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ARTICLE

Special Issue: Informal Judicial Institutions—Invisible Determinants of Democratic Decay

Informal Judicial Institutions in Ireland

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Abstract
In the past twenty-five years, Ireland has moved from a traditional common law model of judicial administration, in which key aspects of judicial careers and administration were handled informally and politically, to a much more formal system designed along European lines. This transition is driven by Irish judges and politicians and influenced heavily by EU and Council of Europe soft law on judicial independence and the rule of law. In this article I sketch an outline of judicial institutions in Ireland before focusing on two topics that exemplify the transition: Judicial conduct and judicial appointments. I argue that the move to formalize judicial administration in Ireland is rooted in a desire to follow best practice but also to avoid politically difficult reforms in other areas.

Keywords Judicial Appointments; judicial governance; judicial conduct; rule of law; regulation.

A. Introduction

One day in 1984, Gillian Hussey, then a solicitor, received a phone call from a senior Irish government minister. Hussey had recently applied to become a District Court judge—judges in Ireland are appointed from legal practice as either solicitors or barristers—and had heard that the government was specifically looking for a women to fill the role. The caller was a relative. Gemma Hussey was the Minister for Education, and married to Gillian Hussey's cousin. As Gillian Hussey describes the call in her memoir:

> I received a phone call from Gemma one day, and she told me that my application was being looked upon favorably. However, she went on, the government didn't want egg on its face, so it was necessary to ask if I was planning to take my ex-husband to court for maintenance. I replied that my marriage had ended 12 years previously and was now water under the bridge . . . . It wasn't long after that phone call that I received news that my application had been accepted. I don't think I would have been chosen if it wasn't for the Hussey surname and that quiet confirmation that I wouldn't cause any embarrassment.[1]

[1]Gillian Hussey, Lessons from the Bench: Reflections from a Career Spent in Ireland's Criminal Courts 24–25 (2022).

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The phone call was, in other words, both political and personal. It offered reassurance from a family member that the application was likely to go ahead. As a condition of appointment, Hussey was asked to confirm that her personal life would not become a political liability. Hussey went on to become a widely respected District Court judge. Her appointment and judicial career typify—both for good and bad—some of the contradictions of the transition from old to new systems of judicial administration in Ireland. A small society in which many elite figures knew one another personally, and in which political and personal connections played a significant role in judicial appointments, nonetheless produced a judiciary that was robustly and reliably independent of politics.

In this article I argue that Ireland is moving from a traditional common law model of judicial management and administration, towards a variant of the European Judicial Council model that is rooted in formal, independent, judge-led institutions. The traditional model was highly informal and relied on culture and political protections for judicial independence. This transition appears to be driven by a combination of factors, most obviously pressure from a "hardening" EU and Council of Europe soft law environment on rule of law and corruption issues. This soft law is increasingly hostile to political input into judicial administration. The move in Ireland is influenced, too, by broader trends in accountability and public administration within anglophone countries. Focusing on the examples of judicial conduct and judicial administration, I suggest that the transition from a traditional common law model to a more recognizably European model has been done without much thought to the distinctive nature of the Irish system. As such, there is potential for this transition to damage judicial independence, instead of strengthening it.

In Section B, I first outline the background to the Irish system, describing some of the basic institutions and practices and how they have evolved in recent decades. I then take two aspects of judicial policy to develop further. In Section C, I discuss judicial discipline in light of the recent "Golfgate" controversy. In Section D, I discuss the move towards formalization of judicial appointments, still ongoing at time of writing. In Section E, I draw together this material, and offer some hypotheses to explain Ireland's move towards formality.

B. Background to the Irish System

The court system in Ireland is in a state of transition. From independence until the mid-1990s, court administration in Ireland was a typical example of a common law system. The administration of the courts and court estate was handled by the Department of Justice, and sometimes by local authorities. Judges were appointed and promoted by the government without input from any other body. Judges could be dismissed for "stated misbehaviour and incapacity"[2] under the Irish Constitution, but this process has never been used. Disciplinary processes for less serious judicial misconduct did not exist.

The primary protection for judges in this system was their *individual* independence. Judges were historically independent not just from the state and from litigants, but from one another. Though senior judges had listing functions (to allocate cases and assign judges to courts) and promotions were in the gift of the government), Ireland followed the traditional common law model of the individual judge as an island, responsible only for her judgments and conduct in court; and, at that, responsible only to the appellate courts. Beyond this core, it was very difficult to *make* a judge do anything. *Collective* or corporate judicial independence was less significant. The Chief Justice lacked few formal responsibilities and was treated instead as first among equals. Such discipline as existed depended on peer pressure and informal conventions, and the culture of judicial independence—the circumspection and detachment from politics and controversy that are cultural totems of the judiciary—came through experience and through the judges' prior professional experience at the bar. Irish judges are appointed late in life, following successful

[2]Constitution of Ireland 1937 art. 35(4)(1).

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Function	New judge-led body	Previous process/agent
Court management	Courts Service (1999)	Administrative/Ministry of Justice, local authorities
Judicial appointments	Judicial Appointments Advisory Board (JAAB) (1995); *Judicial Appointments Commission (2023?)*	Informal-political/Government
Judicial standards/training	Committee for Judicial Studies (1996); Judicial Council (2019)	None
Judicial discipline	Judicial Council (2019)	None/parliamentary impeachment process
Judicial representation	Judicial Council (2019), Association of Judges of Ireland (AJI) (2011)[3]	Informal/none

Figure 1. New institutional structures for the Irish judiciary as of 2023.

careers as barristers or solicitors, and so the culture of the judiciary has historically been parasitic on that of the professions.

Relations between judges and the government were also handled largely informally. Though matters of high principle were essentially in the control of the judiciary, which adopted and enforced a strong doctrine of the separation of powers in constitutional law, administrative and representative discussions between judges and politicians happened out of public view, led by the Chief Justice and the court presidents. Communication between the judiciary and the Government was typically done by a letter sent through the Attorney General,[4] but given the nature of Ireland as a small society with an elite that were normally known to one another, judges often exercised significant influence over the Government behind the scenes.

In her memoir, Gillian Hussey offers a vivid account of what this informality and absence of management meant in practice as a junior judge in the 1980s. Judges were isolated and independent. Hussey describes having to make things up as she went along. The President of the District Court had a role in assigning judges to courts but—as jurisdiction was geographic—little else of a managerial nature. This could be positive and negative. Hussey describes some upsetting encounters: Sexual assault from colleagues, difficult interpersonal relationships, erratic deployment decisions based on personal rather than operational reasons.

From the mid-1990s onwards, this picture began to change in Ireland. New institutions were put in place to handle processes that had historically been managed politically, informally, or not at all. This process of modernization has accelerated dramatically in the past five years (*see* Figure 1). Very visible, formal, and bureaucratic judge-led systems have been superimposed upon the old model of the individual independence judge. A judge-run Court Service and Judicial Council have been created, and a formal judicial appointments system will shortly be created by statute.

A judge appointed to the District Court in 2024 will have a completely different experience to our 1980s judges. Informal practices have been almost completely replaced with formalized management structures, backed by statute. As an applicant, she will apply for a job that will be publicly advertised by a new Judicial Appointments Commission. The judge will be one of three candidates recommended to the government for appointment, and the government will be required to choose from one of those names. Our 2024 judge will receive mandatory training on

[3]The AJI (Association of Judges of Ireland) is a non-statutory representative body for judges set up in response to a crisis in relations between judges and the government in the early 2010s. In recent years the AJI appears to have limited itself to public statements of solidarity with overseas judiciaries and it is not clear how if its representative function will continue to exist alongside the new statutory Judicial Council in the long term.

[4]John O'Dowd, *Speaking to Power: Mechanisms for Judicial-Executive Dialogue*, in JUDGES, POLITICS AND THE IRISH CONSTITUTION 155 (Laura Cahillane, James Gallen & Tom Hickey eds., 2017).

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appointment and regular in-service training through the new Judicial Council. The Council also bears responsibility for setting conduct standards, disciplining and representing judges. Her ultimate "manager," as such, will be a Chief Justice who will be chair of the Judicial Council, the Judicial Appointments Commission and the Courts Service board. The judge may be formally investigated if a member of the public makes a complaint against her, and will be subject to a range of disciplinary sanctions if those complaints are found to be well-founded.

The result is an entirely different formal environment for Irish judges, and a significant change of emphasis. The traditional common law model of the independent individual judge is giving way to a more nuanced focus on an independent collegiate judiciary. This collegiate judiciary is now self-regulating and will shortly be partially self-appointing in ways that are entirely new to the Irish system. In the rest of this article, I will look at two areas of judicial administration that highlight the significance and potential risks arising out of this move from formality to informality: Judicial discipline and judicial appointments.

Before proceeding, a word on terminology. Common law literature typically speaks of "conventions" rather than informal rules in constitutional practice or administration. To preserve consistency with this literature I will keep with "convention" where a consistent non-legal rule is in evidence, and use "informal" to describe looser practices that fall short of the consistency of a rule.

C. Judicial Discipline and the Séamus Woulfe Controversy

Prior to October 2022, Ireland had only one mechanism for disciplining judges: The legislative impeachment procedure provided for by Article 35.4.1 of the Constitution. This process was essentially a "nuclear option," suitable only for very serious misconduct. The process has been initiated only twice in the history of the state, but never completed.[5] There was no formal mechanism for disciplining judges who engaged in low level misconduct, and discipline relied essentially on convention and social pressure from peers. Even at that, given the small judiciary and apparently low levels of misconduct, no consistent informal practices appear to have developed; though it is of course inherent in informal responses that they leave little trace on the public record. One example of a relatively minor misconduct issue that has come into the public domain is a 2011 incident in which a semi-naked judge shouted aggressively at a noisy group of tourists in a hotel. This ended in only the mildest informal action. "All the senior judges could do was to sit down with the judge over a cup of tea and suggest that he take a rest."[6] Serious incidents of misconduct—for example that of District Court judge Heather Perrin, convicted of deception in 2009—tend to end in resignation.

The absence of procedures to deal even with serious misconduct was problematic. In the early 2000s, a Supreme Court, a High Court judge and a court registrar intervened to reduce the sentence of a man convicted of causing death by dangerous driving, apparently following a private intervention by a member of the man's family. The intervention became a public scandal after the Director of Public Prosecution sought judicial review of the sentence reduction, and as a result, the Chief Justice Liam Hamilton, began an investigation and produced a report in which he was critical of all three, in particular the High Court judge, who he concluded had "failed to conduct the case in a manner befitting a judge."[7] The investigation and report were, however, informal and the Chief Justice ended his report stating that "In conclusion, I must, and do, emphasize that I, as Chief Justice, have no jurisdiction . . . to make any recommendations arising out of the facts of this case and I do not, for this reason, propose to do so."[8]

[5]In both prior cases the judge in question resigned before completion.

[6]Ruadhán MacCormaic, The Supreme Court: The Judges, the Decisions, the Rifts and the Rivalries that Have Shaped Ireland 78 (2016).

[7]Raymond Byrne et al, The Irish Legal System 186 (2014).

[8]*Id.*

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Though it is arguable that the Chief Justice's self-evidently damning conclusion in respect of the High Court judge did in fact implicitly suggest a course of action, his position was clear: He had gone as far as he could go, and any disciplinary conclusion was a political matter for the Government and the legislature.[9] Ultimately no formal disciplinary action was taken. All three resigned following a negotiation with the Government, which was anxious to avoid a constitutional crisis about judicial independence. In return, the Government secured the passage of special legislation to provide pensions for them.[10]

Following this crisis, it was proposed that a new Judicial Council should be created to take responsibility for judicial discipline.[11] A judge-led working group was convened, and its 2001 report recommended a broad judicial council, along European lines but with all judges as members. This Council would have responsibility not just for discipline, but also for ethics, training, publications, pay and conditions.[12] This Council would be led by the Chief Justice and the court presidents. These recommendations were accepted by the Government and legislation was prepared; however, because the proposals required a constitutional amendment and thus a referendum, and there was disagreement within the Oireachtas (Irish parliament) on some of the measures, the proposal ultimately fizzled out.

Judicial conduct quickly re-emerged as a problem. In 2004, Circuit Court Judge Brian Curtin was charged with possession of child pornography but acquitted on a technicality. There was thus a *prima facie* criminal case against him that could not be proceeded with. It was considered inappropriate for him to remain in place, yet, he refused to resign. As a result, the Oireachtas began to create a process to impeach him. This had never been done before, and much of the parliamentary process involved had to be created from scratch.[13] Curtin resisted the process at every stage, taking a case challenging the impeachment to the High Court and then to the Supreme Court, which ruled against him in 2006.[14] After this decision Curtin resigned, having served just long enough to qualify for his pension.

The Curtin case once again highlighted the dangers of leaving judicial conduct as an unregulated space in the Irish system. The 2001 proposals for a broad Judicial Council were revived and another working group convened, but once again the matter never received enough political attention to progress. Draft Judicial Council bills were produced in 2009 and 2010 but lapsed. A further attempt to legislate began again in 2013, but it was only after criticism of Ireland by the Council of Europe's GRECO committee on the rule of law in 2017 that political energy was devoted to the project.[15] A draft Judicial Council bill was produced the same year and was ultimately enacted as the Judicial Council Act 2019.[16]

This Act creates a broad Judicial Council along the lines proposed in 2001. All judges are members of the Council, which is chaired by the Chief Justice. The Council acts through a Board made up of a mixture of senior judges (the Chief Justice and four court Presidents) and elected

[9]Subsequently, the Chief Justice was involved in a public dispute with a parliamentary committee after refusing its request to make further inquiries into the affair, on the basis that to do so would be "constitutionally impermissible." *See* Jody Corcoran, *Chief Justice clashes with TDs over Sheedy*, Irish Independent, June 20, 1999, https://www.independent.ie/irish-news/the-chief-justice-clashes-with-tds-over-sheedy/26259794.html.

[10]Courts (Supplemental Provisions) (Amendment) Act 1999 (Act No. 25/1999) (Ir.), https://www.irishstatutebook.ie/eli/1999/act/25/enacted/en/html.

[11]This proposal built on existing proposals made by the Gov't. of Ir., Report of the Constitutional Review Group (1995).

[12]Judicial Conduct Committee, Report of the Committee on Judicial Conduct and Ethics (2001).

[13]For example, special legislation had to be enacted to exempt parliamentary staff from prosecution for handling the illegal material that formed the evidence for impeachment.

[14]*Curtin v. Clerk of Dáil Éireann* [2006] IESC 14, 2 IR 556.

[15]Conor Gallagher, *Report Finds Ireland "Unsatisfactory" in Judicial Independence*, The Irish Times, Jun. 29 2017; Group of States against Corruption (GRECO), Fourth Evaluation Round: *Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors: Compliance Report: Ireland,* Jun. 29, 2017.

[16]Judicial Council Act 2019 (Act No. 33/2019) (Ir.), https://www.irishstatutebook.ie/eli/2019/act/33/enacted/en/html.

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representative judges, and develops policy through dedicated committees. The Council now has responsibility for most aspects of the professional lives of judges (exceptions being courts and court estate—handled by the Courts Service—and judicial appointments, which is discussed below). It functions as a representative body for judges within Ireland and within international organizations and has responsibility for educating and training judges. It is also required to issue formal guidelines to judges on damages in personal injuries cases, and on sentencing. One of its first actions was to write and approve personal injuries guidelines, a politically sensitive topic.[17] Of most importance to us here is the Council's new responsibilities for judicial conduct. The Council is obliged by the Act to issue guidelines on conduct and ethics to Irish judges, and the Act creates a new disciplinary system. A committee of the new Council, the Judicial Conduct Committee, has been created to run this new system. Complaints can be made by members of the public to the Registrar of the Committee. Investigations into conduct may also be initiated by the Committee itself. The Registrar must make decisions about admissibility and thereafter a complex set of rules provide for pathways to an informal resolution process[18] or a formal investigation by a panel of inquiry.[19] This formal panel is given the powers of the High Court, and in serious cases findings of the panel can be used to create a formal pathway to the parliamentary impeachment process.

The Council took some time to agree on judicial conduct rules, and as a result, the rules and the complaints process did not come into operation until October 2022. In this interim period a very high-profile case of misconduct arose. In August 2020, Justice Séamus Woulfe, a newly appointed Supreme Court judge, attended a golfing dinner hosted by the Oireachtas Golf Society in Clifden, Co. Galway. Despite its name, the Society was a private group, though made up of members with a current or past connection to Irish politics; Woulfe served as Attorney General immediately prior to his appointment to the Supreme Court. Under Irish COVID-19 restrictions at this time the legal maximum attendance at an indoor event was 50: The Society's dinner was attended by 81. In addition, the event took place just a day after the Government announced severe new restrictions on indoor events, a reduction to a maximum of six attendees. The dinner was thus potentially in breach of the existing rules, but unambiguously contradicted the much more restrictive rule that was about to come into force.

News of the dinner became public the next day and, at a time when the general public was living under severe restrictions, the perception of a different set of COVID rules for a political elite quickly created a serious public and political controversy.[20] Though the organizers protested that the event was legal, on the basis that the group had been split into two linked rooms each containing less than fifty people, this had little political salience amidst an intense public outcry. A number of political resignations followed in the subsequent days, most prominently that of powerful Irish EU Trade Commissioner, Phil Hogan. It would later become clear, following a criminal trial of the organizers in 2022, that the event was in fact lawful. The "split room" fix put in place to comply with the legal COVID restrictions in force in August 2020 was valid.[21] Though the public and political reaction to the event may have been disproportionate,[22] there was nonetheless genuine and intense public anger about what very quickly became known as "Golfgate."

[17] *See id.* at Part 2(7). This followed significant political pressure over the high rate of inflation of insurance premiums, which insurance companies attributed to the levels of damages awarded by judges. The guidelines are available here: https://judicialcouncil.ie/assets/uploads/documents/Personal%20Injuries%20Guidelines.pdf (last accessed January 2023).

[18] *See id.* at Part 4 (effectively a formal mediation process).

[19] *See id.* at Part 5.

[20] Aoife-Grace Moore & Paul Hosford, *'I should not have attended the event': Minister Apologises for Attendance at Golf Event in Breach of Health Guidelines*, IRISH EXAMINER, Aug. 20, 2020, https://www.irishexaminer.com/news/arid-40035389.html.

[22] Harry McGee, *Golfgate: Judge Mary Fahy Took Less than Five Minutes to Dismiss the Case*, THE IRISH TIMES, Feb. 4, 2022, https://www.irishtimes.com/news/politics/golfgate-judge-mary-fahy-took-less-than-five-minutes-to-dismiss-the-case-1.4793135.

[22] *See E.g.*, Pat Leahy, *What Does the Golfgate Verdict Teach Us? We All Lost the Plot a Bit*, THE IRISH TIMES, Feb. 5 2022, https://www.irishtimes.com/opinion/2022/02/05/pat-leahy-what-does-golfgate-verdict-teach-us-we-all-lost-the-plot-a-bit-1.4793950/.

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Mr. Justice Woulfe, and the judiciary more broadly, found themselves at the center of a moral panic about elite misbehavior during a national emergency. Woulfe had yet to receive an induction or hear a case. To compound matters, he appeared not to grasp the seriousness of the matter and the intensity of the public reaction, nor the sensitive public relations required to weather it. He quickly issued a public apology "for any unintentional breach," but in the same statement complained that he had been assured that the event was in compliance with the guidance.[23] Some more substantial response was clearly required on the part of the judiciary, but none was available. Though the 2019 Act set out clear processes for a judicial disciplinary system, these had yet to come into operation. The only available *formal* process was the parliamentary impeachment process. In these circumstances the Judicial Council resorted to informal improvisation: A non-statutory review. Retired Chief Justice Susan Denham was asked to investigate Woulfe's attendance at the Golfgate event, and to make recommendations, and adopted a process that was loosely modelled on the disciplinary investigation process anticipated in the Act.[24] Denham took evidence from Woulfe, who retained a Senior Counsel to represent him and submitted expert evidence from structural engineers to support his case that he was not in breach of the law. The report found in favor of Woulfe on the substantive legal point: He had not, in Denham's view, breached the law. Denham concluded, however, that he still should not have attended the event and that he failed to consider that, given his new position as a Supreme Court judge, this "might be an impropriety, or might create the appearance of an impropriety, to reasonable members of the Public."[25] Denham attributed this failure, at least in part, to the absence of any induction or training for new judges and recommended that that this be introduced as a matter of urgency. Her conclusion on the consequences for the judge himself was, however, clear.

> In the Reviewer's opinion, based on the evidence and submissions she has received, she is of the view that Mr. Justice Woulfe did nothing involving impropriety such as would justify calls for his resignation from office. Such a step would be unjust and disproportionate.
>
> In light of the mitigation referred to above, the Reviewer is of the opinion that it would be open to the Chief Justice to deal with this matter by way of informal resolution.[26]

In Denham's view Woulfe had engaged in misconduct, but relatively trivial misconduct, and certainly not anything that required his resignation or dismissal.

The report was published by the Judicial Council on its website on October 1, 2022, together with a number of supporting documents, including a transcript of Woulfe's evidence. These were all released with Woulfe's consent, but the transcript proved to be incendiary. Far from appearing penitent or reflective, Woulfe was critical of the media in his evidence to Denham, and repeatedly objected that the public outrage was a media creation. He also offered some criticism of serving politicians including the Taoiseach (prime minister), though this was relatively mild. In a still febrile political environment, Woulfe's self-pitying and legalistic approach to the controversy suggested a lack of self-awareness, and overshadowed the measured conclusions of the Denham report. In early October, three of Woulfe's Supreme Court colleagues met with him to discuss how the matter should be resolved, and two of the three informed him of their view that he should

[23] Aoife-Grace Moore, Peter Towe, Paul Hosford & Joel Slattery, *#Golfgate Latest: Resignations, Apologies, Regrets and a Call for Golf Society to Disband*, Irish Examiner, Aug. 21, 2020, https://www.irishexaminer.com/news/arid-40035683.html.

[24] Given the absence of statutory authority for the process, this approach required the Judicial Council to indemnify Denham against any legal action in relation to the content of her report.

[25] Chief Justice Susan Denham, Report at 26–27 (2020) (hereafter Denham Report), https://judicialcouncil.ie/assets/uploads/documents/report-1-10-20.pdf.

[26] *See id.* at 28.

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resign. Woulfe's shock at this appears to have prompted a health crisis of some sort.[27] During that month he repeatedly missed meetings with the Chief Justice, Frank Clarke, which were aimed at achieving a resolution. News of these repeatedly planned meetings, and their repeated cancellation, were all briefed to the media.

On the fifth of November, Woulfe finally met with Clarke and an outcome was agreed. Woulfe would accept a public reprimand from the Chief Justice, and would not be listed to hear cases for three months. During this time, Woulfe agreed to return his salary. This outcome—though entirely informal and lacking any legal foundation—was consistent with the recommendations of the Denham Report and was comparable with what one might have expected under a formal disciplinary regime. Once again in this process, however, the substantive outcome was overshadowed by the way it was made public. Instead of simply publishing the reprimand and sanction on the Judicial Council website as one might have expected—the Denham Report had been published there—, the Chief Justice issued a press release containing his whole correspondence with Woulfe.[28] In his letters, the Chief Justice set out his view that Woulfe's comments in the Denham transcript had made things worse: "I should say that the reasonable response of a great number of people to the transcripts has, in my judgment, caused even greater damage to the judiciary than did your attendance at the Clifden event."[29]

The Chief Justice stated in terms his belief that Woulfe's position was untenable: "to avoid serious damage to the judiciary, you should resign."[30] Publication of the full correspondence may have been a last-ditch attempt to force Woulfe to resign. If so, it backfired. By so publicly questioning Woulfe's appropriateness for the Supreme Court bench, the Chief Justice pushed politicians into considering impeachment, an action that would have created a difficult political precedent. After several days of intense political and media pressure, the government and the main opposition parties concluded that the matter did not reach the threshold for impeachment, and the matter was allowed to drop.[31] Woulfe served his three-month informal suspension from office and then rejoined the Supreme Court, hearing his first case in February 2021.[32]

The absence of a formal mechanism for disciplining judges contributed significantly to the difficulties that attended the Woulfe case, but it was clearly not the only difficulty. There is a marked distinction in approach between the attitude of Chief Justice Hamilton in relation to the much more serious misconduct that surrounded the Sheedy case in 1999, and that of Chief Justice Clarke in 2020. In 1999, Hamilton felt unable to make any recommendation in relation to the judges concerned, despite making quite damning findings of fact in relation to their behavior, and was extremely cautious about public engagement. In 2020, the judiciary were willing to put in place formal processes to examine Woulfe's conduct, and Chief Justice Clarke was willing to publicly state his view that Woulfe should resign. The creation of the Judicial Council and the fact that disciplinary legislation was on the statute books, even if it was not in force, appears to have been a decisive difference. Personality factors and the lack of personal contact, as a result of the pandemic, may also have played a role.

[27]In his letters to the Chief Justice, Woulfe stated that he "developed a serious medical condition in consequence of the stress." The letters were subsequently published and are available here: https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/ (last accessed January 2023).

[28]Available on the RTÉ website here: https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/.

[29]*See id.*, Letter from Chief Justice Frank Clarke to Judge Seamus Woulfe (Nov. 5, 2020).

[30]*Id.*

[31]A small opposition party tabled a motion to impeach Woulfe in December 2020, but this did not proceed further. See the discussion at 1011 Dáil Éireann Deb. (Dec. 1, 2020), https://www.oireachtas.ie/en/debates/debate/dail/2020-12-01/3/.

[32]Mary Carolan & Colm Keena, *Séamus Woulfe Sits for First Time as Supreme Court Judge Today*, The Irish Times, Feb. 4, 2021, https://www.irishtimes.com/news/crime-and-law/seamus-woulfe-sits-for-first-time-as-supreme-court-judge-today-1.4475403.

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It is of note, however, that having done well in difficult circumstance to innovate an informal review into Woulfe's conduct, the judiciary then proceeded to ignore that review, and to place intense private pressure on him to resign. Whether Woulfe's conduct amounted to a resigning matter, given the background circumstances of a public emergency, is ambiguous.[33] There was substance to the Chief Justice's view that the whole sequence of events amounted to a resigning matter. However, the implicit assumption that Woulfe's attitude and comments *within* the disciplinary process were severable from the process itself was problematic. As Denham's report suggested that the main contributor to the problem was that Woulfe had not received training and lacked full awareness of the requirements of his new position,[34] the decision to publish the transcript—even though it was done with Woulfe's consent—was perhaps ill-judged. Resentment, delay and mental health problems are not uncommon in disciplinary processes. A formal process would likely have imposed more safeguards for the judge than were in evidence here, and the continuous briefing to the media of information that apparently related to Woulfe's mental health is a particular source of concern. Though he was not a sympathetic character in this sequence of events, Woulfe's complaints that he was sharply treated by his colleagues were not without foundation. The impression created is that, against the backdrop of the Judicial Council Act and the pandemic, the judiciary felt empowered or obliged to impose an extremely robust form of informal discipline.

The Judicial Council adopted new judicial conduct rules in October 2022, and the new formal complaints process was commenced at the same time. The conduct rules adopted are based very closely on the Bangalore Principles on Judicial Conduct of 2002. At times, these rules are adopted almost verbatim, with little allowance made for the Irish context other than a few case law references; and the procedures described do little other than restate the provisions of the 2019 Act. It is not yet clear how the new processes will operate in practice.[35] The evident desire on the part of Irish judges, and the Irish elite more broadly, to keep pace with international best practice guidance is a theme that also emerges from recent reforms to judicial appointments. It is to this that we now turn.

D. Judicial Appointments and Informality

Judicial appointments in Ireland were traditionally made along common law lines. Appointments were made by politicians without much formal process. The 1937 Constitution provides that judges are appointed by the President on the advice of the Government.[36] For most of the history of the Irish state, this meant that appointments were in effect, at the discretion of the Government. As discussed below, this is due to change imminently. Appointments were historically controlled by a smaller group at the heart of Government: The Taoiseach, the Minister for Justice and the Attorney General. This group would discuss potential nominees in advance and present an agreed choice of judicial appointee to cabinet.[37] The choice of candidates, especially to the lower courts, was often made as a form of party-political patronage—though party politics were less important at more senior levels other than as a tiebreaker[38]—and it is generally accepted that judges were scrupulously independent once appointed.

The process involved in Gillian Hussey's appointment to the District Court (described in the introduction) was arguably typical in being driven by personal connections, but nonetheless

[33]For the view that this was a borderline case given the "stated misbehaviour" standard, *see* Laura Cahillane & David Kenny, *Lessons from Ireland's 2020 Judicial Conduct Controversy*, 51 COMMON L. WORLD REV. 24, 37–39 (2022).

[34]*See* DENHAM REPORT, supra note 25, at 26–28.

[35]Information on these processes is available on the Judicial Council website: https://judicialcouncil.ie/judicial-conduct-committee/.

[36]CONSTITUTION OF IRELAND 1937 arts. 35(1), 13(9), 13(11).

[37]JENNIFER CARROLL MACNEILL, THE POLITICS OF JUDICIAL SELECTION IN IRELAND 105–06 (2016).

[38]*See id.* at 107.

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resulting in the appointment of a highly independent-minded person. Elgie *et al* speculate that this apparently contradictory feature of judicial appointments in Ireland arises because these appointments were treated as a reward for past political loyalty rather than as an expectation of future preference. They also note, however, that the absence of obvious party-political divides on the bench may also result from a broader ideological consensus within Irish politics. There has often been little difference in principle between the major Irish political parties.[39] In sum, judicial appointments in Ireland appear to support the conclusion evident in empirical literature on courts: That the relationship between *de jure* and *de facto* judicial independence is not clear cut, and that robust *de facto* independence does not necessarily require *de jure* legal protections.[40]

This traditional political and highly informal approach to appointments has given way to formality only very slowly. There are two broad reasons for this. The first is that the traditional approach worked in practice: The system produced robustly independent judges. The second is that the role of the Government in appointments was protected by a long-standing interpretation of the Constitution, and valued by politicians as a harmless form of patronage.

The first attempt to introduce a more rigorous approach to appointments was made in 1995, with the creation of the Judicial Appointments Advisory Board (JAAB). This body was created in large part to resolve a political dispute. The two political parties in the coalition government had a major disagreement about the way in which judges were appointed, which resulted in a minor constitutional crisis after the Attorney General, Harry Whelehan, was appointed as President of the High Court by the Fianna Fáil Taoiseach, Albert Reynolds, over the objections of the minor partner in the coalition, the Labour Party, who regarded him as unsuitable.

The new body was created in an attempt to restore trust in the appointments process within the Government, by removing much of the decision-making process from the Government itself.[41] The JAAB comprised of the Chief Justice and the President of each court (five judges in total), together with the Attorney General and representatives from the Bar Council and the Law Society (the professional bodies), plus three laypersons. The judiciary thus had very strong input into recommendations for new judicial appointments. However, because it was felt that *any* restriction on the Government's discretion to appoint judges was unconstitutional, the Board did not make appointments itself.[42] Instead, it made recommendations. The JAAB was required to make *at least* seven recommendations for each vacancy, and to convey every application to the Minister for Justice.[43] Furthermore, the Government was not required to choose from the list supplied from the JAAB, and could even appoint someone who had not applied. As the JAAB process did not cover promotions of existing judges, this meant that a significant part of normal judicial appointments fell outside of its purview altogether.[44]

[39]Robert Elgie, Adam McAuley & Eoin O'Malley, *The (Not-So-Surprising) Non-Partisanship of the Irish Supreme Court*, 22 Irish Political Studies 88, 105 (2017).

[40]Melton and Ginsburg argue that the relationship between *de facto* and *de jure* judicial independence is contextual and that *de jure* rules are likely to be more impactful in authoritarian regimes: James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, 2 J. of L. and Cts. 187 (2014). On this topic more generally, *see e.g.*, Charles Cameron, *Judicial Independence: How Can You Tell It When You See it? And Who Cares?*, *in* Judicial Independence at the Crossroads: An Interdisciplinary Approach (Stephen Burbank & Barry Friedman eds., 2002); Stefan Voigt & Bernd Hayo, *Explaining De Facto Judicial Independence*, 28 Int'l Rev. of L. and Econ. 269 (2007); Graham Gee, Robert Hazell, Kate Malleson & Patrick O'Brien, The Politics of Judicial Independence in the UK's Changing Constitution (2015); David Kosař, Perils of Judicial Self-Government in Transitional Societies (2016).

[41]The creation of the new appointment body took place without any policy deliberation or external consultation and was primarily designed to "enable the Labour Party to stay in government." *See* MacNeill, *supra* note 37, at 69–70. *See also* MacCormaic, *supra* note 6, at 307.

[42]*See* MacNeill, supra note 37, at 70.

[43]Courts and Court Officers Act 1995, § 16(2) (Act No. 31/1995) (Ir.).

[44]*Id.* at § 16(6) (requiring only that the Government "shall firstly consider" persons recommended by the JAAB, and referred only to barristers and solicitors).

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As a political fix, the JAAB failed: Whelehan resigned within days, and the government collapsed soon afterwards. The long-term effect of the JAAB was also negligible. It was—by design, according to one of those involved—a cosmetic reform.[45] Its effect was diminished still further by the decision of the JAAB, early in the 2000s, to recommend all applicants that it regarded as suitable. This decision was influenced by judicial members of the Board, and apparently arose out of concerns that to do otherwise would be unconstitutional, given the requirement that the Government retain discretion in appointments. The result was that the JAAB was a mere screening body, and as it did not handle promotions of serving judges, only a partial one.[46]

Seen as a reform to judicial appointments, the JAAB was a failure. Though the process of applying for judicial office for non-judges was made more open and more transparent, there was no impact on the Government's discretion. This was not without some benefits. A long-standing convention in appointments holds that at least one Supreme Court judge should be a non-Catholic. More recent practice appears to have aimed at achieving at least the same gender balance in new judicial appointments as exists within the legal profession.[47] Articulating these conventions within a written statutory framework would be difficult.[48]

There have been two serious attempts to reform judicial appointments in the past five years. These highlight the new influence of European agencies and soft law on the rule of law and judicial independence. The first attempt at reform arose out of a Government coalition deal with an independent TD (member of parliament), Shane Ross.[49] Ross's bill was based closely on the Judicial Appointments Commission for England and Wales, and proposed significant lay input within the appointments process. The bill would have created an unwieldy body with 13 members, including a lay majority and lay chair, as well as a number of sub-committees which would operate depending on the nature of the appointment. For a small jurisdiction, the system was significantly over-designed. For a Court of Appeal appointment exercise in 2016, for example, the JAAB reported that there was no suitable candidate that it could recommend; and in 2019 the Board reported that it received only one application for two vacancies on the Supreme Court. The aspect of the Bill that generated most reaction was, however, the role of lay people on the proposed JAC. The removal of the Chief Justice's prior role as chair of JAAB, in favor of a lay chair, was described by a retired Supreme Court judge as "a deliberate kick in the teeth" to the Chief Justice.[50] The then Attorney General, Séamus Woulfe, described the bill as a "dog's dinner" at a public event.[51]

Significant political damage to the Bill was done by the Council of Europe's GRECO anti-corruption body, which in its interim compliance report of 2018 expressed concern about the proposed lay majority and chair, describing it as a breach of European standards.[52] This intervention was reported in the Irish media as a decisive intervention by an eminent European body against the Bill. [53] Moreover, it confirmed the trenchant view of the judiciary that it was

[45]Jennifer Carroll, *You be the Judge Part II*, 10(6) BAR REVIEW 182, 188 (2005).

[46]*See* MacNeill, *supra* note 37, at 129.

[47]*See* RAYMOND BYRNE, J. PAUL MCCUTCHEON, LAURA CAHILLANE & EMMA ROCHE-CAGNEY, THE IRISH LEGAL SYSTEM 178 (2014).

[48]The Judicial Appointments Commission Bill of 2022 § 23(2) imposes a weaker requirement that, "to the extent feasible and practicable" appointments should comprise equal numbers of men and women, and should "reflect the diversity of the population of the state as a whole." This requirement is made subject to the requirement that appointments shall be based on merit.

[49]*See* Sarah Bardon, *Shane Ross Criticised for 'Blocking' Judicial Appointments*, THE IRISH TIMES, Oct. 30, 2016.

[50]*See* Mary Minihan, *Judicial Reform Plan a 'Deliberate Kick in the Teeth' for the Chief Justice*, THE IRISH TIMES, Jun. 27, 2017.

[51]*See* Kevin Doyle, *Judges Bill is 'Complete Dog's Dinner', Claims AG*, THE IRISH INDEPENDENT, Mar. 24, 2018, https://www.independent.ie/irish-news/judges-bill-is-complete-dogs-dinner-claims-ag/36739158.html.

[52]*See* GRECO, FOURTH EVALUATION ROUND, INTERIM COMPLIANCE REPORT: IRELAND, Jun. 2018.

[53]*See, e.g.*, Shane Phelan, *Ross Reforms Dropped from New Judicial Appointments Bill Proposal*, THE IRISH INDEPENDENT, Dec. 15, 2020, https://www.independent.ie/irish-news/politics/ross-reforms-dropped-from-new-judicial-appointments-bill-proposal/39864435.html.

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inappropriate to have a lay majority and a lay chair on the proposed commission. Yet it is not clear why GRECO reached this conclusion. The report does not explain its reasoning, nor what comparative work, if any, was done to support them. Whilst it is normal for appointment systems in civil law countries, with professional judiciaries, to be run entirely by judges, the same is not true of common law systems, where practice is completely inconsistent and no best practice is in evidence. To characterize the proposed lay chair and majority as an attack on judicial independence stretches credulity, not least because it mirrored a relatively recent change in England and Wales that was designed to strengthen judicial independence.[54] Not only did GRECO not take this view in connection with the involvement of lay members on the Judicial Appointments Commission for England and Wales, it *praised* the "proactive" changes to judicial appointments in that jurisdiction.[55] Irish policymakers might be forgiven a degree of confusion.

GRECO's intervention had the effect of bolstering the position of the judiciary in the debate, and the power of the judiciary in the longer term. It is clear from the report that the Irish judiciary lobbied GRECO for this conclusion. As the interim report puts it:

> In addition to the information submitted by the Government, GRECO has also received information, directly submitted to it, by the judicial authorities, through the Chief Justice of Ireland . . . [and court presidents] . . . In their submission they stress that the Judicial Appointments Commission Bill 2017 has not been subject to in-depth consultations with the judiciary (contrary to what is stated by the Government) and that the judiciary has consistently opposed the content of the Bill, the components of which they believe is inconsistent with European standards as reflected in the Council of Europe Recommendation CM/Rec (2010)12.[56]

The Council of Europe document referred to recommends that at least half the members of a judicial appointment body should be judges chosen by their peers, and that where constitutional requirement dictate that appointments must be made by a government or legislator, an independent authority drawn "in substantial part from the judiciary" should make recommendations which the appointing authority follows in practice.[57] As with the GRECO report, it is not clear that this recommendation takes much account of the divergent history of appointments in common law countries, nor of the significance that a unified court system in a common law country has for the legitimacy of judges in the apex court.

The 2017 bill was ultimately filibustered by lawyer members of the Seanad (upper house) and lapsed with the dissolution of the Dáil before a general election in 2020. The appointment of Séamus Woulfe directly from the office of Attorney General to the Supreme Court in 2020 created renewed impetus for reform in this area. This appointment, together with the appointment of his predecessor, Máire Whelan, directly to the Court of Appeal in 2017,[58] highlighted the lacuna in the JAAB process, which did not offer any way for serving judges to apply for promotion. A new bill was proposed in 2020, though delayed significantly. At time of writing (early 2023) it is going through the legislative process and appears highly likely to pass. This bill will make the Chief

[54]The Irish 2017 Bill was partly modelled on the changes made in England and Wales by the Constitutional Reform Act 2005.

[55]*See* GRECO, Fourth Evaluation Round, Evaluation Report: United Kingdom, October 2012, at 27, para. 90.

[56]*See* GRECO, Fourth Evaluation Round, Interim Compliance Report: Ireland, June 2018, paras. 30–32 (emphasis in the original).

[57]*Recommendation on CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities*, Council of Europe, 16 (2017), https://rm.coe.int/1680702ca8.

[58]There was an historic convention in the UK that the Attorney General had first refusal on new appointments to the High Court. It is unclear to what extent (if at all) this convention carried over in Ireland post-independence. There have been three such appointments in Ireland in the past thirty years, and each has been controversial.

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Justice the chair of the new Judicial Appointments Commission and has removed the lay majority that featured in the 2017 Bill. Instead, there will be a nine-person Commission, comprising four lay and four judicial members, and including the Attorney General as a non-voting ninth member. The new bill will include applications from serving judges within its scope, and also includes commitments on diversity and the use of interviews and training.

Of most significance is the effect that the new bill will have on the Government's discretion to appoint judges. For all the complex structure and process that the 2017 bill would have placed around appointments, that bill effectively preserved the Government's unrestricted power to appoint whoever it wished to judicial vacancies. This was done because of the long-standing concern that to do otherwise would be unconstitutional. This concern had also left a deep impact on the JAAB reform in 1995. By contrast, the new bill requires the Government to choose from among three names recommended to it for each post. This is a remarkable change of position and appears to have been driven by recommendations from European bodies. Introducing the Bill, the Minister for Justice, Helen McEntee said:

> The reformed appointments system will be seen to clearly emphasise the principles of meritocracy and independence. It is designed to meet both our own constitutional standards and the standards set by the Court of Justice of the European Union, CJEU, regarding independence and the rule of law in judicial appointments.[59]

This sentiment—a desire to incorporate European best practice—permeates the Bill itself, which in its long title is described *inter alia* as a bill to provide for judicial appointments and related matters "having regard to the recommendation of the Council of Europe's Group of States against Corruption (GRECO) . . . and having regard to Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member states on judges: independence, efficiency and responsibilities . . ."[60]

The original 2020 version of this bill did not contain any constraint on the Government's discretion. It appears that the change was driven by an EU report. In 2021, the EU Commission's Rule of Law Report for Ireland commented that the proposals in an earlier draft offered too much discretion to the Government, stating that "it is important that this reform takes into account Council of Europe recommendations by independent authorities."[61] The Government proceeded to quietly abandon its previously unshakeable position that the Constitution required unfettered Government discretion over appointments. In place of informal political choice, it now appears likely that there will be a highly constrained form of bureaucratic appointment process. The new Bill will empower judges at the expense of politicians, and in the face of countervailing policy concerns. The existing Irish approach seems, for example, better at producing a diverse judiciary than does the approach in England and Wales upon which it is modelled. Political involvement in aspects of judicial appointments is also important as a means of fostering political trust in the judicial system, especially in a common law system with a single unified structure that deals with sensitive constitutional matters, including strong rights-based judicial review of legislation. Equivalent bodies in other countries––the German Constitutional Court or the French Conseil d'État, for example––are not appointed without political input. If the European institutions have given thought to these issues in making recommendations, it is not apparent.

[59]1021 Dáil Éireann Deb. (Apr. 27, 2022).

[60]Judicial Appointments Commission Bill 2022 (Act No. 42/2022) (Ir.) (text of the version as passed by the Dáil on June 29, 2022).

[61]European Commission, *2021 Rule of Law Report: Country Chapter on the Rule of Law Situation in Ireland*, 5 (2021), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0715.

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Though the previous constitutional view on Government discretion was, in truth, founded upon little of substance,[62] it was a mainstream view within Irish constitutional law that had shaped Irish practice on judicial appointments for decades and had long restricted proposals for reform. It was also consistent with historic practice within most common law jurisdictions. For a non-binding European report to lead to its abandonment, without fanfare or complaint, is a significant outcome. In the next section I explore the reasons for this move to formalization in Irish judicial policy.

E. Why Is Ireland Moving towards Formalization?

It is clear from the examples explored above that these reforms have not been imposed on an unwilling Ireland. Elite figures in Ireland—and especially the judiciary—appear to be deeply committed to modernization along European lines. Though the emerging judicial institutional landscape in Ireland looks a little more complex than in many other jurisdictions—in place of a Judicial Council taking care of most aspects of judicial careers, there will be multiple institutions—the new Irish model is otherwise consistent with European best practice norms, with all significant aspects of a judicial career now being both formalized and led by judges themselves. Accounting for this change is difficult in the absence of clear empirical evidence. Here I limit myself to two overlapping hypotheses.

The first is that reforms to judicial institutions in Ireland have proceeded as they have in large part because the proposals emerging in international and European best practice are culturally familiar. They connect to two themes that have been dominant in Anglophone public administration for decades: Accountability and the New Public Management. There has been an explosion in the discourse and modalities of accountability in recent decades.[63] Despite its historic origins as an agent-principal relationship between two individuals,[64] accountability now sits center stage in liberal democracies as a much broader concept of good governance. At its core, this contemporary conception of public accountability expressed a belief that public office holders should be answerable to the public for their conduct in office.[65] We now expect, under the mantle of "accountability," governments, professionals, and public services to comply with norms of openness, responsiveness, lay involvement and control. These practical requirements are overlaid with ethical concerns about the common good, appropriate controls on power, and conceptions of dialogue between citizens and stakeholders.[66]

Although judges have stood aloof from accountability discourse longer than most professional groupings, accountability—tempered by judicial independence—is now a shibboleth of judicial administration.[67] Writing in 2004 in relation to the U.K., Andrew le Sueur identified three different camps on accountability as applied to judges. "Opponents" treated the idea of the

[62]There was no authoritative court decision on the matter. The wording of the constitutional provisions, taken together, is capable of supporting both the "old" and "new" views on this point.

[63]*See E.g.*, MICHAEL POWER, THE AUDIT EXPLOSION (1994); ONORA O'NEILL, A QUESTION OF TRUST: THE BBC REITH LECTURES (2002).

[64]Sir Jack Beatson, High Court Judge, Judicial Independence and Accountability: Pressures and Opportunities, 13 (Apr. 16, 2008), available at https://www.judiciary.uk/wp-content/uploads/2020/08/beatsonj040608.pdf.

[65]Michael Dowdle, *Public Accountability: Conceptual, Historical and Epistemic Mappings*, *in* REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS 197, 199 (Peter Drahos ed., 2017).

[66]*See* Richard Mulgan, *'Accountability': An Ever-Expanding Concept?*, *in* 78 PUBLIC ADMINISTRATION 555, 556 (2000); Michael Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 WEST EUR. POL. 946 (2010); Vernon Bogdanor, Parliament and the Judiciary: The Problem of Accountability, Third Sunningdale Accountability Lecture (2006).

[67]*See, e.g.*, Stephen Burbank, *The Architecture of Judicial Independence*, *in* 72 S. CAL. L. R. 315, 339 (1999) (specifically Burbank's argument that independence and accountability are 'different sides of the same coin').

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accountable judges as an oxymoron: A judge could not be both independent and accountable. "Re-conceptualists" interpreted the existing practices of the judiciary—reasoned judgments delivered in public, the possibility of appeal—as accountability mechanisms. "Radicals" sought new forms of accountability, such as independent scrutiny of appointments.[68]

In the U.K., the radicals won out. Significant reforms to judicial management, appointments and discipline have been made in the U.K. jurisdictions in the past twenty years. For the most part, these reforms have proceeded using a familiar institutional vernacular: The New Public Management. This approach to public administration, originating in the U.K. and associated with neoliberal economics, aims to organize the public sector into individualized independent agencies in the interests of efficiency and accountability. These agencies are depoliticized and run at arms-length from government. In England and Wales (for example), judicial appointments and discipline are now handled by independent agencies that are under the indirect control of the Lord Chancellor.[69]

Both the New Public Administration and the U.K. approach to organizing the judiciary have been influential in Ireland.[70] Ireland, too, has organized many of its key public services into independent agencies. In as much as the European soft law model seeks to organize the judiciary into an independent and depoliticized institution, I hypothesize that this message is well received because it fits neatly into Irish administrative culture. Irish politicians and administrators are already used to the New Public Management concepts of accountability, independence and depoliticization in other areas of public life. The centrality of judicial independence as a value, and the example of judicial reforms in neighboring U.K. jurisdictions, makes it natural that independence and formalization should be seen as policy goals for judicial administration. Nonetheless Ireland—having adopted a judge-led Courts Service and a formal Judicial Council in addition to reforms to judicial discipline and appointments—appears to be going further in this direction than other common law jurisdictions.

The difference may arise out of European influence. My second hypothesis relates to the "hardening" of European soft law on judicial independence, and the incentives that this hardening presents to politicians who are charged with reform.[71] The Irish Government's quiet constitutional *volte face* on discretion in judicial appointments in the aftermath of the 2021 European Commission report appears to indicate that it regards European best practice as something approaching binding. EU law is, of course, technically superior to Irish constitutional law (both as a matter of European law and per Article 29.6 of the Irish Constitution) but this does not apply to recommendations of this kind. In the Europe of today, however, judicial independence and the rule of law are matters of high politics. The democratic backsliding in some Member States of the EU in the past decade has led to a concerted push to articulate and to defend rule of law values. This is most clearly in evidence in the European Commission's rule of law mechanism, which began to report on individual countries in 2020 (and out of which the 2021 report emerged). These rule of law reports rely heavily on Council of Europe evaluations and recommendations; and, in the context of the judiciary, particular on reports from GRECO and the Venice Commission. As such, these Council of Europe soft law sources are now given the additional weight of incorporation by reference into the general rule of law *acquis* of the EU.[72]

[68] Andrew le Sueur, *Developing Mechanisms for Judicial Accountability in the UK*, 24 LEGAL STUD. 73, 75 (2000).

[69] On the system in England and Wales, see Sophie Turenne, *Informal Judicial Institutions - The Case of the English Judiciary*, in this issue.

[70] Although in at least one case, the influences have gone the other way. The Scottish Courts Service was directly influenced by its Irish equivalent, which was established a decade earlier. *See* Gee *et al.*, *supra* note 40, at 9.

[71] On this point, *see also*, David Kosař & Attila Vincze, *European Standards of Judicial Governance, from Soft Law Standards to Hard Law*, 30 JOURNAL FÜR RECHTSPOLITIK 491 (2022).

[72] *See, e.g.*, Rafael Bustos Gisbert, *Judicial Independence in European Constitutional Law*, 18 EUR. CONST. L. REV. 591 (2022).

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In common with many countries, Ireland's historic response to GRECO reports has been patchy. In its compliance report of 2017, GRECO concluded that Ireland's response to the recommendations made in its Fourth Evaluation Round in 2014 had been poor and was indeed "globally unsatisfactory."[73] As a result, GRECO applied its non-compliance procedure. This requires additional reports on progress from the defaulting country but, perhaps more saliently, involves a public and diplomatically embarrassing statement of this status. By the time of GRECO's second interim compliance report on Ireland in 2020, this status had been removed. This was almost exclusively as a result of reforms to Irish judicial institutions. More politically unpalatable GRECO recommendations—for example on ethics and conflicts of interests for politicians—have mostly been left unaddressed.

It is at least arguable that the structure of the GRECO process (and of the EU Commission process) incentivizes politicians to push through reforms that are politically easy rather than tackle more difficult and politically salient recommendations. The depoliticization of judicial administration is—almost by definition—politically uncontroversial. GRECO reports and those published by the EU Commission suggest that the Irish Government pushes back against recommendations on reforms to, for example, politics or criminal prosecutions in a way that it does not where judges are concerned. In the context of the European push to address democratic decay, it is undoubtedly bad politics for a country that sees itself as a liberal, open and democratic to be placed alongside countries in which democratic backsliding is a serious concern. The broader cultural desire of the Irish elite to be seen to be as "good Europeans,"[74] especially in the aftermath of the neighboring U.K.'s highly contentious departure from the EU, may also play a role in driving Irish judges and politicians to signal their liberal pro-European politics by implementing European anti-corruption recommendations (especially where they carry little political cost).

Given this influence of European soft law on Irish reforms, it is unfortunate that many European reports are so poor. The EU Commission reports on Ireland for 2020, 2021, and 2022, for example, have all opened with the line: "Ireland is a common law jurisdiction, whose judiciary is divided into a civil and criminal branch." The statement is incorrect: Ireland has a single, unified, judiciary.[75] They also tend towards unsupported self-referential statements, such as the concern expressed in the 2022 report that, despite never having been used, the judicial impeachment process in Ireland allows for "politicization," which refers back to an equivalent unsupported statement in the 2021 report.[76] Reports by GRECO and the Venice Commission, to which the EU Commission reports make copious reference, are normally of higher quality. However, these reports seldom, if ever, demonstrate any awareness of the cultural distinctiveness of common law systems (and, as noted above in relation to judicial appointments, do not always present a consistent or coherent approach to best practice).[77] The Irish common law system is so different from traditional European models that significant work to contextualize historic practices is required to make meaningful comparisons, yet it seems clear that—even as European best practice guidance calcifies into a one-size-fits-all regulatory regime—this contextual work has simply not been done.[78]

European bodies tend also to adopt a simplistic "politics bad, judges good" approach that is not supported by empirical research into judicial independence.[79] In his work on new models of

[73]*See* GRECO Fourth Evaluation Round, Compliance Report: Ireland, 2017.

[74]Opinion polls consistently identify the Irish electorate as one of the most pro-European amongst EU Member States.

[76]*See 2022 Rule of Law Report*, European Commission, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en.

[77]See discussion above in relation to lay involvement in the Judicial Appointments Commission Bill 2017 (Act No. 71/2017).

[78]This objection connects to a broader problem highlighted by the scholarship in this area, which is that there is very little empirical evidence on the effect of judicial councils on judicial independence and rule of law values. *See, e.g.*, Nuna Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 Am. J. of Compar. L. 103 (2009).

[79]*See, e.g.*, Gee *et al.*, supra note 40.

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judicial administration in Czechia and Slovakia, David Kosař notes the development of a new phenomenon: The powerful Chief Justice or court president. In jurisdictions that did not previously possess the informal cultures required to support judicial independence, the robust formal protections for judicial independence and accountability connoted by the European Judicial Council model did not necessarily remove politics from judicial administration. Instead, handing power over courts and the judiciary created new sites for politics and the exercise of power *within* the judiciary; seen most crudely in moves by judicial leaders to promote friends and isolate rivals.[80] There is no reason to assume that formalization will produce anything like this kind of dynamic in Ireland, nor that judges who have sought to follow clear international best practice are motivated by anything but the best of intentions. Nonetheless formalization has significantly enhanced the power of the senior judiciary at the expense of politicians, and Irish judges—empowered by European institutions and best practice—have shown themselves to be effective lobbyists.

F. Conclusion

The Irish bench to which Gillian Hussey was appointed in 1984 is almost unrecognizable today. Influenced by European best practice, and driven in large part by judges themselves, Irish judicial administration has turned its face against politics and informal practices, and towards formal institutional structures and accountability mechanisms.

The effect of both the informal practices of the past and the formalized structures to which Ireland is moving are unclear. Whilst informal processes for judicial misconduct—in reality, the absence of *any* fixed process—clearly did not serve the Irish judiciary well, broadly speaking the Irish judiciary has been stable, effective, and well-run. It may not have worked in principle, but in the best traditions of common law systems it worked in practice. Public trust in Irish judges has historically been very robust, notwithstanding that many of the *indicia* of European best practice have been absent from Irish judicial administration. The model upon which that trust was based is now being quietly but significantly changed: From a pure common law model based around the independence of the individual judge to a hybrid European judicial council model in which the judiciary as a collegiate body is more important.

The move to formalize Irish judicial administration is received through European influences, sometimes with dubious empirical foundations, but ultimately driven by a desire to improve trust through accountability. Yet, as Onora O'Neill puts it, the "quest for a trust-free world is based on fantasizing that there can be an infinite regress of accountability."[81] The new formalized model is untested. If handled insensitively, it risks damaging judicial independence in Ireland instead of strengthening it. Judges generally may become more remote from society. Senior judge appointed with little or no political involvement may lack legitimacy when it comes to making significant decisions on constitutional issues.

Nonetheless, the fact that Ireland is such a small jurisdiction, and that legal and political elites are often personally known to one another, is an important control on the alienation between these groups that might otherwise arise out of formalization. The appointment of judges late in their careers from legal practice is another important brake on an overweening judicial management culture: The culture of independence at the bar carries over onto the bench. In the

[80] *See* David Kosař, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES (2016). *See e.g.*, David Kosař & Samuel Spáč, *Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-Autonomous Actors?* 13 HAGUE J. ON THE RULE OF L. 107 (2021); Adam Blisa & David Kosař, *Court Presidents: The Missing Piece in the Puzzle of Judicial Governance*, 19 GERMAN L.J. 2031 (2018).

[81] *See* Onora O'Neill, *Trust with Accountability?*, 8 J. OF HEALTH SERVS. RSCH. POL'Y 1, 3 (2003).

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end, it may be that formalization makes little difference. Irish judicial administration is an experiment. Watch this space.

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