

INDEPENDENCE, ACCOUNTABILITY AND THE IRISH JUDICIARY

TANYA WARD*

INTRODUCTION

Human rights cannot be protected without an independent judiciary functioning under the rule of law.¹ Broadly speaking judicial independence requires that judges be protected from governmental and other pressures so they can try cases fairly and impartially. An independent judiciary charged with upholding rights through a system of judicial review is crucial for the proper functioning of our democracy. However, judicial independence does not just happen and requires institutional and individual protections in the form of constitutional mandates, legislative provisions and administrative structures.²

The purpose of this article is to examine international human rights standards on judicial independence and assess the adequacy of Irish law and policy in light of this international framework. Access to a competent, independent and impartial court or tribunal is a fundamental human right and is found in several legally enforceable human rights treaties which Ireland is a party to. For example, Article 14 of the International Covenant

* Deputy Director of the Irish Council for Civil Liberties (ICCL) and Lecturer in Human Rights for the M.Phil. in Ethnic and Racial Studies programme (Trinity College Dublin) and the Masters in Equality Studies (University College Dublin). This article draws heavily upon research originally conducted for the ICCL and published by the author in the form of Ward, *Justice Matters* (Dublin: ICCL, 2007). It is accessible on the ICCL's website at: http://www.iccl.ie/DB_Data/publications/ICCL-Justice-Matters-2007-part-1.pdf and http://www.iccl.ie/DB_Data/publications/ICCL-Justice-Matters-2007-part-2.pdf. The main phase of research for this study took place between 2006 and 2007 and involved 17 face-to-face interviews with Irish judges. Many thanks are due to Deirdre Duffy and Mark Kelly for helpful comments on an earlier version of this paper.

¹ Apple, "The Role of Judicial Independence and Judicial Leadership in the Protection of Human Rights" in Cotran and Sherif, (eds.) *The Role of the Judiciary in the Protection of Human Rights* (London: School of Oriental and African Studies, CIMEL Book Series No. 5, 1998), p. 198.

² Apple, *op.cit.*, p. 201.

on Civil and Political Rights (ICCPR) provides that: “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

Article 6 of the European Convention on Human Rights (ECHR) also guarantees a right to a fair trial before an independent and impartial court. Judicial independence has been interpreted by the European Court of Human Rights to mean that courts must be independent of the executive and the parties to a case.³ The model of judicial independence that is applied is institutional.⁴ When determining whether a court or tribunal meets the requirements of independence, the European Court of Human Rights examines the overall manner of judicial appointments, the duration of terms of office,⁵ the existence of guarantees against outside pressures⁶ and the overall “appearance of independence”.⁷

Standards on judicial independence are also found in soft law, for example the United Nations (UN) Basic Principles on the Independence of the Judiciary⁸ and the Bangalore Principles on Judicial Conduct,⁹ which have been given little attention in Ireland. Adopted in 1985, the UN Basic Principles on the

³ *Ringeissen v. Austria* (1979-80) 1 E.H.R.R. 455 at para. 95.

⁴ Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (London: Legal Action Group, 2001), p. 261.

⁵ *Le Compte, Van Leuven and De Meyere v. Belgium* (1982) 4 E.H.R.R. 1.

⁶ *Piersack v. Belgium* (1983) 5 E.H.R.R. 169 at para. 27.

⁷ *Campbell and Fell v. United Kingdom* (1985) 7 E.H.R.R. at para. 78.

⁸ Office of the High Commissioner for Human Rights, “Basic Principles on the Independence of the Judiciary”, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by the General Assembly in Resolution 40/32 of 29 November 1985 and Resolution 40/146 of 13 December 1985.

⁹ The Bangalore Principles of Judicial Conduct (E/CN.4/2003/65) are a product of several years work by the Judicial Group for the Strengthening of Judicial Integrity (JGSJI) comprising ten Chief Justices from Asia and Africa. The Bangalore Principles were endorsed by the UN Commission on Human Rights in Resolution 2003/43 of 23 April 2003. The UN Office on Drugs and Crime has since issued a *Commentary on the Bangalore Principles of Judicial Conduct* (Vienna: UNODC, September 2007) to give depth and strength to the principles.

Independence of the Judiciary set out standards for Member States to incorporate into their national legislation and practices.¹⁰

Outlining a framework for regulating judicial conduct, the UN Human Rights Commission endorsed the Bangalore Principles of Judicial Conduct in 2003.¹¹ The Bangalore Principles were initially approved by a roundtable of Chief Justices held in The Hague in November 2002, and complement the UN Basic Principles which do not deal with judicial conduct and complaints in any great detail. In addition, the Council of Europe's (COE) Committee of Ministers adopted a recommendation on judicial independence¹² and while it is not legally binding, it is worth mentioning that the European Court of Human Rights has used it as a guide for interpreting Article 6 of the ECHR.¹³

There are two important developments which make the subject of this paper particularly relevant. First, pursuant to the European Convention on Human Rights (ECHR) Act, 2003, the ECHR is now part of domestic Irish law.¹⁴ Second, the Judicial Council Bill is expected to be published in 2008.¹⁵ The purpose of this Bill is to establish a Judicial Council to be representative of the judiciary and to provide a system of effective remedies for

¹⁰ The UN Economic and Social Council adopted *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary*, in Resolution 1989/60, at its 15th plenary meeting of 24 May 1989. This document requires UN Member States to respect and integrate the Basic Principles into their justice systems, as well as publicising them to all acting judges.

¹¹ UN Commission on Human Rights, Resolution 2003/43.

¹² COE Committee of Ministers, Recommendation No. R (94) 12, adopted on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

¹³ In several dissenting judgments, reference is made to the Recommendation, for example, Judge Martens in *Saunders v. United Kingdom* and Judge Ress in *Sigurdsson v. Iceland*, cited in Kuijer, *The Blindfold of Lady Justice, Judicial Independence and Impartiality in Light of the Requirements of Article 6* (The Hague: Kluwer Law Publications, 2004).

¹⁴ Adopting an interpretive model, s. 2(1) of the Act obliges courts to interpret statutory provisions or rules of law in a compatible manner with Convention rights.

¹⁵ Refer to the Government's Legislative Programme for 2008 accessible on the Department of the Taoiseach's website at: www.taoiseach.gov.ie.

complaints against judges.¹⁶ It is also intended that provisions in the Bill will require the Council to draft a Code of Ethics and to investigate allegations of any breaches of judicial ethics. No doubt international standards will be of assistance in this exercise, in particular, the Bangalore Principles.

This article is not intended to provide a comprehensive overview of how Irish law and practice comply with international standards,¹⁷ rather it spotlights areas where there are specific issues affecting the independence of the judiciary in Ireland which require change.¹⁸

I. FUNCTIONAL INDEPENDENCE

A. Separation of Powers

In broad terms, functional or structural independence means that the judiciary must be independent of other branches of government, namely, the executive and the legislature. According to Principle 1 of the UN Basic Principles on the Independence of the Judiciary:¹⁹ “[t]he independence of the judiciary should be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”

The COE Committee of Ministers Recommendation No. R (94) 12 provides that, in securing judicial independence, Member States should insert specific rules in constitutions or other domestic laws.²⁰

¹⁶ Department of Justice, Equality and Law Reform, “Judicial Council Bill”, available at:

http://www.justice.ie/JELR/Pages/Civil_law_reform_proposed_legislation.

¹⁷ For a full overview refer to Ward, *Justice Matters* (Dublin: ICCL, 2007).

¹⁸ There are many areas where law and policy on the courts complies with international human rights standards, in particular, the establishment of the independent Courts Service which provides sufficient independence from the executive together with the fact that judges decide on case allocation. Refer to chapter 6 of *Justice Matters*.

¹⁹ Hereinafter referred to as the “UN Basic Principles”.

²⁰ Principle 1.2 provides that “[t]he independence of judges shall be guaranteed pursuant to the provisions of the [European] Convention [on Human Rights]

The “separation of powers is a distinctively constitutional tool”²¹ and many countries have adopted it as a constitutional guarantee of judicial independence.²² In its formal sense, the separation of powers is designed to make sure that the principal powers of the State are not concentrated in any one branch of government. A system of “checks and balances” ensures that each branch of government restrains the other branch from abuse. Judicial review of legislative and executive action is the most common form of check. This is not to suggest that the separation of powers is a fixed or rigid doctrine. According to Pieterse, “a central feature of the doctrine is that its boundaries are mostly flexible and underdetermined” and that “deviations from the ‘pure’ notion of separation of powers for administrative expedience are common”.²³ This is certainly valid in the case of Ireland.

Article 6 of Irish Constitution adopts a classic separation of powers model. It reads:

1. All the powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State, and in final appeal, to decide all questions of national policy, according to the requirements of the common good.
2. These powers of government are exercisable only by or on the authority of the organs of the State established by this Constitution.

Later constitutional provisions provide more detail on the relationship between the different organs of state and how power is balanced. The Government (the Taoiseach and cabinet) is authorised to exercise executive power subject to provisions of

and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law”.

²¹ Barber, “Prelude to the Separation of Powers” (2001) 60 C.L.J. 59, 71.

²² Morgan, *Separation of Powers in the Irish Constitution* (Dublin: Round Hall/Sweet & Maxwell, 1997) and Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork: Cork University Press, 2001).

²³ Pieterse, “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” (2004) 20 *South African Journal of Human Rights* 386.

the Constitution (Article 28.2) and is answerable to Dáil Éireann (Article 28.4.1°).

Article 15.2.1° vests the “sole and exclusive power of making laws for the State” in the Oireachtas (Irish Parliament) and in practice means that the Irish executive cannot claim any inherent law-making power. However, owing to the fusion of the legislature and executive, the separation of both branches is diluted considerably.²⁴ When elected, members of political parties sit in the Dáil and are appointed to different posts in government if their party is part of the majority. As a result, it is very rare for a government bill to be amended substantially or to fail, and rarer still for a private member’s bill to succeed. Indeed, a recent audit of Irish democratic structures found that “Ireland rates alongside Britain and Greece as one of the most executive-dominated parliaments in Europe”.²⁵ For instance, it found that the governing party or parties of the day exert tight discipline over parliamentarians and opposition parties have limited possibilities to influence government policy and legislation.

B. Judicial Power

Judicial power in the Constitution is based on several different articles, namely, Articles 34, 37.1, 38, 34.3.2° and 15.4.1°. For example, Article 34 states that: “[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.” The power to review legislation comes from Article 34.3.2° which gives the High Court jurisdiction to “question the validity of any law having regard to the provisions of the Constitution”. Article 15.4.1° also forbids the Oireachtas from enacting any law repugnant to the Constitution.

In the administration of justice, “criminal matters” are exclusively a judicial function, while other “limited functions” can be exercised by other persons or bodies. Moreover, Article 38 stipulates that no one shall be tried on any criminal charge save in

²⁴ Morgan, *A Judgment Too Far – Judicial Activism and the Constitution* (Cork: Cork University Press, 2001).

²⁵ TASC, *Power to the People? Assessing Democracy in Ireland* (Dublin: TASC, 2007), Executive Summary, p. 7.

due course of law. The Constitution does not define criminal matters, but because of expansive judicial interpretation, it is clear that these include trial, conviction and sentencing.²⁶ For the most part, the courts have strongly guarded this terrain from extraneous influence, particularly because of Article 37.1, Article 38 and Article 40.4 on the right to personal liberty.²⁷ However, what is clearly noticeable of late are certain Garda functions which traditionally required judicial authorisation and control are now becoming more remote from judicial or independent supervision.²⁸

In civil matters, the Oireachtas has more scope to limit the reach of the judiciary by virtue of Article 37.1, and has hived off various areas of law to separate determination bodies such as the Equality Tribunal, the Labour Court, the Censorship Board and the Refugee Appeals Tribunal, to name but a few. Casey notes that the courts have rarely questioned this phenomenon, preferring instead to rely on a historical notion of what a court does, even though these bodies at times consider very complex legal questions.²⁹

²⁶ *Re Haughey* [1971] I.R. 217.

²⁷ Article 40.4.1° provides that no citizen shall be deprived of his/her liberty save in accordance with the law.

²⁸ Walsh, "Police Powers under the Criminal Justice Act, 2006: The Triumph of Executive Convenience over Judicial Checks and Balances" (paper delivered to the Criminal Law Conference 2006, organised by Thompson/Roundhall in the Royal College of Surgeons on 25 November 2006), p. 2. Examples of this include an expansion of police powers in particular, those providing for long periods of detention for arrested persons *i.e.* s. 39 of the Offences Against the State Act, 1939 and s. 47 of the Criminal Justice Act, 2007.

²⁹ Casey, *Constitutional Law in Ireland*, 3rd ed. (Dublin; Round Hall, 2000). In *McDonald v. Bord na cCon* [1965] I.R. 217, Kenny J. attempted to distinguish the boundaries between judicial and non-judicial powers and identified the following as judicial in character at 231: "a dispute or controversy as to the existence of legal rights or a violation of the law; the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty; the final determination (subject to appeal) of legal rights and liabilities or the imposition of penalties; the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment; the making

The allocation of certain activities to other bodies has not always been a positive development for the rights of individuals³⁰ when one considers the experience of the Refugee Appeals Tribunal (RAT).³¹ It has been plagued by allegations of bias, unfairness and non-transparency due to the fact that it lacks the basic hallmarks of independence (*e.g.* security of tenure for members, a transparent appointments system and rules on case allocation). For many years the tribunal refused to publish its own decisions and when this practice was challenged before the High Court, MacMenamin J. held that it did not accord with “the basic principles of natural justice and fair procedures”.³² Moreover, specific tribunal members have been accused of bias against asylum applicants. With no regulations on the allocation of cases to the tribunal, and members paid by the number of cases they process, statistics obtained by media sources revealed that out of 33 members, one member earned 10% of the total amount paid.³³

of an order by the court which as a matter of history is an order characteristic of courts in this country”.

³⁰ This is not to suggest that the creation of separate administrative bodies to resolve specific issues is not worthwhile. The establishment of the Equality Tribunal to investigate alleged cases of discrimination is a major achievement for the legislature and executive. While its Director reports directly to the Minister for Justice, Equality and Law Reform, Equality Officers (deciding officers) are full-time and appointed subject to the Civil Service Commissioners Act, 1956 and the Civil Service Regulation Acts, 1956-1996. The Equality Tribunal also operates in a transparent manner, as all of its decisions are available to the public and compares favourably with those in place for equality laws claims in other European jurisdictions, see generally Ramboll, *Specialised Bodies to Promote Equality and/or Combat Discrimination* (Brussels: European Union, 2002).

³¹ The Refugee Appeals Tribunal was established in October 2000 in accordance with ss. 14 and 15 of the Refugee Act, 1996, as an independent body to process asylum appeals from the Office of the Refugee Applications Commissioner.

³² *Petar Petrov Atanasov v. Refugee Appeals Tribunal (Tribunal Member, Aidan Eames), Chairman of the Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform* (High Court, unreported, MacMenamin J., 7 July 2005). The Supreme Court upheld MacMenamin J.’s judgment and varied his order in *Opesytan v. Refugee Appeals Tribuna, Fontu v Refugee Appeals Tribunal, Atanasov v. Refugee Appeals Tribunal* [2006] I.E.S.C. 53.

³³ Coulter, “Looking for fairness and consistency in a secretive refugee appeals system”, *Irish Times*, 6 June 2005.

This led to concern that work was being allocated with the rate of affirmation of Office of the Refugee Application decisions³⁴ and this issue was formerly challenged in *Nyembo v. Refugee Appeals Tribunal, James Nicholson*. In this case a refugee applicant sought an order preventing a RAT member, Mr. Nicholson, from hearing his appeal on the basis that there was a reasonable apprehension of bias. The applicant cited the RAT member's reputation among immigration and asylum lawyers, together with statistics compiled by two leading legal practitioners in the area of refugee law which led one of them to advise clients that there was no prospect of success for an applicant appearing before him. The RAT settled this case and two other identical cases in December 2007 and it subsequently emerged that several Tribunal members intended to become notice parties to this case to dispute the Tribunal Chairman's assertion that Mr. Nicholson's record was not at variance with the record of other tribunal members.³⁵

The Constitution Review Group considered whether the administration of justice should be confined to the courts and noted that administrative tribunals are staffed by individuals with specialist expertise and are "cheaper, speedier and more flexible than the courts".³⁶ The group deliberated on whether persons exercising judicial power in these bodies should enjoy a guarantee of independence in the performance of their functions but decided that this was "not feasible". Instead, it was recommended that the question should be kept under review.³⁷ Given the difficulties arising from the RAT³⁸ and the implication for protection seekers

³⁴ Coulter, "Looking for fairness and consistency in a secretive refugee appeals system", *Irish Times*, 20 September 2006.

³⁵ "Evidence of disharmony among members of refugee appeals process", *Irish Times*, 17 May 2008. Notably former Minister Michael O'Kennedy and former Director of Public Prosecutions, Mr. Eamonn Barnes are cited as the members who intended to apply as notice parties.

³⁶ Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Government Stationery Office, 1996), p. 150.

³⁷ Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Government Stationery Office, 1996), p. 155.

³⁸ It is worth mentioning that recent legislative proposals setting up a new protection review body still fail to comply with standards on judicial independence. Section 92(4) of the Immigration, Residence and Protection Bill

and the State,³⁹ this author believes that the issue needs to be reconsidered again by a committee established by the Government with a view to determining what rules these bodies require to ensure they operate independently and fairly.

C. Socio-Economic Rights

Alongside changes in the nature of executive power, which are not discussed here,⁴⁰ it appears that the judiciary is taking an extremely deferential line in areas said to implicate “distributive justice”.⁴¹ The rationale underpinning the relevant judgments is that the judiciary is not the appropriate institution to make decisions on such matters; rather, this task is one that should be undertaken by the legislature and executive. The Irish Human Rights Commission (IHRC) believes that the resistance of the courts to intervene in such cases appears “to be grounded in a rigid view of the separation of powers doctrine and an ideological resistance to the constitutional recognition of economic, social and cultural rights as enforceable rights”.⁴² Indeed, Whyte points

2007 (as initiated) allows the Minister to personally appoint part-time Tribunal members, and the Bill does not include specific rules on the allocation of cases.

³⁹ Coulter reports that judicial review cases which were settled by the Refugee Appeals Tribunal without a hearing cost an estimated €20 million in 2005, 2006 and 2007 in Coulter, “Asylum reviews costing the State €20 million”, *Irish Times*, 18 March 2008.

⁴⁰ See for example Carolan, “Separation of Powers and Administrative Government”, (paper delivered as part of *The Constitution at 70* conference organised by the Centre for Democracy and Law and the School of Law, Trinity College Dublin, 9 June 2007).

⁴¹ See *O’Reilly v. Limerick Corporation*, [1989] I.L.R.M. 181; *MhicMhathuna v. Ireland* [1995] 1 I.R. 484; [1995] 1 I.L.R.M. 69; *D.B. (A Minor, suing by his Mother and Next Friend) v. The Minister for Justice, the Minister for Health, the Minister for Education, Ireland and the Attorney General and the Eastern Health Board* [1999] 1 I.R. 409; *T.D. v. The Minister for Education* [2001] 4 I.R. 259 and *Sinnott v. The Minister for Education* [2001] I.E.S.C. 63. See DeBlacam, “Children, constitutional rights and the separation of powers”, (2002) 37 *Irish Jurist* 113-142; McDermott, “The Separation of Powers and the Doctrine of Non-Justiciability” (2000) 35 *Irish Jurist*, 280-304; O’Mahony, “Education, Remedies and the Separation of Powers” (2002) 24 D.U.L.J. 57-95; Ruane, “The Separation of Powers and the Granting of Mandatory Orders to Enforce Constitutional Rights” (2002) 7 *Bar Review*, 416-421.

⁴² IHRC, *Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document* (Dublin: IHRC, 2005), p. 117.

out that the Constitution does not preclude and actually supports judicial involvement in issues of distributive justice.⁴³

Langwallner is of the view that the courts' approach undermines the "system of judicial review and constitutes a failure to engage in the protection of the rights of the individual".⁴⁴ Relying on jurisprudence from India⁴⁵ and South Africa,⁴⁶ where socio-economic rights are justiciable, Langwallner indicates that these courts largely only interfere with such matters where decisions are irrational or where there has been a sustained violation of individual rights. In these instances, judicial intervention takes the shape of declaratory relief or mandatory orders. Drawing on public law developments in other jurisdictions Walsh suggests that "while economic inequalities cannot and should not be altered by judicial fiat, institutional competency difficulties can arguably be met at the level of remedies."⁴⁷ The central idea is that courts are well placed to set out general standards and duties, while leaving the precise means of compliance to the public body concerned and other affected parties.

⁴³ Whyte, *Social Inclusion and the Legal System – Public Interest Law in Ireland* (Dublin: Institute of Public Administration, 2002), p. 13. See also Murphy, "Economic Inequality and the Constitution", in Murphy and Twomey (eds.), *Ireland's Evolving Constitution 1937-1997: Collected Essays* (Oxford: Hart, 1998) pp. 163-81; Quinn, "Rethinking the Nature of Economic, Social and Cultural Rights in the Irish Legal Order" in Costello (ed.), *Fundamental Social Rights: Current European Legal Protection and the Challenge of the EU Charter on Fundamental Rights* (Dublin: European Movement, 2000), pp. 35-54.

⁴⁴ Langwallner, "Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual", (paper delivered as part of *The Constitution at 70* conference organised by the Centre for Democracy and Law and the School of Law, Trinity College Dublin, 9 June 2007).

⁴⁵ See Hunt, *Reclaiming Social Rights* (Dartmouth: Ashgate, 1996), ch. 4.

⁴⁶ See further Kende, "The South African Constitutional Court's Embrace of Socio-economic Rights: A Comparative Perspective" (2003) 6 *Chapman Law Review* 137 and Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *South African Journal on Human Rights* 383.

⁴⁷ Walsh, "Unfamiliar Inequalities" (2006) 57 *Northern Ireland Legal Quarterly* 156, 177.

The questions here are, why have Irish courts not adopted a similar approach, and are the courts striking the right balance between vigilance and deference in this context notwithstanding the absence of a written catalogue of socio-economic rights? Griffith believes that the principal function of the judiciary is to “support the institutions of government as established by law”, that in both democratic and totalitarian societies “the judiciary has naturally served the prevailing political and economic forces. Politically, judges are parasitic”.⁴⁸ Griffith’s views echo with the school of legal realism⁴⁹ and other critical strands of legal scholarship which contend, among other things, that law and the courts tend to function as an instrument for preserving the status quo and preserving majoritarian concerns.⁵⁰

It is argued below that there is a lack of transparency in the judicial appointments process and that recent reforms still allow for party political affiliation to play a part in selection. As regards understanding what effect this has had on the development of jurisprudence, this question is relatively under-researched as no comprehensive study of the ideological leanings of the Irish judiciary has been undertaken.

II. INDEPENDENCE IN DECISION-MAKING

The UN Basic Principles specify that there should be no “inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by courts be subject to

⁴⁸ Griffith, *The Politics of the Judiciary*, 4th ed. (London: Fontana, 1991), p. 342.

⁴⁹ See generally Singer, “Legal Realism Now” (1988) 76 *California Law Review*, 465-544.

⁵⁰ Examples of this rich vein of critical legal scholarship can be sourced in the following collections: Banakar and Travers (eds.), *Introduction to Law and Social Theory* (Oxford: Hart, 2002); Bartlett and Kennedy, *Feminist Legal Theory: Readings in Law and Gender* (Boulder, San Francisco: Westview Press, 1991); Bottomley, and Conaghan (eds.), *Feminist Theory and Legal Strategy* (Oxford: Blackwell, 2003); Delgado and Stefancic, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1999); Kairys (ed.), *The Politics of the Law: A Progressive Critique* (New York: Basic Books, 1998); Knop, (ed.) *Gender and Human Rights* (Oxford: Oxford University Press, 2004); Murphy (ed.), *Western Jurisprudence* (Dublin: Thomson Roundhall, 2004).

revision” and that this principle “is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law”.⁵¹ In effect, this principle suggests that the executive and the legislature, together with other authorities, must respect decisions and judgments, particularly on constitutional standards, delivered by the judiciary, even when they do not agree with them, as all institutions have a duty to prevent any erosion of the judiciary’s decision-making authority.⁵²

A. Are Judges Subject to any External Pressure when Adjudicating?

Several provisions within the Constitution are designed to ensure that judges are not subject to inappropriate or unwarranted interferences. Article 35.2 states that “[a]ll judges shall be independent in the exercise of their judicial functions and subject only to the Constitution and the law”, and in essence, provides that judges are only required to interpret the Constitution and laws enacted by the Parliament. Article 34.5.1^o requires newly appointed judges to make and subscribe to a declaration which obliges judges to exercise their power without bias.

As regards judges exercising their powers under the Constitution and law generally, other articles protect them against reprisals from government. For example, Article 35.4.1^o forbids the removal of judges of the superior courts except for stated misbehaviour and Article 35.5 provides that remuneration of a judge shall not be reduced during his or her continuance in office. Therefore, conditions of tenure for judges on the Supreme and High Courts are well protected and this is one area where Ireland complies with the UN Basic Principles and the COE Recommendation No. 94 (12).

Once the judicial process is underway, it is inviolable. This principle was established by the courts after the first and only attempted interference by the Oireachtas while judicial

⁵¹ Principle 4, UN Basic Principles.

⁵² United Nations, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers – Professional Training Series No. 9* (New York and Geneva: UN, 2003), p. 121.

proceedings were in train. *Buckley v. The Attorney General*⁵³ concerned a dispute over funds raised by Sinn Féin before its fragmentation in 1940s. When the case was pending before the High Court, the Oireachtas passed the Sinn Féin Funds Act, 1947, section 10 of which provided that on the passing of the Act, all further proceedings should be stayed and that the High Court “if an application in that behalf [were] made *ex parte* by or on behalf of the Attorney General, [should] make an order dismissing the pending action without costs”.⁵⁴ However, Gavan Duffy J. held that this development was unconstitutional citing the separation of powers and held that the Court was established to: “administer justice and therefore it cannot dismiss the pending action without hearing the plaintiffs”,⁵⁵ and confirmed that the action could only be stayed by a court order. This case was appealed by the Attorney General but was ultimately dismissed by the Supreme Court.

The other way the Courts can protect their judicial function from prejudicial or adverse behaviour is through the law of contempt. According to McDermott, the courts have made some attempts to distinguish between criminal contempt⁵⁶ and civil contempt.⁵⁷ The law of contempt also prevents media outlets from publishing scurrilous personal statements about a judge’s conduct in a case.⁵⁸ Due to the fact that the law on contempt is largely judge-made, difficulties have arisen over a lack of clarity

⁵³ *Buckley v. The Attorney General* [1950] I.R. 67.

⁵⁴ Cited in Hogan and Whyte, 4th ed., *J.M. Kelly and the Constitution* (Dublin: Butterworths, 2001), p. 664.

⁵⁵ Hogan and Whyte, 4th ed., *J.M. Kelly and the Constitution* (Dublin: Butterworths, 2001), p. 664.

⁵⁶ This includes contempt in the face of the court, acts calculated to prejudice the due administration of justice, disobedience to a writ of habeas corpus by the person to whom it is directed. Criminal contempt carries a punitive sanction of an unlimited fine and or imprisonment. See McDermott, “Contempt of Court and the Need for Legislation” (2004) 4 J.S.I.J. 185, 190.

⁵⁷ This consists of civil disobedience to an order of the court. The sanction is coercive and consists of a period imprisonment until the order is complied with or waived by the judge. See McDermott, “Contempt of Court and the Need for Legislation” (2004) 4(1) J.S.I.J. 185, 195.

⁵⁸ Refer to *Re Kennedy and McCann* [1976] I.R. 382.

in certain areas.⁵⁹ McDermott believes that a failure to legislate in this area may impose an undue burden on the judiciary in determining what to do when contempt arises in court, and recommends that this gap be dealt with in a Contempt of Court Act.⁶⁰ This area was substantively examined by the Law Reform Commission, which made a series of recommendations to address gaps in the law, including (to name a few): clarifying the jurisdiction in criminal and civil contempt for the District and Circuit Courts; defining the common law offence of “scandalising the court” in statute, which would include “imputing corrupt conduct to a judge or court” and “publishing to the public a false account of legal proceedings”. In addition the Law Reform Commission recommended that “persons should only be found guilty of the offence where there is a substantial risk that the administration of justice, the judiciary or any other particular judge or judges will be brought into disrepute” and the report stated that other offences for interfering with the administration of justice should be created.⁶¹

To conclude, the protections as outlined above appear on the whole to be sufficient to protect the judiciary from external pressure when adjudicating. This author has not uncovered any circumstances where judges have been subjected to external pressure directly from politicians, and it is notable that other research in this area has not unearthed any evidence suggesting that politicians or other actors have attempted to interfere with their decision-making.⁶²

⁵⁹ The law on contempt is too complex to discuss in any great detail here. Refer to the Law Reform Commission, *Consultation Paper on Contempt of Court* (Dublin: L.R.C. 1991); Law Reform Commission, *Report on Contempt of Court* (Dublin: L.R.C. 47, 1994).

⁶⁰ McDermott “Contempt of Court and the Need for Legislation” (2004) 4 J.S.I.J. 185, 190.

⁶¹ Refer to the Law Reform Commission, *Report on Contempt of Court*, (Dublin: L.R.C. 47, 1994), p. 65 for a summary of its recommendations.

⁶² See Ruane’s PhD study on Judicial Independence from 1922-1987, cited in Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork: Cork University Press, 2001).

B. Do Government Ministers and Politicians Make Statements Adversely Affecting the Independence of Judges?

There are few examples of government ministers or local politicians making adverse statements affecting the independence of the judiciary, and in some instances where this has amounted to scandalising the court, the issue has been dealt with through the law of contempt.⁶³ In *State (Director of Public Prosecution) v. Walsh*, O’Higgins J. distinguished between scandalising the court and legitimate criticism:

[W]here what is said or done is of such a nature as to be calculated to endanger public confidence in the court which is attacked and, thereby, to obstruct and interfere with the administration of justice. It is not committed by mere criticism of judges as judges, or by the expression of disagreement – even emphatic disagreement – with what has been decided by a court. The right of citizens to express freely, subject to public order, convictions and opinions is wide enough to comprehend such criticism or expressed disagreement Such concepts occur where wild and baseless allegations of corruption or malpractice are made against a court so as to hold the judges ... to the odium of the people as actors playing a sinister part in a caricature of justice.⁶⁴

Until 1993, the Dáil operated a self-imposed *sub judice* rule in order to avoid the risk of prejudicing judicial proceedings. This rule was relaxed following the adoption of Standing Order 57 to achieve a better balance of the right and duty of the Dáil to debate matters of public interest.⁶⁵

Standing Order 57 only applies to debates within the Dáil and the Ceann Comhairle examines all motions and questions to ensure that they comply with it. Standing Order 59 deals with “utterances in the nature of being defamatory” and applies where defamatory statements are made about individual judges. So, for example, in circumstances where a defamatory statement is made,

⁶³ *The Attorney General v. O’Ryan and Boyd* [1946] I.R. 70.

⁶⁴ *The State (Director of Public Prosecutions) v. Walsh* [1981] I.R. 412, at 421.

⁶⁵ Law Reform Commission *Report on Contempt of Court*, (Dublin: L.R.C. 47, 1994), p. 43.

the Ceann Comhairle can direct the utterance to be withdrawn without qualification, and if it is not withdrawn, treat it as disorder.

As for conduct outside the Oireachtas, there is nothing specific in the various Codes of Conduct barring public representatives or office holders from giving warnings or threats to judges.⁶⁶ The constitutional judicial declaration provides that the only obligation on the judiciary is to uphold the Constitution and laws of the country. There are some international examples where politicians have openly warned the judiciary against overturning legislation. Former Home Office Minister, David Blunkett warned judges not to overturn anti-terrorism legislation⁶⁷ and former British Prime Minister, Tony Blair, threatened to amend the Human Rights Act, 2000 if the judiciary provided “legal obstacles” to deportation cases where torture is an issue.⁶⁸ The vast majority of judges are likely to ignore such threats but these threats could put undue pressure on a newly appointed adjudicator, and given the Government’s role in appointments, particularly on a judge seeking elevation.⁶⁹ The Code of Ethics for Officers Holders and other members of the Oireachtas could stipulate that elected representatives cannot seek to influence the judiciary in this way. This is not to suggest that public criticism of the courts by Office Holders and members of the Oireachtas is not acceptable. On the contrary, public criticism is an essential aspect of freedom of expression and advances democratic values. However, politicians should not pressurise judges on how to interpret the law, rather, they should speak to judges through lawmaking.

⁶⁶ For example, the *Code of Conduct for Office Holders* as drawn up by the Government pursuant to s. 10(2) of the Standards in Public Office Act, 2001; the *Code of Conduct for Members of Dáil Éireann other than Office Holders* (2002) and the *Code of Conduct for Members of Seanad Éireann* (2002).

⁶⁷ Travis, “Blunkett warns judges over anti-terror plans”, *The Guardian*, 8 August 2005; Tempest, “Howard warns against ‘judicial activism’”, *The Guardian* 10 August 2005.

⁶⁸ Speech delivered by Tony Blair, the British Prime Minister at the Prime Minister’s Press Conference, 5 August 2005. Available at: www.number-10.gov.uk/output/Page8041.asp.

⁶⁹ The Judicial Appointments Advisory Board (discussed in part III of this article) has no role in the elevation of judges to higher courts.

C. Jurisdictional Competence

Independence in decision-making entails the exclusive authority to determine jurisdictional competence on matters of a judicial nature.⁷⁰ In practice, this implies that the judiciary should be authorised to deal with all matters of a judicial nature and, in the event of a dispute, the judiciary should have exclusive authority to decide whether a matter submitted to it falls under its jurisdiction.⁷¹

Article 34.3.1° of the Constitution provides that the courts of first instance must include a High Court “invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal”. Article 34.3.2° also invests the High Court with the power to determine the validity of any law having regard to the Constitution. Under Article 40.4, the High Court must also hear complaints concerning the detention of any person.

The High Court determines its jurisdiction on a case-by-case basis and will interfere with lower court jurisdiction if there is a serious danger that justice would not be done.⁷² Then again, the High Court also has inherent power to decline jurisdiction,⁷³ and in practice, is slow to encroach on the administrative sphere. Though the court will consider the fairness of an administrative decision, it will not replace such a decision with its own.⁷⁴ Nonetheless, Hogan and Whyte suggest that the Irish courts are reluctant to allow a legislative provision to oust their jurisdiction. In *Murren v. Brennan*, Gavan Duffy J. proclaimed that “[w]hile a court of law would be slow to interfere with any decision clearly entrusted by statute to a Minister of State, the phrase ‘whose decision shall be final’ ... cannot exclude the constitutional

⁷⁰ UN Basic Principles: “3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law”.

⁷¹ Dung, *Judicial Independence in Transitional Countries* (Oslo: United Nations Development Programme, 2003), p. 12.

⁷² *O’R v. O’R* [1985] I.R. 367.

⁷³ Refer to Gannon J. in *R v. R* [1984] I.R. 296.

⁷⁴ Refer to O’Flaherty J. in *Attorney General v. Hamilton (No. 1)* [1993] 2 I.R. 250.

jurisdiction of the High Court in a case deemed by the High Court to warrant interference”.⁷⁵

The courts will submit to some restriction of their jurisdiction by way of fixed time limits on applying for leave for judicial review. According to the Law Reform Commission, time limits are an essential feature of judicial review and necessary to ensure that public bodies are not “held hostage to an interminable threat of legal challenge”.⁷⁶ At the same time, the Law Reform Commission recognizes that time limits should provide individuals with a “reasonable opportunity to call into question public decisions”.⁷⁷

Section 5(2)(a) of the *Illegal Immigrants (Trafficking) Act, 1999* currently imposes a 14 day limit (not working days) on persons intending to challenge the validity of an immigration or refugee related decision.⁷⁸ The High Court has discretion to extend this limit if there are good and sufficient reasons. This provision imposes a heavy burden on potential litigants who have to secure the services of a legal team and launch judicial review proceedings within this timeframe. In *Re 26 and the Illegal Immigrants (Trafficking) Bill, 1999*⁷⁹ the Supreme Court held that section 5 was not repugnant to the Constitution and did not indirectly discriminate against non-Irish citizens as comparable time limits also apply to persons or companies challenging the validity of planning decisions.

The Law Reform Commission considered the issue of time limits in its *Report on Judicial Review Procedure* and noted that the “time limit imposed regarding immigration is more onerous” given the personal circumstances of non-Irish citizens challenging

⁷⁵ *Murren v. Brennan* [1942] I.R. 466.

⁷⁶ Law Reform Commission, *Report on Judicial Review Procedure* (Dublin: L.R.C. 71, 2004), p. 35.

⁷⁷ Law Reform Commission, *Report on Judicial Review Procedure* (Dublin: L.R.C. 71, 2004), p. 35.

⁷⁸ The Rules of the Superior Courts Act, 1986, Order 84, rule 2(1) covers time-limits for other litigation. It provides that judicial review actions should be issued promptly within three months of an actual decision being taken, or six months where the relief sought is certiorari, unless the court considers there is good reason for extending the time limit.

⁷⁹ *Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] I.E.S.C. 19.

decisions.⁸⁰ It also took the view that judicial review proceedings should not constitute a mechanism whereby “a failed immigration applicant” might try to delay the immigration process.⁸¹ Taking account of the State’s obligation to manage migration and the individual rights of foreign nationals, the Law Reform Commission recommended that the Illegal Immigrants (Trafficking) Act, 2000 be amended so as to increase the fixed time limit on applications for judicial review to 28 days, with judicial discretion to extend where good and sufficient reasons are established.⁸²

In 2005, the UN Committee on the Elimination of Racial Discrimination (CERD) also expressed concern that a 14-day time limit had been introduced for immigration related decisions and recommended that this restriction should be resolved in the forthcoming legislation on immigration.⁸³ However, it appears that the Government has ignored both the Law Reform Commission and the CERD in this regard. It recently introduced the Immigration, Residence and Protection Bill, 2008 to reinstate and modify all existing immigration and refugee law. Section 118 of the Bill deals with special procedures for judicial review and retains the 14 day time limit and as well further restricting the court’s discretion to grant leave.⁸⁴ In this author’s view, these provisions may be unconstitutional as they infringe on the jurisdictional competence of the High Court by reducing the

⁸⁰ Law Reform Commission, *Report on Judicial Review Procedure* (Dublin: L.R.C. 71, 2004), at p. 35.

⁸¹ Law Reform Commission, *Report on Judicial Review Procedure* (Dublin: L.R.C. 71, 2004), at p. 48. In this instance, the Law Reform Commission drew on the Attorney General’s submissions in *Re 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] I.E.S.C. 19.

⁸² Law Reform Commission, *Report on Judicial Review Procedure* (Dublin: L.R.C. 71, 2004), para 2.35, p. 49. The Law Reform Commission did not make any recommendations on changing time limits on planning applications as it found that the Planning and Development Act, 2000, s. 50(4) was working well in practice. See p. 45.

⁸³ UN Committee on the Elimination of All Forms of Racial Discrimination, Concluding Observations, CERD/C/IRL/CO/2, 10 March 2005. See Observation No. 24.

⁸⁴ Refer to s. 118(3)(a), Immigration, Residence and Protection Bill, 2008 (as initiated).

court's discretion to grant leave and the applicant's right to access judicial review proceedings.⁸⁵

III. APPOINTMENTS

Principle 10 of the UN Basic Principles refers to judicial appointments:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

This principle means that judicial candidates' professional qualifications and personal integrity must be the sole reason for selection. The UN provides further clarification, stating that "[j]udges cannot lawfully be appointed or elected because of the political views that they hold or because, for instance, they profess certain religious beliefs. Such appointments would seriously undermine the independence both of the individual judge and of the Judiciary as such, thereby also undermining public confidence in the administration of justice".⁸⁶

Madhuku explains that judges are more likely to be appointed on the basis of political allegiance where politicians are

⁸⁵ The right to access a court is an unenumerated constitutional right (*McAuley v. Minister for Posts & Telegraphs* [1966] I.R. 345; *Murphy v. Minister for Justice* [2001] 1 I.R. 95) and is also protected by Article 6 of the ECHR (*Golder v. UK* (1979-80) 1 E.H.R.R. 524; *Juristic and Collegium Mehereau v. Austria* (2006), Application No. 6253/00).

⁸⁶ UN, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (UN: Geneva, 2003), p. 123.

involved in the appointment process.⁸⁷ However, the appointment of judges by the executive is not necessarily in breach of Article 6 (the right to a fair trial) of the ECHR.⁸⁸ For there to be a breach of the ECHR, an applicant to the European Court of Human Rights would need to demonstrate that the appointment process was largely unsatisfactory or that the establishment of a tribunal to decide a particular case was done with a view to influencing its final outcome.⁸⁹ However, the COE does recommend that “[t]he authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules”.⁹⁰

In countries where constitutional or legal provisions allow judges to be appointed by the Government, the COE Recommendation states that:

[T]here should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above. These guarantees could be, for example, one or more of the following:

- i. a special independent and competent body to give the government advice which it follows in practice; or
- ii. the right for an individual to appeal against a decision to an independent authority; or
- iii. the authority which makes the decision safeguards against undue or improper influences.⁹¹

⁸⁷ Madhuku, “Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa” (2002) 46 *Journal of African Law* 232, 234.

⁸⁸ *Campbell and Fell v. United Kingdom* (1985) 7 E.H.R.R. 165 at para. 78.

⁸⁹ *Zand v. Austria* (1979) 15 D.R. 70 at para. 77.

⁹⁰ COE Recommendation No. R (94) 12.

⁹¹ COE Recommendation No. R (94) 12.

In the case of Ireland, Article 35.1 of the Irish Constitution states that the President is tasked with appointing members of the judiciary, “[t]he judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President”. However, the President only exercises this power on the authorisation of the Government.⁹²

As regards the selection process for judges, prior to 1995, the Government recommended all judges for appointment to the President as provided for by Article 13.9 of the Constitution. In the absence of any formal or transparent procedures, decisions on appointments were primarily made by members of cabinet and the Taoiseach. However, the fact that the Government has a role in appointing judges would not strictly be in violation of Article 10 of the UN Basic Principles, if judges were appointed based on merit and not on political affiliation. According to Byrne and McCutcheon “many of those appointed to judicial office have had connections, to some extent or another, either with the political party or parties whose members form the Government of the day or have become known to the Government in some way”.⁹³

Bartholomew’s study from 1971 of the Irish judiciary describes the nature of the judicial appointments system by clearly demonstrating that the opinion of the Taoiseach was paramount in judicial appointments and that political allegiances played a key role.⁹⁴ Indeed, from Dáil records it does appear that political party representations feature in the cabinet’s decisions on appointments.⁹⁵

⁹² Article 13.9 of the Irish Constitution provides that: “[t]he powers and functions conferred on the President by this Constitution shall be exercisable and performed by him only on the advice of the Government”.

⁹³ Byrne and McCutcheon, *The Irish Legal System*, 4th ed. (Dublin: Tottel Publishing, 2005), p. 112.

⁹⁴ Bartholomew, *The Irish Judiciary* (Notre Dame, Indiana: University of Notre Dame Press, 1971), pp. 32-36.

⁹⁵ In response to a Dáil question on whether members of the judiciary submitted representations to him, and the extent to which those representations are relevant in the making of judicial appointments, a former Minister for Justice, Equality and Law Reform declared: “[s]ince I took office, I have received over 40 representations from members of the Oireachtas in respect of Judicial appointments. Eight persons, on whose behalf representations were

In 1994, a political controversy erupted as a result of the appointment of the Attorney General to the position of President of the High Court after he had just resigned from office due to political pressure.⁹⁶ A newly formed government in 1994 established an independent Judicial Appointments Advisory Board (JAAB) to advise the Government in this area.

A. The Judicial Appointments Advisory Board

The JAAB was set up pursuant to Part IV of the Courts and Court Officers Act, 1995. Recalling that the COE⁹⁷ recommended that independent authorities take decisions on judicial appointments, the JAAB certainly complies with this, with members of the judiciary and other legal professionals playing a prominent role.⁹⁸ In order to protect their independence, section 14 of the Courts and Courts Officers Act, 1995 enables the JAAB to adopt its own procedures to carry out its functions.

The JAAB's main purpose is to identify persons and inform the Government of suitably qualified persons for appointment to judicial office.⁹⁹ The JAAB makes its recommendations on the basis of criteria laid down in section 16(7) *i.e.* where a person: has displayed in his or her practice as a barrister or solicitor, as the case may be, a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned; is suitable on the grounds of character and temperament; is otherwise suitable; and complies with requirements of section 19 of the Act regarding tax compliance.

Bacik, Costello and Drew have criticised these criteria as being "ill-defined and open to an overly subjective interpretation

made, were subsequently appointed, all to the District Court bench". Vol. 523, *Dáil Debates*, 24.

⁹⁶ The incident is described by David Gwynn Morgan. The Attorney General was forced to resign because of a nine-month delay by his office in processing a warrant for the extradition of a suspected paedophile, Fr. Brendan Smyth to Northern Ireland. See Morgan, "Selection of Superior Judges" (2004) 22 I.L.T. 42.

⁹⁷ COE Recommendation No. R (94) 12.

⁹⁸ Courts and Court Officers Act, 1995, s. 13(2).

⁹⁹ Courts and Court Officers Act, 1995, s. 13(1).

at present”.¹⁰⁰ They suggest that considerations such as “character” and “temperament”¹⁰¹ should be replaced with criteria and competences that are transparently meritocratic. When compared with assessment criteria from other common law jurisdictions such as New Zealand¹⁰² and Canada,¹⁰³ Irish criteria for judicial appointments do appear to be extremely imprecise. Apart from difficulties with the criteria, the JAAB is not empowered to recommend applicants in any order of preference based on merit. Instead, the JAAB must nominate a list of up to seven candidates¹⁰⁴ which the Government is not obliged to choose from.¹⁰⁵ The JAAB also plays no advisory role in the appointment of the Chief Justice or appointments where a judge currently sitting on the bench applies for a position on a higher court.¹⁰⁶ Roughly one or two judges a year have been elevated to

¹⁰⁰ Bacik, Costello and Drew, *Gender Injustice: Feminising the Legal Professions?* (Dublin: Trinity College Dublin Law School, 2003), p. 337.

¹⁰¹ This is not to suggest that “temperament” is not an essential attribute of a judge. Rather, the point being made here that the criterion of “temperament” alone is not specific enough.

¹⁰² Refer to the All-Party Oireachtas Committee on the Constitution, *The Courts and the Judiciary* (Dublin: Government Stationary Office, 1999), pp. 63-64.

¹⁰³ See the criteria for judicial appointment on the Commissioner for Federal Judicial Affairs’ website: <http://www.fja.gc.ca/fja-cmf/index-eng.html>.

¹⁰⁴ The JAAB sometimes submits additional names then as it has received legal advice that this is permissible under the legislation.

¹⁰⁵ By way of example, the Government did not seek the advice of the JAAB when appointing Ryan J. to the High Court in 2003. See JAAB, *Judicial Appointments Advisory Board Annual Report, 2003* (Dublin: JAAB, 2003) available at:

[http://www.courts.ie/Courts.ie/Library3.nsf/\(WebFiles\)/22FC013356BD3C1B8025703E003E18A1/\\$FILE/Annual%20Report%202003.pdf](http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/22FC013356BD3C1B8025703E003E18A1/$FILE/Annual%20Report%202003.pdf). Ryan J. was appointed by the Government to quickly fill the post of Chair of the Commission into Child Abuse following the resignation of Laffoy J.

¹⁰⁶ See Courts and Court Officers Act, 1995, s. 17. It could be suggested that it is not appropriate for members of the Board to decide on applications from a sitting judge, particularly, since that judge may be on the Board. However, in circumstances where the Attorney General applies for a judicial position, he/she is required to withdraw from the Board (s. 18(3)). Any member of the Board applying for a more senior position could be requested to do the same.

a higher position by the Government without any advice from the JAAB between 2002 and 2006.¹⁰⁷

B. Political Affiliation and Appointments?

The question here is, does political affiliation play a part in judicial appointments? In 2000, the following was put to Mr. John O'Donoghue, the former Minister for Justice, Equality and Law Reform, by Mr. Alan Shatter TD:

Can the Minister explain why Deputy Conor Lenihan boasted in the House three weeks ago that he had somebody, on whose behalf he made representations, appointed to the District Court Bench? Why is it that some Independent Deputies to whom the Government is dependent have made similar boasts? Why is it that the overwhelming majority of persons appointed to the District Court have been favoured by representations made directly to the Minister by either Cabinet or back bench colleagues or Independent Deputies?¹⁰⁸

The Minister did not respond directly to the allegation and instead stated that anyone appointed was on the list. He continued that his predecessor, Nora Owen, TD, who was a member of the rainbow coalition, received 70 representations from backbenchers regarding judicial appointments.

What the above statement indicates is that despite the introduction of the judicial short listing process, allegations of political bias in appointments persist, and representations to Ministers on judicial appointments still seem to occur. Carroll's study of the Irish judiciary which involved eight judges appointed through the JAAB would seem to confirm this. The general response of the judges involved in this study on the JAAB was that "it was a good idea in theory, but in practice, it had made very little change to the political patronage system of appointments".¹⁰⁹

¹⁰⁷ Refer to JAAB, *Judicial Advisory Appointments Annual Reports 2002-2006* (Dublin: JAAB, 2002-2006).

¹⁰⁸ Vol. 526, *Dáil Debates*, 15.

¹⁰⁹ Carroll, "You be the Judge Part II – The Politics and Processes of Judicial Appointments in Ireland" (2005) 11 *Bar Review*, 186.

When the current appointments system was considered by the All-Party Oireachtas Committee on the Constitution in 1995, it suggested that Ireland's "short-listing procedure" compared favourably with other common law jurisdictions.¹¹⁰ The Committee also noted that: "[t]he independence of the judiciary might suggest that the executive should have no discretion in the appointment of judges. But, since the judiciary is an organ of state, it must ultimately be held accountable to the people".¹¹¹ The Committee recommended that the current system should be retained, as it felt that the Government received enough non-partisan advice from the JAAB.¹¹² The Committee's views do not take account of the fact that many appointments are made where the JAAB has no role and the fact that it is not permitted to submit its list based on order of merit.

For Malleon, the challenge of judicial appointments is to ensure that the "democratic legitimacy of the judiciary is maintained without introducing a form of politicisation that reduces the quality of the judges appointed and transforms judges into politicians in wigs".¹¹³ It is argued in this article that the current legal arrangements do not strike the right balance between democratic accountability and judicial independence and do not fully comply with international human rights standards for several reasons.

First, while JAAB is an independent body made up of judges and some members of the legal profession, it is only a short-listing mechanism and has no role in relation to senior appointments or promotions. This situation could be easily

¹¹⁰ The All-Party Oireachtas Committee on the Constitution, *Fourth Progress Report: The Courts and the Judiciary* (Dublin: Government Stationary Office, 1999), p. 7.

¹¹¹ The All-Party Oireachtas Committee on the Constitution, *Fourth Progress Report: The Courts and the Judiciary* (Dublin: Government Stationary Office, 1999), p. 7.

¹¹² The All-Party Oireachtas Committee on the Constitution, *Fourth Progress Report: The Courts and the Judiciary* (Dublin: Government Stationary Office, 1999), p. 7.

¹¹³ Malleon, "Introduction", in Malleon, and Russell (eds.), *Appointing Judges in an Age of Judicial Power – Critical Perspectives from Around the World* (Toronto; University of Toronto Press, 2006), p. 6.

remedied if the JAAB was empowered to choose only three candidates for each position in order of merit.¹¹⁴

Second, it is unclear whether judicial candidates' professional qualifications and personal integrity are the sole reason for selection by the Government. The Board's short listing criteria are currently imprecise, and it does not compare favourably with other jurisdictions such as New Zealand or Canada. In addition, the Government provides no criteria or rationale for why certain individuals are recommended to the President for appointment or elevation. Therefore, the criteria for judicial appointments should be transparently meritocratic, and it is proposed that Ireland could follow the New Zealand or Canadian model in this regard.

Third, there is a lack of transparency in the appointments system. Although the JAAB began publishing annual reports in 2002, they only refer to the JAAB's short-listing activities. It is known that the Government receives representations in relation to judicial appointments and yet no information is forthcoming as to what role they play in the appointment process. The Government does not publish any reports explaining why it has chosen a particular individual for appointment. If the system was clear and transparent, allegations of political bias would not persist.¹¹⁵

Lastly, what is clear from the facts set out above is that there is no legal sanction to prevent the Government from appointing a political supporter to the bench over someone who is better qualified. Were political affiliation to play a part in judicial appointments, it could have an effect on the development of judicial outcomes and jurisprudence, thus undermining judicial independence and the protection of individual rights. It could also lead to legal practitioners feeling compelled to affiliate to a political party if they wanted to seek appointment to the Bench.

¹¹⁴ Morgan made a similar recommendation in "Selection of Superior Judges", *Irish Law Times* (2004) 22 I.L.T. 42.

¹¹⁵ This is not to suggest that representations cannot form part of the appointments process. In South Africa, calls for representations were actually introduced to encourage diversity among the Bench. Refer to Corder, "Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa", in Russell and O'Brien (eds.), *Judicial Independence in the Age of Democracy – Critical Perspectives from around the World* (Charlottesville; London: The University Press of Virginia, 2001).

The changes as recommended above would go some way in bringing the judicial appointments system in line with international standards.

IV. ACCOUNTABILITY AND JUDICIAL ETHICS

Judges enjoy an important place in the justice system and are endowed with immense powers to perform their functions. However, the liberal notion of judicial independence and irremovability from office must be balanced with the democratic principle of accountability.¹¹⁶ The UN Basic Principles set out minimum standards for discipline, suspension and removal. Principle 17 implies that when a complaint is made against a judge, the examination needs to be dealt with confidentially, initially at least, and that a judge's due process rights must be respected.¹¹⁷ Principle 18 makes clear that judges can only be suspended or removed for very serious reasons such as incapacity or unethical behaviour.¹¹⁸ Judges cannot be removed "because of opposition to the merits of a case or cases decided by the judge in question".¹¹⁹ Principle 19 also points to the necessity of drafting a judicial code of ethics to guide judges on appropriate behaviour.¹²⁰ Notably, the UN Basic Principles do not specify

¹¹⁶ Russell, "Toward a General Theory of Judicial Independence", in Russell and O'Brien (eds.), *Judicial Independence in the Age of Democracy – Critical Perspectives from around the World* (Charlottesville; London: The University Press of Virginia, 2001).

¹¹⁷ Principle 17. "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge".

¹¹⁸ Principle 18. "Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties".

¹¹⁹ United Nations, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (Geneva: UN, 2003), p. 129.

¹²⁰ Principle 19. "All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."

what kind of behaviour should be disciplined or what disciplinary action can be taken.

COE Recommendation No. R(94) 12 goes further and recommends that disciplinary measures may include the withdrawal of cases from a judge, moving the judge to other judicial tasks within the court, economic sanctions such as a reduction in salary for a temporary period, and suspension. It also recommends that reasons for removal “should be defined in precise terms by the law”.¹²¹ However, it does not provide clarity on behaviour that should be sanctioned, as this is intended to be legislated for at a national level.

The question arises as to what type of body or institution may discipline a judge and whether it needs to be independent. In some countries, specialised judicial courts decide on cases of judicial misconduct (*e.g.* Czech Republic, Estonia, Lithuania, Slovenia, Slovakia and Ukraine), and in others, a Judicial Council acts as a disciplinary court (*e.g.* France, Moldova and Portugal).¹²² The European Charter on the Statute of the Judge suggests that sanction should only take place “following the proposal, the recommendation, or with the agreement of a tribunal or authority composed as least as to one half of elected judges”.¹²³ The inclusion of judges in the disciplinary mechanism does seem to offer some protection of judicial independence.

A. Accountability Mechanisms in Ireland

Article 35.4.1° of the Irish Constitution provides that “[a] judge of the Supreme or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and Seanad Éireann calling for his removal”.

¹²¹ 5.1 of the European Charter on the Statute for judges also states that the grounds for disciplinary sanction should be “expressly defined”.

¹²² Kuijer, *The Blindfold of Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (Nijmegen: Wolf Legal Productions, 2004), at ch. 6.

¹²³ Principle 5.1.

In contrast to constitutional provisions on impeachment for the President¹²⁴, this Article does not make clear how a judge should be removed. Article 34.4.1° refers to the passing of resolutions for the removal of a judge by both Houses of the Oireachtas. By virtue of Article 15.11.1° such resolutions of the Dáil and Seanad may be passed by a simple majority vote of those present and voting.¹²⁵

The terms “stated misbehaviour or incapacity” are not defined in the Constitution or by the Irish courts. While it seems that “incapacity” refers to physical or mental disability, the term “stated misbehaviour” is more problematic and ill-defined.¹²⁶ Moreover, there are no statutory provisions outlining a procedure for the investigation of complaints made against judges of any court. However, certain legal provisions do allow the Chief Justice to interview a judge of the District Court “where the Chief Justice is of the opinion that the conduct of a judge of the District Court has been such as to bring the administration of justice into

¹²⁴ Article 12.10: “1° The President may be impeached for stated misbehaviour; 2° The charge shall be preferred by either of the Houses of the Oireachtas, subject to and in accordance with the provisions of this section; 3° A proposal to either House of the Oireachtas to prefer a charge against the President under this section shall not be entertained unless upon a notice of motion in writing signed by not less than thirty members of that House; 4° No such proposal shall be adopted by either of the Houses of the Oireachtas save upon a resolution of that House supported by not less than two-thirds of the total membership thereof; 5° When a charge has been preferred by either House of the Oireachtas, the other House shall investigate the charge, or cause the charge to be investigated; 6° The President shall have the right to appear and to be represented at the investigation of the charge; 7° If, as a result of the investigation, a resolution be passed supported by not less than two-thirds of the total membership of the House of the Oireachtas by which the charge was investigated, or caused to be investigated, declaring that the charge preferred against the President has been sustained and that the misbehaviour, the subject of the charge, was such as to render him unfit to continue in office, such resolution shall operate to remove the President from his office”.

¹²⁵ Article 15.11.1°: “All questions in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member”.

¹²⁶ Hogan and Whyte, *J.M. Kelly and the Constitution* 4th ed. (Dublin: Butterworths, 2001), p. 1009.

disrepute, the Chief Justice may interview the judge privately and inform him of such opinion”.¹²⁷

Section 36(2)(a) of the Courts (Supplemental Provisions) Act, 1961, also gives the President of the District Court the power to investigate a judge of that court where it appears that “the conduct of a justice of the District Court is prejudicial to the prompt and efficient discharge of the business of that Court”.¹²⁸ Apart from the legislative provisions outlined above, there is no other way to investigate and resolve judicial misconduct¹²⁹ and there is no complaints mechanism for members of the public or legal professionals who might feel wronged by a judge. This is a potential breach of an individual’s right to a legal remedy as provided by Article 13 of the ECHR.¹³⁰

Over the years, reported incidents of judicial misconduct have been increasing over time¹³¹ and mainly relate to delays in delivering reserved judgments,¹³² biased comments made by judges in court¹³³ and poor management of court lists. However,

¹²⁷ The Courts (Supplemental Provisions) Act, 1961, s. 10(4) as amended by the Courts Act, 1991, s. 21(2).

¹²⁸ This procedure was used in 2000 to investigate the transferring of a pub license by District Court Judge, O’Buachalla J., into Ms. Catherine Nevin’s sole name (the license had also been in her husband’s name). Ms. Nevin was a friend of O’Buachalla J. and had just been charged with her husband’s murder. Murphy J. chaired the Inquiry and found that O’Buachalla J.’s failure to disqualify himself from hearing the application was an error of judgment and not an act of misconduct. Source: *RTE News* (December 5, 2006).

¹²⁹ According to the Report of the Committee on Judicial Conduct and Ethics (Government Stationary Office: December 2000) there have been occasions where complaints have been made to a President of a court and they have taken informal steps on an ad hoc basis in order to reach a resolution (p. 9).

¹³⁰ The remedy in question does not need to be judicial in character. Instead, the main effect of Article 13 is to require that there is a domestic remedy to deal with the substance of an arguable complaint under the ECHR. See *Krasuski v. Poland* (Application No. 61444/00, judgment of 14 June 2005) at para 60.

¹³¹ Hunt, “Judge not ...” (2008) 102 *Law Society Gazette* 22.

¹³² See for example, in *Doran v. Ireland* (2003) (Application No. 50389/99) where the European Court of Human Rights found that Ireland breached Article 6.1 and Article 13 of the ECHR on account of a delay. Also, see Working Group on a Courts Commission, *Sixth Report* (Dublin: Government Stationary Office, 1996), p. 56.

¹³³ This is dealt with below in section B. *Judicial Ethics*.

successive governments were slow to respond to any of these issues and the lack of a proper accountability mechanism for judges came into sharp focus after the Sheedy Affair¹³⁴ and again during the Curtin case.¹³⁵

Before and since the Sheedy Affair the issue of judicial accountability has been considered by a number of groups and bodies¹³⁶ with the most recent being the Committee on Judicial Conduct and Ethics Report.¹³⁷ It proposed that a Judicial Council should be set up with representation from all members of the judiciary which would be empowered to deal with judicial conduct and ethics, judicial studies and conditions of work. On the question of judicial conduct and ethics, the Report proposed the establishment of a separate Judicial Conduct and Ethics Committee to consider complaints made against judges by members of the public. In circumstances where the Committee could not deal with complaints informally or through appeal or judicial review, the Report recommended that the complaint should be dealt with by a Panel of Inquiry comprising three members – two judges and one lay person recommended by the Attorney General – but no members of the legal profession. In circumstances where the Panel finds impropriety on the part of a judge, the Report recommended a series of sanctions.

In considering the Report's proposals from a human rights perspective, it is clear that many of its recommendations are in line with the UN Basic Principles. For example, the fact that complaints against judges would be dealt with by a procedure in accordance with established standards of judicial conduct echoes Principle 17 of the UN Basic Principles. Moreover, given that the

¹³⁴ For a full examination of the Sheedy Affair, refer to Byrne and McCutcheon, *The Legal System*, 4th ed., (Dublin: Tottel Publishing, 2005), p. 132.

¹³⁵ For a full examination on events surrounding the Curtin case, refer to Ward, *Justice Matters* (Dublin: ICCL, 2007), p. 69.

¹³⁶ Working Group on the Courts Commission, *Working Group on the Courts Commission Report* (Dublin: Government Stationary Office, 1998) and The All-Party Oireachtas Committee on the Constitution, *Fourth Progress Report: The Courts and the Judiciary* (Dublin: Government Stationary Office, 1999).

¹³⁷ The Committee on Judicial Conduct and Ethics, *Committee on Judicial Conduct and Ethics Report* (Dublin: Government Stationary Office, 2000). Hereinafter referred to as the "Keane Report".

Inquiry Panel would be independent and be comprised mostly of judges, this mechanism should be enough to ensure that a member of the judiciary is not disciplined for political reasons.

As regards sanctions, the Report proposes that together with a private or public reprimand, the Inquiry Panel should be able to recommend to judges who are the subject of an inquiry that they attend courses of “counselling or treatment” or that the judge not be assigned to court duties for a specified time. The Report also recommends that the Inquiry Panel’s report should be considered by the Conduct and Ethics Committee, which may decide to implement with or without modifications the recommendations of the Inquiry Panel.

A draft Judicial Council Bill has been in development for some time and media reports indicate that initial proposals did not follow all of the Keane Report’s recommendations. In particular it appears that representative functions of the Judicial Council were absent.¹³⁸ A Working Group involving a representative of the Chief Justice and Minister for Justice have since been established to agree on a set of proposals. If this new legislation follows the Keane Report’s recommendations, it will go some way in meeting the international standards on judicial independence.

B. Judicial Ethics

Principle 19 of the UN Basic Principles states that “all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct”. The Bangalore Principles are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They contain six principles or values:

1. *Independence*: Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore

¹³⁸ Coulter, “Working group to develop Judicial Council” *Irish Times*, 17 April 2008. This could have been a disappointing development. Principle 9 of the UN Basic Principles state that judges are free to form and join associations and other bodies in order to represent their interests, protect their independence, as well as promote their professional training.

- uphold and exemplify judicial independence in both its individual and institutional aspects.
2. *Impartiality*: Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
 3. *Integrity*: Integrity is essential to the proper discharge of the judicial office.
 4. *Propriety*: Propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge.
 5. *Equality*: Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.
 6. *Competence and diligence*: Competence and diligence are prerequisites to the due performance of judicial office.¹³⁹

Ireland has no set of ethical guidelines for judges on how they should perform their functions. Instead, the only provisions governing their activities are to be found in the Constitution. Recalling that Article 35.2 of the Irish Constitution requires all judges to be “independent in the exercise of their judicial functions”, Article 34.5.1^o requires newly appointed judges to make a judicial declaration to execute their functions “without fear or favour, affection or ill-will towards any man” and to uphold the Constitution and laws.¹⁴⁰

The delay in introducing a Code of Judicial Ethics for judges is a serious gap. A number of circumstances have reportedly occurred where judges have made statements which could be construed as racist or sexist.¹⁴¹ They may be due to

¹³⁹ The Bangalore Principles provide further guidance.

¹⁴⁰ The wording of reflects the Constitution’s drafting history and has been criticised by the UN Human Rights Committee (see Recommendation 29(b), Concluding Observations of the Human Rights Committee: Ireland, 24/07/2000) and the Constitution Review Group, as discriminating against individuals who do not believe in God. See *Report of the Constitution Review Group* (Dublin: Government Stationery Office, 1996), p. 141.

¹⁴¹ See e.g. the court report in the *Longford Leader* from 19 February 2003, and “Judge Apologises to Nigerian Woman”, *Irish Times*, 21 February 2003.

some form of internal bias or a lack of familiarity with certain cultural, racial or other traditions. A code of ethical principles for judges could be important in preventing such events, as it could guide judges as to what behaviours are acceptable. A code could also steer judges in the area of extra-judicial comment¹⁴², and protect them against scenarios where they could face disqualification.

CONCLUSION

In the main, judicial independence is very well protected in Ireland. The Constitution and other legal measures provide sufficient protection to judges against reprisals, and the administration of the courts is managed in an independent manner. However, in the present article it is argued that the jurisdiction of the High Court has been restricted in immigration matters, and that the hiving off of certain activities to *quasi* judicial bodies has not always safeguarded the rights of individuals. Moreover, it is suggested that the judiciary has taken a deferential line with regard to socio-economic rights, and the judicial appointments mechanism does not strike the right balance between democratic accountability and judicial independence. Finally, this paper highlights the fact that Ireland does not have a judicial complaints mechanism and code of ethics for judges. The forthcoming Judicial Council Bill provides an invaluable opportunity to remedy some of these issues. A lot of work has been done at an international level in the form of the UN Basic Principles, the Bangalore Principles on Judicial Conduct and the COE Recommendation No. R (94) 12, which could be of great use to those preparing the Bill and future Code of Ethics.

¹⁴² Judges interviewed for the *Justice Matters* project had very different views on whether judges should express views outside of the courtroom. A number felt that judges should not engage in extra-judicial comment as they felt that it could possibly lead to their disqualification from future cases. Others thought that judges could give approved speeches or speak on designated areas. Refer to Ward, *Justice Matters* (Dublin: ICCL, 2007), pp. 58-60.