *Grzęda*. These standards are often aspirational and one-sided, as they are created by judges (sitting on these supranational bodies) without the input of scholars and other governmental actors.¹⁰⁵ The Court is not an advisory body but a court and should determine what the law is rather than what it could or should be according to one set of actors.

The ECHR and the right to challenge legislation

One last topic that will be addressed here concerns a matter that is not mentioned explicitly in the judgment, yet seems to be an inevitable consequence of the

¹⁰⁴See P. O'Brian, 'Never Let a Crisis Go to Waste: Politics, Personality and Judicial Self-Government in Ireland', 19 *German Law Journal* (2018) p. 1871.

¹⁰⁵See more generally on this matter: M. Bobek and D. Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15 *German Law Journal* (2014) p. 1257.

Court's reasoning: a right protected by the Convention to challenge (at least some) legislation. The violation of Article 6(1) ECHR in this case was based on the fact that Grzęda did not have any possibility to challenge the law that terminated his mandate. If one follows that reasoning to its conclusion, it would seem that the Court implicitly required a possibility of judicial review of legislation. However, such a point of view would contradict decades of established case law.

Nowhere does the majority explicitly engage with this thorny issue.¹⁰⁶ In one paragraph (para. 299) it seems to indirectly provide a justification, by claiming that the 2017 amending act was not compatible with the rule of law, since it was not an instrument of general application, but a measure directed at a specific group of 15 clearly identifiable people.¹⁰⁷ The majority thus seems to have treated the 2017 amendment as an *ad hoc* law or a 'bill of attainder', a bundle of individual decisions under the guise of formal legislation. According to this line of reasoning, the 2017 amendment was formally adopted as legislation, but materially it was 15 administrative decisions, which should have been amenable for review.

Such a reasoning poses problems, however. The conceptualisation and permissibility of *ad hoc* laws and bills of attainder are notoriously difficult issues of constitutional theory,¹⁰⁸ and the Court does not provide any theoretical grounds for its point of view. It does not explain what the defining elements of a bill of attainder (such as the existence of 'punishment'¹⁰⁹ and a 'specificity' requirement) are and what is the content of these elements. It is far from self-evident that a supranational body may of its own motion reclassify a domestic legal measure, at least without rigorous justification.

Moreover, the substantive reasoning of the Court here may also be called into question. Contrary to *Selahattin Demirtaş* and certainly to *Baka* – the cases to which the Court referred in its reasoning¹¹⁰ – it is not so obvious in this case that the legislative amendment was directed against 'specific persons'. The law applied to all judicial members of the Polish judicial council, was drafted in a general manner, and the new mode of selection of judicial members will apply

¹⁰⁶See the dissenting opinion of judge Wojtyczek, paras. 3.1.2 and 5.2.

¹⁰⁷Grzęda, *supra* n. 1, para. 299.

¹⁰⁸For instance, on the conceptualisation of a bill of attainder in the United States, see *United States v Lovett*, 328 U.S. 303 (1946); *American Communications Association v Douds*, 339 U.S. 382 (1950); and *Nixon v Administrator of General Services*, 433 U.S. 425 (1977).

¹⁰⁹See e.g. A. Dick, 'The Substance of Punishment Under the Bill of Attainder Clause', 63 *Stanford Law Review* (2011) p. 1177.

¹¹⁰Grzęda, *supra* n. 1, para. 299.

to all new selections in the future.¹¹¹ To dig deeper, specificity alone is not enough to treat a statute as a bill of attainder, because the legislature must be able to legislate with respect to legitimate ‘classes of one’ such as the President or a Chief Justice.¹¹² When one follows the Court’s reasoning, it becomes difficult to draw the line between permissible acts of a general nature and impermissible *ad hominem* legislation. This is especially the case in institutional matters, since laws establishing some kind of institutional reform will most often impact a certain well-delineated group of people. In addition, as also pointed out by dissenting judge Wojtyczek, the majority reasoning undermines any transitional provisions, since those are always one-off statutory provisions and usually apply to a set of clearly identifiable persons.¹¹³ All of this is not to say that the legislative amendment did not have the reproachable intention to remove the sitting members of the judicial council and capture that body. Yet, that in itself does not provide sufficient justification for the Court to reclassify this statute as another source of law. Invoking the rule of law is simply not enough and ‘the rule of law mantra’ should not absolve the Court from a duty to provide persuasive legal reasoning.

Irrespective of the above, when one looks beyond *Grzęda*, it becomes apparent that the Court has implicitly imposed such a right to challenge legislation in other cases as well, but without taking the step that the law in question was incompatible with the rule of law. One can see this in the subsequent *Żurek* judgment, but even more clearly in *Gumenyuk*. In that latter case, eight Ukrainian Supreme Court judges had been prevented from further exercising their judicial function as a result of a legislative amendment.¹¹⁴ After finding Article 6(1) ECHR applicable to the case, the Court recalled that, given the prominent place that the judiciary occupies among state organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary, it should be particularly attentive to the protection of the judicial members against measures that may affect their status or career and that can threaten their independence and autonomy. Because of that and the widely acknowledged need to have in place procedural safeguards for the domestic judiciary, the Court held that the applicants should have in principle enjoyed direct access to a court in respect of their allegations of unlawful prevention from exercising their judicial functions.

¹¹¹See also Urgent Joint Amicus Curiae Brief of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Three Legal Questions Concerning the Mandate of Members of Constitutional Bodies, Opinion No. 1003/2020, § 36 (referred to in the dissenting opinion of judge Wojtyczek, para. 4.5.1).

¹¹²*Nixon v Administrator of General Services*, 433 U.S. 425, 472 (1977).

¹¹³See the dissenting opinion of judge Wojtyczek, para. 4.5.1.

¹¹⁴*Gumenyuk*, *supra* n. 23.

The Court's recent judgments thus seem to imply a right for judges to challenge legislation when it affects their independence.¹¹⁵ Yet, as noted, that would contravene decades of established case law. It has been stated time and again that neither Article 6, nor Article 13 ECHR guarantee access to a remedy with the power to invalidate or override a formal law.¹¹⁶ It is strange that in none of the abovementioned judgments was this elephant in the room addressed by the majority. Especially from a Grand Chamber, more clarity could have been expected in this regard. This leads to a situation in which recent jurisprudence seems to carve out an exception to a principle that has been unchanged in the Court's case law for decades, but without explaining or even recognising it.

Importantly, not only would such an understanding imply an important nuance on decades of established case law, it would also have important repercussions for the balance of powers within European countries. Not all European countries allow for judicial review of legislation. For a country with a strong history of parliamentary sovereignty, like the United Kingdom, the absence of a strong form of judicial review could even be understood as forming part of its constitutional identity. For those countries that do allow for a form of judicial review of legislation, large differences exist in terms of what bodies are competent, who can initiate the review, the scope and intensity of review, and other procedural issues.¹¹⁷ In that respect, not all countries may grant judges a privileged status to initiate abstract review of constitutionality. Likewise, not all countries permit concrete judicial review or individual constitutional complaints to which abstract challenges to the legislation can be attached. As such, the Court's case law as understood above may require the Contracting Parties to reassess – and potentially recalibrate – this particularly sensitive issue concerning the balance between the legislature and the judiciary. If our understanding of the case law is correct, this would thus immediately raise a set of follow-up questions on how that requirement should work, such as what courts would be able to perform such review, what intensity of review should be adopted, what should be the consequences of this form of review, what form of relief must the courts be able to provide, and, most importantly, why only judges should have this privilege. In view of such questions and the fact that this approach by the Court seemingly goes against decades of established case law, it is up to the Court to explicitly address this issue when it is confronted with similar complaints.

¹¹⁵See for the same conclusion the dissenting opinion of judge Wojtyczek in the *Grzęda* judgment, para. 6.2.

¹¹⁶Among many others: *Buzoianu*, *supra* n. 32, para. 41; ECtHR 12 January 2021, No. 36345/16, *L.B. v Hungary*, para. 74.

¹¹⁷See A.W. Heringa, *Constitutions Compared: An Introduction to Comparative Constitutional Law*, 6th edn. (Boom 2021) p. 301-352; M. De Visser, *Constitutional Review in Europe: A Comparative Analysis* (Hart Publishing 2014).

CONCLUSION

It bears repeating that the *Grzęda* case was, all things considered, not that complex. The main novelty – the question whether judges should receive a similar protection for their membership in a judicial council as in their normal adjudicatory role – was a hurdle that the Grand Chamber took without (m)any difficulties in a single paragraph. Seen in that light, it is unfortunate that the majority used this case to so sweepingly criticise the entirety of the Polish judicial reforms. In doing so, it unnecessarily ventured into very difficult and contentious territory, diluting the clarity of its own reasoning along the way. Yet, for the Strasbourg Court to persuasively and legitimately decide in rule of law cases, its judgments must be based on a clear and principled reasoning. A more focused judgment, relying more on the previous case law and without unnecessary steps, would have gone a long way in this regard. One can and should expect more from the Grand Chamber in a case like this.

Irrespective of that criticism, *Grzęda* is a noteworthy judgment since it touches upon several important current topics in the Court's jurisprudence and contributes to the development of its case law. This case note discussed three such issues. First, it showed that the Grand Chamber's understanding of the principle of judicial independence moved away from its traditional individual right for the parties to a judicial dispute and more towards a general duty for the state to safeguard the independence of the judiciary as a whole. Second, it criticised the Court's judge-centred understanding of judicial councils and argued that its reasoning was normatively flawed. Third, and perhaps most notably, the judgment seems to implicitly create a Convention-based right for judges to challenge legislation that may affect their autonomy or career. Yet, in doing so, it would depart from decades of consistent and unequivocal jurisprudence.

Just like hard cases, sometimes easy cases can make bad law. While the outcome of the *Grzęda* judgment is certainly the right one, the road to get there was long-winded, confusing and at times simply unconvincing. In such pivotal times for the two large European projects, it is important that European supranational courts safeguard the founding values of their polities, and do so on the basis of sharp and persuasive legal reasoning and incremental and well thought out development of its jurisprudence.

