04

PERSONAL INDEPENDENCE AND THE IRISH JUDICIARY

4.1 INTRODUCTION

This section focuses on personal independence for individual judges and assesses to what degree Irish law and practice complies with international human rights standards. Similar to other well-established liberal democracies, the personal independence of Irish judges very well protected, particularly in relation to conditions of service and tenure (section 4.3) and remuneration (section 4.4). However, this section also indicates that recent reforms in judicial appointments still allow for political affiliation to play a part in appointments and that criteria for judicial selection is imprecise and ill-defined (section 4.2).

In the area of judicial studies, section 4.6 suggests that it is underdeveloped and generally only consists of conferences which take place throughout the year. The findings from this section reveal that newly appointed judges are generally not provided with any form of induction and the current programme fails to meet the individual needs of judges.

Finally, this section finds that complaints against judges have not been processed expeditiously and the Government's handling of judicial complaints is criticised along with its failure to legislate in this area (section 4.7). This section further considers proposals for reform and makes additional recommendations to enhance judicial accountability in Ireland.

4.2 APPOINTMENTS

4.2.1 SELECTION AND CRITERIA

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

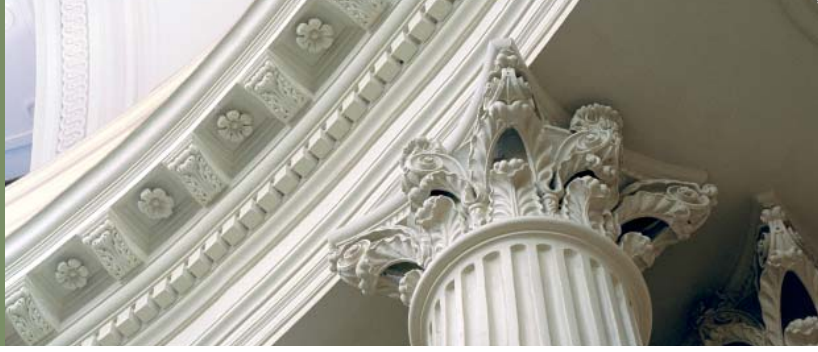
> Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against 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:

> Judges 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.[1]

Madhuku explains that judges are more likely to be appointed on the basis of political allegiance where politicians are involved in the appointment process.[2] However, the appointment of judges by the executive is not necessarily in breach of Article 6 of the ECHR.[3] Indeed, for there to be a breach of the Convention, an applicant to the Strasbourg Court 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.[4]

1. UN (2003) *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN: Geneva, at p. 123.
2. Madhuku, L. (2002) "Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa", *Journal of African Law*, 46, 2, at p. 234.
3. *Campbell and Fell v UK* (1985) 7 EHRR 165 at para 78.
4. *Zand v Austria* (1979) 15 DR 70 at para. 77.



The IBA Minimum Standards also state that participation by the executive or legislature in judicial appointments is not inconsistent with judicial independence, so long as judicial appointments "are vested in a judicial body in which members of the judiciary and the legal profession form a majority".[5] Appointments by a non-judicial body in a country with a long democratic tradition and where judicial appointments operate satisfactorily, will not ordinarily be considered inconsistent with the principle of judicial independence.[6] Nonetheless, the COE does recommend that:

> The 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.[7]

In countries where constitutional or legal provisions allow judges to be appointed by 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.[8]

In the case of Ireland, Article 35.1 of the Irish Constitution states that the President is tasked with appointing members of the judiciary:

> The 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, Article 13.9 provides that:

> The powers and functions conferred on the President by this Constitution shall be exercisable and performed by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.

Therefore, in effect the Constitution empowers the Government to select judges. The Constitution does not prescribe any system or qualifications for appointment. Instead, the Courts of Justice Act 1924 outlined minimum qualifications for judges which were later repeated in the Courts (Supplemental Provisions) Act 1961. In *The State (Walshe) v Murphy*, this legislation was held to be within the contemplation of Article 36iii of the Constitution, which stipulates matters to be regulated by ordinary law, including "the constitution and organisation" of the courts.[9]

Before 1995, only a practising barrister of twelve years' standing could apply to be a member of the Superior Courts.[10] In addition, only a practicing barrister of not less than ten years standing could apply to be a judge of the Circuit Courts.[11] However, both barristers and solicitors of not less than ten years' standing could apply for appointment to the District Court. [12]

5. 3(a), IBA Minimum Standards.
6. 3(b), IBA Minimum Standards.
7. COE Recommendation No. R (94) 12.
8. COE Recommendation No. R (94) 12.
9. In this case, Finlay J stated that:
"It seems to me that, since the word "constitution" in Article 36.iii involves the concept of appointment, formation or making up, it would appear to follow that the determination of the qualifications of any person to be appointed as a judge of any court is clearly within the provisions of Article 36.iii." *The State (Walshe) v Murphy*, (1981) IR 275 at 287.
10. Section 5(2) of the original 1961 Courts (Supplemental Provisions) Act 1961.
11. Section 17(2) of the original 1961 Act.
12. Refer to Section 29(2) of the Courts (Supplemental Provisions) Act 1961.

Given that solicitors were excluded from appointment to the Superior Courts and the Circuit Courts, they lobbied for many years for an amendment to the 1961 Act.[13] In 1995, the 1961 Act was amended to allow solicitors of at least ten years' standing to be considered for appointment to the Circuit Courts.[14] The first solicitors were then appointed to the Circuit Court in 1996. Judges of the Circuit Courts with at least four years experience could also apply for appointment to the High Court,[15] meaning that former solicitors could now be promoted to the High Court.

A further amendment to the 1961 Act occurred with the enactment of the Courts and Courts Officers Act, 2002, which provided for direct appointments of both barristers and solicitors of not less than 12 years' standing to the Superior Courts.[16] As a result the first practicing solicitor, Mr Justice Michael Peart, was appointed directly to the High Court in 2002.

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 (Irish Prime Minister). Ryan has observed that this feature of the Constitution has undermined the strict separation of powers model in Ireland.[17] 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. [18]

They go on to explain that this was common practice before 1922 and that many barristers appointed to the Bench had either been MPs in the Westminster Parliament or served as a law officer, for example, the Attorney General. Similar arrangements also existed in other jurisdictions of the UK.

Writings on the judicial appointments system in Ireland are very recent.[19] Bartholomew's study of the Irish judiciary describes the nature of the judicial appointments system and clearly indicates that the opinion of the Taoiseach is paramount in judicial appointments and that political allegiances play a key role.

> A general consensus exists that there are no promises of judgeships for party service and this same consensus holds that no appointments are made of those unqualified for the judicial posts… This is not to say that the best person available is always named but that usually those named are of judicial calibre.
>
> A judicial appointment does not "just happen". It is in a very real sense the finest and the most desirable appointment that the Government can make. It is a status appointment. The choice is not made casually….
> The "inner circles" of the party and the Government always have in mind potential appointees for judicial vacancies before they actually occur… The Minister for Justice makes up a list of prospects and presents it in Cabinet meeting. The "list" may contain a single name. The Ministers may add names to this list. Persons on it may be politically active or politically neutral.
>
> Some judges have thought that their work as a counsel in "State cases" has helped their cause, that this gave them an opportunity to get to know the Taoiseach. Others have had members of the Government as clients and the personal friendship resulting helped. Another judge pointed out that his uncle was a friend of influential persons. One judge said simply that he met the Minister for Justice through a member of parliament and proceeded to tell the Minister that he was interested in appointment. Persons who feel that they have a chance to be appointed commonly put in an application for the post.
>
> No formal vote is taken at the Cabinet meeting; an informal agreement on a particular person evolves. If the Taoiseach… has a favourite, that man will make the appointment. Certainly no one has ever been named a judge over the objections of the Taoiseach. The person chosen is then formally consulted and his consent secured. Then the President, who has not been consulted on the

13. Byrne, R. and McCutcheon, J. P. (2005) *The Irish Legal System*, Tottel: Dublin, 4th ed. at p. 110.
14. Refer to Section 30 of the Courts and Court Officers Act 1995.
15. Refer to Section 29 of the Courts and Court Officers Act 1995.
16. According to Section 5 of the Courts and Courts Officers Acts stipulates qualifications for consideration for appointments to the Superior Courts: "a practising barrister or a practising solicitor of not less than 12 years' standing who has practice as a barrister or a solicitor for a continuous period of not less than 2 years immediately before such appointment".
17. Ryan, F. (2001) *Constitutional Law*, Roundhall/Sweet & Maxwell, at p. 67.
18. Byrne and McCutcheon, *supra*, at p. 112.
19. Notable exceptions include articles written by Morgan, D. G. (2004) "Selection of Superior Judges", 22 ILT, at 42 and Carroll, J. (2005) "You be the Judge Part II – The Politics and Processes of Judicial Appointments in Ireland", *Bar Review December 2005*, at. p.182.

> appointment is told the name of the appointee and the formal appointment is made by the President…
>
> A former Taoiseach made the statement that "all things being equal" a person's politics is controlling in such appointments. All Irish governments have to a greater or lesser degree been politically motivated in the making of judicial appointments. The English used judges as patronage and the new government after independence named judges that agrees with its aims.[20]

While Bartholomew's study is from 1971, there is not much information in the public domain to suggest that judicial appointments differed to any great degree in latter years. For example, when asked about the political nature of the judicial appointments system, Ministers from the Government of the day have chosen to avoid dealing directly with the issue.[21]

Commenting on judicial appointments prior to 1995, one judge interviewed for the present study indicated that the Government appointed at least four judges in a row who had been chairpersons of the Bar Council. The interviewee explains the difficulties faced by the Government making appointments and the fact that they rely on the legal profession for guidance.

> At that stage, I think, they were looking for guidance from the profession. The Government and very few lay people realise the difference of good law and bad law. It's very hard for outsiders and when it comes before the Government what the various possibilities are, so they are dependent largely on the advice of the Attorney General who may consult with other persons from the profession. And when the system is working well, they usually get a very experienced lawyer that way. But of course, if they just take a government appointee, well there's a great danger.
> **Retired Judge of the Superior Courts, Interview No. 1**

Indeed, from Dáil records it appears that political party representations feature in the Government's decision on appointments. In response to a Dáil question on whether members of the judiciary submitted representations to him, and the extent to which extent those representations are relevant in the making of judicial appointments, a former Minister for Justice, Equality and Law Reform declared:

> Since 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 made, were subsequently appointed, all to the District Court bench.[22]

On the appointments process generally and on representations, the Minister suggested that the current system be maintained.

> I am sure that the Deputy will agree that it is appropriate that, as the Executive of the elected representatives of the people, the Government should retain the final decision in these matters as provided for under Articles 35.1 and 13.9 of the Constitution. It is therefore difficult to avoid a situation where public representatives continue to recommend to Ministers candidates for these positions. It is part and parcel of our democratic system. Accordingly, I am not convinced that it would be right or indeed lawful to exclude a candidate from judicial office because representations had been made on his or her behalf, given that there could be cases where the recommendation was made without the knowledge of the candidate involved.[23]

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.[24] Because of this appointment, the Labour Party withdrew from the coalition government and the Government collapsed. Subsequently, the newly-elected government established an independent Judicial Appointments Advisory Board to advise the Government in this area.

20. See Bartholomew, P. C. (1971) *The Irish Judiciary*, University of Notre Dame Press, at p 32-36. This section is also reproduced in Byrne and McCutcheon, at p. 121-122
21. In response to a question put in 1971 on any proposals for reforming the judicial appointments system and to assertions by Mr L'Estrange, T.D. that it was political in nature, the then Minister for Justice, Mr Des O'Malley TD stated that: "The situation is as it has been for 50 years and as it was during the periods of government other than Fianna Fáil Governments" (Dáil Éireann – Volume 256 – 04 November, 1971); in 1973. As recently as January 2005, the Minister for Justice, Equality and Law Reform, Mr Michael McDowell, TD, was asked if political affiliations of candidates are a factor in appointments. The Minister responded by describing various legislative provisions on judicial appointments, including the role of the Judicial Appointments Advisory Board (to be discussed in Section 6.2.2). He also stated that it: "is the most practical system that can apply consistent with the requirements of the Constitution". However, the Minister failed to respond to the question on political party affiliations (Dáil Éireann Vol. 596 – 26 January, 2005).
22. *Dáil Éireann* – Vol. 523 – 05 October, 2000, at 24.
23. *Ibid*.
24.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, D. G. (2004) "Judiciary – Selection of Superior Judges", *Irish Law Times*, No. 3, at p. 42.

4.2.2 THE JUDICIAL ADVISORY APPOINTMENTS BOARD (JAAB)

The Hon. Mr Justice Michael Peart, the first solicitor appointed directly to the High Court
Source: Courts Service ©

The Judicial Advisory Appointments Board (JAAB) was established pursuant to Part IV of the Courts and Court Officers Act, 1995. Recalling that the Council of Europe[25] 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. For example, section 13(2) provides that the JAAB shall consist of:

- The Chief Justice (Chairperson);
- The President of the High Court;
- The President of the Circuit Court;
- The President of the District Court;
- The Attorney General;
- A practicing barrister, nominated by the Chairman of the Bar Council;
- A practicing solicitor, nominated by the President of the Law Society of Ireland;
- Not more than three persons appointed by the Minister for Justice, Equality and Law Reform, which are persons engaged in or having knowledge or experience of commerce, finance, administration, or persons who have experience as consumers of the service provided by the courts that the Minister considers appropriate.[26]

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 also has the power to appoint sub-committees to: assist in advertising for applications for judicial appointment; require applicants to complete application forms; consult persons concerning the suitability of applicants to the JAAB; invite persons identified by the JAAB to submit their names for consideration by the JAAB; arrange for interviewing of applicants[27] who wish to be considered by the JAAB for appointment to judicial office; and do such other things as the JAAB considers necessary to enable it to discharge its functions.[28]

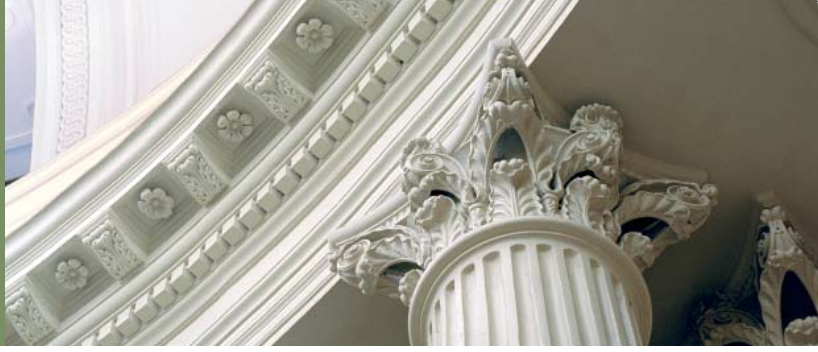
BOX 8: CRITERIA FOR JUDICIAL APPOINTMENTS IN NEW ZEALAND*

The criteria for appointment to the New Zealand Court of Appeal and High Court include:

(1) Legal ability (professional qualifications and experience; outstanding knowledge of the law and its application; extensive practice of law before the courts or wide applied knowledge of the law in other branches of legal practice; overall excellence as a lawyer);
(2) qualities of character (personal honesty and integrity; impartiality, open mindness and good judgement; patience, social sensitivity and common sense; the ability to work hard);
(3) personal technical skills (oral communication skills with lay people as well as lawyers; the ability to absorb and analyse complex and competing factual and legal material; listening and communication skills; mental agility; management and leadership skills; acceptance of public scrutiny);
(4) reflection of society (awareness and sensitivity to the diversity of New Zealand community; knowledge of cultural and gender issues).

*Source: All-Party Oireachtas Committee on the Constitution (1999) The Courts and the Judiciary, Government Stationary Office, at p. 63-64.

25.COE Recommendation No. R (94) 12.
26. These government representatives are appointed for a three year term and are eligible for reappointment - Section 13(2)(c). The current nominees are: Mr John Coyle, Ms Olive Braiden and Mr Tadhg O'Donoghue.
27.The Board has yet to interview anyone for a judicial vacancy because it feels it has sufficient information. In 2005, the Board commissioned a consultancy firm to make recommendations on an appropriate recruitment/interview system. The consultancy firm's findings were considered by a Sub-Committee of the Board in 2006. Source: Judicial Appointments Advisory Board 2005 Annual Report, at p. 15.
28. Section 14(2) Courts and Court Officers Act, 1995.



The JAAB's main purpose is to identify persons and inform the Government of suitably qualified persons for appointment to judicial office.[29] 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/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 (tax compliance).

The criteria for appointment has been criticised as being "ill-defined and overly subjective" by Bacik, Costello and Drew.[30] They suggest that considerations such as 'character' and 'temperament'[31] should be replaced with criteria and competences that are transparently meritocratic. Indeed, when compared with assessment criteria from other common law jurisdictions, 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 candidates[33] which the Government is not obliged to choose from[34] and when an individual is recommended for appointment outside the JAAB, a notice is posted in the Irish State Gazette (*Iris Oifigiúil* [35]).

The JAAB has given consideration to whether there is a need to change the current system but has decided against this.

> The Board has, accordingly, given careful consideration as to whether it should invite the Government to consider whether the legislation should be amended so as to enable it to indicate an order of preferences. Its is conscious, however, of the difficulties which might result from such a change, not least the question as to whether it would place unjustifiable constraints on the exercise by the Government of a function which is exclusively assigned to it under the Constitution. It has accordingly decided not to make such a recommendation.[36]

BOX 9: CRITERIA FOR JUDICIAL APPOINTMENTS IN CANADA*

In Canada, courtroom experience is considered to be only one of many factors in assessing a candidate's suitability for the judicial. Professional and competence indicators include: general proficiency in the law; intellectual ability; analytical skills; ability to listen; ability to maintain an open mind while hearing all sides of an argument; ability to make decisions; capacity to exercise sound judgment; reputation among professional peers and in the general community; areas of professional specialisation, specialised experience or special skills; ability to manage time and workload without supervision; capacity to handle heavy workload; capacity to handle stress and pressures of the isolation of the judicial role; interpersonal skills – with peers and the general public; awareness of racial and gender issues and bilingual ability. Relevant personal characteristics also include: a sense of ethics, patience, courtesy, honesty, common sense, tact, integrity, humility and punctuality.

*Source: Commissioner for Federal Judicial Affairs www..fja.gc.ca/jud_app/assess_e.html

However, should the JAAB not be able to reduce the list to three best candidates? It is true that this gives more direction but the Government still receives information on all applicants who submit an application for each post and is not obliged to choose from the JAAB's list. Certainly, other commentators writing in this area have suggested that the list should be reduced to three candidates.[37]

29.Section 13(1) Courts and Court Officers Act, 1995.
30. Bacik, I., Costello, C. and Drew, E. (2003) *Gender Injustice*: Feminising the Legal Professions? Law School: Trinity College Dublin.
31. This is not to suggest that 'temperament' is not an essential attitribute of a judge. Rather, the point being made here that the criterion of 'temperament' alone is not specific enough.
32. Refer to Box 7 and 8 for criteria for judicial appointments in New Zealand and Canada respectively.
33. The Board sometimes submits additional names as it has received legal advice that this is permissible under the legislation.
34. By way of example, the Government did not seek the advice of the JAAB when appointing the Hon. Mr Justice Sean Ryan to the High Court in 2003. Judicial Appointments Advisory Board (2003) *Annual Report*, www.courts.ie Justice Sean Ryan was appointed by the Government to quickly fill the post of Chair the Commission into Child Abuse following the resignation of Ms Justice Lydia Laffoy.
35. http://www.irisoifigiuil.ie/
36. Judicial Appointments Advisory Board (2002) Annual Report, www.courts.ie , at p. 23.
37. See Morgan, *ibid* and Carroll, *ibid*.

In 2000, the following was put to Mr John O'Donoghue, the former Minister for Justice, Equality and Law Reform, by Mr 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 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?[38]

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 statements indicate 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. Indeed, Carroll's study of the Irish judiciary which involved eight judges appointed through the JAAB would seem to confirm this. Their general response 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".[39]

The JAAB 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.[40] Between 2002 and 2005, the Government elevated the following number of judges to higher courts:

The JAAB also has no role in appointments to the position of President of the High Court, Circuit Court and District Court. Overall, this means that there are a significant number of persons elevated where an independent body has no role in advising the Government.

When the current appointments system was considered by the All-Party Oireachtas Committee on the Constitution in 1995, it was suggested that Ireland's "short-listing procedure" compares favourably with other common law jurisdictions[41]. The Committee also noted that:

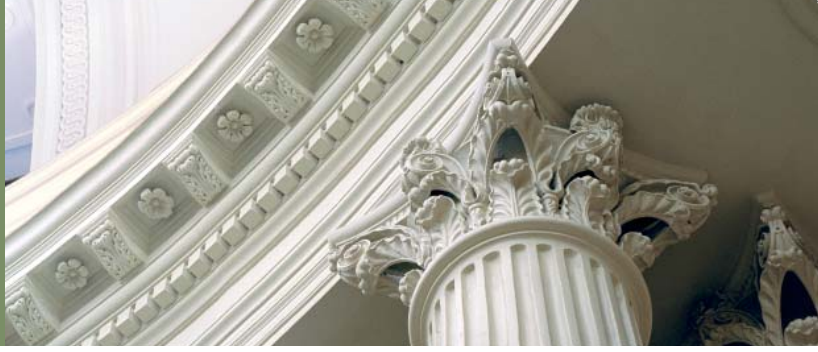
> The independence of the judiciary might suggest that the executive should have no discretion in the appointment of judges. But, since the judiciary is an organ of state, it must ultimately be held accountable to the people.[42]

Table 1: Number of Judges Elevated by the Government 2002-2005

Year	Number of Judges Promoted
2002	One member of the High Court, the Hon. Justice, McCracken was elevated to the Supreme Court.
2003	One member of the Circuit Court, the Hon. Justice Sean O'Leary, elevated to the High Court.
2004	One member of the High Court, the Hon. Justice Nicholas Kearns, elevated to the Supreme Court and one member of the Circuit Court, the Hon. Judge Elizabeth Dunne, elevated to the High Court.
2005	One member of the High Court, the Hon. Justice Fidelma Macken, elevated to the Supreme Court and one member of the Circuit Court, the Hon. Justice Kevin Haugh, elevated to the High Court.

Source: Judicial Advisory Appointments Annual Reports 2002-2005

38, Dáil Éireann, Vol. 526 – 15 November, 2000.
39. Carroll, *ibid*, at p. 186.
40. See Section 17 Courts and Court Officers Act, 1995. 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 [Section 18(3)]. Any member of the Board applying for a more senior position could be requested to do the same.
41. All-Party Oireachtas Committee on the Constitution (1999), op cit., at p. 7.
42. *Ibid*, at p. 7.



The Committee recommended that the current system should be retained:

> The Committee takes the view that our present system of appointing judges should be retained. It feels that the government has sufficient non-partisan advice from the Judicial Appointments Advisory Board and that it, as the executive of the elected representatives of the people, should retain the final decision. It is significant that because the judicial candidates are already short-listed by the board strictly on merit, the government cannot be open to criticism that it appoints only its own supporters rather than suitably qualified persons when it chooses from the list.[43]

The Committee's views do not take account of the fact that many appointments are made where the JAAB has no role.

For Malleson, 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".[44] It is argued in this report that the current legal arrangements do not strike the right balance between democratic accountability and judicial independence. Indeed, from the facts outlined above, it is clear that the judicial appointment system does not fully comply with international human rights standards for the following reasons.

First, while JAAB is an independent body and 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 remedied if the JAAB was empowered to choose only three candidates for each position in order of merit.

Second, it is unclear whether judicial candidates' professional qualifications and personal integrity are the sole reason for selection by Government. The Board's short listing criteria are currently imprecise and do not compare favourably with other jurisdictions such as New Zealand or Canada. Also, the Government provides no criteria or rationale for why certain individuals are recommended to the President for appointment or elevation. Therefore, criteria for judicial appointments should be transparently meritocratic and it is recommended 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, these reports only refer to the JAAB's short-listing activities. Furthermore, it is known that the Government receives representations in relation to judicial appointments and yet no information is forthcoming as to who these representations are from and whether they play a role 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. The Government should therefore be required to publish reports indicating why it has chosen certain judges for selection or elevation.

Lastly, what is clear from the information 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. It could also lead to legal practitioners feeling compelled to affiliate to a political party if they wanted to seek appointment to the Bench. The changes as recommended above would go someway in bringing the judicial appointments system in line with international standards.

43. *Op. cit.*
44. Malleson, K. (2006) "Introduction", in Malleson, K. and Russell, P. H. (eds) *Appointing Judges in an Age of Judicial Power – Critical Perspectives from Around the World*, University of Toronto Press: Toronto, Buffalo, London, at p. 6.

4.3 CONDITIONS OF SERVICE AND TENURE

In most countries, judicial independence is secured by giving judges long and sometimes lifetime tenure, and by making it very difficult to remove them from office. Such measures provide personal protection to judges from reprisals and political changes in government. Principle 11 of the UN Basic Principles provides that: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law." Principle 12 also states that: "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".

In the case of the US, federal judges are appointed for life and removal can only happen through an impeachment process for very serious reasons.[45] In other jurisdictions, particularly Eastern European, judges are not appointed for life and normally selected for a specified time period which cannot be reduced. Indeed, this practice is not incompatible with the ECHR.[46] However, some governments may still try to remove judges through non-reappointment and or under the guise of restructuring court systems. For example, the Australian Government has been accused of subverting judicial independence by abolishing courts and tribunals, effectively ending the tenure of certain judges.[47] This led the Hon. Justice Kirby to conclude that: "if judicial officers are repeatedly removed from their offices, and not afforded equivalent or higher appointments, the inference must be drawn that their tenure is, effectively, at the will of the executive". [48]

A well known example of removal through restructuring is the case of Judge Pastukhov, who was appointed as judge of the Belarusian Constitutional Court in March 1997 for a period of eleven years. Judge Pastukhov lost his position three years later because of a presidential decree declaring his term of office had expired following the entry into force of the new Constitution in November 1995. The UN Human Rights Committee decided that this act constituted an attack on the independence of the judiciary.

> The Committee takes note of the author's claim that he would not be removed from the bench since he had, in accordance with the law in force at the time, been elected a judge on 28 April 1994 for a term of 11 years. The Committee also notes that presidential decree of 24 January 1997 No 106 was not based on the replacement of the Constitutional Court with a new court but that the decree for dismissal of the author was stated as the expiry of his term as Constitutional Court judge, which was manifestly not the case. Furthermore, no effective judicial protections were available to the author to contest his dismissal by the executive. In these circumstances, the Committee considers that the author's dismissal from this position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country. [49]

Conditions of tenure appear to be well protected for Irish superior court judges with constitutional provisions comparable to those in the US system. According to 35.4.1°:

> A judge of the Supreme Court 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 by Seanad Éireann calling for his removal.

Not only does this constitutional standard make it extremely difficult to remove a judge from office, it also precludes temporary appointments to these courts.

45. See for example, Article 3, Section 1 of the US Constitution. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."
46. *Engel and Others v Netherlands* (1979-80) 1 EHRR 647.
47. See for example, see Williams, J. M. (2002) "Judicial Independence in Australia" in Russell, P. H. and O'Brien, D. M. (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, Virginia University Press; Debelijak, J. (1999) "Judicial Independence in the Modern Democratic State", *Australian Law Reform Commission*, Reform Issue 74, at p. 35.
48. The Hon. Mr Justice M.D. Kirby (1995) "The Abolition of Courts and Non-Reappointment of Judicial Officers in Australia", *Australian Bar Review*, 12, at p. 181,
49. Communication No 184.1998 Belarus 17/09/2003, UN doc. CCPR/C/78/D/814/1998, at 7.3.

Since the foundation of the State, this author knows of no 'political'/politically motivated attempt to remove judges from the Irish Superior Courts. Judicial independence is a well established and accepted democratic principle in Ireland and it is unlikely that an elected Government would consider removing a judge on political grounds.

As regards retirement, the mandatory age of retirement is 65 for judges of the District Court. District Court judges can be retained up to 70 years of age on a year-to-year basis. Circuit Court justices retire at 70 years together with judges appointed to the Superior Courts who were appointed after 15 December 1995. Judges appointed to the Superior Courts before this date normally retire at 72 years and a similar arrangement exists for judges who sat on international courts.

Security of tenure in the Circuit/District Court is provided through ordinary legislation pursuant to Article 36iii.[50] Judges of the lower courts were traditionally not provided with security of tenure as they were usually lay justices.[51] Recognising that this situation no longer exists, the Constitution Review Group considered whether it was necessary to extend constitutional security of tenure to judges on the lower courts.[52] The Group decided against this, believing that such a move would enshrine the lower courts in the Constitution and reduce the flexibility of the Oireachtas.

In addition, provision for temporary appointments to the Circuit and District Court is made by the Courts of Justice Act 1936 (sections 14 and 51); the Courts of Justice Act 1947 (section 4 and schedule) and the Courts (Supplemental Provisions) Act 1961 (section 48(8)). This particular provision was upheld as constitutional by Finlay CJ in *Magee v Culligan*.

> The fact that the provisions of s20 of the 1946 Act as a legislative regulation of the terms and conditions of judges of the District Court applies that particular protection to judges of the District Court who are permanent, as distinct from temporary, does not, the court is satisfied, in any way render the appointment of judges of the District Court for fixed short periods inconsistent with any provision of the Constitution, nor does it in any way interfere with or limit their constitutionally guaranteed independence.[53]

As for international human rights standards, Principle 12 of the UN Basic Principles requires judges to be guaranteed tenure until a mandatory retirement age; the appointment of temporary District Court judges clearly does not comply.

Citing Finlay CJ's decision, the All-Party Oireachtas Committee on the Constitution did not believe it was necessary to give Circuit Court justices and District Court judges a constitutional guarantee of security of tenure. [54] However, Hogan and Whyte suggest that Finlay CJ's judgment could be perceived as being overly formalistic:

> […] in that the failure to re-appoint a judge who had served out his fixed term appointment might be said to amount in substance to 'removal' of that judge in circumstances where the prescribed procedure of Dáil and Seanad resolutions etc were not followed. Moreover, if such a procedure were ever to be applied in the case of judges of the High Court and the Supreme Court, this would seem to run squarely against the guarantee contained in Article 35.4.1°. [55]

To date judges in Ireland have not been removed from office through restructuring.[56] However, given that security of tenure is only provided for District and Circuit Court justices through ordinary legislation, in principle, it would be possible for a future government to remove them by legislative amendment. While Hogan and Whyte believe that such a statute would risk invalidation if its operation impinged on judicial independence, a constitutional change protecting District Court judges and Circuit Court justices would eliminate any uncertainty and this is a recommendation from this report.[57] Given that in Australia, a democratic developed nation with a common law legal system, judges have recently been removed through restructuring, consideration should be given to providing District Court judges and Circuit Court justices security of tenure via the Constitution.

50. Section 20 of the Courts of Justice (District Court) Act 1946 and section 30(1) of the Courts (Supplemental Provisions) Act 1961.
51. All-Party Oireachtas Committee on the Constitution, (1999), at p. 10.
52. Constitution Review Group (1996), Report of the Constitution Review Group, at p. 185.
53. Finlay CJ, in Magee v Culligan [1992] 1 IR 223.
54. All-Party Oireachtas Committee on the Constitution, at p. 11.
55. Hogan and Whyte, *ibid*, at p. 1006.
56.Information received from the Judicial Support Unit, in December 2006.
57. Hogan and Whyte, *ibid*, at p. 1007.

4.4 ADEQUATE REMUNERATION

If judges are to remain free from extraneous governmental influences, adequate remuneration is vital. Corruption is more likely to happen in countries where judges are not adequately paid, for example, in the transitional democracies of Central and Eastern Europe.[58] Principle 14 of the IBA Minimum Standards of Judicial Independence provides that: "Judicial salaries and pension shall be adequate and should be regularly adjusted to account for price increases independent of executive control." This Principle is intended to safeguard against bribery and corruption. The COE's Consultative Council of the European Judges (CCJE) advises that it is also important "to make specific legal provisions guaranteeing judicial salaries against reduction".[59] However, reductions can happen but only in certain circumstances. In *Manitoba Provincial Judges Assn. v. Manitoba (Minister for Justice)*, the Canadian Supreme Court ruled that the only circumstance where a reduction in judges' salaries is permissible is when reductions are part of an overall public economic policy. [60]

The Irish Constitution gives the strongest possible protection against a reduction in remuneration. Article 35.3 provides that the: "the remuneration of a judge shall not be reduced during his continuance of office." As per Article 36iii, judges' salaries are set by the Oireachtas and regulated by statute. To date, no attempt has been made by the State to reduce judges' salaries, but that does not mean that remuneration has always been adequate.

Byrne and McCutcheon trace the development of judicial salaries over the years and maintain that at the beginning of the 19th century, salaries for justices were high by the standards of the day.[61] When the Irish Free State was established in 1922, judicial salaries were reduced by approximately 50% and judges' salaries were only modestly increased in 1947 and 1953. Then in 1957, judges of the Superior Courts sent a memorandum to Government stating that their salaries were below comparable standards in the public sector, as well as judicial salaries in England and Northern Ireland.[62] Further increases occurred in the 1960s and finally in 1977 judges salaries were linked to other senior office holders in the public sector via the Oireachtas (Allowances to Members) and Ministerial, Parliamentary and Judicial Offices (Amendment) Act 1977. However, by the 1980s, salaries fell below the levels needed to attract high calibre candidates and major increases in salaries occurred following recommendations from the Review Body on Higher Remuneration in the Public Sector.[63]

Currently, judges' salaries remain within the scope of the Review Body on Higher Remuneration in the Public Sector, thus putting some distance between the Government and judiciary. The Review Body normally conducts salary reviews every four years and during this process, members of the judiciary regularly make submissions. Increases in judicial salaries also occur in line with National Wage Agreements and percentage increases in salaries for general civil servants.[64] The most recent salary increases were in December 2006 and the table below delineates salaries currently payable to judges in each court.

Table 2: Received salary from 1 December 2006

Position	Salary
Chief Justice	€ 262,983
President of the High Court	€ 244,199
Judge of the Supreme Court	€ 229,173
President of the Circuit Court	€ 221,660
Judge of the High Court	€ 216,027
President of the District Court	€ 163,428
Judge of the Circuit Court	€ 157,794
Judge of the District Court	€ 131,494

Source: Judicial Support Unit, the Courts Service.

58. For example, as regards Moldova, the International Commission of Jurists reports that there were huge arrears in judges' salaries which exacerbated the country's corruption problem. See the International Commission of Jurists (2004) report, *Moldova – The Rule of Law in Moldova*, www.icj.org
59. 6.1, Opinion No. 2001 of the Consultative Council of the European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of Judges.
60. (1997) 3 S.C.R. *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Judge) 3.*
61. Byrne and McCutcheon, at p. 130.
62. *Ibid*, at p. 130.
63. http://www.reviewbody.gov.ie/
64. Information received from Judicial Support Unit, December 2006.

In the author's view, these salaries are high enough to dissuade against corruption and bribery given the current economic climate and also compare favourably with other national wages. For example, the national average wage for public sector civil servants is €38,421.76[65] and the industrial wage for men is €31,715.32 and €20,967.96 for women.[66]

Judges' pensions are protected by statute[67] and the Supreme Court has accepted that they are also protected by Article 35.1 and cannot be reduced. In *District Judge McMenanin v Ireland*, the Supreme Court held that pension entitlements for judges are "deferred remuneration"[68] and could not be reduced during continuance in office and stated that Article 36.ii imposed a duty on the Oireachtas to regulate by law the pension arrangements for judge.

Presently, occupational superannuation arrangements of judges comprise: (a) personal benefits (pensions, lump sums awarded to retired members and death gratuities awarded in respect of members who die during service) and (b) spouses and children's benefits. Pension and lump sum benefits are calculated by reference to: (i) total reckonable service and (ii) salary on the last day of service. In addition, a minimum of two years' service is required for benefit, and part years are reckonable on a *pro rata* basis.[69]

Overall, these pension arrangements are favourable for judges, particularly since they have constitutional protection. This is a major strength of the Irish system as it clearly complies with international human rights standards. No recommendation is made in this regard.

4.5 FREEDOM OF EXPRESSION AND ASSOCIATION

The UN Basic Principles state that judges are entitled to freedom of expression like other members of society provided that they "conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary."[70] Judges are also 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.[71]

4.5.1 REPRESENTATION AND ASSOCIATION

In Ireland, judges' interests are represented on the Courts Service Board. For example, the Supreme Court judges are represented on the Courts Services Board by the Chief Justice and two ordinary judges of the Supreme Court. High Court judges are represented on the Court Service Board by the President and an ordinary judge of the High Court and similar arrangements exist for judges of the Circuit Court and District Court.

In the case of the Circuit Court, judges are also able to present their interests when nominated by the President to sit on committees from time to time and when presenting submissions to the Higher Body on Remuneration.[72] It is also worth mentioning that there is an Association of District Court Judges to provide additional representation. Further, the Board of the Judicial Studies Institute (JSI) (discussed below) is chaired by the Chief Justice and is made up of representatives from the each of the Courts.

The question arises as to whether judges are fairly represented and are able to participate in associations and bodies, including promoting their professional training. Before the establishment of the Courts Service, the interests of judges were largely represented by the President of each Court. The establishment of the Courts Service and full representation of judges on its Board and the JSI would seem to be a major improvement on pre-existing structures.

However, what is very clear about the current formal structures is that for the most part, the Presidents of each court represent the interests of judges, together with persons nominated by the Presidents. This might diminish the possibility of individual judges who might disagree with the President's policy on an issue to have his/her voice heard. The proposed Judicial Council[73] should provide a greater opportunity for representation and freedom of expression as all members of the judiciary will be members. Several judges interviewed believed that the new Judicial Council would enable them to deal with issues, including judicial studies, in a much more structured way. For example, commenting on the setting up of a complaints mechanism, one judge remarked:

65. Central Statistics Office (2005) http://www.cso.ie/statistics/public_sector_earnings.htm
66. Central Statistics Office (2005) http://www.cso.ie/statistics/indearnings.htm
67. Section 46 of the Courts (Supplemental Provisions) Act, 1961 (as amended).
68. As Geoghegan J put in the High Court, 'a pension is nothing more than deferred remuneration' (1996) 3 IR 100 at 111.
69. Information received from Judicial Support Unit, December 2006.
70. Principle 8, UN Basic Principles.
71. Principle 9, UN Basic Principles.
72. Information from the Judicial Support Unit, December 2006.
73. Refer to Section 6.7 for an explanation of the proposed Judicial Council.

> It's not just the setting-up of a complaints mechanism. It's also to have, what I'd describe as a judges' trade union or judicial council where we collectively meet and discuss issues of interest such as facilities, resources, our working day, our working year, education, remuneration and discipline amongst ourselves. The sooner we can do that the better.
> **Circuit Court Judge, Interview No. 9**

This finding clearly indicates the importance of bringing forward legislation to establish a judicial council.

4.5.2 EXTRA-JUDICIAL COMMENT AND EDUCATING THE PUBLIC

No rules currently exist governing extra-judicial comment.[74] While judges sometimes appear at conferences they rarely speak publicly on any issue. Keane believes that is due to the fact that judges might make themselves liable to accusations of bias and to having their decisions overturned on appeal. [75]

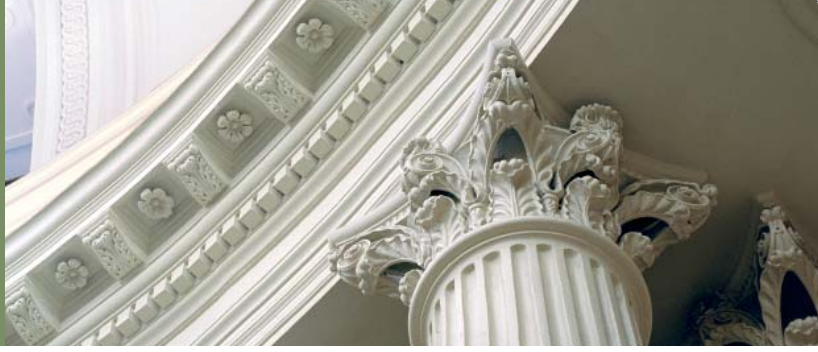
Judges who participated in the present study were asked if they should have any role in educating the public on human rights. Several judges did not believe that judges had any role for fear of disqualification from a case at a later stage or because of the separation of powers.[76]

> Absolutely Not: Judges should be seen in court and speak there as necessary, otherwise they should be invisible and silent.
> **Anonymous Judge, response received in February 2006**

> I'm not sure on the role of public promotion. There's a difficult line to be drawn, it is absolutely essential that we preserve our independence. We must be unbiased… You need to exercise 'self restraint' as a judge and we must be perceived as impartial.
> **Judge of the Superior Courts, Interview No. 5**

> I don't think that's the role of judges. I think they have to be careful about what speeches they make and interviews they give, because they have to appear to remain objective in any case that might come before them. If they have expressed views extrajudicially, it could be compromised by having expressed those views in relation to objectivity in dealing with a particular case that could come at them in two years time and they might need to disqualify themselves from hearing it if they've already expressed themselves in a way that might indicate that they have a predetermined view about something. Great caution needs to be exercised in terms of where, and in what circumstances, a judge may give speeches and interviews. I don't think it's the role of judges to educate the public in human rights. Their function is interpret and apply the law. I think they're different functions.
> **Judge of the Superior Courts, Interview No. 8**

74. Keane, R. (2005) "Extra-Judicial Comment by Judges", *Judicial Studies Institute Journal, Vol. 5:1*, at p. 199.
75. *Ibid*, at p. 200.
76. Disqualification is discussed in more detail in Section 6.3.



> If you make a speech or give a lecture expressing a view on a particular topic of human rights, you have thereby excluded yourself from the case when it comes to be decided. That's not a very sensible thing to do. You'll recollect in the case involving Pinochet, Lord Hoffman participated in the House of Lords and there was an objection that he was a board member of Amnesty International or his wife was. The result was they had to vacate the judgment and have a new hearing. So judges speaking out on topics are very dangerous in a way because the very topic they speak of is then going to be one they're barred from participating in.
> **Irish Judge, International Court, Interview No. 13**

> We have to maintain the separation of powers…. Certainly judges can explain reasons for giving decisions within the context of human rights legislation. It is a matter for the media, who mediates the matter.
> **District Court Judge, Interview No. 15**

> Yes by writing clear and reasoned judgments.
> **Circuit Court Judge, Interview No. 12**

A number of judges interviewed did think that judges should educate the public on human rights issues, but only through speeches and interviews and that such a role should be exercised cautiously.

> Through speeches and interviews.
> **Circuit Court Judge, Interview No. 9**

> Yes. But you have to be very careful about it. They have to step back from politics.
> **Retired Judge of the Superior Courts, Interview No. 1**

> I think so. Some judges are more interested then others on human rights issues. You will find that some judges are excellent speakers and good communicators, while others are not so gifted.
> **Circuit Court Judge, Interview No. 11**

> I do think that judges have a role on speaking now and then on issues. Judges have to be careful. They have to be disciplined about what they say from the Bench. It's not a pulpit. Some judges are inclined to make political speeches from the Bench, which I don't agree with. A judge is there to administer the law. The Oireachtas has a job to do in making the law. But it's useful at times for a judge to reflect, to give the benefit of his or her experience to a wider audience. I think that's very useful, not in any sort of a speechifying way. Just to explain now-and-then what it's like to do the job, what difficulties a judge has, issues that come before the judge and how they impact on society as a whole. I think that's very useful.
> **Circuit Court Justice, Interview No. 10**

One judge also spoke of the importance of maintaining a connection with the public:

> I think judges should have a connection with the public, speaking at conferences perhaps. It's difficult if you're writing. You have to avoid dealing with the actual cases that you're doing and interviews are particularly difficult. No matter what you say before the interview, you tend to get pushed into dealing with things that you shouldn't. But I do think that we should try to have a better connection with people than we do.
> **Retired Judge of the Superior Courts, Interview No. 14**

From the comments above, it is clear there is variation among members of the judiciary themselves. Some are concerned with the possibility of disqualification which might be due to a lack of guidance in this area, while others see the importance of educating the public but only in restricted circumstances.

Recognising that judges are a source of immense expertise, there is an argument to be made that they have a duty to work towards the improvement of the administration of justice.[77] Indeed, the American Bar Association (ABA) Model Code of Judicial Conduct states that complete separation of a judge from extra-judicial activities "is neither possible nor wise; a judge should not become isolated from the community in which the judge lives".[78] The Model Code also stipulates what extra-judicial activities judges can engage in:

> A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:
> (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
> (2) demean the judicial office; or
> (3) interfere with the proper performance of judicial duties[79]

77. McKay, R. B. (1970) "The Judiciary and Nonjudicial Activities", *Law and Contemporary Problems*, Vol. 35, No. 1, Judicial Ethics (Winter, 1970), at pp. 9-36. Cited In Keane, *ibid*.
78. See commentary under Canon 4, http://www.abanet.org/cpr/mcjc/canon_4.html
79. See Canon 4.

Moreover, Canon 4 and 5 of the Judicial Conference Code provide that:

> 4. A judge may engage in extrajudicial activities to improve the law, the legal system and the administration of justice.
> 5. A judge should regulate extrajudicial activities to minimise the risk of conflict with judicial duties.[80]

If a Code of Ethics were to be drafted for the Irish judiciary, comparable provisions could be included to ensure that Irish judges are able to make a greater contribution to informed debate and be aware of the circumstances in which they can express their opinions freely. Therefore, it is recommended that a future Code of Ethics for the judiciary should refer to the extra-judicial comment.

4.6 COMPETENCE, DILIGENCE AND JUDICIAL STUDIES

Competence and diligence are considered prerequisites for performance of judicial duties. The Bangalore Principles provide that judicial duties should take precedence over all other activities[81] and judges must devote their judicial professional activities to judicial duties, including the making of decisions and any other relevant tasks.[82] In addition, judges are required to take "reasonable steps" to maintain/enhance the "knowledge, skills and personal qualities necessary for the proper performance of judicial duties" through available training and other supports.[83] This includes an obligation to keep apprised of relevant developments in international law and other instruments establishing human rights norms.[84] Principle 4.4 of the European Charter on the Statute for Judges indicates that judges need to maintain and broaden their knowledge in order to perform their duties "through regular access to training which the State pays for". Clearly, regular judicial studies could assist judges to ensure that their knowledge remains up-to-date.

4.6.1 JUDICIAL STUDIES IN IRELAND

Judicial studies is a relatively new area in Ireland and only developed after the introduction of the Court and Court Services Act, 1995. Section 19 requires persons wishing to be considered for judicial office to give an undertaking in writing to take "such course or courses of training or education, or both, as may be required by the Chief Justice or President of the Court". Hence, there is a legal obligation on Irish judges to engage in further education once they join the Bench.

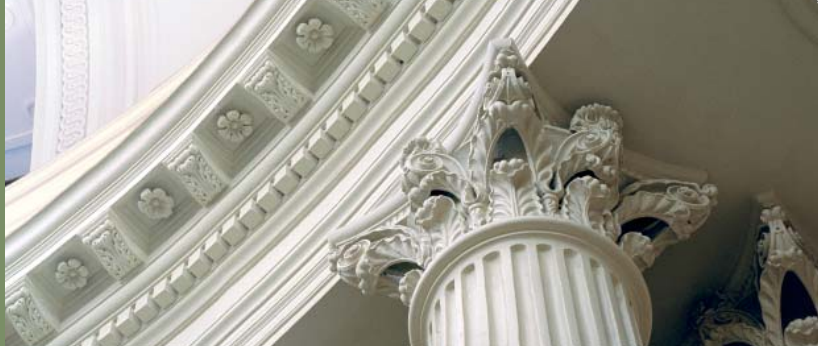
Section 48 of the Court and Court Services Act, 1995 provides that the Minister "may, with the consent of the Minister for Finance, provide funds for the training and education of judges". As a result, the former Chief Justice, Liam Hamilton, established the Judicial Studies Institute (JSI) to oversee expenditure and planning for judicial training. However, according to a number of judges participating in the present study, the concept of further education for the judiciary was not initially fully embraced by everyone. The reluctance to engage in further studies was attributed to the possibility of infringing on judicial independence and because of certain perceptions.

> The JSI is very much in an embryonic stage. When it was established, when the concept of further education for judges was first mooted, it was shortly after I was appointed…. We were grappling with the problem of many judges believing that further education was an interference with their independence. We had great trouble trying to convince people that the more you were educated, the more independent you could become. There has been a degree of resistance and resentment to the notion of continuing education.
> **Circuit Court Judge, Interview No. 9**

> […] the concept of judicial independence is a very strong one. Most judges in my experience are perfectly willing to go along with a judicial support, judicial education concept. But they don't like being told they need training. It doesn't ring well with them.
> **Retired Judge of the Superior Courts, Interview No. 14**

> Partly because appointees to the Bench are largely from the Bar, few senior counsel are willing to admit gaps in their knowledge.
> **Circuit Court Judge, Interview No. 12**

80. Cited in Keane, *Ibid*.
81. Bangalore Principles, 6.1.
82. *Ibid*, 6.2.
83. *Ibid*, 6.3.
84. *Ibid*, 6.4.



In 1996, only €6,000 was made available for judicial studies. However, over the years the sum has steadily increased, from €63,486 in 1998 to €450,000 in 2006. The Institute organises events for judges and distributes Bench Books with guidelines for newly appointed judges. Traditionally, the JSI organises one conference for each section of the judiciary with one annual event for all members.

Judges interviewed for the present study had very mixed views on the effectiveness of judicial studies events. A number were quite satisfied with the programme, while others believed it was inadequate.

> Quite effective given the demands on judicial time and the need to maintain judicial neutrality.
> **Anonymous Judge, response received in February 2006**

> I think very well. There was a conference for the entire Bench, top to bottom, and then separate Circuit Court judges own annual conferences and we've had some stuff on that so I'm quite happy. It's been adequate.
> **Circuit Court Judge, Interview No. 7.**

> It's been good. We have an annual conference once a year. We try and pick topics that are relevant to our daily practice and there are once-off lectures as well.
> **Circuit Court Judge, Interview No. 11**

> It is very important that judges are going to these conferences and the round table dinner is also very helpful… You can chat about the difficulties that you find. It's very interesting that way. Nine years is long in some respects. But in the overall picture it's a short period of time and I think the JSI is worth its weight in gold.
> **District Court Judge, Interview No 16**

Other judges were more critical.

> The Judicial Studies Institute only "moderately" responds to judges needs.
> **Judge of the Superior Courts, Interview No. 5**

> I think the JSI has had some very interesting and useful conferences and I wouldn't criticise it overly but I think that judges probably need a bit more help in terms of induction, and also when new areas of legislation come in rather than just being given the text of the Act and make what you will of it. It would be helpful.
> **Retired Judge of the Superior Courts, Interview No. 14**

> It hasn't been effective at all in my opinion and I would have quite strong views about what the JSI should be doing […] to call it an Institute is completely inappropriate.
> **Judge of the Superior Courts, Interview No. 8**

> The training and education programme is working in a vacuum. The conferences happen much too infrequently. Once or twice a year is the most we get to interact and meet. One of the best ways to advance one's knowledge of the law is by active involvement with each other and discussing ideas as they come up and being guided by seminal lectures or papers.
> **Circuit Court Judge, Interview No. 9**

Several judges felt that the programme did not meet the individual needs of judges and recommended that judicial studies sessions should be organised for small groups of judges on a specific topic.

> I would like more interactive programmes rather than lectures. I would like more informal roundtable discussions.
> **Judge of the Superior Courts, Interview No. 6**

> There are always improvements. The biggest problem we have in judicial training is getting lectures and materials that affect us in our day-today business, and to try to avoid too esoteric and remote options. That's always a problem […] You can get overly academic papers, when you're a hands-on judge, particularly when your time is short, you want training that helps you do the job.
> **Circuit Court Justice, Interview No. 10**

> There are two annual conferences, one which encompasses all judges, and we all meet in Dublin Castle. You might have someone like Tom O'Malley come to talk to us about sentencing policy or something like that. But in reality, that is of relevance to very few of the judges who are there, certainly High Court judges. Maybe a handful of us deal with sentencing matters. So it has no relevance to others who may be dealing with family law matters or judicial review. So the chances of giving everyone something meaningful in a single day seminar with three or four speakers is slight.
> **Judge of the Superior Courts, Interview No. 8**

Noticeably, judges of the Circuit Court were more likely to be critical of the timing of events on weekends, particularly because they already travel a great deal for sittings.

> I would like to see more frequent and shorter sessions. I am not in favour of weekend seminars. Many circuit and district judges always work away from their homes. Hence weekend conferences are an additional burden for those judges and their families. A week day seminar is just as beneficial.
> **Circuit Court Judge, Interview No. 11**

> […] a far more focused approach to training should take place on a regular basis where a talk is organised to which a handful of judges are asked to attend because what's being spoken about is relevant to their day-to-day work.
> **Judge of the Superior Courts, Interview No. 8**

The issues arising here relate to the fact that judges are expected to generally attend JSI events on their own time at weekends. Other areas of the public sector allow for officials to attend training programmes during the official working week. However, given the lack of judges sitting on the Bench, judges largely attend JSI events on their own time.

Concerns about judicial studies have not gone unnoticed and the Courts Service recently commissioned the Law School in the University of Limerick to conduct an evaluation. According to representatives from the Courts Service, the researchers recommended that there should be a Dean of Studies who is supported by researchers with additional administrative staff.[85] Not only would this enhanced Institute be responsible for organising in-service training for sitting judges, it would also provide induction for new judges. Finally, the researchers drafted a three-year strategic plan for the JSI which is dependent on resources. Clearly, given the findings in the present report, these recommendations are most welcome. However, to date they have not been acted on.

4.6.2 INDUCTION

There is currently no formal form of induction for any level of the judiciary, apart from the District Court which involves the assignment by the President of a new judge to another District Court judge for a week. For the most part, judges sitting on the Superior Courts have to rely on colleagues for guidance and of course, the President of the High Court or Chief Justice.

The majority of judges interviewed for the present study believed that their experience as general practitioners was sufficient to enable them to successfully manage a court and adjudicate on cases.

> Induction programmes are more important for judges who have specialised in one area. For example, procedures/ judicial practice differ in family and criminal cases.
> **Judge of the Superior Courts, Interview No. 5**

Ireland's practice in this area diverges from comparable jurisdictions,[86] for example, Scotland and England where newly appointed judges undergo induction programmes before joining the Bench.[87] Most judges interviewed felt that there should be some form of proper induction in Ireland. It is also important to remember that if induction programmes were organised for judges, the Government could entertain applications from academic lawyers who might have no or few years in practice.

85. Interview with Ms Catriona Gilheany, Acting Secretary to Judicial Studies Institute and Brendan Ryan, Director of Corporate Services, the Courts Service, 9 January 2006.
86. Judges in continental legal systems are educated for many years before joining the Bench. For example, to become a judge in France, one must train at the *Ecole Nationale de la Magistrature (ENM)* at Bordeaux. Selection is competitive and entrants complete 31 months of training before they can sit on the Bench. Source: All Party Oireachtas Committee Report on the Constitution, at p. 65.
87. In Scotland one induction course is usually organised for newly appointed judges each year (see Scotland, Judicial Studies Committee Work Plan at http://www.judicialstudies-scotland.org.uk/plan.htm). The English Judicial Board Management Plan (2005-2006) also reveals that it will organise an induction course "to equip newly appointed recorders with the knowledge and skills necessary to perform their judicial role effectively in the Crown Court" (see www.jsboard.co.uk).

4.6.3 HUMAN RIGHTS EDUCATION

As mentioned above, section 6.4 of the Bangalore Principles includes an obligation for judges to keep appraised of all relevant developments in international law and other instruments establishing human rights norms. The JSI has organised a number of events on international human rights, particularly in preparation for the ECHR being given further effect.[88] The JSI has also given approval to judges to either attend or chair/speak at major conferences and events, some being national in focus[89] and others international.[90] Further, a number of judges have participated in Council of Europe training events and the JSI is proposing to organise a visit to the European Court of Human Rights for six to eight judges of the Superior Courts. [91]

The above information seems to suggest that a significant number of events occurred in the period prior to the introduction of the ECHR Act 2003 and that the introduction of the Act may have heralded a new phase of judicial studies on human rights for Irish judges. However, what is also apparent is that these events mainly focus on the ECHR and its jurisprudence, rather than on UN human rights instruments. It would therefore appear that this a lacuna in the current education programme and is of serious concern given that most important developments within the human rights sphere happen at the UN.

All judges interviewed for the present study were asked to describe their education in human rights and all explained that they have been trained in constitutional fundamental rights and freedoms.

> Our education in terms of human rights would have been the study of fundamental rights and Irish law – John Kelly's book.
> **Irish Judge, International Court, Interview No. 13**

> I think I was lectured in constitutional law.
> **Judge of the Superior Courts, Interview No. 4**

Some judges interviewed had either been involved in or adjudicated on notable constitutional cases concerning personal rights guarantees, as well as equality cases.[92]

> Well, I practiced constitutional law. I was the Junior Counsel in the _____ case in 1970s. So I was very interested and I did a lot of those sorts of cases.
> **Circuit Court Judge, Interview No. 7**

> I would have been quite aware because I did a lot of criminal work. I wasn't an expert but I would have been very familiar with the whole constitutional position in Ireland and the rights of the accused persons, fundamental freedoms, and some general stuff on the ECHR.
> **Circuit Court Justice, Interview No. 10**

88. For example, the JSI organised a conference for Superior Court judges on the European Convention on Human Rights in June 2001.
89. For example, the Hon. Mr Justice Declan Budd, the Hon. Mr Justice Kevin O'Higgins and the Hon. Mr Justice Nicholas Kearns attended a seminar on human rights and the criminal law, organised by the Irish Centre for European Law, Trinity College Dublin, January 2000; Judge Joseph Mangan attended at a conference on migrant workers and human rights, organised by the Irish Human Rights Commission and the Law Society of Ireland, October 2005; Judge Thomas O'Donnell attended a conference on the European Convention on Human Rights, organised by the Bar Council, December 2005 and Judge James Scally attended the eight-annual NGO Forum on human rights, organised by the Department of Foreign Affairs, June 2006; the Hon. Justice McMenamin addressed the a conference on children's rights organised by the Irish Human Rights Commission/the Ombudsman for Children/Law Society of Ireland in November 2006; Source: The Judicial Support Unit, December 2006.
90. For example, the Hon. Justice Frederick Morris attended a conference on human rights law and migration, at the Trier Academy of Law, June 2000; the Hon. Justice Joseph Finnegan attended a conference on a Charter of Fundamental Rights for the European Union, at the Trier Academy of Law, October 2000; the Hon Mr Justice Laffoy, His Honour Judge Deery and Judge Finn attended a conference on the "European Court of Human Rights – A Review of Recent Case-Law", at the Trier Academy of Law, January 2001; the Hon. Mr Justice Paul Gilligan attended the first working group meeting of the European Human Rights Training Network in Strasbourg, May 2006 and the Hon. Justice Paul Gilligan attended a European Justice Training Network training activity on the effects of ECHR jurisprudence on nationals systems, in Barcelona, in November 2006. Source: The Judicial Support Unit, December 2006.
91. The JSI indicate that other visits may be organised for other levels of the Irish Judiciary. Source: the Courts Service, December 2006.
92. Other judges interviewed had engaged in a number of other human rights related activities, however, they cannot be described here as it would identify them to the reader.

As regards international human rights standards, apart from judges who had previously lectured or been involved in international networks or associations, most judges had only attended conferences or events. This is not surprising given that international human rights are a relatively new feature of undergraduate university based law courses and postgraduate programmes. Although the Law Society of Ireland solicitor training programme has incorporated some form of human rights education since the early 1990s[93], the Honourable Society of King's Inns, which traditionally trains barristers, has never included a formal human rights module in its Diploma programme. In addition, international human rights do not feature significantly in the Barrister-At-Law programme.[94]

The overall effect of this would be that many judges on the Bench may never formally have studied international human rights as part of their previous legal education. Moreover, one judge interviewed believed that there was an antipathy to international human rights among certain sections of the judiciary which might mean they are unwilling to fully engage with judicial studies on this topic.

> Some would admit to knowing little about the Convention.
> **Circuit Court Judge, Interview No. 12**

However, it must be noted here that the JSI has funded one judge of the District Court to partake in both a Diploma programme on the European Convention on Human Rights and an LLM Programme in International Human Rights Law, so there are some judges interested in this area.

In terms of what is provided by the JSI, a number of judges were satisfied with events organised on the ECHR.

> The conferences have been very effective. They're up-to-date with wonderful speakers […] We have had lawyers and academics from Matrix in London, who specialise in human rights law. They were interesting, not just from the substantive point of view as from a practical point of view.
> **Circuit Court Judge, Interview No. 7**

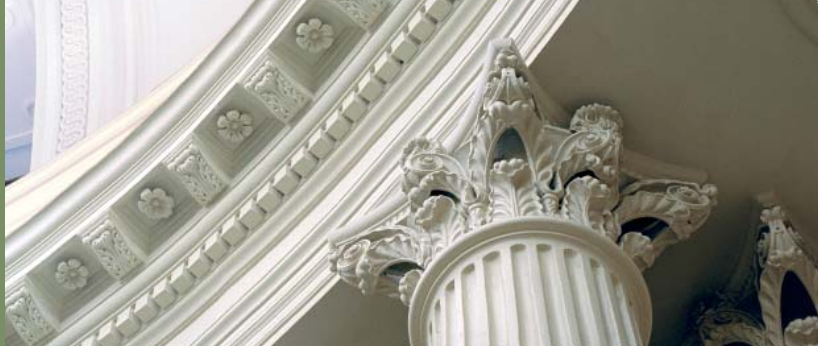
Again, other judges wanted additional more practically and narrowly focused sessions on select human rights topics.

> I would favour more interactive programmes rather than lecturing. I would like more round-the-table discussions. Informally we would have that. Perhaps it could be more structured.
> **Judge of the Superior Courts, Interview No. 6**

Indeed, one judge interviewed from the Superior Courts said that apart from Article 6 (right to a fair trial) other Convention articles and jurisprudence were not of interest to him. He explained that he arrived at this conclusion on the basis of his age and the fact that he adjudicated on mostly criminal cases.

It is clear from the findings above that if judges are to be kept appraised of international human rights developments and of their practical application, the JSI will need to undertake a human rights training needs analysis to establish what the judiciary requires and organise more frequent and focused sessions.

93. Interview with Mr TP Kennedy, Head of Education, Law Society of Ireland, 28 November 2005.
94. However, it is important to mention here that the King's Inns are looking at the possibility of incorporating human rights standards into their Diploma Programme and are also open to reviewing the Barrister-at-Law degree. Interview Ms Sarah McDonald, Dean of Law School, Kings Inns, 27 November 2006.



4.6.4 FURTHER ACADEMIC STUDIES

The JSI facilitates judges who wish to engage in further academic study and this is a major strength in the JSI's activities. For example, the JSI has funded District Court judges to take part in social context type education[95] such as training on Drug and Alcohol policy. As mentioned above, the JSI facilitated a judge to study for a Diploma and a LLM programme and one judge is completing a PhD. Such endeavours are extremely important for the judiciary as they increase expertise and legal knowledge on the Bench. Indeed, one judge interviewed spoke of the importance of judges engaging in further education and imparting the learning to other members of the judiciary.[96] However, the current difficulty is that further academic study for judges is not legislated for, meaning that the JSI could refuse to fund further education programmes for judges. Moreover, with no formal policies in place regarding study leave (in contrast, other areas of the public sector do have such policies), judges may be dissuaded from or unable to engage in further education programmes. A final point made by one judge is that while the JSI will fund a relevant course of education, they do not circulate any further education opportunities.[97]

Action is required to protect and facilitate judges' right to further academic study. It is therefore recommended that further academic studies for judges be formalised in legislation and that formal polices be put in place regarding study leave.

4.7 JUDICIAL ACCOUNTABILITY

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.[98] The UN Basic Principles set out basic standards for discipline, suspension and removal.

> 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.
> 18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
> 19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
> 20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.[99]

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. Principle 18 makes clear that judges can only be suspended or removed for very serious reasons such as incapacity or unethical behaviour. Judges cannot be removed: "because of opposition to the merits of a case or cases decided by the judge in question".[100] Principle 19 also points to the necessity of drafting a judicial code of ethics to guide judges on appropriate behaviour. Notably, the UN Basic Principles do not specify what kind of behaviour should be disciplined or what disciplinary action can be taken.

95. Refer to Section 7.4.1.
96. Interview with a District Court Judge, Interview No. 15. It is worth mentioning here that Judge Tom O'Donnell, having completed a third level human rights programme, distributed a paper to all members of the Judiciary on human rights. It is entitled: "The Constitution, the European Convention on Human Rights Act 2003 and the District Court - A Personal View from a Judicial Perspective".
97. Interview with a District Court Judge, Interview No. 16.
98. Russell, P. H. (2002) "Toward a General Theory of Judicial Independence", in Russell, P. H. and O'Brien, D. M. (eds) *Judicial Independence in the Age of Democracy – Critical Perspectives from around the World*, University Press of Virginia, at p. 14.
99. UN Basic Principles.
100. UN (2003), *supra*, at p. 129.

COE Recommendation No. R(94) 12 goes further and recommends that disciplinary measures may include: (1) the withdrawal of cases from a judge; (2) moving the judge to other judicial tasks within the court; (3) economic sanctions such as a reduction in salary for a temporary period; and (4) suspension. It also recommends that reasons for removal: "should be defined in precise terms by the law".[101] However, it does not provide clarity on behaviour that should be sanctioned. Instead, the CCJE recommends that judicial misconduct should be legislated for at a national level.[102]

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 (Czech Republic, Estonia, Lithuania, Slovenia, Slovakia and Ukraine), and in others, a Judicial Council acts as a disciplinary court (France, Moldova and Portugal).[103] 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".[104] The inclusion of judges in the disciplinary mechanism does seem to offer some protection of judicial independence.

Finally, Principle 16 of the UN Basic Principles states that judges should enjoy "personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions". This principle reflects the fact that judges are public servants and so the State should compensate persons wronged by judicial misconduct.

4.7.1 CONSTITUTIONAL AND STATUTORY PROVISIONS

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.

In contrast to constitutional provisions on impeachment for the President,[105] this Article does not go any further in explaining 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.[106]

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.[107] Moreover, there are no statutory provisions outlining a procedure for the investigation of complaints made against judges of any court.

Certain legal provisions do allow the Chief Justice to interview a judge of the District Court:

> […](w)here 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 disrepute, the Chief Justice may interview the judge privately and inform him of such opinion.[108]

101. 5.1 of the European Charter on the Statute for judges also states that the grounds for disciplinary sanction should be "expressly defined".
102. Principle 1.3.
103. Kuijer, M. (2004) *The Blindfold of Justice: Judicial Independence and Impartiality in Light of the Requirements of Article ECHR*, Nijmegen Wolf Legal Productions, at Chapter 6.
104. Principle 5.1.
105. "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."
106. "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."
107. Hogan and Whyte, at p. 1009.
108. Section 10(4) of the Courts (Supplemental Provisions) Act, 1961, as amended by Section 21(2) of the Courts Act, 1991.

Further, section 36(2)(a) of the Courts (Supplemental Provisions) Act, 1961, 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".[109]

Apart from the legislative provisions outlined above, there was no other way to investigate and resolve judicial misconduct until the *Curtin* case (see below).[110] Also, there is no complaints mechanism for members of the public or legal professionals who might feel wronged by a judge.

Over the years, reported incidents of judicial misconduct have been rare and mainly relate to delays in delivering reserved judgments[111], biased comments made by judges in court[112] and poor management of court lists. However, successive governments were slow to respond to any of these issues. The lack of a proper accountability mechanism for judicial accountability came into sharp focus following certain events in 1998/1999 and is described in the following section.

4.7.2 THE 'SHEEDY AFFAIR' [113]

Mr Philip Sheedy was sentenced to four years imprisonment in October 1997 by Judge Matthews in the Circuit Criminal Court, having pleaded guilty to dangerous driving and causing death. Friends of Mr Sheedy met Mr Justice O'Flaherty, a member of the Supreme Court, by chance and informed him of the details of the case. Mr Justice O'Flaherty decided that Sheedy's case was very similar to another dangerous driving case which he had presided in and where a custodial sentence had been reduced.[114] Subsequently, Justice O'Flaherty contacted the County Registrar, Mr Michael Quinlan, explained the details of the case and asked if the case could be re-listed.

The County Registrar then contacted Mr Sheedy's solicitor and advised him that he could make an application before a Circuit Court justice, who might or might not be willing to hear the case. If an application was to be made, the solicitor was advised to submit the application to a judge in Court 24 of the Dublin Circuit Criminal Court. Sheedy was originally sentenced in this court by Judge Mathews, but when the case was re-listed, Judge Cyril Kelly as sitting at Court 24.

The re-listed hearing occurred in November 1998, very shortly after the Chief State Solicitor had been informed of its date. The hearing was over very quickly without either side having an opportunity to make interventions and without a representative of the Chief State Solicitor in the courtroom. Judge Kelly declared that having read a psychological report he had concerns about the mental health of Mr Sheedy and suspended the remainder of his sentence with a good behaviour bond of three years.

Judge Kelly based his decision on medical reports which were available to Judge Mathews at the time of sentencing and so the Director of Public Prosecutions made an application for judicial review in February 1999. However, the case was withdrawn as the accused agreed to a quashing of the order and returned to prison. Mr Sheedy's legal team then proceeded to appeal against the severity of the original sentence and the Court of Criminal Appeal reduced it from four to three years.[115]

Soon afterwards the Attorney General asked the Chief Justice Hamilton, to conduct an investigation into the affair. The Chief Justice found that although Justice O'Flaherty had acted out of "humanitarian interest", he concluded that the judge's intervention was "inappropriate and unwise, that it left his motives and actions open to misinterpretation and that it was, therefore damaging to the administration of justice". The Chief Justice also criticized Justice Kelly[116] for claiming to reconsider Sheedy's sentence on the basis of an up-to-date psychological report and for carrying out a sentence review without giving the prosecution enough notice.[117]

109. This procedure was used in 2000 to investigate the transferring of a pub license by District Court Judge, Donnchadh O'Buachalla, into Ms Catherine Nevin's sole name (the license had also been in her husband's name). Ms Nevin was a friend of Judge O'Buachalla and had just been charged with her husband's murder. Mr Justice Frank Murphy chaired the Inquiry and found that Judge O'Buachalla'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) "Report finds O'Buachalla carried out functions without bias", www.rte.ie/news/2000/1205.nevin.html
110. According to the Report of the Committee on Judicial Conduct and Ethics, 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 to in order to reach a resolution (at p. 9).
111. Working Group on a Courts Commission (1999) *Sixth Report*, Government Stationary Office, at p. 56.
112. Refer to Section 6.4.1 on Personal Bias and the Irish Judiciary.
113. Chief Justice, Liam Hamilton (14 April 1999) *Report on the Role of the Judiciary*, available from the Irish Courts Service.
114. *People (DPP) v McDonald*, Court of Criminal Appeal, unreported, 29 July 1998.
115. *People (DPP) v Sheedy* [2000] 2 IR 184.
116. Judge Kelly was elevated to the High Court just before the Chief Justice's Inquiry began.
117. The actions of the County Registrar were considered in a separate inquiry conducted by the Department of Justice, Equality and Law Reform. Refer to Section 6.5 for details.

Following the publication of the Chief Justice's report, the Government announced that it was beginning the impeachment process and the two judges then resigned. Further attempts by the Joint Oireachtas Committee on Justice, Equality and Law Reform to investigate the incident failed on separation of powers grounds. The Joint Committee had written to Justice O'Flaherty and asked him to appear before them to answer some questions. However, Justice O'Flaherty refused citing Article 35.2 of the Constitution, "that all judges shall be independent in their judicial functions and subject to the Constitution and the law". He continued that had the Oireachtas initiated legal proceedings under Article 35.4.1° he would have been obliged to appear.

In terms of comparing what happened following the Sheedy incident with the UN and COE standards on judicial accountability, it is clear that the entire process was seriously lacking. The investigation itself was not based on "well established standards of judicial conduct", as required by Principle 18 of the UN Basic Principles. There was no code of conduct or foundation in law for the Chief Justice's inquiry. However, the Chief Justice's inquiry was useful in establishing the facts which were damaging to the judges concerned. Further, without a body to discipline a judge or rules on sanctions, the only option for the Government was impeachment which might not have been an appropriate sanction in this instance.

4.7.3 PROPOSALS FOR REFORM

Before and since the Sheedy Affair, the issue of judicial accountability has been considered by numerous bodies and groups. Their recommendations are summarised below.

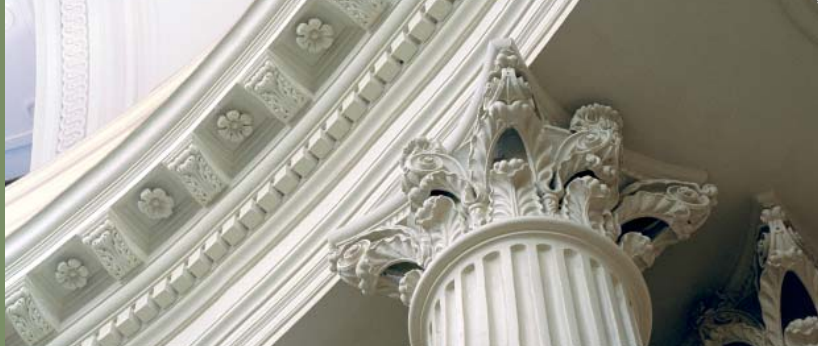
The 1996 Constitution Review Group was critical of the lack of clarity in the impeachment process and recommended that judges should not just be removed by a simple majority vote in the Houses of the Oireachtas. Instead, the Group recommended that a two-thirds majority should apply. It also recommended that judicial conduct generally should be regulated by the judiciary itself within the legislative framework of a Judicial Council embracing all the courts and that amendments should be made to Article 35 of the Constitution to facilitate this.[118]

The All-Party Oireachtas Committee on the Constitution agreed with many of the Constitution Review Group's recommendations. However, the Committee also recommended the establishment in the Constitution of a Judicial Council with reference to the function of prescribing a code of ethics.[119]

In 1998, the Working Group on the Courts Commission recommended that in order to protect judicial independence, a judicial body – a Committee on Judicial Conduct and Ethics - should be established to deal with complaints and disciplinary matters.[120] This report also recommended that this Body should be responsible for drafting a General Code of Ethics for judges as well as having a role in judicial studies.

By far the most extensive set of recommendations is to be found in the Report of the Committee on Judicial Conduct and Ethics (2000).[121] This report proposed that a Judicial Council should be set up with representation from all members of the judiciary. The proposed Council was to be empowered to deal with: (1) judicial conduct/ethics, (2) judicial studies/publications and (3) conditions of work.

118. Constitution Review Group (1996) Report of the Constitution Review Group, Government Stationery Office.
119. All-Party Oireachtas Committee on Constitution (1999) *Fourth Progress Report: The Courts and the Judiciary*, Government Stationery Office: Dublin.
120. Working Group on the Courts Commission (1998) *Working Group on the Courts Commission Report*, Courts Service: Dublin.
121. Committee on Judicial Conduct and Ethics (2000) *Committee on Judicial Conduct and Ethics Report*, Government Stationery Office: Dublin.



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 the appeal/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.

The Report suggested that the Panel of Inquiry should carry out its inquiry in a manner similar to the procedures which exist for investigating District Court judges. In circumstances where the Panel finds impropriety on the part of a judge, the Report recommended a series of sanctions which are not legal in character. For example, the first would be private reprimand by the Committee, the second a public reprimand by the Committee, and the third, a recommendation to the Government to consider tabling a resolution calling for the removal of a judge.

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 (Principle 17). Moreover, given that the 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.

COE Recommendation No. R(94) 12 suggests that disciplinary measures should include withdrawal of cases from judges, moving a judge to another task or imposing economic sanctions. The Report does not recommend that economic sanctions be imposed on judges and it is unclear whether its recommendations would extend to recommending a particular judge undergo training, for example anti-racism awareness training if a judge was found to be discriminatory.

4.7.4 THE CURTIN CASE: THE IMPEACHMENT PROCESS CONSIDERED

In response to the Report of the Committee on Judicial Conduct and Ethics, the Government published the Twenty-Second Amendment to the Constitution Bill in 2001. The main purpose of this Bill was to put the Judicial Council on a legal footing and to amend the impeachment process. However, the Bill was subsequently withdrawn.

Then in January 2002, another political crisis emerged when Judge Curtin, a Circuit Court justice, was charged with possessing child pornography. Judge Curtin was subsequently acquitted in June 2004 when it emerged that there were technical difficulties with the search warrant. Following Judge Curtin's acquittal, the Government moved two motions in each House of the Oireachtas. The first called for the removal of Judge Curtin from office pursuant to Article 35.4.1, and the second proposed the establishment of a Joint Committee of the Houses of the Oireachtas for the purposes of investigating/receiving evidence relating to matters of public concern and in accordance with fair procedures. This motion also indicated that the powers of the Joint Committee would be amended to compel witnesses. The Dáil suspended the first motion with a view to establishing a Joint Oireachtas Committee to investigate the judge's conduct.

Soon afterwards, the Oireachtas passed legislation amending existing statutes on compellability and privileges, as its existing powers did not apply to judges or could not be employed in impeachment processes.[122] These amendments came into effect in June 2004, and in the same month, the Committee on Procedure and Privileges, Dáil Éireann, adopted an additional Standing Order (Number 63A) setting out special procedures governing any motion for the removal of a judge pursuant to the applicable constitutional or statutory provisions.

After the Joint Committee began its work in 15 June 2004, Judge Curtin initiated legal proceedings challenging the constitutionality of the investigation and finally lost his appeal at the Supreme Court in March 2006.[123]

The basis of Judge Curtin's legal challenge was that the procedures adopted by the Houses were not capable of providing constitutional fairness. He also contended that the requirement to appear before the Committee constituted an encroachment on the independence of the judiciary.

122. The Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act, was amended by the Committees of the Houses of the Oireachtas.
123. *Curtin v Dáil Éireann* [2006] IESC 14.

The Supreme Court stated in a judgment written by Murray J, that it was "axiomatic that any resolution proposed pursuant to Article 35.4.1 of the Constitution will involve some sort of intrusion into the life or affairs public or private of the judge". Moreover, because of the presumption of constitutionality, the Court determined: "that the powers of the Houses of the Oireachtas will be exercised in respect of the principles of basic fairness and constitutional justice." The Court also indicated that the courts would intervene if necessary to "protect the independence of the judiciary and the rights of an individual judge from irresponsible, irrational or malicious abuse of these powers".

> In the light of these basic principles, the Court considers that there is no ground for the challenge to the power of a Committee of the Houses of the Oireachtas to call a judge before it or to require him or her to produce documents or other things, which the Committee considers necessary for its investigation of matters relating to a motion duly proposed pursuant to Article 35.4.1. It is legitimate for the Committee to ask a judge to provide relevant documents and articles.
>
> The Court does not consider that the power to call a judge as a witness or to produce articles as evidence involves any improper or unconstitutional invasion of judicial power or judicial independence. On the contrary, the power is included in the Constitution for the purpose of ensuring the fitness and integrity of the judiciary. The Court finds nothing unconstitutional in the impugned provision.

The Court went on to consider the interpretation of Article 35.4.1 and held that the Houses of the Oireachtas could appoint a Committee to assist in its consideration of resolutions pursuant to Article 35.4.1°. Reading this Article with other relevant provisions of the Constitution, the Court said that there was nothing to prevent the Houses from adopting standing orders for the establishment of Committee to investigate judicial misconduct. Further, the Court noted that Judge Curtin did not question the setting up of the Joint Committee *per se*. He only demanded that its procedures would meet fundamental constitutional requirements of fairness and justice. Given that the measures introduced by the Government explicitly stated that "principles of basic fairness of procedures and the requirements of natural and constitutional justice" would apply to proceedings, the Court believed that this was sufficient to accord Curtin his full rights to constitutional justice and fair procedures.

This judgment is extremely important as it sheds light on the operation of Article 35.4.1°. For instance, the Court makes it clear that the Oireachtas can establish a Committee to investigate stated misbehaviour by judges and that judges can be compelled to cooperate with such an investigation. It also establishes that judges are entitled to constitutional justice and fair procedures and that the courts will intervene where the rights of an individual judge are subject to abuse.

In conclusion, the Curtin case illustrates the defective nature of current judicial accountability mechanisms in Ireland in that the inquiry into his behaviour was not processed expeditiously with the result that no impeachment took place. However, at least the Supreme Court has provided clarity and established that, judges can be held to account in this way and are entitled to fair procedure rights.

4.7.5 THE COMMITTEE ON JUDICIAL CONDUCT AND ETHICS (2000): PERSPECTIVES OF JUDGES

All judges interviewed for the present study welcomed the proposals from the Committee on Judicial Conduct and Ethics and were supportive of the concept of judicial accountability generally.

> Independence does not mean that you are not accountable.
> **Circuit Court Judge, Interview No. 12**

> We need to implement the terms of the Keane report. It's a very considered report and we're concerned that it can get up and running.
> **Judge of the Superior Courts, Interview No. 6**

> Yes I do. I was involved in discussion of that. We really do need something like that because as we can see from the Curtin case, and indeed was seen from the O'Flaherty case before, that there's nothing between taking no notice or just saying a few words to somebody, or impeachment. You need something to deal with the lesser offences and to keep judicial ethics going. I think that's very important and I think it's most unfortunate that that wasn't brought into law between the O'Flaherty case and the Curtin case. It wasn't for lack of persuasion by Judge Keane. Because I know that Judge Keane repeatedly went to the Government saying we need this done now, and it never happened. Then the Curtin case came up and that threw a spanner in the works.
> **Retired Judge of the Superior Courts, Interview No. 14**

> There needs to be a Judicial Council, and within that Council, there needs to be a complaints mechanism. I'd be in favour of speeding up the process by which that is being done. I think it's very slow. I think the public demand accountability from judges. It only takes a couple of high profile cases to increase the need for it. The Curtin case has shown up severe deficiencies in dealing with complaints against judges. There's only the nuclear option of the resolution of both Houses and that's cumbersome and completely unsatisfactory. So I think a Judicial Council – from what I know is proposed – I think would be very adequate. I cannot understand how every other jurisdiction can have a Judicial Council, and this jurisdiction seems to have such a great difficulty in putting one in place.
> **Judge of the Superior Courts, Interview No. 8**

> I do. I think it's very useful protection for the judiciary that there's a complaints mechanism, and that the Constitution is amended to deal with it. I've nothing to hide and I don't think most judges do […] if you get a judge who's persistently bad-tempered and bad mannered in court and obnoxious. If people feel strongly that they're being dealt with badly, they should have a right of complaint.
> **Circuit Court Justice, Interview No. 10**

> It is good for the judiciary and the administration of justice that such a procedure should be established.
> **District Court Judge, Interview No. 15**

A number of judges also welcomed the inclusion of lay people in proposals for a Judicial Council.

> There should only be lay people on the committee. No barristers, no solicitors, no academics. There is no reason why competent persons from various other walks of life should not be able to work very successfully on this body. Lay members would be more circumspect. They would introduce a practical approach with every resolution to determine the issue. Legal advisers could be made available should they be requested.
> **Circuit Court Judge, Interview No. 11**

> There has to be a complaints mechanism.
> The only perspective I would view it from is the public's perspective.
> **Judge of the Superior Courts, Interview No. 3**

Another judge was concerned that existing variations in the way that District Court judges are dealt with will be maintained in the future.

> Given the appalling mess in the recent past, I'm in favour of a Judicial Ethics Bill covering all aspects. The one reservation I'd have […] is that we're a two-tier society. We can actually be dealt with and disciplined by the Chief Justice after an appropriate inquiry. The others have more complicated impeachment process. We don't have that in the District Court. I would have thought that if there's going to be a Judicial Council Bill and given the workload of district judges and given the amount of time with the public at the cold face. I actually feel we should as judges, all be on the same level. If it's a matter of impeachment to dismiss a judge in the higher courts, it should be the same for us.
> **District Court Judge, Interview No. 16**

From the comments above it is evident that there is a lot of support for the Report of the Committee on Judicial Conduct and Ethics and an eagerness to see a judicial accountability mechanism put in place.

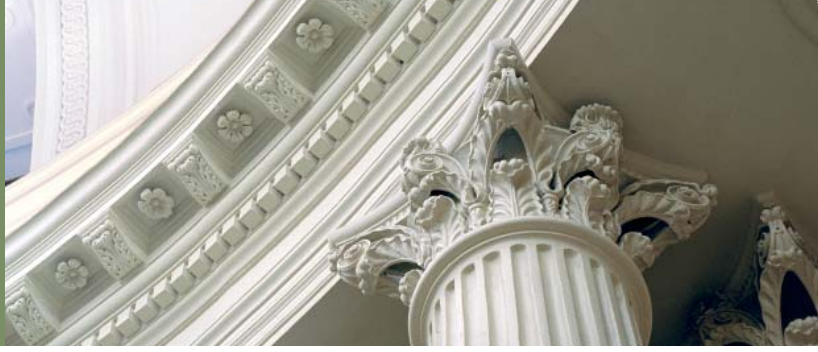
At present there is still no system even though the Government has committed itself in its legislative programme to introducing a Judicial Council Bill "to provide effective remedies for complaints about judicial misbehaviour including lay participation in the investigation of the complaints".[124] At the time of writing, the Bill had still not been published, six years after the Report from the Committee on Judicial Conduct and Ethics.[125] It is therefore recommended that the Government move to introduce this legislation as a matter of urgency.

4.8 RECOMMENDATIONS

Appointments

- Criteria for judicial selection should be replaced with criteria with competencies that are transparently meritocratic and precise.
- When advising the Government on judicial appointments, the number of persons short listed by the JAAB should be reduced to three. The JAAB should also be involved in advising the Government on promotions.
- Criteria for recommending a judge for appointment or elevation by Government must be transparent and defined. The Government should consider publishing reports indicating why it has recommended a person for appointment or elevation.

124. See the Office of the Taoiseach at http://www.taoiseach.gov.ie/index.asp?docID=2581
125. However, it is likely that the legal proceedings in the Curtin case prevented the Government from moving the Bill.



Security of Tenure

- Security of tenure for District and Circuit Court should be guaranteed via the Constitution.

Representation and Association

- Legislation establishing a Judicial Council should be urgently brought forward.

Freedom of Expression

- A 'Code of Ethics' should be drafted for judges to guide them on appropriate conduct, and in particular, on extra-judicial comment.
- Judges should be facilitated to educate the public on specific topics through speeches and lectures.

Judicial Studies

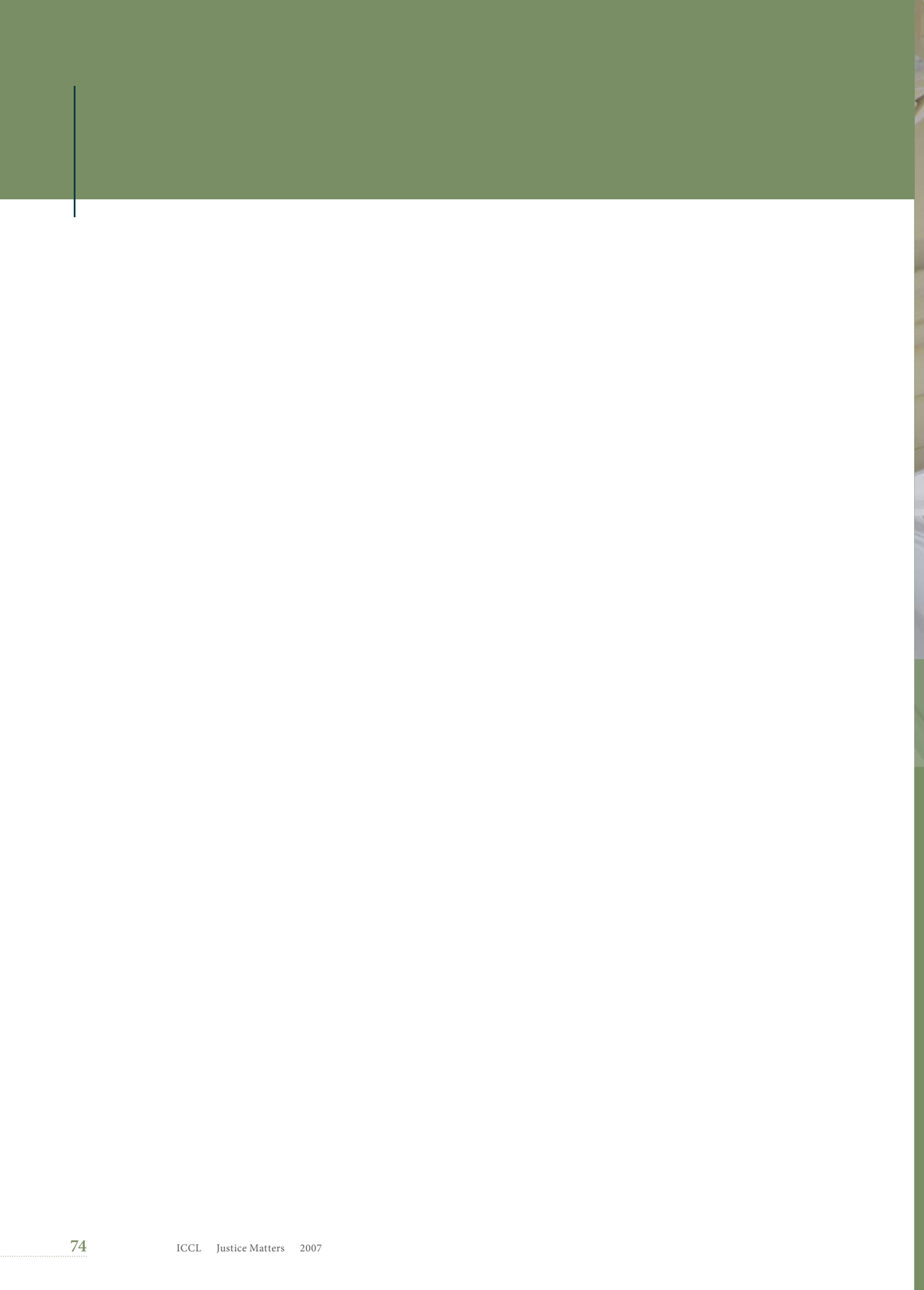
- Future developments in judicial studies should adopt a more structured approach. In order to meet the needs of individual judges, needs assessments of individual judges should be conducted.
- Current proposals from the JSI on the development of judicial studies (a Dean of Studies, induction for new judges, enhanced studies for judicial studies, three-year strategic plan) must be acted upon and funded as a matter of urgency by the Government.
- Comparable to other sections of the civil service, judicial studies and further academic study should be incorporated into professional time for judges.
- The right of judges to pursue further academic studies should be recognised in law.

Human Rights Education

- An international human rights training needs analysis of judges should be conducted to establish what additional programmes the judiciary requires.
- Future sessions on human rights should be more frequent and focused on specific human rights topics.
- Education on UN instruments should be incorporated into all programmes.

Future Legislation on Judicial Complaints

- Legislation giving effect to recommendations made by the Report of the Committee on Judicial Conduct and Ethics (establishment of a Judicial Conduct and Ethics Committee to consider complaints made against judges by members of the public; an informal system for resolving complaints; a Panel of Inquiry to undertake investigations; sanctions to include a private or public reprimand or resolution calling for the removal of a judge; sanctions including that judges attend counselling or treatment) should be introduced as a matter of urgency.
- This legislation should ensure that complaints against judges are processed expeditiously and fairly under an appropriate procedure. Examination of complaints at initial stages should be kept confidential.
- Sanctions against judges should include the option of recommending a judge to undergo awareness training if a judge was found to be discriminatory.
- A Code of Ethics guiding judges on appropriate behaviour should be drafted in consultation with members of the judiciary. The Government and judicial branch could look to the Bangalore Principles and other sets of non-legally binding principles in this regard.



05

IMPARTIALITY AND THE IRISH JUDICIARY

5.1 INTRODUCTION

This section focuses on impartiality and considers whether Irish law and practice are in line with international human rights standards. Section 5.2 examines the development of bias in Irish law and section 5.3 identifies grounds for disqualification. This section reveals that the Irish courts distinguish between actual bias (the subjective test) and where there might be a reasonable apprehension of bias (the objective test) and that this broadly complies with international human rights standards.

Section 5.4 considers the issue of personal bias among the Irish judiciary and indicates that cases of subjective bias among the judiciary are very rare. However, this section also reveals that there is evidence to suggest that judges have sometimes made statements that could be construed as racist or sexist. Section 5.5 looks more broadly at the subject of corporate bias which refers to the fact that because of their background, judges tend to have a particular outlook on life and a similar value system. Although this question is not substantively addressed here, this section does demonstrate that judges have very similar profiles and backgrounds. This section makes recommendations to increase diversity on the Bench and within the legal profession.

Finally, section 5.6 deals with managing fair court proceedings and makes clear that there is a positive obligation on judges to prevent bias and discrimination happening in their courts. This section also looks at cases where judges have taken positive action to prevent bias from happening in their courts.

5.2 IMPARTIALITY AND IRISH LAW

Principle 2 of the UN Basic Principles provides that:

> The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The Universal Statute of the Judge also states that:

> […] in the performance of judicial duties the judge must be impartial and must so be seen. The judge must perform his or her duties with restraint and attention to the dignity of the court and of all persons involved.

One of the most extensive set of guidelines in the Bangalore Principles is the obligation on judges to be impartial. A judge is required to "perform his or her judicial duties without favour, bias or prejudice"[1]. Principle 2.2 also states that:

> […] a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

In contrast to other jurisdictions, 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", as mentioned in section 3, Article 34.5.1° 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 that they will uphold the Constitution and laws.

According to Hogan and Whyte, the declaration has been referred to by judges "in a more or less rhetorical way" and has never been fully considered or interpreted.[2] The wording of the declaration reflects the Constitution's drafting history and has been criticised by the UN Human Rights Committee,[3] together with the Constitution Review Group,[4] on the basis that it discriminates against individuals who do not believe in God.[5]

1. Principle 2.1.
2. At p. 994. For example, they cite Black J who said in the *Re Tilson*, *Infants* case on whether the Constitution discriminates between different religions, "If I had thought it did, I never could have made a public declaration that I would uphold it", *Re Tilson*, *Infants* [1951] IR 1, (1952) 86 ILTR 49.
3. Recommendation 29(b), concluding observations of the Human Rights Committee: Ireland, 24/07/2000.
4. Constitution Review Group (1996) *Report on the Constitution Review Group*, Government Stationery Office, at p. 179.
5. The All-Party Oireachtas Committee did not fully agree with these recommendations on the basis that most people believe in God. Instead they suggest that judge should be able to omit the religious reference if they so wish. See All-Party Oireachtas Committee at p. 51.

Personal rights guarantees in the Constitution are also relevant. Article 40.1 provides that:

> All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

Jurisprudence on the Irish constitutional equality guarantee is remarkably underdeveloped, particularly when compared with international jurisprudence.[6] However, Hogan and Whyte explain that the equality precept does bind the judiciary and note that during Dáil debates on the draft Constitution, Taoiseach de Valera indicated that the purpose of the provision was to cover the impartiality of judicial behaviour and the principle that legislation should not be discriminatory.[7] However, the courts have tended to consider judicial bias under Articles 35.2 and 34.5.[8]

Two basic principles of justice, *audi alteram partem*[9] and *nemo judex in causa sua*,[10] also apply to all judicial proceedings and a substantial body of jurisprudence has developed mainly under the latter. What is apparent from an examination of Irish case law on bias is that the domestic courts have developed almost identical standards as the European Court of Human Rights. Therefore, this is one area in which Irish law complies with international human rights norms. It is not possible to cover every aspect of bias here; rather the current section will refer to major decisions which are pertinent for the present study.

The Irish courts distinguish between actual bias (the subjective test) and where there might be a reasonable apprehension of bias (the objective test). However, most bias cases have arisen under the objective test in two ways: (1) circumstances where bias is presumed, such as pecuniary interest or ties of affinity and (2) all other cases where a "right-minded" person aware of all the facts might still suspect bias.[11]

For objective test to be established there needs to be a "real likelihood of bias"[12] or "a reasonable apprehension".[13] Bias is presumed in circumstances where there is a material or pecuniary interest[14] and prior involvement in a case may be adequate to establish bias.[15]

As regards the situations where it has been found that objective bias exists, like the jurisprudence under the ECHR[16], prior involvement in a case may be adequate.

The following section considers the development of jurisprudence on disqualification in more detail.

6. Casey, J. (2000), at p.458.
7. Hogan and Whyte, at p. 1325-1326. Hogan and Whyte draw on research conducted by Oran Doyle, a PhD candidate in Trinity College Dublin.
8. Hogan and Whyte, at p.1326.
9. Latin for 'to hear the other side'.
10. Latin for 'no man may be a judge in his own cause'.
11. Hogan and Whyte, *ibid*, at p. 648.
12. *Corrigan v Irish Land Commission* [1977] IR 317 at 328; *Dublin and County Broadcasting Ltd v Independent Radio and Television Commission* (12 May 1989) HC. Also see Barron J in *Orange Communications Ltd v Director of Telecommunications Regulation (No 2)* [2000] 4 IR 159 at 186.
13. *Bula Ltd v Tara Mines Ltd*, [1988] ILRM, 149.
14. *Doyle v Croke* (6 May 1988, unreported) HC is a leading case here. However, de Blacam ibid, at p. 98, asserts that this principle is not so rigid for non-judicial bodies. Refer to *Dublin and County Broadcasting Ltd v Independent Radio and Television Commission* (12 May 1989) HC. Spi
15. *O'Neill v Irish Hereford Breeders Association Ltd* [1992] 1 IR 431.
16. *Hauschildt v Denmark* (1990) 12 EHRR 266; *Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288; *Oberschlick (No. 1) v Austria* (1991) 19 EHRR; *De Haan v the Netherlands* (1997) App No. 84/1996/673/895; *Wettstein v Switzerland* (2000) App. No. 33958/96; *Kyprianou v Cyprus* (2005), App No. 73797/01.

5.3 DISQUALIFICATION

The two key principles related to disqualification are the aforementioned *nemo judex in causa sua* and Lord Hewart's dictum that "justice should not only be done but should manifestly and undoubtedly be seen to be done".[17] For example, Principle 2.5 of the Bangalore Principles makes it clear that judges should disqualify themselves from participating in: "any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially".

There are no statutory rules or guidelines for Irish judges on disqualification. In most cases where it is perceived that a judge has an interest, they normally disqualify themselves.[18] In *Bula Ltd v Tara Mines Ltd*, Denham J gave some guidance on circumstances where a judge may be disqualified.

> […] long recent and varied connection may disqualify a judge. The circumstances must be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case. Special circumstances precluding a judge from presiding include a situation where the judge as counsel had previously given legal services to a party on an issue alive in the case to be heard by the court.[19]

In *Dublin Wellwoman Centre Ltd v Ireland*[20], the Supreme Court held that Carroll J ought to have disqualified herself from a case concerning access to information on abortion. The case had originally been taken by the Society for the Protection of Unborn Children (SPUC) and they objected to Carroll J presiding over the case because of her previous role as Chairwoman of the Second Commission on the Status of Women.[21] Justice Carroll refused to disqualify herself stating that she had made the judicial declaration and would execute her office without fear or favour. Adjudicating on the case, the Supreme Court applied the reasonable apprehension test and decided that due to Justice Carroll's prior activities there was a perceived risk of bias.

In the United Kingdom (UK), a similar situation arose in relation to the extradition of the former Chilean President Pinochet in 1998. On 25 November 1998, the House of Lords ruled that Pinochet did not enjoy immunity for arrest and extradition for crimes against humanity allegedly committed whilst in office.[22] Amnesty International intervened in this case and after the delivery of the judgment it became apparent that Lord Hoffman, who was one of the five judges presiding over the case, was a long-term member of that organisation and a Director of Amnesty International Charity Ltd. Following an appeal by Pinochet, the House of Lords overturned its original judgment and ruled that Lord Hoffman should have automatically disqualified himself from the case even though he had no pecuniary interest.[23]

Following this judgment, an unprecedented number of English cases sought to overturn decisions on the grounds of various different allegations of judicial bias. Hearing five cases together, Malleson explains that the English Court of Appeal moved quickly to "close the floodgates".[24] In *Locabail Limited v Bayfield Properties*[25] the Court set out circumstances where judges should disqualify themselves in a judgment written by Lord Bingham.

17. *Rex v. Sussex Justices*, Ex parte McCarthy, [1924] IKB 256 at p 259.
18. For example, the Hon. Mr Justice Michael Hanna recently disqualified himself from an internet libel case because he personally knew a solicitor and barrister referred to in legal documents related to the case. Justice Hanna said that the "highest possible standards must be maintained" by members of the judiciary. "Not only must justice be done, but justice must be seen to be done". Source: (Friday, October 13 2006) 'Judge disqualifies himself from barrister's internet libel case', *Irish Times*. There are other situations where judges have not made declarations and cases have collapsed. A trial of five anti-war protestors who had been accused of criminal damage of a US Navy plane collapsed on 7 November 2005 when it became known that McDonagh J who was presiding over the case had attended the inauguration of US President, George Bush. (07.11.05) "Trial of Shannon anti-war protestors collapses", *Irish Times Breaking News*. www.ireland.com
19. *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 412 at 458.
20. 1989 I.R. 593.
21. In that role, Justice Carroll had written a letter to the Taoiseach indicating support for the right to access abortion counselling and information services.
22. [1998] 3 WLR 1456, [1998] 12 CL 210.
23. *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte (No 1)* [1990] All ER 577.
24. Malleson, K. (2002) "Safeguarding judicial impartiality", Legal Studies, 22, at p. 53.
25. *Locabail Limited v. Bayfield Properties* [2000] 1 All ER 65.

> In practice, the most effective guarantee of the fundamental right recognized at the outset of this judgment is afforded not (for reasons already given) by the rules which provide for disqualification on grounds of actual bias nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes there was a real danger (or possibility) of bias.[26]

He continues to say however that the Court could not conceive of circumstances in which an objection could be soundly based on religion, ethnic or national origin, gender, age, class, means or sexual orientation of the Judge.

> Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor on that of any member of the judge's family; or previous political association; or membership of social or sporting or charitable bodies; or Masonic association; or previous judicial decisions; or extracurricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultating papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in the cases before him; or membership of the same inn, circuit, local law society or chambers.[27]

On the other hand the court considered that:

> A real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge was closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasions; or if on any question at issue in the proceedings before him the judge had expressed views particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue within an objective judicial mind; or if for any other reason there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.

Malleson questions the Court's reasoning on the inconceivable factors outlined above on the basis that no rationale was advanced. It appears that they either ignored or failed to consider research which exists making the link between a judge's background and their decision-making.[28] Malleson suggests that there will indeed be situations which arise where a factor relating to the judge's background will affect the overall appearance of impartiality. For example, what if a devout Catholic was asked to preside over a "right to die" case or if an openly gay judge was asked to consider whether gay couples should adopt?

In any case, the *Locabail* decision provided guidance to the judiciary on disqualification and the Lord Chancellor's Department subsequently issued guidelines on judicial activities/interests to judges with the result that disqualification is rare.[29]

Irish jurisprudence on objective bias may be developed in a case which is currently before the High Court. In *Nyembo v. Refugee Appeals Tribunal*, a refugee applicant is seeking an order preventing a Refugee Appeals Tribunal member, Mr Jim Nicholson, from hearing his appeal, on the basis that there is a reasonable apprehension of bias. In this case, the applicant is citing Mr Nicholson'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 Mr Nicholson in an oral hearing. According to the evidence relied on by the applicant, Mr Nicholson did not find in favour of an applicant in an oral hearing in 2002, 2003 and 2004 despite the fact that he determined hundreds of case in those three years. The applicant is relying on this to ground a reasonable apprehension of bias. This case is of particular importance because if the Court finds in favour of the applicant, it may mean that in exceptional circumstances judges and decision-maker's records could be relied on as a factor indicating objective bias in future.

26. *Ibid*, at p.73.
27. *Ibid*, at p.77.
28. Malleson, K. (2000) "Judicial Bias and Disqualification after Pinochet (No. 2)", *Modern Law Review*, Vol. 63 at p. 59.
29. *Ibid*.

All in all from a brief overview of the case law above, it is evident that the Irish courts have developed very similar standards to the European Court of Human Rights on questions of impartiality. While it cannot be said that the Irish justice system fails to protect against objective bias, it is more difficult to comment on the question of subjective bias as almost no cases have arisen under this heading.

In terms of improving the current system, it would be useful to oblige judges to make a declaration of interest in certain circumstances and provide guidance in a Judicial Code of Ethics on external activities upon which they can engage in.

5.4 PERSONAL BIAS AND THE IRISH JUDICIARY

Apart from internal political viewpoints, judicial bias mostly manifests itself in the form of racism and patterns of sentencing.[30] As stated above, subjective bias among members of the judiciary is very rare and it is unclear if bias plays a part in sentencing practices.[31] However, there is evidence to suggest that judges have sometimes made statements which could be construed as racist.

A Longford District Court Judge was criticised for making racist comments when passing judgment on a shop-lifting case. According to the *Longford Leader*,[32] the judge said that:

> There are people in this State who have worked all their lives and they don't, in their old-age pension, have the benefits these ladies have […] The majority of shopping centres in this District Court area will be putting a ban of access to coloured people if this type of behaviour does not stop […] We give them dignity and respect, and the first thing they do is engage in criminal activity.

After first defending the statement the judge withdrew it the following day.[33]

Another incident arose in 2003 when a Circuit Court judge made improper comments about Nigerians driving around without insurance when passing judgment on a driving offence.[34] The judge subsequently withdrew his comments. More recently a judge made inappropriate remarks in court when passing sentence on a Polish man convicted of handling stolen property. According to media reports the judge said:

> This kind of stuff has to stop. He's in the country 10 days being engaged in criminal activity […] Don't come in here and look for asylum or whatever status is going and within 10 days being engaged in criminal activity.

The man was sentenced to seven months suspended on the condition that he left the State within 48 hours and did not return for three years.[35]

30. See for example, Cunneen, C. (1993) "Judicial Racism", *Australian Institute of Criminology*, No. 21 Aboriginal Justice Issues: Proceedings of a conference held 23-25 June 1992 or Amnesty International (1999) *Killing with Prejudice: Race and the Death Penalty in the USA*, AI Index: AMR 51/052/1999.
31. For example, O'Malley points out in 2004 that 9.1% of the Irish prison population were foreign nationals and was much higher than statistics in Northern Ireland. However, he believes that it is difficult to prove racial bias or discrimination within the criminal justice system without detailed research. See O'Malley, T. (2006) *Sentencing Law and Practice*, Thompson: Roundhall, at p. 213.
32. 19 February 2003.
33. 20 February 2003, "Longford judge defends 'coloured people' comment", *Irish Times*.
34. 21 February 2003, "Judge Apologizes to Nigerian woman", *Irish Times*.
35. Lucey, A. (14 December 2006) "Judge tells man to leave in 48 hours", *Irish Times*.

There are other situations a judge has made remark possibly offending women. Upon dealing with an assault charge against a woman, a judge expressed that:

> It seems to me that women are getting drunk and acting like alley cats. Then they are fighting like savages. I can't say I blame the man for hitting her if she had attacked him.[36]

Another District Court judge was criticised for his remarks on women following the withdrawal of assault allegation by a woman against her fiancé. According to media reports, the judge said:

> The next time you cry wolf, people might not listen and the gardaí might not believe you. […] It is becoming a very common occurrence that people make serious complaints and then withdraw them. This is the second time this happened this week and I cannot help but notice that they are mostly made by women.[37]

The *Canadian Ethical Principles for Judges* is very clear on this issue and states that "judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability".[38] However, the fact that a judge may use language that can be construed as discriminatory might not mean that they actually harbour bias. According to the Canadian principles:

> Inappropriate conduct may arise from a judge being unfamiliar with cultural, racial or other traditions or failing to realize that certain conduct is hurtful to others. Judges therefore should attempt by appropriate means to remain informed about changing attitudes and values and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist them to be and appear to be impartial. [39]

Hence, training and awareness raising has a role in addressing bias of this nature. Indeed, the UN Committee on Racial Discrimination recommends that states parties should "strive firmly to ensure a lack of any racial or xenophobic prejudice on the part of judges, jury members and other judicial personnel."[40] Citing the Bangalore Principles, the UN Committee Against Racism also recommends that:

- Judges should be aware of the diversity of society and differences linked with background, in particular racial origins;
- They should not, by words or conduct, manifest any bias towards persons or groups on the grounds of their racial or other origin;
- They should carry out their duties with appropriate consideration for all persons such as the parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation; and
- They should oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behaviour towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.

These recommendations are particularly relevant in an increasingly globalised society and point to the importance of further judicial studies and intercultural awareness, to equip judges dealing with minorities and migrants accessing the courts. This has been acknowledged by Judge Clare Leonard who has stated:

> There is a need for education. It is essential to have some idea of the background and customs of people who appear before us, particularly if they are asylum seekers.[41]

However, there has not been a significant amount of training for Irish judges and this is an area urgently requiring more attention.[42]

36. Fahy, D. and Fitzgerald, J. (22 February 2001) "Assault case judge criticized over comments on behaviour of women", *Irish Times*.
37. 17 November, 2006, "Judge criticised over remarks about women", *Irish Times*.
38. Canadian Judicial Council, *Ethical Principles for Justice*, at p. 23.
39. *Ibid*, at p.25.
40. No 31, General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, from A/60/18,pp.18-108. 16/08/2005.
41. Judge Clare Leonard (20001) "Racism and Xenophobia: Difficulties Facing the Courts in Ireland and Sweden in Dealing with Ethnic Minorities", *Judicial Studies Institute Journal*, Vol. 2.1, at p. 121.
42. In 2001, members of the Irish judiciary participated in an international visit to Sweden to compare how the Irish and Swedish system deals with ethnic minorities and racism/xenophobia (see Judge Leonard, *ibid*). The JSI also hosted a conference for all members of the judiciary on the administration of justice in November 2003 which discussed (among other topics), administration of justice in a multicultural society. Members of the National Consultative Committee on Racism and Interculturalism (NCCRI) addressed this conference. Ordinarily, the NCCRI delivers anti-racism/awareness training to individuals in the public sector. However, to date there has been no further engagement with members of the Irish judiciary and this is a major gap.

5.5 CORPORATE BIAS AND THE IRISH JUDICIARY

The Levee of the Right Hon. The Lord High Chancellor of Ireland, 1900. Source: Kindly provided by the Honourable Society of the Kings Inns ©

Corporate bias refers to the fact that because of their background, judges tend to have a particular outlook on life and a similar value system, which might lead them to decide certain types of cases in a biased way. The question arises as to whether corporate bias exists within the Irish judiciary. Although this question has not been addressed substantively in this section there is evidence to suggest that corporate bias is a reality as regards the profile of judges at least.

Two studies examining the socio-economic backgrounds of Superior Court judges, the first undertaken in 1969[43] and the second in 2004[44], reveal very similar profiles. Both Bartholomew and Carroll found that a typical Irish judge was mostly likely to be: male[45]; middle class; a Roman Catholic[46]; from an urban setting; a practicing barrister before joining the Bench; a graduate of University College Dublin (UCD) with a Bachelor of Arts (BA) and someone who was involved in politics in the early part of their career.[47]

How can so little have changed in over 40 years? The question is easily answered. Bacik's *et al*. study argues that practices in the legal profession such as working long hours and an 'old boys club' has effected the overall number of women in private practice. Taking the number of women practicing as barristers, their report showed that only 34% were women in 2003, up from a mere 16% twenty years before. Bacik *et al*. also found that even though women now make up about one third of barristers, they only account for one fifth of all sitting judges.

Exclusions on solicitors becoming Superior Court judges[48] would mean that most judges on the Bench that took part in Carroll's study were more likely to be practicing barristers. Further, Byrne and McCutcheon explain that university legal education was extremely poor for most of the last century, resulting in most senior practitioners, including judges holding general university BA and/or MA degrees, followed by professional training.[49] This would explain why the judges in both studies were more likely to have a BA as a basic degree, rather than a law degree.

In relation to the socio-economic status of judges, statistics consistently reveal, that students entering university are more likely to be from middle class families.[50] It is also likely that the high fees payable for course at Kings Inns and the fact that barristers must take up a full-time pupilage for one year combine to make training at the Bar difficult for persons on lower incomes.[51]

43. Bartholomew, P. C. (1971) *The Irish Judiciary*, University of Notre Dame Press.
44. Carroll, J. (2004) "You be the Judge Part – A Study of the Backgrounds of Superior Court Judges in Ireland in 2004 Part 1", Bar Review, November 2005.
45. There were no female judges in Bartholomew's study. However, Carroll found that 13% of judges on the Superior Courts were female in 2004.
46. 82% of judges in Bartholomew's study classified themselves as Roman Catholics, while only 67% of judges in Carroll's study indicated they were Catholic.
47. In both studies, the extent of political party activity varied from someone who is an active member to someone who may have canvassed at elections.
48. These restrictions were removed in 2002 (refer to Section 6.2.1) for the Superior Courts and in 1995 for the Circuit Court.
49. Byrne, R. and McCutcheon, J. P. (2003) *The Irish Legal System*, Tottel Publishing: Dublin at p 85.
50. Refer to Lynch, K. (1999) *Equality in Education*, Gill and MacMillan: Dublin and more recently see Fitzgerald, G. (19 March 2005) "Failure to tackle social inequality shows in higher education figures", *Irish Times*.
51. This was acknowledged in the Competition Authority's report. See Competition Authority (2006) *Solicitors and Barristers*, Competition Authority: Dublin.

In considering why so many UCD graduates went on to become judges, it might be explained by religion and politics. In 1868, most members of the Bar were Church of Ireland goers, unionists[52] and probably graduates of Trinity College Dublin which up until the late 1800s excluded Catholics. However, the character of the profession radically transformed with independence from Great Britain and the balance between Church of Ireland/unionists and republican/Catholics "tilted rapidly and decisively".[53] Towards the middle part of this century, Ferguson indicates that the number of Protestants at the Bar dwindled and "the few who came fresh to the profession from Trinity College were counted brave".[54] Of course this does not fully address the under-representation of graduates of universities located outside Dublin.

Concerted efforts to make the judiciary and legal profession more accessible and reflective of society are virtually non-existent. Entry into university law programmes is extremely competitive and alternative routes such as access programmes, only a recent phenomenon. In addition, reforms in professional training for solicitors and barristers, which have occurred in Northern Ireland, England and Wales, have not been matched in Ireland.[55] This is despite recommendations from the Fair Trade Commission's Report into Restrictive Practices in the Legal Profession[56] which called for the establishment of an Advisory Committee on Legal Education and Training to review all aspects of legal education. The latest report from the Competition Authority is also critical of the Kings Inns and the Law Society of Ireland because they have a monopoly on professional training.

> The two bodies have a monopoly in the markets for training of solicitors and barristers […] This arrangement has the potential to exclude suitable candidates from pursuing a career as a solicitor or barrister, particularly individuals who do not have the means to finance full-time education.[57]

For the most part, improvements in legal education resulted in universities offering full-time undergraduate degrees focusing solely on legal subjects, rather than mixed degrees.[58] Moreover, on the whole, individuals who study for a Diploma in Legal Studies at the Kings Inns[59] and then train to be a barrister will never do any public interest type education. Further professional legal training programmes for solicitors focus solely on legal practice areas.[60] Quinn is of the view that university law programmes should incorporate policy perspectives and insights from other disciplines in order to ensure that law students leave with an ability to see "the public interest".[61]

As regards moving forward, this author argues that the judiciary should be more reflective of society. While this will not necessarily lead to a radical transformation in judicial decision-making, it will enhance political legitimacy. Referring to Hewart's maxim, Malleson maintains "there is clearly a public perception that a judiciary which does not at least to some degree reflect the community which it serves in terms of composition is not capable of doing justice in the wider sense of the term".[62] The 2006 Census revealed that ten percent of the national population is foreign born and it is notable that there are no non-Irish or black/minority ethnic people sitting on the Bench.[63]

52. Ferguson, K. (2005) *King's Inns Barristers* 1868-2004, The Honourable Society of the King's Inns/Irish Legal History Society, at p. 70.
53. *Ibid*.
54. *Ibid*.
55. The Council of Legal Education for Northern Ireland is the governing body for all aspects of legal education in Northern Ireland and manages the Institute of Professional Legal Studies. The Institute organises integrated vocational training for solicitors and barristers.
56. The Commission's report was undertaken under the Restrictive Practices Act 1972. This Act has since been replaced by the Competition Acts 1991 and 1996, and the 1991 Act replaced the Fair Trade Commission with the Competition Authority.
57. Competition Authority, *ibid*, at p. v.
58. For example, UCD ran a mixed law, politics and business degree in the 1950s/1960s but was discontinued and until recently it only offered straight law degrees, with options to study business or languages. It introduced a law and politics/history/philosophy undergraduate degree in 2006. Trinity College Dublin only offers straight law degrees, however, Professor William Binchy did stress that Trinity's Law School tries not to just focus on 'black letter' law with lecturers incorporating a contextual approach to their teaching. The Law School at the National University of Ireland, Galway is an exception with many graduates leaving with an arts degree and a law degree. The University of Limerick offers a law degree with European Studies and University College Cork has introduced a clinical law degree.
59. The Honourable Society of the Kings Inns took over the training of barristers after the formation of the Irish State in 1922. Previously barristers were trained at the Inns of Court in London. The Kings Inns is under control of members of the Judiciary and senior members of the Bar and is independent of government.
60. However, the Law Society does try to offer a broader curriculum to their trainees by inviting speakers from external NGOs to speak on specific topics. Source: Interview with TP Kennedy, Head of Legal Education. Mr Kennedy also stressed that universities were the most important location for providing students with a broader education and given times constraint, the Law Society must focus on legal practice.
61. Quinn, G. (2006) "The Future of University Legal Education in Ireland: Lawyers as Moral Agents in our Republic", paper delivered to Trinity College Dublin conference on legal education in Ireland, 29 September 2006.
62. Malleson (2002), *supra*, at p. 66.
63. http://www.census.ie/statistics/popnclassbyreligionandnationality2006.htm

In section 4, it was recommended that the criteria for judicial selection should be replaced with criteria and competencies that are transparently meritocratic and precise. It is further recommended that judicial selection procedures incorporate measures to increase groups which are underrepresented. When South African Judicial Service Commission investigated ways to increase diversity, it rejected the idea of a quota system in favour of treating diversity as a "component of competence", rather than an independent requirement competing with competence.[64] The adoption of this measure in the Irish context would allow the appointments process to maintain its meritocratic character and at the same time go someway in facilitating minorities and under-represented groups to be appointed to the Bench. However, given that the legal profession itself is unrepresentative of society as a whole, this measure needs to be accompanied by a removal of structural barriers to university and legal education. This can be achieved by introducing more access programmes for university law courses and by providing additional state financial support for barrister and solicitor traineeships for minority and under-represented students.[65] However, in the first instance it would be useful if the Government followed the UK's example (see Box 10) and commissioned a review to look at the issue of representativeness in the legal profession and judiciary, with a view to making recommendations for change.

The Hon. Ms Justice Mella Carroll, the first woman appointed to the High Court
Source: Courts Service ©

BOX 10: INCREASING DIVERSITY IN THE JUDICIARY - ENGLAND AND WALES

In 2004, the Department for Constitutional Affairs (DCA) conducted a consultation to invite submissions as to how the judiciary of England and Wales might be made more reflective of society, while continuing to make judicial appointments solely on merit.* It also sought to identify barriers that deterred candidates from applying for judicial positions.

On the basis of this consultation and a review**, the DCA and the Lord Chancellor, the Lord Chief Justice and the Chairman of the Judicial Appointments Commission, devised a *Judicial Diversity Strategy*.*** The key strands of the Strategy are to:

- Promote judicial service and widen the range of people eligible to apply for judicial office (responsibility of DCA);
- Encourage a wider range of applicants, so as to ensure the widest possible choice of candidates for selection (responsibility of the Judicial Appointments Commission);
- Promote diversity through fair and open processes for selection to judicial office solely on merit (responsibility of the Judicial Appointments Commission);
- Ensure that the culture and working environment for judicial office-holders encourages and supports a diverse judiciary and increases understanding of the communities served (responsibility of DCA).

* Department of Constitutional Affairs (2004) *Increasing Diversity in the Judiciary,* http://www.dca.gov.uk/consult/judiciary/diversitycp25-04.htm
** Opinion Leader Research (2006) Judicial Diversity: *Findings of a Consultation with Barristers, Solicitors and Judges*, Department of Constitutional Affairs: London.
*** Department of Constitutional Affairs (2006) *Judicial Diversity Strategy*, http://www.dca.gov.uk/publications/reports_reviews/judicial_diversity_strat.pdf

64. Du Bois, F. (2006) "Judicial Selection in Post-Apartheid South Africa" in Malleson, K. and Russell, P.H. (eds) *Appointing Judges in an Age of Judicial Power – Critical Perspectives from Around the World*, University of Toronto Press: Toronto, Buffalo, London, at p. 294.
65. It should be acknowledged here that the Kings Inns do allow a small number of students in financial difficulty to forego paying fees each year.

5.6 MANAGING FAIR COURT PROCEEDINGS

As part of managing fair court proceedings, human rights law imposes a positive obligation on judges to prevent bias and discrimination happening in their courts. When allegations of bias are made, there is an obligation on a judge to investigate and take action. For instance, in *Narrainen v Norway*, the UN Committee Against Racism stated that:

> If members of a jury are suspected of displaying or voicing racial bias against the accused it is incumbent upon the national judicial authorities to investigate the issue and to disqualify the juror if there is a suspicion that the juror might be biased… every effort should be made to prevent any form of racial bias from entering into judicial proceedings which might result in adversely affecting the administration of justice on the basis of equality and non-discrimination, due attention should be given to the impartiality of juries.[66]

If a defendant or party raises the issue of impartiality, jurisprudence from the European Court of Human Rights also provides that it must be examined unless it is "manifestly devoid of merit".[67] Most ECHR cases concern accusations of partiality attributable to racism. In *Remli v France*, a juror was overhead by a third person as saying "What's more, I'm a racist".[68] The Court found a violation of Article 6 as the French judge failed to react to the allegation of racial bias within the jury.

However, the Court is reluctant to intervene in cases where judges do conduct an inquiry into allegations of bias and conclude that the trial is fair. In *Gregory v the United Kingdom* [69], a note was passed to the judge from the jury stating "Jury showing racial overtones. One member to be excused". The trial judge showed the note to the prosecution and defence and gave a strict warning to the jury to put aside any prejudice and base conclusions on the evidence presented. The Court decided that there was no violation of Article 6 and distinguished the *Gregory* case from *Remli*.

> In that case, the trial judges failed to react to an allegation that an identifiable juror had been overhead to say that he was racist. In the present case, the judge was faced with an allegation of jury racism which, although vague and imprecise, could not be said to be devoid of substance. In the circumstances, he took sufficient steps to check that the court was established as an impartial tribunal within the meaning of Article 6(1) of the Convention and had offered sufficient guarantees to dispel any doubts in this regard.

In a later case, *Saunders v the United Kingdom*,[70] the Court concluded that a judge's response to a similar incident had not been satisfactory.

> […] the judge should have reacted in a more robust manner than merely seeking vague assurances that jurors could set aside their prejudices and try the case solely on the evidence. By failing to do so, the judge did not provide sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court. It follows that the court that condemned the applicant was not impartial from an objective point of view.

In the case of Ireland, the principles of fair procedures and constitutional justice[71] also impose a positive obligation on judges to prevent bias in their court rooms, meaning that the Irish courts have developed comparable standards.

In the case of objective bias, the court has established a very high standard to be met. In the *People (DPP) v Tobin*,[72] the Court of Criminal Appeal ordered a retrial as the case involved a prosecution for rape and sexual assault, and during the course of jury deliberations, the foreman disclosed that a member of the jury mentioned they had experienced sexual abuse. The foreman assured the Court that this was not affecting the impartiality of the person but believed that the Court should be aware. The trial judge refused to discharge the jury and the Court of Criminal Appeal upheld the applicant's appeal:

> Little is or was known at the relevant time of the personal experience of the individual juror, except that, during the deliberations on the jury's verdict, this history was for the first time brought to the attention of the other jurors and then to that of the Court. It is perfectly understandable that a juror might not wish to draw attention to himself or herself in relation to such an embarrassing matter. This perhaps illustrates the very fact that the private or even secret nature of sexual abuse may have a profound impact on a person. It does not follow that such a person on a jury is incapable of acting impartially. The opinion of the juror and of the jury as a body was that there was no

66. Michel L.N. Narrainen, 15 March 1994, CERD/C/44/D/3/1991, para. 9.3
67. *Remli v France* (1996) ECHR 18 at para 48.
68. *Ibid*.
69. (1997) 25 EHRR 577.a
70. *Saunders v The United Kingdom* (1996) 19187/91 ECHR 65.
71. *East Donegal Co-operative -v- Attorney General* [1970] IR 317; *Kennedy v Ireland* [1987] IR 587 and *Gulyas v Minister for Justice* [2001] 3 IR 216.
72. [2001] 3 IR 469.

> problem about their impartiality. That, of course, disposes of any question of subjective bias. *It leaves outstanding the possibility of objective bias* (emphasis added). This is to be assessed according the standards of a reasonable and fair minded observer who knows the relevant facts …. The central facts are the simple ones that the appellant was on trial for extremely serious offences which must have been sufficiently similar to the experience of the juror to cause him or her to bring the matter up. In that situation, the Court considers that in the special circumstances of this case a reasonable and fair minded observer would consider that there was a danger, in the sense of a possibility, that the juror might have been unconsciously influenced by his or her personal experience and, for that reason the appellant might not receive a fair trial. Moreover, even jurors without similar experience of sexual abuse might well be influenced by sympathy for a fellow juror who had suffered, at the hands of another, the type of abuse with which the abused was charged.[73]

It is likely that the Strasbourg Court would have been reluctant to intervene in this case if the judge had conducted an inquiry following the foreman's disclosure, and it is arguable that this should have been the appropriate response of the trial judge in this case. Moreover, there would have been no need to excuse the juror in question, if the judge was satisfied that he/she was unbiased.

Adjudicating on the question of possible prejudicial pre-trial publicity[74] affecting the defendant's right to a fair trial, Hamilton P set out the responsibility of a judge in managing fair court proceedings:

> The responsibility is discharged by controlling the procedures of the trial, by adjournments or other interlocutory orders, by rulings on the presumption of innocence, the onus of proof, the admissibility of evidence and especially by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer. More than usual care however is called for in the empanelling of a jury and in the conduct of a trial in cases of this nature.[75]

In *DPP v (Haugh)*,[76] a Divisional High Court considered whether additional safeguards or procedures, specifically the use of a standard questionnaire, could be introduced by a trial judge to ensure that jury members were not prejudiced by pre-trial publicity. The High Court disagreed with this approach and determined that there was nothing in the law to permit the inquisition or interrogation of potential jurors as contemplated by the trial judge. Carney J saw no reason why a special set of rules should apply which would not be applied to all others. Relying on the *Lehman*[77] and *Singer*[78] judgments, Laffoy J affirmed that neither party to a criminal trial can engage in "exploratory questioning" of a potential juror. Instead, she held that judges must ensure fair procedures by giving strict warnings in respect of jurors' obligations and give warnings as he/she sees fit.

Indeed, there are many examples of judges offering guidance to jurors. In October 2005, Mr Osagie Igbinedion was tried and found not guilty of reckless endangerment in relation to a home circumcision. When directing the jury, Haugh J told the jury they could not bring what he called their "white westerns values" to bear when deciding on the case.[79]

73. At p. 478.
74. For a fuller discussion of this issue, refer to Donnell, J. L. (2000) "The Jury on Trial: Reflections on DPP v Haugh", *Bar Review July 2000*, at p. 470.
75. *Z v DPP* [1994] 2 ILRM 481 at p. 495.
76. *DPP v Haugh* [2000] IEHC 178 (12 May 2000).
77. The *People (DPP) v Lehman*, 1947 IR 137.
78. The *People (AG) v Singer*, 1975 IR 408.
79. RTE (07 October 2005) "Nigerian cleared over circumcision death", http://www.rte.ie/news/2005/1007/igbinediono.html

In another case from December 2006, Carney J proffered advice when empanelling the jury in advance of the retrial of Mr Padraig Nally, a farmer who was charged with the unlawful killing of Mr John Ward, a member of the Traveller community in October 2004.[80] Mr Nally's original conviction had been quashed and a retrial ordered by the Criminal Court of Appeal. The trial itself attracted a significant amount of unbalanced media reporting[81] and when it came to empanelling a new jury, Carney J advised them that they should try the case strictly on the basis of evidence. He said: "Anybody serving is warranting that he or she can do that without any prejudice towards the Travelling or farming community". In the face of very strong evidence, the jury found Mr Nally not guilty of murder or manslaughter.[82] However, this was not due to the judge's failure to manage fair court proceedings.

The case law as outlined above sets out several judicial precedents on managing fair court proceedings. However, without more in depth research this author is unable to determine whether this is practice in all courts and this is certainly a topic meriting further examination. In any event, judges still have an obligation to prevent bias and discrimination happening in their courts and this requires attentiveness to difference[83] and clear guidance on how to uphold this obligation. Therefore, it is recommended that judges be supported in this endeavour through the judicial studies programme and suggested guidelines in a Code of Ethics.

Lastly, an innate sensitivity to diversity issues would enable judges to identify and deal with situations where bias and discrimination arises. Competencies for judicial appointment in New Zealand include an ability to reflect on society, including an awareness and sensitivity to the diversity of communities and a knowledge of cultural/gender issues.[84] The Canadian judicial appointments system also classifies awareness of racial and gender issues and bilingual ability as a competence.[85] Similar criteria should be enumerated for judicial appointments in the case of Ireland.

80. Garland. F. (05 December 2006) "Jury warned against 'prejudice' during trial', *Irish Times*.
81. See RAXEN Bimonthly Bulletin No. 6, November 2005, available from the European Monitoring Centre on Racism and Xenophobia. Some other commentators suggested that the media reporting verged on "incitement to hatred", McGaughey, F. (2005) "Media Review: The Ward/Nally Case", *Spectrum*, Issue 10, NCCRI: Dublin, at p. 21.
82. Mr Nally argued he acted in self-defence but in her evidence, the State Pathologist revealed that John Ward had been shot twice. The first shot injured him in the hand and hip and the second shot was fired while he was in a crouched position. He had also been beaten about ten times around the head with open wounds to his skull and he suffered a fracture to his right arm. Source: Shiel, T. (14 July 2005) "Gunshot wound to chest fatal, says pathologist", *Irish Times*.
83. See Principle 5(2) of the Canadian Ethical Principles for Judges.
84. Refer Box 7: Criteria for judicial appointments in New Zealand, Chapter 4.
85. Refer to Box 8: Criteria for judicial appointments in Canada, Chapter 4.

5.7 RECOMMENDATIONS

Disqualification

- Judges should be obliged to make a declaration of interest at the outset of cases and be provided with guidance on this matter in a Judicial Code of Ethics.

Bias and Impartiality

- The following obligations should be included in a Judicial Code of Ethics:
  - To be aware of the diversity of society and differences linked with background, in particular racial origins.
  - By words or conduct, a judge should not manifest bias towards persons or groups on the grounds of their racial or other origin.
  - Carry out their duties with appropriate consideration for all persons such as parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation.
  - Oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behaviour towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.
- Further research should be conducted into the management of fair court proceedings.

Judicial Appointments

- Minority or under-represented status should be treated as a component of competence for the purpose of increasing diversity on the Bench.
- The criteria of "awareness of diversity, racial and gender issues" should be added as a competency for judicial appointments.

Judicial Studies

- Judges should be provided with support on how to deal with bias and discrimination in the courtroom.

Diversity and Legal Education

- The Government or legal bodies should undertake a review of the legal profession and the judiciary to examine the issue of representativeness with a view to making recommendations for change.
- The Government should introduce more access programmes for undergraduate university courses.

06

ADMINISTRATIVE INDEPENDENCE

6.1 INTRODUCTION

This chapter concerns the issue of administrative independence for the judiciary and determines to what extent administrative matters are free from interference by the Executive. In the area of funding, section 6.2 examines whether judges have enough resources to adequately perform their functions. This section reveals that, historically, the courts have been starved of resources and that when litigation greatly increased in the 1980s and 1990s, the courts were near collapse. While the situation has been vastly improved with the establishment of the Courts Service - an independent agency - a number of judges interviewed believed that there were not enough judges on the Bench and proper courtrooms/facilities, resulting in long delays in some instances.

Section 6.3 deals with the administration of the courts and makes clear that judges should manage their own administration and decide on the assignment of cases. This section reveals that before 1999 there were serious questions about administrative independence, as civil servants employed by the Department of Justice (as it was known then) provided administrative support for judges and the courts. It is argued in this section that this is no longer of concern as the Courts Service now handles all administration. Judges also have a key oversight role in the management of the courts and are represented on the Courts Service Board. The only potential weakness is that there is nothing in law to ensure that the Executive will continue to allocate resources for the administration of the courts.

Finally, section 6.4 considers the allocation of cases and indicates that the assignment of cases is largely in the hands of judges, which reduces the likelihood of interference or improper influences in the writing of court lists.

6.2 ADEQUATE RESOURCING

The court system offers an essential public and social service and adequate resources are necessary to enable judges to "properly perform their functions".[1] Proper performance implies performance in an independent and impartial manner.[2] Judiciaries and courts cannot function without adequate resourcing and states may indirectly affect the independence of the judiciary by withdrawing or failing to provide proper support, resulting in long delays, no venues for court hearings and insufficient judges to preside over cases. Facilitating judges to take part in decision-making on resourcing is one way to overcome these difficulties.[3]

BOX 11: EXTRACT FROM LAW REFORM COMMISSION REPORT ON FAMILY COURTS – A SYSTEM IN CRISIS*

The courts are buckling under the pressure of business. Long family law lists, delays, brief hearings, inadequate facilities and over-hasty settlements are too often the order of the day. […] There is no proper system of case management […] The courts lack adequate support services […] The burden placed on those who operate the system, especially judges and court officials, has become intolerable.

* Law Reform Commission (1996) *Report on Family Courts*, Law Reform Commission: Dublin, at p. ii.

1. Principle 7, UN Basic Principles.
2. Dung, L. T. (2003) *Judicial Independence in Transitional Countries*, United Nations Development Programme: Oslo Governance Centre, at p. 18.
3. Article 14, Universal Charter of the Judge.

However, resourcing for the judiciary and courts system is a major issue in both well-established and transitional democracies. In France for example, over 500 French judges protested against working conditions outside the Ministry of Justice in 2001.[4] The judges complained that the country's 6,000 judges were overwhelmed resulting in massive backlogs in cases. Indeed, over this period the European Court of Human Rights found France in violation of Article 6, para 1 of the ECHR which provides for a fair and public hearing in a reasonable time.[5] Moreover, in order to satisfy the requirement of an impartial trial, domestic legislation and the system for financing the courts must prevent outside pressure from judges.[6] The independence and impartiality of Russia's judiciary has also been undermined over time through poor resourcing. Since the late 1990s, Russia's poor economic performance meant that its court system only received about one third of what it needed to function. Consequently, the judiciary amassed large debts and were forced to plead to local governments/economic organisations for funding, organisations whose acts and actions they frequently adjudicate on. According to Foglesong, there are now grave concerns about the impartiality of the Russian judiciary in the administration of justice.[7]

This author knows of no attempt by any Irish Government to undermine the independence of the judiciary by restricting funding. However, inadequate funding for the courts has been a consistent problem particularly in the 1980s and 1990s because of an enormous increase in civil and criminal litigation.[8] In 1995, the Minister for Justice established the Working Group on a Courts Commission to undertake a wide-ranging review of the operation of the courts system in Ireland.[9] The Group found that the courts were "stretched" to "breaking point" and "in crisis"[10] because of inadequate resourcing resulting in long delays for litigants and poor case management.

Protestors and supporters outside the Four Courts (2007).
Source: Irish Times ©

Table 3: Courts Service Budget Allocations, 2002-2006

Year	2002	2003	2004	2005	2006
	€'000	€'000	€'000	€'000	€'000
Total current expenditure	56,738	63,896	70,392	78,013	82,391
To capital expenditure	30,536	28,283	27,599	26,403	29,450
Total Gross Expenditure	87,274	92,179	97,991	104,416	111,841

Source: Courts Service, December 2006

4. International Commission of Jurists (2002) *France – Attacks on Justice 2002*, www.icj.org
5. *Malve v France* (2001) 99 ECHR 493; *Tricard v. France* (2001) 98 ECHR 460; *Versini v France* (2001) 98 ECHR 4611 and *Mortier v France* (2001) 98 ECHR 494.
6. *Salov v Ukraine*.
7. Foglesong, T. (2002) "The Dynamics of Judicial (In)dependence in Russia", in Russell, P. H. and O'Brien, D. M. (eds) *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, University Press of Virginia.
8. Working Group on a Courts Commission (1996) *First Report Management and Financing of the Courts*, Government Stationery Office, at p. 9.
9. Its Terms of Reference included to review: (a) the operation of the Courts system, having regard to the level and quality of service provided to the public, staffing, information technology, etc; (b) the financing of the Courts system, including the current relationship between the Courts, the Department of Justice and the Oireachtas in this regard; (c) any other aspect of the Courts system which the Group considers appropriate.
10. *Ibid*, at p. 34.

Since the mid 1990s, the situation has vastly improved. Following on from the activities of the Working Group on a Courts Commission, the Courts Service was established via the Courts Service Act 1998 on 9 November 1999 (to be discussed below). Since the establishment of the Courts Service, the level of funding allocated from the Department of Finance has substantially increased (see Table 3). The Courts Service annual reports indicate that in its early years, it spent significant amounts on the recruitment of new staff, the introduction of new management systems and on buildings.[11] The question that one needs to ask is whether this level of funding is sufficient to allow the judiciary to properly perform its functions.

Until May 2007, the number of judges sitting in each court was eight in the Supreme Court, 32 in the High Court, 34 in the Circuit Court and 55 in the District Court with a total of 129 judges.[12] According to the Census, the national population was 4,239,848 persons in 2006.[13] Therefore, the number of judges as per the population would appear to be extremely low.

Table 4 illustrates the number of applications/appeals/cases and other matters before the courts in 2005. What is particularly striking about this table is the number of cases coming before the District Court and falling within the jurisdiction of the High Court.

A number of judges interviewed for the present study were extremely dissatisfied with the level of resourcing provided for the courts. Judges on the lower courts were critical about the number of judges on the Bench and the length of lists.

> If you go out on the Bench with a huge list, you're already putting the pressure on in the first case, not the last case. Matters are getting much more complex [….] Taking up a lot more time now and the resources have not been put in place to match that.
> **District Court Judge, Interview No 15**

One judge on the Superior Courts pointed out that although additional judges were necessary, there were not enough facilities for them to hear cases and while this may be dealt with through the courts building programme, it would not be addressed for a number of years. Another judge was particularly aggrieved by the quality of chambers that some of his colleagues were forced to inhabit and complained that Courts Service staff had better facilities.

Table 4: The Workload of the Courts in 2005

Court	Applications/Appeals/Cases and other matters
Supreme Court	446 new appeals lodged 7,996 registrar's certificates issued
Court of Criminal Appeal	257 new appeals lodged
High Court	2,592 bail applications
Central Criminal Court	83 new cases
Circuit Criminal Court	389 jury trials 6,545 appeals from the District Court
District Court	302,134 summary cases 198, 412 indictable cases
Juvenile crime	2,434 cases
High Court personal injury	746 summonses
High Court summonses	4,580 plenary summonses
Judicial review	1,419 applications
Asylum and immigration High Court applications	1,863 applications
Extradition cases in High Court	69 applications

Source: Courts Service Annual Report 2005

11. Courts Service Annual Report 2000.
12. Judicial Support Unit.
13. http://www.census.ie/statistics/popnbyage2006.htm

Judges interviewed for the present study were also concerned about delays, particularly in the criminal justice system and considered that breaches of Article 6 (right to a fair trial) may occur as a result. The Courts Service annual reports show average waiting times for a variety of cases. Statistics for 2005 reveal that while some cases are heard immediately (bail, Criminal Assets Bureau, commercial list, extradition), others have significant waiting times. For example, 15 months on "the judicial review list", seven months on the Supreme Court list and seven to nine months on the Criminal Court list. However, waiting times in a number of Circuit Courts and Districts are considerable in a range of different matters. For example, in Kilkenny Circuit Court the average waiting time for criminal matters is 18 months, 24 months for civil cases, 12 months for judicial separation and 12 months for divorce. In the District Court, the longest waiting times are recorded at Bray District Court (18 months for criminal matters and 14 months for civil cases) and Dun Laoghaire.

Apart from causing delays, one judge pointed out that a huge volume of cases can affect a judge's ability to provide reasoned decisions in a timely manner. She believed that if judges had more time to write decisions, it would enhance the quality of justice. Moreover, at the District Court level, long lists of cases put so much pressure on judges that they are not able to provide reasons in all circumstances.

> They can't give written judgments on all the cases. Otherwise you need much more District Court judges. We have a very low level of judges compared with most countries per head of the population.
> **Retired Judge of the Superior Courts, Interview No. 14**

In section 3.5, it was argued that a failure to give reasons was in breach of Article 6(1) of the European Convention on Human Rights. It was also noted that one of the main obstacles to this is the failure to install digital recording equipment throughout the court system. This is a clear case of a lack of resources adversely affecting the judiciary's ability to perform its functions.

Further, concerns were raised by judges interviewed about judicial administrative support. While on the whole, judges were satisfied with the quality and availability of judicial researchers, they raised concerns about having to share secretarial support. One judge in particular felt that it was necessary to have a dedicated administrator who was highly qualified rather than just a clerk. The judges are also supported by the Judicial Support Unit but it only comprises three full-time staff members who also work for the Judicial Studies Institute, as well as Secretary to the Judicial Studies Institute Board.[14]

Despite recent increases in funding by the Government to the Courts, Ireland spends far less on its legal system in comparison to other Western European countries. The European Commission for the Efficiency of Justice report on European Judicial Systems indicates that out of 38 countries in 2004, the Irish Government's budget allocation for the legal system per inhabitant stood at just under €50.[15] In contrast, the same study demonstrated that Norway spent over €60 per inhabitant, England and Wales spent more than €70 per inhabitant in 2004 and Scotland and the Netherlands just under €90 per inhabitant. In fact, the study shows that Ireland spends less on each inhabitant than any other Western European country. Only the Eastern European countries and Greece spend less.

To conclude, it is apparent that despite recent improvements in resourcing for the courts, there are still issues pertaining to infrastructure, administrative support and positions on the Bench. In some instances this is seriously affecting judges' ability to perform their functions, particularly at the District Court level. Resources for the Courts Service should be increased to expand the courts building programme to provide for courtrooms and chambers for judges and for additional administrative supports.

In May 2007, the Government increased the number of judges sitting on the Bench. The High Court now has 38 judges, an increase of six, the Circuit Court has 38 judges, an increase of four and the District Court has 61 judges, an increase of six. Although a significant improvement, it is not clear at the present time whether this rise will fully alleviate the demands of the court. This issue will have to be kept under review.

14. This role is performed by Mr Brendan Ryan BL, who is also Director of Corporate Services at the Courts Service.
15. European Commission for the Efficiency of Justice (CEPEJ) (2006) *European Judicial Systems Edition 2006 (2004 data)*, Council of Europe: Strasbourg. www.coe.int

6.3 ADMINISTRATION OF THE COURTS

A key feature of administrative independence is ensuring that judges can manage their own administration and the UN Basic Principles stipulate that judges should decide on the assignment of cases.[16] Difficulties in administrative independence can arise when court administrators report directly to members of the Executive or Legislature. For example, in a study of courts administrators in the Missouri municipal courts, Myers found that administrators/clerks who did not solely report to a judge were more likely to be "confused" as to their responsibilities.[17] When administrators reported to City Managers, they indicated that the City exerted too much control over court finances and in circumstances where administrators reported to police chiefs, the police tried to "write the ticket" i.e. decide on which judge handled a case.[19]

BOX 12: WORKING GROUP ON A COURTS COMMISSION (1996) OBSERVATIONS ON COURT ADMINISTRATION

The reality of the current system is that certain court officers have dual responsibility roles and operate in a bifurcated managerial system. This creates its obvious tensions and complexities. The Civil Servants who work for the Minister for Justice quite reasonably can see their first responsibility as being to the Minister and not the judiciary. It is important to preserve the independence of the judicial function that on judicial issues, the Court staff be responsible to the Court. The system has developed on an ad hoc basis, is inadequate and needs to be modernised.

* Working Group on a Courts Commission (1996) *First Report Management and Financing of the Courts*, Government Stationery Office, at p.22.

Prior to the establishment of the Courts Service in 1999, there were serious questions about administrative independence. Civil servants from the Courts Division of the Department of Justice (as it was known then) provided administrative support for judges and the courts. The difficulties with this arrangement were identified by the Working Group on a Courts Commission (see Box 12) which recommended that an independent and permanent body should be set up to manage a unified court system.

In response, the Government established the Courts Service via the 1998 Courts Services Act. The functions of the Courts Service are outlined in section 5 of the Act and include:

> (a) To manage the courts;
> (b) To provide support services for the judges;
> (c) To provide information on the courts system to the public;
> (d) To provide, manage and maintain court buildings; and
> (e) To provide facilities for users of the courts.

The service has no functions in relation to the administration of justice and section 9 specifically protects the independence of the judicial function.

> No function conferred on or power vested in the Service, the Board or the Chief Executive, under this Act shall be exercised so as to interfere with the conduct of that part of the business or the courts required by law to be transacted by or before one or more judges or to impugn the independence of-
> (a) a judge in the performance of his or her judicial functions, or
> (b) a person other than a judge in the performance of limited functions of a judicial nature conferred on that person by law.

16. Principle 14, UN Basic Principles.
17. Myers, L. G. (2005) *Judicial Independence in the Missouri Municipal Court*, Institute for Court Management, available from the National Centre for State Courts http://www.ncsconline.org/
18. *Ibid*, p. 55.
19. *Supra*, at p. 60.

Judges are involved in the management of the Courts Service and take up key positions on its Management Board. For instance, Section 11(1) of the 1998 Acts states that the Board shall consist of:

(a) the Chief Justice for the time being or a judge of the Supreme Court nominated by the Chief Justice;
(b) a judge of the Supreme Court elected by ordinary judges of the Court;
(c) the President for the time being of the High Court or a judge of the High Court nominated by the President of that Court;
(d) a judge of the High Court elected by the ordinary judges of that Court;
(e) the President for the time being of the Circuit Court or a judge of the Circuit Court nominated by the President of that Court;
(f) a judge of the Circuit Court elected by the ordinary judges of that Court;
(g) the president for the time being of the District Court or a judge of the District Court nominated by the President of that Court;
(h) a judge of the District Court elected by the judges, other than the President, of that Court;
(i) a judge nominated by the Chief Justice for the time being in respect of his or her experience or expertise in a specific area of court business;
(j) the Chief Executive;
(k) a practising barrister nominated by the Chairman for the time being of the Council of the Bar of Ireland;
(l) a practising solicitor nominated by the President for the time being of the Law Society of Ireland;
(m) a member of the staff of the Service elected by the members of the staff for that purpose;
(n) an officer of the Minister nominated by the Minister;
(o) a person nominated by the Minister to represent consumers of the services provided by the courts;
(p) a person nominated by the Irish Congress of Trade Unions; and
(q) a person who, in the Minister's opinion, has relevant knowledge and experience in commerce, finance or administration and who is nominated by the Minister after consultation with such bodies as the Minister considers are representative of such interests in the State.

The functions of the Board are to consider and determine policy in relation to the service [section 13(1)(a)] and oversee the implementation of that policy by the Chief Executive [section 13(2)(b)].

There are a number of provisions setting out the relationship between the Executive and the Courts Service. For example, section 7(1) of the 1998 Act provides that the Chief Executive should submit the first strategic plan to the Minister for Justice, Equality and Law Reform for approval and must be prepared to take account of directions issued from the Minister from time to time section [7(2)(b)]. Section 8(1) of the Act also obliges the Courts Service to submit annual reports to the Minister and any other information concerning policy and activities generally, any specific matter or any report specified [section 8(3)]. In addition, the Minister may inform the Courts Service Board of any policy or objective of the Government or a Minister of the Government referred [section 13(3)].

In considering the provisions as outlined above, it is apparent that the Courts Service and its structures provide sufficient independence from the Executive. Not only do judges play an oversight role through the Courts Services Board, the 1998 Act prevents Courts Service staff from infringing on the judicial function. The Courts Service is also accountable in a number of ways to the Minister and the Government which is to be expected in a liberal democracy where the Minister and Cabinet are politically accountable the electorate.

The only potential weakness in the legislative framework is around resourcing. Judges of the superior and lower courts have security of tenure which guarantees that the Government will make funding available for their salaries. As there are no comparable provisions protecting resourcing to the Courts Service, this is one way the Executive could potentially infringe on the administrative independence of the judiciary.

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6.4 ALLOCATION OF CASES TO JUDGES[20]

Recognising that it is essential that cases are allocated to judges fairly and not to obtain a certain result, the COE Recommendation 94(12) suggests that:

> The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of a case. Such distribution may, for instance, be made by drawing lots or a system for automatic distribution according to alphabetic order or some similar system.[21]

Clearly this recommendation removes discretion from the system. However, Malleson observes that an effective random allocation system must "ensure that insufficiently experienced or competent judges are not included in the pool from which the judge or judges who will hear a case are chosen".[22] There is a place for specialisation in certain circumstances, i.e. children's courts and criminal courts.

The allocation of cases in Ireland differs depending on the court. For instance, in the Supreme Court, the Chief Justice allocates cases and selects the Bench typically three or five judges depending on the nature of the case.

The President of the High Court is responsible for allocating cases among judges and normally assigns 'lists' consisting of similar cases (judicial review, chancery, personal injuries etc.) to particular judges usually on the basis of expertise. Several judges are nominated by the President to deal with high volume lists. The 'List Judge' decides on how many cases will be listed each day/week/term and it is the List Judge who will distribute cases to other judges assigned on that list. It is the role of the Court Registrar to liaise with each party and to brief the judge in question on how long each case is likely to take (normally shorter cases are heard together). Dates are usually affixed in court in the presence of both parties.

As regards the District and Circuit Court, judges are assigned to courts in different regions around the country by the President of each court for a period of time ranging from one month to more than a year. The judge assigned to that court is expected to deal with all its business and decides on the listing of cases. In Dublin, the setup varies slightly as there are several District Courts with some courts covering specific types of cases, for example, the Smithfield District Court deals with family law matters. In this instance, the President of the District Court assigns judges to each court. Again, dates are largely fixed in court and the on Registrar and law clerks act in an administrative capacity to maintain this information.

From the above information, it is clear that the allocation of cases is mainly in the hands of the judiciary which reduces the likelihood of improper influences from a party to a case. Moreover, the fact that court dates are largely fixed in court makes the process more transparent. No recommendations are made in relation to the allocation of cases.

6.5 RECOMMENDATIONS

Resourcing

- Resources for the Courts Service should be increased to expand the courts building programme to provide for courtrooms and chambers for judges and for additional administrative support for judges.
- The number of judges on the Bench was recently increased. It is recommended that this issue should be kept under review to ascertain whether the increase is sufficient to reduce waiting times and enable judges to deliver reasoned decisions at the District Court level.
- The Government should make funding available to allow the Courts Service to introduce digital recording in all District Court venues.

20. The information was gathered in December 2006 by contacting the individual Registrars for each court.
21. 2(e), COE Committee of Ministers, Recommendation No. R (94) 12, adopted on 13 October 1994 at 518th meeting of the Ministers' Deputies.
22. Malleson , K. (2002) "Safeguarding judicial impartiality", *Legal Studies*, 22, *supra*, at p. 69.

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SUMMARY OF RECOMMENDATIONS

1. Separation of Powers

- It is recommended that the separation of powers be fully examined by a committee established by the Government or by the Law Reform Commission with a view to strengthening accountability and independence in decision-making.

2. Law on Contempt

- In line with recommendations from the Law Reform Commission, it is recommended that the Government bring forward legislation on contempt of court to clarify and update this area of law.

3. External Influences on Judicial Conduct

- Consideration should be given to amending the Code of Ethics for politicians to specifically preclude them from making direct statements outside of the Oireachtas that might appear to undermine the independence of the judiciary.

4. Time Limits for Judicial Review on Immigration Decisions

- Time limits for applying for judicial review on immigration decisions should be extended via the forthcoming Immigration, Residence and Protection Bill, in line with recommendations from the Law Reform Commission and the UN Committee Against Racism.

5. Appellate Jurisdiction of the Supreme Court

- In the interests of justice and right of access to the courts, where an applicant has been refused leave to appeal in the High Court and/or a certificate of appeal, a facility should be available whereby a single judge of the Supreme Court can review the matter.

6. Failure to Provide Reasoned Decisions

- The Government should make funding available to allow the Courts Service to introduce digital recording in all District Court venues.

- The number of District Court judges should be substantially increased with a view to reducing court lists and enabling judges to provide reasoned decisions.

7. Appointments

- Criteria for judicial selection should be replaced with criteria and competencies that are transparently meritocratic and precise.

- Minority or under-represented status should be treated as a component of competence for the purpose of increasing diversity on the Bench.

- The criteria of "awareness of diversity, racial and gender issues" should be added as a competency for judicial appointments.

- When advising the Government on judicial appointments, the number of persons short listed by the JAAB should be reduced to three. The JAAB should also be involved in advising the Government on promotions.

- Criteria for recommending a judge for appointment or elevation by Government must be transparent and defined. The Government should consider publishing reports indicating why it has recommended a person for appointment or elevation.

8. Security of Tenure

- Security of tenure for District and Circuit Court judges should be guaranteed via the Constitution.

9. Representation and Association

- Legislation establishing a Judicial Council should be urgently brought forward.

10. Freedom of Expression

- A 'Code of Ethics' should be drafted for judges, providing guidance on appropriate conduct and, in particular, on extra-judicial comment.
- Judges should be facilitated to educate the public on specific topics through speeches and lectures.

11. Judicial Studies

- Future developments in judicial studies should adopt a more structured approach. In order to meet the needs of individual judges, needs assessments of individual judges should be conducted.
- Current proposals from the JSI on the development of judicial studies (a Dean of Studies, induction for new judges, enhanced studies for judicial studies, three-year strategic plan) must be acted upon and funded as a matter of urgency by the Government.
- Comparable to other sections of the civil service, judicial studies and further academic study should be incorporated into professional time for judges.
- The right of judges to pursue further academic studies should be recognised in law.
- Judges should be provided with support on how to deal with bias and discrimination in the courtroom.

12. Human Rights Education

- An international human rights training needs analysis of judges should be conducted to establish the requirement for any additional programmes.
- Future sessions on human rights should be more frequent and focused on specific human rights topics.
- Education on UN instruments should be incorporated into all programmes.

13. Future Legislation on Judicial Complaints

- Legislation giving effect to recommendations made by the Report of the Committee on Judicial Conduct and Ethics (establishment of a Judicial Conduct and Ethics Committee to consider complaints made against judges by members of the public; an informal system for resolving complaints; a Panel of Inquiry to undertake investigations; sanctions to include a private or public reprimand or resolution calling for the removal of a judge; sanctions including that judges attend counselling or treatment) should be introduced as a matter of urgency.
- This legislation should ensure that complaints against judges are processed expeditiously and fairly under an appropriate procedure. The examination of complaints at initial stages should be kept confidential.
- Sanctions against judges should include the option of recommending a judge to undergo awareness training if a judge was found to be discriminatory.
- A Code of Ethics guiding judges on appropriate behaviour should be drafted in consultation with members of the judiciary. The Government and judicial branch could look to the Bangalore Principles and other sets of non-legally binding principles in this regard.

14. Bias and Impartiality

- The following obligations should be included in a Judicial Code of Ethics:
    - To be aware of the diversity of society and differences linked with background, in particular racial origins.
    - By words or conduct, a judge should not manifest bias towards persons or groups on the grounds of their racial or other origin.
    - Carry out their duties with appropriate consideration for all persons such as parties, witnesses, lawyers, court staff and their colleagues, without unjustified differentiation.
    - Oppose the manifestation of prejudice by the persons under their direction and by lawyers or their adoption of discriminatory behaviour towards a person or group on the basis of their colour, racial, national, religious or sexual origin, or on other irrelevant grounds.
- Further research should be conducted into the management of fair court proceedings.

15. Diversity and Legal Education

- The Government or legal bodies should undertake a review of the legal profession and the judiciary to examine the issue of representativeness with a view to making recommendations for change.
- The Government should introduce more access programmes for undergraduate university courses.
- The Government should provide additional financial supports for people from minority and other under-represented groups to train as barristers and solicitors.

16. Resourcing

- Resources for the Courts Service should be increased to expand the courts building programme to provide for courtrooms and chambers for judges and for additional administrative supports.
- The number of judges on the Bench was recently increased. It is recommended that this issue be kept under review to ascertain whether the increase is sufficient to reduce waiting times and enable judges to deliver reasoned decisions at the District Court level.
- The Government should make funding available to allow the Courts Service to introduce digital recording in all District Court venues.

Appendix 1

UN BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY (1985)[1]

INDEPENDENCE OF THE JUDICIARY

1. The independence of the judiciary shall 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.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

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.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. 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.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

FREEDOM OF EXPRESSION AND ASSOCIATION

8. In accordance with the Universal Declaration for Human Rights, members of the judiciary are, like other citizens, entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

QUALIFICATIONS, SELECTION AND TRAINING

10. 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.

1. 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 United Nations General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

CONDITIONS OF SERVICE AND TENURE

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

DISCIPLINE, SUSPENSION AND REMOVAL

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.

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

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

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Appendix 2

THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT[2]

Preamble

WHEREAS the *Universal Declaration of Human Rights* recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the *International Covenant on Civil and Political Rights* guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the *United Nations Basic Principles on the Independence of the Judiciary* are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

2. The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

VALUE 1: INDEPENDENCE

Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free there from.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

VALUE 2: IMPARTIALITY

Principle:

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.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy: Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

VALUE 3: INTEGRITY

Principle:

Integrity is essential to the proper discharge of the judicial office.

Application:

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

VALUE 4: PROPRIETY

Principle:

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practice regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge;

Or

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practise law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges.

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

VALUE 5: EQUALITY

Principle:

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

VALUE 6: COMPETENCE AND DILIGENCE

Principle:

Competence and diligence are prerequisites to the due performance of judicial office.

Application:

6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

DEFINITIONS

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"*Court staff*" includes the personal staff of the judge including law clerks.

"*Judge*" means any person exercising judicial power, however designated.

"*Judge's family*" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

"*Judge's spouse*" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

Explanatory Note

1. At its first meeting held in Vienna in April 2000 on the invitation of the United Nations Centre for International Crime Prevention, and in conjunction with the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Judicial Group on Strengthening Judicial Integrity (comprising Chief Justice Latifur Rahman of Bangladesh, Chief Justice Bhaskar Rao of Karnataka State in India, Justice Govind Bahadur Shrestha of Nepal, Chief Justice Uwais of Nigeria, Deputy Vice-President Langa of the Constitutional Court of South Africa, Chief Justice Nyalali of Tanzania, and Justice Odoki of Uganda, meeting under the chairmanship of Judge Christopher Weeramantry, Vice-President of the International Court of Justice, with Justice Michael Kirby of the High Court of Australia as rapporteur, and with the participation of Dato' Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers) recognized the need for a code against which the conduct of judicial officers may be measured. Accordingly, the Judicial Group requested that codes of judicial conduct which had been adopted in some jurisdictions be analyzed, and a report be prepared by the Co-ordinator of the Judicial Integrity Programme, Dr Nihal Jayawickrama, concerning: (a) the core considerations which recur in such codes; and (b) the optional or additional considerations which occur in some, but not all, such codes and which may or may not be suitable for adoption in particular countries.

2. In preparing a draft code of judicial conduct in accordance with the directions set out above, reference was made to several existing codes and international instruments including, in particular, the following:

   (a) The Code of Judicial Conduct adopted by the House of Delegates of the American Bar Association, August 1972.

   (b) Declaration of Principles of Judicial Independence issued by the Chief Justices of the Australian States and Territories, April 1997.

   (c) Code of Conduct for the Judges of the Supreme Court of Bangladesh, prescribed by the Supreme Judicial Council in the exercise of power under Article 96(4)(a) of the Constitution of the People's Republic of Bangladesh, May 2000.

   (d) Ethical Principles for Judges, drafted with the cooperation of the Canadian Judges Conference and endorsed by the Canadian Judicial Council, 1998.

   (e) The European Charter on the Statute for Judges, Council of Europe, July 1998.

   (f) The Idaho Code of Judicial Conduct 1976.

   (g) Restatement of Values of Judicial Life adopted by the Chief Justices Conference of India, 1999.

   (h) The Iowa Code of Judicial Conduct.

   (i) Code of Conduct for Judicial Officers of Kenya, July 1999.

   (j) The Judges' Code of Ethics of Malaysia, prescribed by the Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, in the exercise of powers conferred by Article 125(3A) of the Federal Constitution of Malaysia, 1994.

   (k) The Code of Conduct for Magistrates in Namibia.

   (l) Rules Governing Judicial Conduct, New York State, USA.

   (m) Code of Conduct for Judicial Officers of the Federal Republic of Nigeria.

   (n) Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan.

   (o) The Code of Judicial Conduct of the Philippines, September 1989.

   (p) The Canons of Judicial Ethics of the Philippines, proposed by the Philippines Bar Association, approved by the Judges of First Instance of Manila, and adopted for the guidance of and observance by the judges under the administrative supervision of the Supreme Court, including municipal judges and city judges.

   (q) Yandina Statement: Principles of Independence of the Judiciary in Solomon Islands, November 2000.

   (r) Guidelines for Judges of South Africa, issued by the Chief Justice, the President of the Constitutional Court, and the Presidents of High Courts, the Labour Appeal Court, and the Land Claims Court, March 2000.

   (s) Code of Conduct for Judicial Officers of Tanzania, adopted by the Judges and Magistrates Conference, 1984.

   (t) The Texas Code of Judicial Conduct.

(u) Code of Conduct for Judges, Magistrates and Other Judicial Officers of Uganda, adopted by the Judges of the Supreme Court and the High Court, July 1989.

(v) The Code of Conduct of the Judicial Conference of the United States.

(w) The Canons of Judicial Conduct for the Commonwealth of Virginia, adopted and promulgated by the Supreme Court of Virginia, 1998.

(x) The Code of Judicial Conduct adopted by the Supreme Court of the State of Washington, USA, October 1995.

(y) The Judicial (Code of Conduct) Act, enacted by the Parliament of Zambia, December 1999.

(z) Draft Principles on the Independence of the Judiciary ("Siracusa Principles"), prepared by a committee of experts convened by the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers, 1981.

(aa) Minimum Standards of Judicial Independence adopted by the International Bar Association, 1982.

(bb) United Nations Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly, 1985.

(cc) Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") prepared by Mr L.V. Singhvi, UN Special Rapporteur on the Study on the Independence of the Judiciary, 1989.

(dd) The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, adopted by the 6th Conference of Chief Justices, August 1997.

(ee) The Latimer House Guidelines for the Commonwealth on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles, 1998.

(ff) The Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System, adopted by the expert group convened by the Centre for the Independence of Judges and Lawyers, February 2000.

At its second meeting held in Bangalore in February 2001, the Judicial Group (comprising Chief Justice Mainur Reza Chowdhury of Bangladesh, Justice Claire L'Heureux Dube of Canada, Chief Justice Reddi of Karnataka State in India, Chief Justice Upadhyay of Nepal, Chief Justice Uwais of Nigeria, Deputy Chief Justice Langa of South Africa, Chief Justice Silva of Sri Lanka, Chief Justice Samatta of Tanzania, and Chief Justice Odoki of Uganda, meeting under the chairmanship of Judge Weeramantry, with Justice Kirby as rapporteur, and with the participation of the UN Special Rapporteur and Justice Bhagwati, Chairman of the UN Human Rights Committee, representing the UN High Commissioner for Human Rights) proceeding by way of examination of the draft placed before it, identified the core values, formulated the relevant principles, and agreed on the Bangalore Draft Code of Judicial Conduct. The Judicial Group recognized, however, that since the Bangalore Draft had been developed by judges drawn principally from common law countries, it was essential that it be scrutinized by judges of other legal traditions to enable it to assume the status of a duly authenticated international code of judicial conduct.

The Bangalore Draft was widely disseminated among judges of both common law and civil law systems and discussed at several judicial conferences. In June 2002, it was reviewed by the Working Party of the Consultative Council of European Judges (CCJE-GT), comprising Vice-President Reissner of the Austrian Association of Judges, Judge Fremr of the High Court in the Czech Republic, President Lacabarats of the Cour d'Appel de Paris in France, Judge Mallmann of the Federal Administrative Court of Germany, Magistrate Sabato of Italy, Judge Virgilijus of the Lithuanian Court of Appeal, Premier Conseiller Wiwinius of the Cour d'Appel of Luxembourg, Juge Conseiller Afonso of the Court of Appeal of Portugal, Justice Ogrizek of the Supreme Court of Slovenia, President Hirschfeldt of the Svea Court of Appeal in Sweden, and Lord Justice Mance of the United Kingdom. On the initiative of the American Bar Association, the Bangalore Draft was translated into the national languages, and reviewed by judges, of the Central and Eastern European countries; in particular, of Bosnia-Herzegovina, Bulgaria, Croatia, Kosovo, Romania, Serbia and Slovakia.

The Bangalore Draft was revised in the light of the comments received from CCJE-GT and others referred to above: Opinion no.1 (2001) of CCJE on standards concerning the independence of the judiciary; the draft Opinion of CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality; and by reference to more recent codes of judicial conduct including the Guide to Judicial Conduct published by the Council of Chief Justices of Australia in June 2002, the Model Rules of Conduct for Judges of the Baltic States, the Code of Judicial Ethics for Judges of the People's Republic of China, and the Code of Judicial Ethics of the Macedonian Judges Association.

The revised Bangalore Draft was placed before a Round-Table Meeting of Chief Justices (or their representatives) from the civil law system, held in the Peace Palace in The Hague, Netherlands, in November 2002, with Judge Weeramantry presiding. Those participating were Judge Vladimir de Freitas of the Federal Court of Appeal of Brazil, Chief Justice Iva Brozova of the Supreme Court of the Czech Republic, Chief Justice Mohammad Fathy Naguib of the Supreme Constitutional Court of Egypt, Conseillere Christine Chanet of the Cour de Cassation of France, President Genaro David Gongora Pimentel of the Suprema Corte de Justicia de la Nacion of Mexico, President Mario Mangaze of the Supreme Court of Mozambique, President Pim Haak of the Hoge Raad der Nederlanden, Justice Trond Dolva of the Supreme Court of Norway, and Chief Justice Hilario Davide of the Supreme Court of the Philippines. Also participating in one session were the following Judges of the International Court of Justice:

Judge Ranjeva (Madagascar), Judge Herczegh (Hungary), Judge Fleischhauer (Germany), Judge Koroma (Sierra Leone), Judge Higgins (United Kingdom), Judge Rezek (Brazil), Judge Elaraby (Egypt), and Ad-Hoc Judge Frank (USA). The UN Special Rapporteur was in attendance. The "Bangalore Principles of Judicial Conduct" was the product of this meeting.

Appendix 3

INTERVIEWS

Government Departments and Statutory Agencies

- Mr Brian Ingoldsby, Civil Law Reform, Department of Justice, Equality and Law Reform, 17 October 2005.
- Mr GN Rubutham, Director of Reform and Development and Brendan Ryan, Director of Corporate Services, the Courts Service, 14 November 2005.
- Dr Alpha Connolly, Chief Executive Officer, Irish Human Rights Commission, 12 December 2005.
- Ms Catriona Gilheany, Acting Secretary to Judicial Studies Institute and Brendan Ryan, Director of Corporate Services, the Courts Service, 9 January 2006.
- Ms Fionola Flanagan, Office of the Attorney General, 13 January 2006.

Legal and Representatives Bodies

- Mr James McGuill, Solicitor and member of the Law Society of Ireland's Human Rights Committee, 27 October 2005.
- Mr TP Kennedy, Head of Education, Law Society of Ireland, 28 November 2005.
- Ms Sarah McDonald, Dean of Law School, the Honourable Society of the Kings Inns, 27 November 2006.
- David Langwallner, BL and Lecturer in Constitutional Law, the Honourable Society of the Kings Inns, 8 December 2006.

Non-Governmental Organisations (NGOs)

- Mr Michael Farrell, Human Rights Commissioner and Solicitor with Free Legal Advice Centre (FLAC), 7 December 2005.
- Mr Frank Murphy, Solicitor, Ballymun Law Centre, 16 December 2005.
- Ms Sinead Lucey, Legal Consultant to Irish Traveller Movement, 9 November 2005.
- Ms Rachel Mullan, Policy Officer, Women's Aid, 9 November 2005.

United Kingdom (UK)

- Mr Edward Adams, Department of Constitutional Affairs, UK Government, 29 December 2005.
- Mr Eric Metcalfe, Head of Human Rights Policy, Justice, 29 September 2005.
- Mr Lord Anthony Lester of Herne Hill, Blackstone Chambers, 29 September 2005.

Individual Interviews

- Professor William Binchy, Human Rights Commissioner and member of the Faculty of Law, Trinity College Dublin, 16 December 2005.
- Professor William Schabas, Irish Centre for Human Rights, National University of Ireland, Galway, 21 September 2005.
- Ms Brid Moriarty, BL (formerly with the Law Society), 24 November 2005.

Telephone Interviews/Conversations

- Mr Michael O'Flaherty, Reader in Human Rights/Co-Director of the Human Rights Law Centre, University of Nottingham and member of the UN Human Rights Committee, 15 October 2005.
- Former Chief Justice Rajsoomer Lallah, member of the UN Human Rights Committee, 27 October 2005.
- Ms Roisin Pillay, International Commission for Jurists (ICJ), 21 August 2006.

Interviews with Judges

- Six justices from the Superior Courts.
- Five justices from the Circuit Court.
- Two judges from the District Court.
- One retired judge with experience in the Superior Courts and international courts and another retired judge with experience of the Superior Courts.
- One Irish judge from an international court.

Appendix 4

LIST OF INTERVIEWS WITH MEMBERS OF THE IRISH JUDICIARY

No.	DATE OF INTERVIEW	DESCRIPTION
1.	November 2005	Retired Justice of the Superior Courts, Interview No. 1
2.	January 2006	Justice of the Superior Courts, Interview No. 2
3.	January 2006	Justice of the Superior Courts, Interview No. 3
4.	April 2006	Justice of the Superior Courts, Interview No. 4
5.	June 2006	Justice of the Superior Courts, Interview No. 5
6.	June 2006	Justice of the Superior Courts, Interview No. 6
7.	June 2006	Circuit Court Justice, Interview No. 7
8.	June 2006	Justice of the Superior Courts, Interview No. 8
9.	June 2006	Circuit Court Justice, Interview No. 9
10.	June 2006	Circuit Court Justice, Interview No. 10
11.	June 2006	Circuit Court Justice, Interview No. 11
12.	July 2006	Circuit Court Justice, Interview No. 12
13.	July 2006	Irish Judge, International Court, Interview No. 13
14.	December 2006	Retired Justice, Superior Courts, Interview No. 14
15.	December 2006	District Court Judge, Interview No. 15
16.	January 2007	District Court Judge, Interview No. 16

Appendix 5

JUDICIARY ADVISORY GROUP MEMBERS

- Chair: Aileen Donnelly, Senior Counsel (SC).
- His Honourable Justice, Donal Barrington, former judge of the High Court, the Supreme Court, the European Court of Justice and the first President of the Irish Human Rights Commission.
- Noeline Blackwell, Director, Free Legal Advice Centre (FLAC).
- Sergeant Mick Byrne, Garda Human Rights Unit, An Garda Síochána.
- Alma Clissman, Parliamentary and Legal Reform Officer, Law Society of Ireland.
- Fiona Crowley, Legal and Research Manager, Amnesty International (Irish Section).
- Michael Finucane, Solicitor.
- Mary Ellen Ring, Senior Counsel (SC).
- Judy Walsh, Lecturer, Equality Studies Centre, University College Dublin.

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