European Influences on the Court's Judgment in *Re Article 26 and the Judicial Appointments Commission Bill 2023*

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In its judgment on the Article 26 reference on the Judicial Appointments Commission Bill, the Supreme Court engages in some depth with the European case law and best practice guidance on judicial appointments, and with their influence on the Bill itself.[1] Although European case law is permissive, European soft law and guidance is much more prescriptive. The effect of the Bill and of the outcome of the Article 26 judgment is that it is the more demanding soft law standard that has been incorporated into Irish law. This is troubling because European recommendations in this area are often poorly reasoned and demonstrate scant recognition of the distinctiveness of the Irish common law system.

1. European Law and Soft Law in the Judgment

European Union law traditionally engaged very little with the structures and processes of Member State judicial systems. Where it did so, the matter typically arose on the fringes of an Article 267 reference where there was some doubt about whether the body proposing to make the reference counted as a 'tribunal'. The Lisbon Treaty, which came into force in 2009, brought about EU accession to the ECHR and the creation of the EU Charter of Fundamental Rights. The result was to take a more robust rights-based standard for fair trial and judicial independence into EU law, influenced by the Strasbourg approach. This was to become particularly important in the following decade, as the phenomenon of democratic backsliding in some EU Member States led to a slew of cases responding to, for example, the forced early retirement of Supreme Court judges in Poland.[2] The result of this legal response to backsliding is that both EU and ECHR law on judicial appointments has developed significantly in the past five years.

In its judgment, the Supreme Court engages with both the European guidance and the case law on this topic, taking in both the EU and Council of Europe/ECHR systems.[3] Some hints of what the Supreme Court was likely to conclude on this point could be gleaned from Mr Justice Hogan's time as Advocate General at the Court of Justice of the European Union (CJEU). As he put it in his opinion in *Repubblika* (2021) addressing a Maltese appointments system which closely resembles the Irish one, 'neither EU law nor, for that matter, the ECHR, impose any fixed, *a priori* form of institutional guarantees designed to ensure the independence of judges'. Hogan also noted that political appointment is a feature of many court systems which are, nonetheless, considered to be 'resolutely independent'.[4]

The newly developed European case law on judicial appointments is permissive. CJEU case law does not mandate one particular model for appointments (and, given the diversity of legal

[1] *In the matter of Article 26 of the Constitution and in the matter of the Judicial Appointments Commission Bill 2022* [2023] IESC 34 ('JAC Bill judgment'). Following the judgment of the Supreme Court, the Judicial Appointments Commission Bill was signed into law by the President on 8 December 2023. To preserve consistency with the JAC Bill judgment, I will nonetheless refer to 'the Bill' here.
[2] Case C–619/18 *Commission v Poland* (Grand Chamber, 24 June 2018).
[3] The JAC Bill judgment, n 1, 'Part IV – The International Context', paras 67–110.
[4] Case C–896/19 *Repubblika v Il-Prim Ministru* (Grand Chamber, 20 April 2021) Opinion of AG Hogan, para 70.

systems in Europe, could not plausibly do so). Instead, it focusses on the substance of the independence of judges once they have been appointed. Thus, in *VQ v Land Hessen* (2020), the CJEU held: 'The assessment of the independence of a national court or tribunal must, including from the perspective of the conditions governing the appointment of its members, be made in the light of all the relevant factors.'[5] Similarly in *Repubblika*, the Grand Chamber held that

> the mere fact that the judges concerned are appointed by the President of a Member State does not give rise to a relationship of subordination of those judges to the latter or doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role.[6]

By contrast, in *AK* (2019), which addressed changes to Polish law on judicial tenure and appointments, the CJEU highlighted factors in the new arrangements that might tend to create 'legitimate doubts, in the minds of subjects of the law' about the independence of a reformed appointments body and disciplinary chamber.[7] The European Court of Human Rights takes a similar contextual approach to the CJEU. In *Ástráðsson v Iceland* (2020) it held similarly that 'appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role'.[8] Nonetheless, both CJEU and ECtHR appear in some judgments to express a preference for both more formal and less political appointment systems. This preference is still carefully distinguished from the legal position in both EU and ECHR law that a range of appointment processes are acceptable, but it is possible that in future it may concretise into a less permissive standard.[9]

Given the nature of this case law, there is no inherent obstacle to a judicial appointment system that incorporates political choice. There was thus no conflict between the pre-existing system for judicial appointments in Ireland, within which politicians exercised a decisive role, and EU or ECHR law. More precisely, and as the Supreme Court held in its judgment on the Article 26 reference, the content of the Bill could not be viewed as a measure 'necessitated by the obligations of membership of the European Union' for the purposes of Article 29.6 of the Constitution and so was open to constitutional challenge.[10]

Whilst 'hard' European case law allows for a range of approaches to judicial appointments, there is nonetheless a significant body of international and European soft law that is more restrictive. A plethora of guidance, reports and recommendations on judicial appointments have been issued from bodies like the UN, the International Commission of Jurists, the Vienna Commission and (most relevant to the JAC Bill), the Council of Europe and the EU. In the context of the JAC Bill there are two important bodies to focus on: firstly, the Council of Europe's GRECO body; and secondly, the European Commission, which has taken on a rule of law function in the past decade in response to democratic backsliding. GRECO (Group of

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[5] Case C–272/19 *VQ v Land Hessen* (Third Chamber, 9 July 2020) para 56.
[6] *Repubblika*, n 4, judgment of the Grand Chamber at paragraph 56.
[7] Case C–585/18 *AK & Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court)* (Grand Chamber, 19 November 2019) para 153.
[8] *Ástráðsson v Iceland* App no 26374/18 (ECtHR, 1 December 2020). The CJEU regards the principles of the Convention as equivalent to those of EU law and will normally take the decisions of the Strasbourg court into account. See eg Case C–506/94 *Wilson v Ordre des Avocats du Barreau de Luxembourg* (Grand Chamber, 19 September 2006) para 46 (general principles of ECHR).
[9] See eg *Repubblika,* no 4, paras 65–71.
[10] JAC Bill judgment, no 1, para 103.

European States Against Corruption) is an anti-corruption body that since 1999 has conducted a series of thematic reviews of Council of Europe jurisdictions, focusing in its fourth evaluation round (2012–16) on parliaments, the judiciary and prosecutors. GRECO operates on a 'peer review' basis, with members evaluating each other on compliance with rule of law criteria. The body does not produce general standards of its own, but instead draws on a range of international and European best practice guidelines to evaluate the performance of Member States.[11]

Within the EU, a Rule of Law Framework was established in 2014 and provides for a monitoring process run by the European Commission. This process comes with a hard edge. In some cases, the Commission has taken infringement proceedings against Member States on rule of law grounds.[12] From 2020, the EU Commission also began to produce individual country reports on the state of the rule of law in the Union, with additional country reports for each Member State. These reports do similar work to GRECO reports and, like GRECO, do not articulate an independent standard, but rather draw on the same body of European best practice guidelines (including GRECO reports).

Though the Supreme Court is entirely correct to note that the JAC Bill represents an 'autonomous, autochthonous exercise of legislative sovereignty by the Oireachtas',[13] it is equally obvious that a key legislative objective was to comply with Council of Europe recommendations. As the judgment puts it, these inform 'the terms of the Bill as passed by the two Houses of the Oireachtas'.[14] The long title of the Bill explicitly refers to these influences:

> 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.[15]

The Supreme Court judgment extracts in some detail aspects of the 2010 Council of Ministers recommendation referred to here, noting that 'at least half' of members of a judicial appointing body should be judges chosen by their peers, and that where politicians are involved they should 'in practice' follow the recommendations of the independent judicial appointing body.[16] The Court also notes a recommendation from GRECO that the existing system for judicial appointments in Ireland 'be reviewed with a view to targeting the appointments to the most qualified and suitable candidates in a transparent way, without improper influence from the executive/political powers'.[17] The Court concludes by tacitly endorsing these extracted materials, and thereby the policy considerations that motivated the Bill.

> The importance of the role of the judiciary in a democratic state is self-evident but is strongly reflected in these materials. The need for the independence of the judiciary in

[11] GRECO lists its source materials on its website here: <https://www.coe.int/en/web/greco/round4/reference-texts> accessed 16 February 2024.
[12] Under the general infringement process in Art 258 TEU and the dedicated rule-of-law sanctions power in Art 7 TEU.
[13] JAC Bill judgment, n 1, para 103.
[14] ibid, para 72.
[15] This reference to GRECO is, so far as I have been able to ascertain, unique in the Irish statute book.
[16] JAC Bill judgment, n 1, para 73, extracting paras 46–48 of the 2020 Committee of Ministers recommendation.
[17] ibid para 76, extracting GRECO's *Evaluation Report on Ireland (Eval IV rep 3E 2014).*

> the exercise of the functions entrusted to it could not be clearer and the manner in which judicial appointments are made is an important facet of the of judicial independence.[18]

2. Placing the Judgment in Context: The Legislative History

Both the references to GRECO and judicial acceptance of the Bill are more significant when placed in the context of the failed 2017 reform attempt that preceded it. The 2017 Bill would have addressed two limitations of the pre-existing appointments system. The Judicial Appointments Advisory Board (JAAB), was a very limited appointment body. Influenced by the historical view that *any* restriction on the Government's discretion to choose judges was unconstitutional, the Board was required to recommend *at least* seven names for each vacancy to the Minister for Justice.[19] JAAB's role was further limited in two ways. Firstly, JAAB did not handle promotion of existing judges, which were entirely at the discretion of the Government.[20] Secondly, the Government was not required to appoint from within the list supplied by JAAB, and could even choose to appoint someone who has not applied.[21] Thus JAAB was only a partial screening body, and exercised a very limited role in appointments.[22]

The 2017 Bill would have created a new Judicial Appointments Commission to replace the JAAB, comprising 13 members, including a lay chair and lay majority on its proposed commission. This aspect of the proposed commission was loathed by the judiciary. The effective removal of the Chief Justice's existing role as chair of JAAB was described as 'a deliberate kick to the teeth' of the Chief Justice by former Supreme Court judge Catherine McGuinness.[23] This view of the 2017 Bill was echoed by GRECO.

In its interim compliance report for Ireland for 2018, GRECO expressed concern about the proposed lay majority and chair in that Bill, describing it as a breach of European standards.[24] This intervention was widely reported as a decisive intervention by an eminent European body against the Bill[25] and confirmed the deep-seated view of the judiciary that it was inappropriate to have a lay chair and majority on a commission of this kind. It is clear from GRECO's 2018 interim report that the Irish judiciary lobbied GRECO for this intervention. As the report puts it

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[18] ibid para 78.
[19] Courts and Court Officers Act 1995, s 16(2).
[20] During an early phase of JAAB's existence, even this limited role was further diluted by the decision of the Board to recommend all appointable applicants for every post. This was apparently done out of concern to preserve Government discretion, as judicial members took the view that to do otherwise would be an unconstitutional restraint on executive discretion. See J Carroll MacNeill*, The Politics of Judicial Selection in Ireland* (Four Courts Press 2016) 129.
[21] Section 16(6) of the 1995 Act provides that the Government 'shall firstly consider' persons recommended by JAAB.
[22] The expectation in the Act that seven names would be provided to the Minister for each vacant post has sometimes proven wildly optimistic. For a Court of Appeal recruitment exercise in 2016, JAAB reported that it could recommend no one, and in 2019 the Board reported only one application for two vacancies on the Supreme Court. These outcomes may arise because knowledgeable applicants are aware that such senior posts are normally filled by the promotion of existing judges.
[23] Mary Minihan, 'Judicial Reform Plan a "Deliberate Kick in the Teeth" for the Chief Justice' *The Irish Times* (Dublin, 27 June 2017).
[24] GRECO*, Fourth Evaluation Round, Interim Compliance Report: Ireland* (June 2018).
[25] eg Shane Phelan, 'Ross Reforms Dropped from New Judicial Appointments Bill Proposal' *The Irish Independent* (Dublin, 15 December 2020).

> In addition to the information 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.[26]

GRECO's verdict had a major influence on the fate of the 2017 Bill, which was filibustered in the Seanad and ultimately lapsed with the dissolution of the Dáil before the 2020 general election. The 2023 Bill largely addresses the objections to its 2017 predecessor. The Chief Justice will be chair of the new JAC, and the lay majority has been removed. Though it is clear that the Chief Justice, for one, would still have preferred a judicial majority,[27] in fact the 50 per cent judicial representation on the new Commission is higher than any comparable common law model appointment body that I have been able to find with the possible exception of Malta (see Table 1 for a – non-exhaustive and unscientific – survey of common law judicial appointment systems).[28] A nine-person Commission will comprise the Chief Justice as chair, three additional judges, four lay members and the Attorney General as a non-voting ninth member.[29] Like the 2017 Bill, the 2023 Bill brings promotions of serving judges within its scope, and includes commitments on diversity in appointments, the use of interviews, and mandatory training.

A key focus of the Article 26 reference, however, was not part of the original 2020 Heads of the Bill. As with the equivalent arrangements for the JAAB and in the 2017 Bill, Head 51 of provided that the Government 'shall firstly consider' recommendations from the new Commission. In the Bill as ultimately passed by the Oireachtas, s 51 provides that the Government 'shall *only* consider' recommendations from the Commission.[30] Past attempts at reform – the JAAB reform and the 2017 Bill, both preserved the Government's unrestricted power to appoint whomever it wished to judicial vacancies.

The change to s 51 appears to have been driven by EU guidance. 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 in account Council of Europe recommendations relating to the need for the executive power to follow in practice the recommendations by independent authorities.[31]

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[26] GRECO *Fourth Evaluation Round, Interim Compliance Report: Ireland* (June 2018) paras 30–32. Emphasis in the original.
[27] Mary Carolan, 'Chief Justice Criticises Aspects of New Bill for Reform of Judicial Appointments System' *The Irish Times* (Dublin, 31 May 2022).
[28] Pakistan, also captured in Table 1, operates a very different system, which brings judges and politicians together into a single-stage appointment process.
[29] Judicial Appointments Commission Bill 2022, s 9.
[30] Emphasis added. Section 52, addressing appointments to judicial offices outside the State, contains wording to the same effect. This provision did not appear in the Heads published in 2020.
[31] EU Commission, *2021 Rule of Law Report: Country Chapter on the Rule of Law Situation in Ireland* SWD(2021)715, 5.

Table 1: Membership of Common Law Judicial Appointment Bodies (an unscientific survey)							
Jurisdiction	**Judicial**	**Legal**	**Lay**	**Total**	**Chair**	**Legal majority**	**Judicial majority**
Scotland[32]	4	2	6	12	Lay	*even*	N
NI	6	2	5	13	Judicial	Y	N
E&W[33]	6	2	6	14	Lay	Y	N
Canada Supreme Court	0	6	2	8	Legal	Y	N
Ontario	3	3	5	11	Lay	Y	N
South Africa[34]	3	5	15	23	Judicial	N	N
Pakistan[35]	5	3	1	9	Judicial	Y	Y
Malta	4	1	1	6	Judicial	Y	Y
Jamaica	2	2	2	6	Judicial	Y	N
India	Only judges may be involved. The Indian Supreme Court has held that this is a constitutional requirement.[36]						
Australia, New Zealand	Judges appointed by the Government on the advice of the Attorney General						
USA	Federal judges nominated by the President and appointed by Congress						

The 2021 report also notes the position of the Government that discretion is an Irish constitutional requirement. By 2022, this position had changed. In her statement accompanying the publication of the Bill, Minister for Justice Helen McEntee commented that the provision 'will ensure that we are meeting all of our necessary obligations under EU law' and also noted that the Bill followed 'a substantial process of consultations', including with the European Commission. Introducing the Bill in the Dáil, Minister McEntee said that

> 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 independence.[37]

The judgment of the Supreme Court on the Article 26 reference glosses the meaning of section 51, to the effect that the Government is not obliged to appoint persons on the Commission's list of recommendation.[38] It is nonetheless remarkable that the Government so dramatically (and quietly) abandoned what had previously been regarded as a constitutional red line:

[32] Decisions on the *legal* competence of candidates are made by legal members only.
[33] Lay here includes a lay judicial member (magistrate).
[34] Numbers refer to core membership; flexible composition depending on the appointment; lay members.
[35] Lay member is Federal Minister for Law and Justice. Appointment body also includes the Attorney General and a retired judge.
[36] See the three judges cases: *SP Gupta v Union of India* (1981), *Supreme Court Advocates-on-Record Association v Union of India* (1993) and *In Re Special Reference No 1* (1998).
[37] Judicial Appointments Commission Bill 2022: Dáil Deb 27 April 2022, vol 1021, no 2.
[38] JAC Bill judgment, n 1, paras 166–75. The Court rejected the argument that appointments fell within an *exclusive* zone of executive power (para 197): 'It is not apparent, therefore, that the fact that the power of appointment of judges is structured as it is in the Constitution impliedly limits the general capacity of the Oireachtas to legislate on this topic.'

unfettered Government discretion over judicial appointments. This constitutional point had been the defining feature of judicial appointment practice and of past attempts at reform.

3. Reflections: Hard and Soft Law

This is not the place for a detailed analysis of the interactions between European law, European guidance, and the Irish constitutional system. What is worth noting, however, is that the product of these interactions has been that GRECO and other soft law recommendations have, by virtue of the operation of Article 26, been immunised from further constitutional challenge. This notwithstanding the fact that (as the Supreme Court emphasises) European law says something quite different and more permissive.

It is easy to see how and why this has occurred. There are strong political incentives for the Government to demonstrate compliance with GRECO recommendations. In its compliance report of 2017, GRECO concluded that Ireland's response to earlier recommendations in 2014 had been poor, and was now 'globally unsatisfactory'. As a result, GRECO began a formal non-compliance procedure which imposes additional progress reports on the defaulting country. The incorporation by reference of GRECO standards into EU discourse about the rule of law and democratic decay brings with it additional pressures. Whilst not introducing a direct legal obligation as such, the annual rule of law review process that has existed since 2020 creates a new and stable locus for political engagement within the EU on this topic. Within this process there is also the ultimate possibility, however unlikely it may be in this case, of enforcement proceedings taken by the EU Commission under the Rule of Law Framework. Given the evident enthusiasm judges have for a more formal appointment process (apparent in the judgment of the Supreme Court as well as in the recent political history of judicial appointments reform), the political incentives also favour reforms to courts and the judiciary over other ethics and rule of law reforms. By the time of GRECO's updated report on Ireland in 2020, the status of 'globally unsatisfactory' had been removed. This was almost exclusively as a result of reforms to Irish judicial institutions. More politically unpalatable recommendations – for example on ethics and conflicts of interests for politicians – were (and remain) mostly unaddressed.

European guidance in this area – even when directed specifically at Ireland – is often poorly reasoned, and demonstrates scant recognition of the distinctiveness of the Irish common law system. Whilst condemning lay involvement in Irish proposals, GRECO simultaneously appeared to approve of it for UK equivalents. The JAC for England and Wales, which contains a lay majority, was praised by GRECO as a 'proactive' reform.[39] The quality of EU Commission reports on the rule of law in Ireland is also problematic.[40] Both bodies appear to be reading arrangements for civil law jurisdictions across common law jurisdictions, where judge-run appointment processes are rare and there is no clear best practice. Recommendations appear to ignore the fact that Ireland possesses a unified judicial system which, unlike many others in Europe, combines powers of strong constitutional review alongside ordinary judicial

[39] GRECO *Fourth Evaluation Round, Evaluation Report: United Kingdom* (October 2012) 26, para 90.
[40] The Annual Reports for 2021, 2022 and 2023 all open with the (factually incorrect) line: 'Ireland is a common law jurisdiction, whose judiciary is divided into a civil and criminal branch.' The reports also tend towards unsupported self-referential statements, such as the concern expressed in the 2022 report that, despite never having been taken to completion, the judicial impeachment process in Ireland allows for 'politicization'; a claim which, upon close inspection, turns out to be supported only by an equivalent unsupported claim made in the 2021 report.

functions. There is a simplistic assumption that any political involvement is bad, and greater formalisation must always be good. Yet a Supreme Court with strong powers of judicial review might reasonably be subjected to more political scrutiny of appointments (as is the case in other European countries). Ironically – and perhaps underpinning the confusion and inconsistency in this area – GRECO's reports for 2022 and 2023 note the removal of Government discretion from the 2023 Bill approvingly, but both the EU Commission and GRECO continue to criticise the absence of a judicial majority on the proposed JAC. GRECO takes the view that the absence of a provision to this effect from the Act represents a continuing failure on the part of Ireland to comply with its recommendations.[41]

The JAC Bill is an important and necessary reform to judicial appointments in Ireland. It does not detract from this to acknowledge that the policy inputs into the Bill were not all of great quality. Future Irish policy-making in this area will need to be more sensitive and more thoughtful about how to address European guidance that takes insufficient account of the distinctiveness of the Irish legal system.

[41] GRECO, *Fourth Evaluation Round: Second Interim Compliance Report: Ireland* (November 2020).