

IAJ/UIM

Study Commission IV- 2022

Judicial Workplace and Judicial Independence

What is the impact on judicial independence of the judicial workplace (including nominations and appointments, independence in decision-making, governance, assignments, fund and other resources)?

Please provide examples in the judicial workplace that foster judicial independence and identify barriers and practices that impede or negatively impact judicial independence.

The Response of the Association of Judges of Ireland (AJI)

Introduction

Under the Constitution of Ireland the Government comprises three branches namely legislative, executive and judicial. Justice shall be administered in courts established by law by judges appointed in the manner provided for in the Constitution. The provisions relating to Independence of Judges is provided for in Article 35 of the Constitution

Article 35. 2 provides “All judges shall be independent in the exercise of their judicial functions and subject only to this constitution and the law”.

Judges shall not be removed from office except for stated misbehaviour or incapacity and then only upon resolutions passed by both Houses of Parliament.

The remuneration of a judge shall not be reduced during his/her continuance in office save in accordance with the following provisions namely the

remuneration of judges to be subject the imposition of taxes levies or other charges that are imposed by law and where reductions of persons whose remuneration is paid out of public money are made in the public interest provision may also be made in law for proportionate reductions to the remuneration of judges.

Judicial independence is further strengthened by the rules of common law that acts done or words spoken by a Judge in his or her judicial capacity are privileged although the immunity does not extend to judges knowingly acting without jurisdiction. Further no order for costs can be made against members of the judiciary where they have acted bona fide and where they have not sought to defend the decision which is being impugned.

However it has been recognised that the independence of the courts and their immunity from control is not absolute. Kelly “The Irish Constitution” at 6.1.166 states as follows:

“The independence of the courts and their immunity from control by the Oireachtas (*Parliament*) is not absolute, and could scarcely be made so. Most of the actual court structure and court procedure is prescribed, immediately or ultimately, by statute, which the Oireachtas can modify; there seems to be nothing to prevent the Oireachtas from changing the law retrospectively so as to nullify the effect of the court’s judgement in one case or a series of cases, provided, of course, that this does not trench on the rights of parties to that litigation. The position of the judges is not quite as impregnable as a casual reading of the relevant sections of Article 35 might suggest, as they are unprotected against a sudden arbitrary reduction in the retiring age (aimed at eliminating the senior judge or judges) or against legislation which would put the organisation of courts

business (and thus the manipulation of case lists) into executive hands. In addition, the administration of criminal justice is to a certain extent under executive rather than judicial control, as the decision to institute, or not to institute, a prosecution and the right to commute or reduce or remit a penalty imposed by a court, is in non-judicial hands (in the latter instance by virtue of the Constitution itself: Article 13.6). What does appear to be inviolable is the actual judicial process itself while in operation; once begun, it must be allowed to run its course without interference.”

1. Nominations and Appointments

Judges are appointed by the President of Ireland on the advice of the government.

The Judicial Appointments Advisory Board (JAAB) is a statutory body charged with “identifying persons and informing the Government of the suitability of those persons for appointment to judicial office.” Where a vacancy has arisen or is about to arise the JAAB acts on the request of the Minister of Justice. The JAAB must submit the names of at least seven persons for each position it recommends for appointment (unless less than seven apply) together with certain details of each applicant. This list is not ranked in any order. In advising the President on the appointment of a person for judicial office the Government is required to consider firstly persons recommended by the JAAB for that purpose.

Serving members of the judiciary may apply direct to the Attorney General for consideration for any vacancy which may arise in a judicial office and such application is not considered by JAAB.

Proposed Government legislation will provide for a new Judicial Appointments Commission with equal numbers of judges and lay persons which will submit an unranked list to Government. Serving judges will be required to apply for judicial vacancies to this proposed Commission.

The Council of Europe GRECO (Group of States against Corruption) in its 2014 Report on Ireland recommended *“that the current system for selection, recruitment , promotion and transfers of judges be reviewed with a view to target the appointments to the most qualified and suitable candidates in a transparent way, without improper influence from the executive/political powers”*

GRECO in its Second Compliance Report on Ireland published in July 2022 finds that this recommendation has not been implemented. The report states as follows:

“GRECO maintains its position, expressed in previous reports, that the JAAB, consisting of a majority of judges, has a suitable composition in conformity with the requirement enshrined in the Council of Europe committee of Ministers Recommendation CM/REC(2010)12 which provides that in situations where final judicial appointments are taken by the executive, an independent authority, drawn in substantial part from the judiciary, should be authorised to make recommendations or opinions prior to such appointments. Further GRECO remains concerned that under the proposed Bill, the Government, before its decision on appointment, would still receive a non-prioritised list of candidates, without any ranking among the candidates put forward, which could lead to politicised decisions. In this regard GRECO reiterates the importance of a merit-based

selection procedure leading to a targeted shortlist of only the very best candidates, ranked in order of priority.”

2. Independence in Decision Making

It is an accepted principle of Irish law that judges are independent in the exercise of their judicial function.

The Irish judiciary under the auspices of the Judicial Council have in June 2022 adopted Guidelines for the Judiciary on Conduct and Ethics. These Guidelines are primarily the adoption of the Bangalore Principles. Principle 1 Independence provides as follows:

“As recognised by the Constitution, judicial independence is a prerequisite to the rule of law and a fundamental guarantee to a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

The Judicial Conduct Committee shall have regard to the guidelines in determining whether complaints against a judge amount to judicial misconduct. The complaints procedure against Judges has not commenced as of July 2022 but is anticipated to commence from the middle of September 2022.

3. Governance and Assignments

A Chief Justice and Presidents of the Court of Appeal, High Court, Circuit Court and District Court are appointed whose duties include the operation of their court and the assignment of judges to deal with the work of the court subject to

available resources. Each President is independent in the exercise of their functions.

The Court Service is a statutory body appointed with functions which include managing the courts, in providing services to and for the judges and providing other services relating to courts administration.

The majority of members of the Board of the Courts Service are members of the judiciary. The functions of the Board are to consider and determine policy in relation to the service and to oversee the implementation of that policy.

It is specifically provided by law that no function conferred or power vested in the service or the board or the chief executive shall be exercised to interfere with the conduct of that part of the business of the courts required by law to be transacted or to impugn the independence of a judge in the exercise of his or her judicial functions.

5. Fund and Other Resources

Funding for the Courts Service is provided by Central Government. Funding for the remuneration of judges is also provided by Central Government.

(A) Judicial Remuneration

The rate of Remuneration of Judges is determined having regard to pay increases or reductions applicable to the public service and negotiated by the relevant Governmental Departments with public service unions. The judiciary have no input or involvement in these negotiations. Allowances for travel and subsistence for judges is determined by the Minister of Justice with the sanction of the Minister for Finance.

The constitutional and internationally accepted principle of no reduction in judicial remuneration was varied in Ireland following a constitutional referendum in 2011 which now permits reductions in judicial remuneration in accordance with the terms of the Constitution as referred to earlier.

Reductions in judicial remuneration took place as a result arising from the economic conditions then prevailing.

Judicial remuneration for all Court jurisdictions has only been restored to previous levels from July 2022.

A structure does not exist in Ireland whereby issues relating to judicial employment conditions, to include remuneration, can be raised, explored and determined. The AJI's position is that it is a core component in support of the independence of the judiciary that an independent body be established so that these issues can be appropriately raised and considered.

The GRECO Evaluation Report of 2014 recommended *“that an appropriate structure be established within the framework of which questions concerning constitutional safeguards of the judiciary in connection with the employment conditions are to be examined-in close dialogue with judicial representatives-with a view to maintaining the high levels of judicial integrity and professional quality in the future.”*

GRECO, in its review of July 2022, found that this recommendation has not been implemented by the Irish Government.

(B) Other Resources

The effective operation of the courts in Ireland is subject to the adequate provision of resources by central government to the Courts Service.

The ability of judges to sit in Court is dependent on the availability of court rooms and court staff. Courts do not proceed or are cancelled where these support services are not available with particular pressures being encountered due to the Covid 19 pandemic. Lack of resources or postponement of Courts has caused problems in the increase in backlogs and considerable delays in the conclusion of cases.

In April 2021 the government appointed a Judicial Planning Working Group to “make recommendations on relevant issues such as judicial workload, barriers to entry, efficiency gains and speed of access to justice”. The group comprises representatives from various governmental departments, the court service and the attorney general. Two judicial observers were added to the group in October 2021. As part of their deliberations the Working Group have commissioned the OECD to prepare a report including comparative studies with other jurisdictions and to make recommendations.

The Irish judiciary await the outcome of this working group and its report and recommendations.