

Ireland's System for Disciplining and Removing Judges

Dr Laura Cahillane*

Abstract—In Ireland, judges can only be removed as a result of ‘stated misbehaviour’ but the extent of this phrase is unclear, as is the process of actually removing the judge. Furthermore, Ireland has no formal process for lesser forms of judicial discipline. These oversights have exacerbated controversies of judicial behaviour. For example, during the Sheedy Affair, there was no formal mechanism for investigating or issuing sanctions as a result of the conduct of the judges and in the Curtin case, the difficulties involved in the attempt to remove the judge delayed the process to such an extent that the judge eventually retired on a full pension. A more recent episode involving an ‘improper approach’ by a judge into the case of another judge highlighted the lack of any proper procedures in this area. Given that this is an issue that impacts both judicial independence and public confidence in the judiciary to a significant degree, it is vital that a formal system for disciplining and removing judges is established in Ireland. In this context, this article examines the current system and analyses potential reforms to this.

Introduction

In a survey carried out last year by the European Commission, The Irish legal system was ranked the second highest in Europe for its perceived level of judicial independence. However, in recent years various issues have arisen which have caused us to question our levels of protection for judicial independence and how this can be balanced with accountability. Such discussions arose during the debates on the judicial pay referendum, the controversy caused by Judge Kelly’s comments in 2013 that the government was demolishing judicial independence,¹ and the more recent debates about the appropriateness of the current judicial appointments procedure. Of course, these questions arise most frequently around instances of judicial misconduct. The Judicial Council Bill was to have provided an appropriate mechanism for balancing judicial independence and accountability but it has never even reached the stage of being debated in the Oireachtas.

* Dr Laura Cahillane is a lecturer in Constitutional Law in the University of Limerick.

¹ See Laura Cahillane, ‘Judicial Independence and the Current Controversy’, available at <<http://constitutionproject.ie/?p=217>> Accessed 24 July 2015.

The Bill is included on the government's current programme for legislation. While this is a positive move, given that it is listed as number 37 on the Justice list and it has been on the books for a long time at this stage, holding one's breath in anticipation of its publication any time soon would not be advisable. However, the issues which led to the idea of such a bill in the first place have not gone away – we simply have not spoken about them in a while so perhaps we need to revive the discussion on this in advance of its potential publication.

One issue which has not yet really been discussed is whether our system of disciplining and removing judges is fit for purpose. One might argue that Ireland's judges have an excellent reputation and we do not need a formal disciplinary system. However, there have been controversies in recent years and we have to consider if the outcomes of these episodes have been satisfactory. Take, for example, the Sheedy Affair, where two judges and a county registrar resigned following the release of Philip Sheedy from prison.² This episode had serious consequences for the administration of justice in Ireland and we have to question whether the result was fair both for the judges involved but also in relation to public confidence in the system. The other obvious example here is the case of Judge Brian Curtin, who could not be prosecuted for the possession of child pornography due to an expired warrant but whose removal proved a messy and ultimately unsuccessful venture and the judge later resigned on a full pension.³ A less obvious example is the episode which came to light in 2013 when Judge Abbott alleged that Judge Desmond Hogan

² For details see John O'Dowd, 'The Sheedy Affair' (2000) 3 *Contemporary Issues in Irish Law & Politics* 103. Philip Sheedy caused the death of Anne Ryan by driving while intoxicated. He was found guilty of causing death by dangerous driving and was sentenced to four years in prison by Judge Matthews. Justice O'Flaherty intervened on Sheedy's behalf after a chance encounter with Sheedy's sister when the judge was walking his dog. After this, Dublin County Registrar Michael Quinlan was called to Mr Justice O'Flaherty's chambers to have Sheedy's case re-listed. Sheedy's sentence was then reviewed before Mr Justice Cyril Kelly, and not Judge Matthews, as would be the correct procedure. After the brief hearing Mr Justice Kelly remitted what was left of Sheedy's sentence. Neither the gardaí nor the DPP was told of the review or the fact that Sheedy was released. Earlier, the Taoiseach Bertie Ahern had also intervened on Sheedy's behalf in an attempt to secure day release for Sheedy. The seemingly shady dealings involved in the case caused a public uproar which ended in the resignations of judges Flaherty and Kelly and the Registrar.

³ For more see Laura Cahillane, 'Judicial Discipline: Where Do We Stand? A Consideration of the Curtin Case' (2009) 27 *Irish Law Times* 26.

had made an improper approach about a current case.⁴ Following a brief joint investigation by President of the High Court, Mr Justice Nicholas Kearns and President of the Circuit Court Ray Groarke, it was decided that no wrongdoing had occurred but many questions were left unanswered. On the basis of these examples, it is difficult to argue that we do not need a proper judicial disciplinary system which would clarify issues around removal and sanctioning of judges. In advance of the possible publication of the Judicial Council Bill and before we decide on appropriate reform, we have to first examine the system which currently exists in Ireland and then consider possible improvements to this.

While it is not possible to cover every angle of the discussion in this Article, the current system, including the meaning of ‘stated misbehaviour’, will first be examined. It is submitted that this phrase is too vague and potential mechanisms for clarifying this will be considered. Then the possibility of disciplinary action and sanctions as well as the adoption of a code of conduct will be considered as to whether these are a possible way to improve judicial discipline while upholding independence. Finally, the various reform proposals and attempts at providing reform will be analysed.

I. THE CURRENT SYSTEM FOR REMOVAL OF A JUDGE IN IRELAND

The only disciplinary procedure to which all judges can be held accountable is Article 35.4.1^o of Bunreacht na hÉireann.⁵ This provision states: ‘A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and Seanad Éireann calling for his removal.’ It is essential that the meaning of this phrase be determined as judges in Ireland can only be formally disciplined under this

⁴ See Michael Clifford, ‘A “Quite Improper” Ruling on the Judiciary’ *Irish Examiner* (Dublin, 6 November 2013): <<http://www.irishexaminer.com/viewpoints/analysis/a-quite-improper-ruling-on-the-judiciary-248603.html>> Accessed 24 July 2015.

⁵ While the provision mentions superior court judges only, District and Circuit Court judges are subject to the same procedure by virtue of s 20 of the Courts of Justice (District Court) Act 1946 and s 39 of the Courts of Justice Act 1924. However, this also means that technically, the removal process for these judges could be amended at any time by the Oireachtas.

provision.⁶ Furthermore, the only form of discipline currently available is the nuclear option of removing a judge from office. At present, due to the elusiveness of this provision, it is not necessarily clear whether any particular act will constitute misbehaviour which necessitates removal. Surprisingly enough, we have not yet had, either here or in the United Kingdom, a situation in which there was an attempt to remove a judge who disputed the argument that her conduct amounted to misbehaviour as would warrant removal, although it is likely that this argument would have been put forward on behalf of Mr Justice O’Flaherty, following the Sheedy Affair, had he not resigned.⁷ In the *Curtin* case, for example, although he denied accessing child pornography, Judge Curtin did admit to accessing adult pornography and it seems to have been accepted that this did not amount to stated misbehaviour. Equally, it was accepted without discussion that accessing child pornography would constitute misbehaviour. There has never been any real attempt to question what, in fact, would come under the provision. This will now be considered below.

II. THE MEANING OF STATED MISBEHAVIOUR

This phrase ‘stated misbehaviour’ was first adopted in Article 68 of the 1922 Constitution of Saorstát Éireann. This is the only part of the Article which appears to depart from the 1701 provision which had previously applied.⁸ In the past, the phrase ‘during good behaviour’ had always been used. The Irish phrase used in Article 35.4.1^o is *mí-iompair*, which simply means bad behaviour. Generally,

⁶ There are specific provisions available for disciplining judges of the District Court; see s 21 of the Courts of Justice (District Court) Act 1946, ss 10(4) and 36 (2) of the Courts (Supplemental Provisions) Act 1961. However, these are mainly supervisory and ultimately only amount to the possibility of the aberrant judge being informed that his/her conduct has been such as to ‘bring the administration of justice into disrepute’.

⁷ It is unclear whether the actions of O’Flaherty, in having the case re-listed, would constitute ‘stated misbehaviour’ under the meaning of the provision. See n 2 above.

⁸ The practice which developed in the era of the Glorious Revolution was that judges would hold their office *quamdiu se bene gesserint* (during good behaviour) and this practice was enshrined in legislation with the passage of the Acts of Settlement in 1700 and 1701. During this time the method of impeachment was dispensed with, as was an alternative procedure, which involved a bill of attainder against a judge. Eventually, the only method of removing judges which remained was removal by the Crown on address of both Houses of Parliament.

‘stated’ means detailed or expressed, and we can presume the intention was that the misbehaviour in question must be detailed and not just a vague accusation before an address is taken.⁹ This seems to have been the interpretation taken in the Curtin case.¹⁰ In other words, this nuclear option would not be taken on the basis of blind allegations. The aim is to prevent frivolous, unverified allegations of misconduct against judges and ensure fairness in that there would have to be proof before the ultimate step of removing the judge is taken. So, the real question is: What constitutes misbehaviour?

(i) Defining Misbehaviour

At first glance, it would seem that a definition of misbehaviour would not pose any problems but further consideration reveals the difficulties. In any attempt to define misbehaviour, the most obvious example would be serious crime; it would be safe to say that all types of serious crime such as murder, attempted murder, rape etc would be considered misbehaviour for the purposes of Article 35.4.1°. However, it is questionable whether all criminal acts should be taken into account. Take, for example, a judge receiving a conviction for a minor traffic offence as opposed to a series of drunken driving offences.¹¹ Driving in a bus lane or receiving a parking ticket could hardly be equated with getting behind the wheel of a car while intoxicated.

It seems the current position taken in Ireland is that the offence would have to be sufficiently serious, as illustrated by the Terence Finn case. On 18 January 2008, a District Court Judge from Mitchelstown, Judge Terence Finn, was charged with ‘failing to display an NCT cert, using a vehicle without an NCT cert and with

⁹ The equivalent provision in the Australian constitution uses the words ‘proved misbehaviour’. It is likely that the word ‘stated’ would be interpreted in a similar manner to the Australian provision.

¹⁰ This point was also raised in the *Curtin* case. It was argued that since it had not been actually proved that Judge Curtin had committed the alleged act, that perhaps he could not be removed in this way. See [2006] 2 IR 556.

¹¹ This is the example given in *JM Kelly: The Irish Constitution* to illustrate this point. See Gerard Hogan and Jerry Whyte (eds), *JM Kelly: The Irish Constitution* (4th edn, Bloomsbury 2003) para [6.4.38] fn 70.

failure to produce an NCT cert'.¹² However, it was never suggested that disciplinary action should be taken. Evidently, these sorts of offences are not considered so serious as to constitute actual misbehaviour. However, if the judge in question is one who would normally hear cases concerning minor traffic offences, one would imagine the conviction could be considered serious in the eyes of the public. How could a judge pass judgment on others if it was common knowledge that s/he had actually committed the same offence?¹³ While certainly not serious enough to merit removal, this case provokes questions on whether or not lesser disciplinary sanctions would be appropriate in such cases.

In 1976, Professor Shetreet, a leading authority on the subject of judicial discipline, defined misbehaviour as involving the following types of misconduct: misconduct involving moral turpitude (corruption or corrupt motives); unjustified absence from office or neglect of official duties; persistent political partisanship or partiality; misconduct in private life; criminal behaviour.¹⁴ In fact, misconduct involving 'moral turpitude' seems to have been a prerequisite in the past for any motion of inquiry into the conduct of a judge in England and Wales.¹⁵ In 1994, a letter from the Lord Chancellor to the Lord Chief Justice of England and Wales mentioned drink driving, offences of violence, dishonesty or 'moral turpitude' as instances of misbehaviour. Behaviour which 'could cause offence, particularly on racial or religious grounds, or amounting to sexual harassment' was also mentioned.¹⁶ Many of these examples also cause difficulty, however. While neglect of official duties and political partisanship are unproblematic, examples such as 'misconduct in private life' are questionable. Furthermore, even the example of behaviour involving 'moral turpitude' would be difficult to define and apply in different circumstances.

¹² RTÉ News, 18 January 2008: <<http://www.rte.ie/news/2008/0118/finnt.html?rss>> Accessed 24 July 2015.

¹³ Judge Finn was in such a position.

¹⁴ Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (North-Holland Publishing Company 1976). Shetreet's more recent edition concentrates instead on the Guide to Judicial Conduct. See S Shetreet and S Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (CUP 2012).

¹⁵ *ibid* 339–40.

¹⁶ *ibid* 293.

There has been some attempt at a definition of misbehaviour in Australia.

Article 72 of the Australian Constitution provides the following:

The Justices of the High Court and of the other courts created by the Parliament... [s]hall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.¹⁷

Older Australian authorities had given a very limited interpretation of this provision. In 1984, the DPP Ian Temby opined ‘ordinarily such misbehaviour must be in a matter pertaining to the office held although conviction for an infamous offence which renders the person unfit to exercise the office is apparently sufficient...’¹⁸ The Solicitor General of the Commonwealth, Dr Griffith, was formally requested to give an opinion as to the meaning of the expression. His conclusions were that the phrase was limited to ‘matters pertaining to: (a) judicial office, including non-attendance, neglect of or refusal to perform duties; and (b) the commission of an offence against the general law of such a quality that the incumbent is unfit to exercise office’.¹⁹ Since then, a number of opinions have been given,²⁰ all of which suggest that s 72 has no such restricted meaning but that it extends to any behaviour indicating unfitness for judicial office.²¹ This seems like a sensible approach and the examples above given by Shetreet and the Lord Chancellor could all come within a definition of behaviour indicating unfitness for judicial office.

In New Zealand in 1997, the Solicitor-General gave an opinion on the definition of ‘misbehaviour’ during the case of Judge Beattie, who had been charged but acquitted of intent to defraud.²² It was the Solicitor-General’s opinion that

¹⁷ s 72 of the Australian Constitution.

¹⁸ Ian Temby, (1984) 58 *The Australian Law Journal* 309.

¹⁹ *ibid* 311.

²⁰ Opinion of the Counsel to the Senate Select Committee on the Conduct of judge [*Author: ‘Judges’, plural, capitalised?] 1984, Opinions of each of the three Commissioners of the Parliamentary Commission of Inquiry appointed under the Act of 1986. For more information see ‘Chapter 20 – Relations with the Judiciary’ on the website of the Australian Parliament, available at [http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers/~::~::~::~::/link.aspx?id=0E08560231F44A7EA3F8F388D9C9FCAC&_z=z](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers/~/~/~/~/~/~/~/~/~/~/link.aspx?id=0E08560231F44A7EA3F8F388D9C9FCAC&_z=z) Accessed 24 July 2015.

²¹ *ibid*.

²² No further disciplinary proceedings were taken against the judge. For more on this see PA Joseph, ‘Constitutional Law’ (1998) *New Zealand Law Review* 197, 198.

‘misbehaviour’ means ‘conduct that is [so] morally wrong and improper that it demonstrates a judge lacks the integrity to continue to exercise judicial office’.²³ However, he rejected a test based on public confidence in the administration of justice.

The most recent consideration of the meaning of misbehaviour is the Privy Council’s *Hearing on the Report of the Chief Justice of Gibraltar*.²⁴ In considering the meaning of ‘misbehaviour’²⁵ the majority of the Privy Council approved of the approach of Lord Scott in the case of *Lawrence v Attorney General of Grenada*.²⁶ Lord Scott identified four ‘ingredients’, which the Privy Council felt could be best employed by asking the following questions:

1. Has the Chief Justice’s conduct affected directly his ability to carry out the duties and discharge the functions of his office?
2. Has that conduct adversely affected the perception of others as to his ability to carry out those duties and discharge those functions?
3. Would it be perceived to be inimical to the due administration of justice in Gibraltar if the Chief Justice remains in office?
4. Has the office of Chief Justice been brought into disrepute by the Chief Justice’s conduct?²⁷

As Shetreet and Turenne have noted, the first three factors assume a link between the misbehaviour and a reason why the judge would be less effective to continue his duties on account of it and these overlap to a certain extent but the final requirement that the office be brought into disrepute adds an element of gravity. Despite the apparent clarity in the test above, agreement on four questions proved difficult for the Privy Council and ultimately led to a disagreement on whether the conduct of the Chief Justice satisfied the final test.²⁸ While the majority recommended the removal

²³ *ibid* 199.

²⁴ [2009] UKPC 43. This followed a domestic tribunal hearing which recommended the removal of the Chief Justice.

²⁵ s 64(2) of the Gibraltar Constitution Order 2006 .

²⁶ [2007] UKPC 18, [2007] 1 WLR 1474. Lord Scott formulated his test based on a passage from the judgment of Gray J in the Australian case of *Clark v Vanstone* (2004) 81 ALD 21.

²⁷ [2009] UKPC 43, 203.

²⁸ The conduct in question was failing to criticise his wife’s comments when she attacked various members of the executive and the Bar Council. Various other incidents were also considered.

of the judge, the minority felt that the high threshold for removal had not been satisfied. However, all were in agreement that public confidence had been adversely affected by the conduct of the judge.

(ii) Finding a Yardstick

We have not yet had a discussion in Ireland as to how to define ‘misbehaviour’ for the purposes of Article 35.4.1²⁹. In deciding on a definition it is necessary to consider whether it would be useful to have specific categories, such as those originally favoured by Shetreet,³⁰ expressly set out in statute, as grounds for removal. There is an argument in favour of laying out the grounds for removal in statute so as to give guidance as to whether something constitutes misbehaviour or not. The Consultative Council of European Judges has insisted on the need for a ‘precise definition of offences for which a judge may be removed from office and for disciplinary procedures complying with the due process requirements of the Convention on Human Rights’.³¹ However, as well as the obvious problem as to how such a statute would be drafted, this suggestion also brings up the more general argument of detailed provisions versus general principles. The modern trend is in favour of having detailed provisions to deal with every part of the law. This can be seen in many recent Acts of the Oireachtas.³² Many parts of the common law and older customs are regulated according to general principles which, some would argue, are insufficient in today’s world. It is argued that including more detail in such provisions excludes the possibility of confusion and possible injustice. On the other hand, there is an argument supporting the general principles because of the fact that they can cover more ground without having to be specific and so nothing is

²⁹ Although there have been some proposals. See below.

³⁰ See above.

³¹ Recommendation No R (94) 12, Principle VI(2) and (3) of the Consultative Council of European Judges (CCJE), also see Opinion No 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on ‘Standards Concerning the Independence of the Judiciary and the Irremovability of Judges’:
<<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/CCJEIndependenceofJudges.pdf>
> Accessed 24 July 2015.

³² See, for example, recent Company Law legislation where there is an attempt to legislate for all possible scenarios, which in turn makes for very detailed and complex legislation.

inadvertently left out. However, creating statutory categories would mean compiling a list of all of the possible types of behaviour which would warrant removal, something which could hardly be exhaustive. In particular, having a specific list for misconduct in office could potentially exclude things which might not occur to legislators now but which might, with the changing of society, become problematic later on.

Because of these difficulties it is suggested instead that a yardstick be used to clarify the meaning of Article 35.4.1°. This then leaves the question as to what would be the most appropriate yardstick. Based on the discussion above, one clear candidate, which is arguably the most essential feature in the system of justice, is public confidence. There needs to be public confidence in the administration of justice in order for the system to work. As Lord Denning once noted:

a judge who was guilty of conduct which lead people to point a finger of scorn saying, 'who made thee a ruler and a judge over us', should not be tolerated on the bench. Such scornful remarks destroy the confidence which people should have in judges.³³

The courts system could not function if members of the public, as well as lawyers, had to appear before judges in whom they had no confidence or respect and this seems to be the unwritten test in many instances of misconduct. The importance of this factor is well illustrated by a quote from former United States Senator Sam J Ervin: 'Judges who lose the general respect of the public, for whatever the reason, weaken the entire structure of the judiciary, and consequently damage an important factor contributing to social stability and peace.'³⁴

The only difficulty is how to tell if the matter has actually affected public confidence and to what extent. Do you ask the first person you see on the street? Or would you consult a lawyer or a politician? Or should your quest be directed toward finding the rational man or the right-thinking woman? One might suggest judging the matter by the reaction in the press, letters to the editor, or by the amount of

³³ Shetreet quoting Lord Denning. See Shetreet (n 14) 282.

³⁴ Shetreet (n 14) quoting from P B Kurland *Appointment and Disappointment of Supreme Court Justices* 1972 Law & Soc Order 183, 235.

people complaining on radio or social media. But even if you deduce that a lot of people are annoyed about the situation, how can you tell if public confidence has been damaged to such an extent that in order to rectify it the judge must be removed or disciplined? Essentially, there is no easy answer to this question and the most obvious answer is that each case would have to be considered on its own merits. Despite this difficulty, it is submitted that such a yardstick would at least eliminate much of the current ambiguity surrounding the meaning of ‘misbehaviour’.

While the question has not yet been seriously considered in Ireland, there have been some suggestions put forward in various reform proposals on how to clarify the phrase.

(iii) Proposals

The Constitution Review Group, which reported in 1996,³⁵ recommended, among other things, the insertion of the words ‘prejudicial to the office of judge’³⁶ into Article 35.4.1° in order to qualify the meaning of stated misbehaviour. The group was of the opinion that the phrase ‘stated misbehaviour’ could give rise to difficulties and so it would be necessary to provide a more precise meaning: ‘It considers that to use the phrase “prejudicial to the office of judge” to qualify “stated misbehaviour” would more clearly identify the elements of what should give rise to impeachment.’³⁷

This proposal was rejected, however, by the All-Party Oireachtas Committee on the Constitution in their *Fourth Progress Report* in 1999.³⁸ It is unclear why it was rejected, since no alternative had been proposed and the direction is not sufficient as it is. The reasoning given in the progress report of the Committee was that it was ‘unnecessary to narrow the grounds for removal in this manner. The

³⁵ *Report of the Constitution Review Group* Dublin Stationary Office 1996, 184–85. The Report also recommended other changes which are relevant to this study, for example it was suggested to provide the Article 12.10 impeachment process for judges and other constitutional officers but not for judges of the District and Circuit Courts.

³⁶ Which is not unlike the Australian definition given above.

³⁷ *Report of the Constitution Review Group*, fn 81.

³⁸ *Fourth Progress Report: The Courts and the Judiciary*, The All-Party Oireachtas Committee on the Constitution, Dublin Stationery Office, 1999.

terms are used throughout the common law world.’³⁹ However, an amendment as proposed by the Constitution Review Group would not amount to a narrowing of the Article but rather would provide a yardstick which would allow for a consideration of many types of behaviour. It is difficult to see how such an addition could narrow the grounds for removal. On the contrary, the clarification ‘prejudicial to the office of judge’ is still quite vague and open to interpretation, as demonstrated by the *Gibraltar Hearing*. The Report of the Oireachtas Committee went on to note the types of conduct believed by Professor Shetreet to come within the meaning of misbehaviour, as outlined above. Each of these types of misconduct could also be considered ‘prejudicial to the office of judge’, so the reason for rejecting the proposal of the Constitution Review Group does not stand up. Even if we were to take these five categories as examples, however, the problem remains of what types of criminal behaviour should be considered and what constitutes misconduct in private life. Professor Shetreet does propose a workable test based on public confidence, and the report recognises this:

In Professor Shetreet’s view, the test as to whether events reach a standard justifying removal is whether the behaviour has consequences for public confidence in the administration of justice. This permits the conduct to be considered in the social context in which it occurs.⁴⁰

After making this valid point, the Committee goes on to state: ‘Retaining the existing grounds will allow the Oireachtas to refer to precedents in other common law countries.’⁴¹ This is a disappointing conclusion on this point. It is unfortunate that the Committee did not recommend a change along the lines of the suggestions of the Constitution Review Group or Professor Shetreet. In any case, inserting a clarification to the wording of Article 34.5.1° would not preclude the use of precedents in other jurisdictions as persuasive authority.

The UN Basic Principles on the Independence of the Judiciary provide a similar direction to that suggested by the Review Group: ‘Judges shall be subject to

³⁹ *ibid.*

⁴⁰ *ibid* 31.

⁴¹ *ibid.*

suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties'.⁴² In many cases in the United States it has been assumed that misbehaviour extends to any conduct indicating unfitness for office. A yardstick in the style of one of these would certainly be a suitable possibility for determining what type of behaviour should be considered. When an act of misconduct is called into question we need to decide whether it is so serious that the judge involved could not possibly continue to administer justice. At present, the direction in the Constitution is not clear enough to make that decision straightforward. While a yardstick based on public confidence or fitness for judicial office might still be difficult to measure, it at least would provide a more stable basis than that which currently exists.

III. BALANCING JUDICIAL INDEPENDENCE

In any discussion of judicial discipline and removal, it is important to bear in mind the principle of judicial independence. This is a fundamental principle in our Constitution but it is potentially vulnerable to attack in the areas of judicial appointment, remuneration and removal. Therefore it is important that in reforming these areas that judicial independence is preserved.

In the past, judicial independence generally meant independence from the executive; this is due to the power the executive traditionally held over the judiciary.⁴³ Today, judicial independence has a much broader meaning. Chief Justice Denham has described it as follows: 'The concept of the independence of the judge exists so that he or she may fulfil his or her duties freely. The concept exists to guard the impartiality of the judge, to protect the judge from interference... Both the institutional judiciary and the individual judiciary are independent.'⁴⁴ She continues to make a significant point: 'The independence of the judiciary is for the benefit of

⁴² Number 18, UN Basic Principles on the Independence of the Judiciary (1985), as quoted in the report of the ICCL 'Justice Matters' on Personal Independence and the Irish Judiciary 22.

⁴³ For a brief explanation of the history of judicial independence, see David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Roundhall 1997) 10.

⁴⁴ Susan Denham, 'The Diamond in a Democracy: An Independent, Accountable Judiciary' (2001) 5 *The Judicial Review* 31, 58.

the community, not the judges. It is a duty not a privilege for a judge.’⁴⁵ Therefore, judicial independence is linked to public confidence in the administration of justice – in order to have confidence in the system, the public needs to be assured both that judges will be independent but also that they will be accountable.

Thus, the best way to ensure independence and accountability is to provide for a carefully thought-through system of removal and discipline of judges, which would abide by fair procedures. The 1999 report of the All-Party Oireachtas Committee on the Constitution determined that by maintaining the distinction between judicial decisions (which should not generally be investigated as part of disciplinary measures) and judicial conduct, ‘one can maintain a balance between judicial independence and accountability’.⁴⁶ Martin Friedland has also considered this issue in Canada and concluded that:

There is a natural tension between accountability and independence. The public needs to be assured that complaints of misconduct are properly dealt with. At the same time, accountability could have an inhibiting effect on proper judicial action. It is necessary to devise systems that provide for accountability, yet at the same time do not curtail a judge’s obligation to rule honestly and according to the law. A well-thought-out, balanced system should enhance accountability and, at the same time, increase the public’s confidence in the judiciary and therefore encourage respect for judicial independence.⁴⁷

Given that judicial independence and public confidence are linked, it would seem that the lack of a transparent system of judicial discipline and removal in Ireland is a greater threat to independence than a properly thought-out, balanced system of accountability.⁴⁸

Another issue related to independence is the question of who should ultimately decide whether something constitutes stated misbehaviour, with or without the addition of a yardstick-type clarification. This is a complicated matter

⁴⁵ *ibid.*

⁴⁶ *Fourth Progress Report: The Courts and the Judiciary*, The All-Party Oireachtas Committee on the Constitution (Dublin Stationery Office, 1999) 23.

⁴⁷ Martin Friedland, ‘A Place Apart: Judicial Independence and Accountability in Canada, A Report Prepared for the Canadian Judicial Council’ (1995) 264.

⁴⁸ This point is also made in many of the reports considered below.

which raises deep separation of powers questions. However, during the course of interviews conducted with members of the judiciary, the overwhelming consensus among the judges was that this is an issue for the legislature. This is not a question to which deep consideration has been given in any of the reform reports but it is generally assumed that the Oireachtas would make this determination. This also seems to be the position following the judgment in the Curtin case, where Murray CJ found that Curtin would be entitled to a distinct hearing on the issue of misbehaviour, which should be adjudicated on before the Houses considered the second question of whether or not the judge should be removed.⁴⁹ On the question of whether or not the courts could review a decision on what constitutes stated misbehaviour, it may well be that we will have to await a decision from the courts on this specific issue before we can have a definite answer.

A final point on judicial independence is that since it is linked with public confidence, then it would be sensible to consider the creation of a judicial disciplinary system for dealing with conduct short of removal in order to maintain confidence in the system and ensure accountability.

IV. DISCIPLINE AND SANCTIONS

Another factor that has yet to be considered in Ireland is the issue of sanctions as a lesser form of discipline and the question of whether a judge could continue in office if she were to be admonished or sanctioned (but not actually threatened with removal). In Ireland, apart from the limited system for disciplining District Court judges,⁵⁰ there is no lesser form of sanction besides the nuclear option of removal. While it might be argued that it is not possible to provide a system of sanctions at all as any black mark against a judge would impair her ability to do her job, it is submitted that not having a system of sanctions is potentially more of a threat to a judge's career as behaviour that in other jurisdictions might lead to a sanction, might, in Ireland lead to removal. The Sheedy episode is instructive here.

⁴⁹ See *Curtin v Dáil Éireann* [2006] 2 IR 556, 59–60.

⁵⁰ n 6.

While Justice Hugh O’Flaherty was certainly wrong to interfere in the Sheedy case and, whether intentionally or not, was the cause of getting the case re-listed and ultimately Sheedy being released, we have to question whether this behaviour was serious enough to merit removal.⁵¹ He may very well have decided to resign anyway but if a system of sanctions had been in place and if it were open to the Chief Justice to administer some sort of reprimand instead, it is possible that O’Flaherty’s career could have recovered. We also have to ask if the behaviour of O’Flaherty was any more serious than that of Judge Desmond Hogan when he allegedly inquired into an ongoing case following a representation from a politician. This case melted into the shadows once the presidents of the High and Circuit Courts decided nothing untoward had occurred. However, this was the only possible outcome under the present system because there is no possibility of admitting that wrongdoing had occurred, then taking appropriate action. This was not behaviour which would require removal but if the incident occurred as Justice Abbott has alleged then it should certainly have attracted a sanction for Judge Hogan who, it seems, acted inappropriately.⁵² The ultimate sanction of removal is not suitable for every little indiscretion but at the same time, if judges are seen to ‘get away with’ misbehaving just because their conduct is not serious enough to merit removal then this can cause serious problems of confidence in the system.

Even if we accept that a system of sanctions is necessary, we then have to decide on the type of sanctions which would be appropriate. The Report of the All-Party Oireachtas Committee on the Constitution, which is considered below, drew a distinction between legal and moral sanctions. According to the Report, legal sanctions are penalties imposed by law and moral sanctions are psychological pressures imposed by society; these pressures would be imposed by a group consisting of the judge’s peers on the bench and respected lay persons.⁵³ The idea of legal sanctions is a difficult one because it affects both judicial independence and public confidence in judges in a more serious way. It could be argued that imposing

⁵¹ For a discussion on the Sheedy Case, see n 2.

⁵² See Clifford, n 4.

⁵³ See *Fourth Progress Report: The Courts and the Judiciary* The All-Party Oireachtas Committee on the Constitution (Dublin Stationery Office 1999), 25.

a legal sanction on a judge effectively takes away her independence and means that members of the public will not have the same respect for the judge because of that. Thus, there are a number of questions which follow from any decision to create a more comprehensive disciplinary system. The main questions to be asked include: Should disciplinary action be made public and what effect would that have? Should there be a hierarchy of sanctions or specific sanctions for specific offences? Should the sanctions include actions such as demotion and reduction of salary or is this unconstitutional? And finally, is there greater protection for judicial independence in having moral rather than legal sanctions?

In order to consider these questions, it is helpful to look at a long-established system which uses various legal sanctions as disciplinary action.

(i) Discipline of Judges in the Civil Legal System of France

The discipline of judges in France is the responsibility of the Conseil Supérieur de la Magistrature (Superior Council of Judges). According to the current Constitution, the role of the Conseil Supérieur de la Magistrature (the CSM) is to assist the President of the Republic in his mission as the ‘guarantor of the independence of the judicial authority’ and the President of the Republic is to act as the President of the CSM, essentially a figurehead role. The CSM’s duties include nominating and appointing judges and public prosecutors and acting as a disciplinary council, something ‘which ensures that the judiciary cannot become an instrument of political power’. The Council is empowered to punish recalcitrant members. Sanctions available to the CSM include:

- Reprimand with a note on the judge’s file
- Mandatory transfer of jurisdiction
- Withdrawal of certain functions
- Reduction in grade by one degree
- Reduction in grade by more than one degree
- Mandatory retirement

- Dismissal with pension
- Dismissal without pension⁵⁴

The least severe form of discipline is a negative evaluation. This is not considered a formal sanction but it can at least impair a judge's chances for promotion. The most usual sanction resorted to is an official warning (reprimand) which is deleted from the judge's file after three years if no further warning or disciplinary sanction has been given. The Minister for Justice, in consultation with the judge's superiors, may ask for the judge to be suspended with pay during the proceedings. The judge has a right to see the charges and his or her record and all documents of the preliminary investigation. The judge can have counsel and call witnesses before the CSM. In a type of appeal, a judge can seek to have the judgment annulled by the Council of State.

(a) Instances of Misconduct⁵⁵

The behaviour for which sanctions are given is quite varied and ranges from inappropriate judicial comment to criminal behaviour. However, the most common sanction is a reprimand. In a case from 1966, a judge published an article under a pseudonym in *le Monde*, in which he criticised the Minister for Justice for a recent decision. The CSM found that the article demonstrated a deliberate ignorance of the principle of the independence of the judiciary and issued a reprimand.⁵⁶ In another case in 1969 it was found that a certain judge neglected his duties of care. He was absent from court without permission supposedly because of an illness he had contracted during a stay in Algeria. When a higher judge pointed out some shortcomings to him, he responded with a rude and aggressive letter. In deciding to sanction him with a reprimand, the CSM took into account his excellent record and previous good conduct.⁵⁷ The CSM also gave the sanction of reprimand with a note

⁵⁴ See *Recueil des Décisions Disciplinaires*, available on the website of the CSM <<http://www.conseil-superieur-magistrature.fr/>> Accessed 24 July 2015.

⁵⁵ The instances below are taken from the most recent report available, the *Recueil des Décisions Disciplinaires* (ibid), which is from 2005.

⁵⁶ ibid 195.

⁵⁷ ibid 197.

on the judge's file in 2001 when a certain judge was found guilty by the Tribunal de Grande Instance of exercising violence on his partner and possessing a dangerous weapon.⁵⁸

Another common sanction is that of reduction in rank, which also involves a transfer of jurisdiction. In one example where this sanction was given in 1999, a particular judge, being unable to obtain an amphetamine drug, which she had used for many years and felt she still needed, falsified documents on headed paper from the Hospital Raymond-Poincaré in order to obtain the drugs. She was found guilty in the Tribunal Correctionnel and fined 5,000 francs, but the decision was excluded from publication in the judicial bulletin.⁵⁹ In another case in 2004, a judge had caused a number of minor incidents both inside and out of court because of an alcohol dependency. These incidents were witnessed by a number of people and because of this, it was felt, she had damaged public confidence in the judiciary. The CSM decided to withdraw her function as a Juge d'Instruction (which amounts to a reduction in rank) and transfer her to a different jurisdiction.⁶⁰

Generally, it is only the lesser forms of punishment which are resorted to, although there have been times where it was necessary to use the nuclear option of dismissal. The CSM produced a report of all disciplinary cases from 1958 to 2005 and only 16 cases led to the removal of the judge involved (this includes cases of mandatory retirement). This is quite a small figure, especially when we consider that in the year 2000, according to statistics from the Ministry of Justice, there were 6,721 judges in France.

Until 2001, the procedure was private but there was a suggestion that the absence of publicity contravened Article 6 of the European Convention of Human Rights and so an organic law was brought in, in 2001, which provided that all sittings of the Council would now be in public. The aim of this was not only to effectively reinforce the legitimacy of the disciplinary council but also to guarantee the respect of rights and liberties of individuals according to the values of the

⁵⁸ *ibid* 490.

⁵⁹ *ibid* 453.

⁶⁰ *ibid* 535, 557.

Convention. In fact, even though judges are allowed to object to the public hearing, most prefer to have to have a public debate on this issue.⁶¹

While the information above is instructive, it is also necessary to point out that judges in France occupy a very different position to those in Ireland. They are viewed as civil servants, they embark on a judicial career directly out of university and so are often not experienced professionals by the time they reach the bench and they are not treated with the same sort of reverence often accorded to judges in Ireland. However, that is not to say that, while the system in France is quite different, lessons cannot be learned from their procedures.

(ii) Sanctions in Ireland?

With regard to the possibility of sanctions being introduced for judicial misbehaviour in Ireland, there is an argument against a public reprimand as it could undermine the independence and respect of the judge in question and it could make it difficult for the judge to continue on the bench. But on the other hand, if the misbehaviour has been made public, then a private sanction would be counterintuitive. Of course if the misconduct is relatively minor then there would be no real reason to make the reprimand public. Since a public reprimand is a much more serious punishment than a private one, this would have to be confined to serious cases of misbehaviour, where it is necessary for the public to be aware of the fact that the judge has been disciplined. Essentially, if the misconduct has been made public, then the resulting sanction would have to be made public in order to have any effect and the same would apply if the misconduct is so serious that it should be made public.

Related to this is the question of whether the judge could continue to administer justice after having been admonished. In France, this does not seem to pose a problem, although this may be because their judges are not regarded in the same way as English or Irish judges. At present, because it would be so unusual for a

⁶¹ See Guy Canivet, 'La Responsabilité des Juges en France' (2003) *Automne* 103, *Commentaire* 644.

judge to be reprimanded in Ireland then it could possibly have a negative effect. On the other hand, if this was to happen as part of an established system of discipline, then it is possible that the public would have more confidence in the administration of justice if they could be assured that a judge who steps out of line will be punished.

One might then ask how the sanctions would be determined. The obvious option would be to have a list of sanctions, in varying degrees of seriousness, which would be available at the discretion of the disciplinary body, a system not unlike the French one. However, the seriousness of the sanctions is also a delicate area. Presumably, the option of dismissal would not be available to any sort of judicial disciplinary body as this would, in fact, amount to a usurpation of the legislative power of removal. At least that is the constitutional position at present. It would of course be entirely possible to hold a referendum for the purpose of amending Article 35.4.1° to allow for a committee of judges to remove errant judges. Neither would reduction of salary be possible because of the fact that Article 35.5 specifically prohibits this. It appears that demotion may not be possible under the Constitution either. For example, if a Circuit Court judge was moved down to the District Court, this would effectively constitute removal from the Circuit Court, since each of the courts in the Irish system is separate. To remove a judge from the Circuit Court, the constitutional procedure would have to be followed, therefore one could not conceivably have demotion as a sanction.

In a few of the reports, outlined below, moral rather than legal sanctions were opted for, presumably because of the fear of interference with judicial independence. In a jurisdiction such as Ireland, where incidents of judicial misconduct are quite low, it is likely that moral sanctions will be preferred.⁶² Similarly, there seems to be a consensus that if a system of lesser forms of discipline was to be introduced in Ireland, in order to protect judicial independence, the body responsible for this would have to be a judicial or primarily judicial one.⁶³

⁶² Although during an interview, a former president of one of the courts expressed the opinion that even if moral sanctions are brought in initially, legal sanctions will, most likely, be resorted to eventually.

⁶³ In all of the reports discussed below, it was recommended that for instances less serious than those which would require removal, these should be dealt with internally or by a body specifically designed to investigate such complaints and which would comprise a majority of judges. See reports below.

V. A CODE OF CONDUCT

While we have already considered defining more clearly the type of behaviour which should lead to discipline or removal of judges, another option, or an additional safeguard, would be to draw up a list of conduct judges are to abide by in order to maintain good behaviour. It could be argued that a code of conduct makes it easier for judges to behave within acceptable standards because unless standards are actually laid down, then there is always a possibility of unintentionally stepping over the line, whereas when there is a specific, accepted code then it is easy to see what behaviour is tolerated and what is not. Two examples are considered below.

(i) The Code of Judicial Conduct in the United States

The earliest form of judicial code in the United States was the ‘Canons of Judicial Ethics’, which were written in 1924 by a committee of the American Bar Association, chaired by William Howard Taft, then Chief Justice of the US Supreme Court. These canons were extremely vague and ineffective and so they were replaced by the ‘Code of Judicial Conduct’ in 1972. The American Bar Association created the code, which was adopted by the Judicial Conference on 5 April 1973. This code is only binding when a federal or state government adopts it, but almost all of them have. In fact, 47 states and the District of Columbia have adopted the code (in whole or in part). Montana, Rhode Island, and Wisconsin have not adopted the code, but each has created its own set of regulations, principally based on the code. The Judicial Conference of the US Courts adopted the Code of Judicial Conduct in 1973, thus subjecting federal judges to its rules. Various governments have used violation of the rules as the basis for taking actions against deviant judges.

The code now contains seven canons:

1. A Judge Should Uphold the Integrity and Independence of the Judiciary
2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

3. A Judge Should Perform the Duties of the Office Impartially and Diligently
4. A Judge May Engage in Extra-Judicial Activities to Improve the Law, the Legal System, and the Administration of Justice
5. A Judge Should Regulate Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties
6. A Judge Should Regularly File Reports of Compensation Received for Law-Related and Extra-Judicial Activities
7. A Judge Should Refrain from Political Activity⁶⁴

There is then an explanation of each Canon. First, each canon is broken down and explained. Let us take, as an example, Canon 2 on Impropriety:

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

C. A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Then there is commentary provided on each of the sections. The commentary on Canon 2A is laid out as follows:

Canon 2A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge... Actual improprieties under this standard include violations of law, court rules or other specific provisions of this

⁶⁴ The code is available on the US Courts website at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf> Accessed 24 July 2015.

Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

The commentary on this particular section is very broad but, in general, the commentary moves from extremely broad to very specific situations. The specific situations seem to have developed from cases that have arisen over the years. One advantage of this system is that the canons themselves are so ambiguous that almost any type of behaviour can be made to fit into one or another category.

It has been conclusively decided that enforcement of the code is a matter of public concern. For instance, in *re Complaints of Judicial Misconduct*, the US Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders held that anyone can take a complaint of judicial misconduct to their relevant judicial council, as *locus standi* is not necessary here.⁶⁵

(ii) Guide to Judicial Conduct in England and Wales

The United States chose, as the most suitable type of code for that jurisdiction, general principles, which can be interpreted and explained. The Judges Council for England and Wales decided on an alternative option. The Guide to Judicial Conduct, originating in guidelines drafted in 2002, was reformulated in 2006 and has been updated a number of times.⁶⁶ The guide is described as offering 'assistance to judges on issues rather than to prescribe a detailed code and to set up principles from which judges can make their own decisions and so maintain their judicial independence'.⁶⁷

Initially, the guide is based on the Bangalore Principles of Judicial Conduct which were initiated in 2001. The 38-page document (the amount of detail is striking in comparison to the 19-page American document) sets out comprehensive standards for judges in the areas of independence, impartiality, integrity, propriety, competence and diligence, personal relationships and perceived bias, and includes a

⁶⁵ See 9 F3d 1562 (US Jud Conf 1993).

⁶⁶ Most recently in March 2013. The UK Supreme Court also adopted a similar guide in 2009.

⁶⁷ See Guide to Judicial Conduct: <<https://www.judiciary.gov.uk/publications/guide-to-judicial-conduct/>> Accessed 24 July 2015.

detailed chapter on activities outside of the court as well as a short piece aimed at retired judges and various appendices. The Bangalore Principles are set out as the beginning of the guide. They are as follows:

- I. Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
- II. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
- III. Integrity is essential to the proper discharge of the judicial office.
- IV. Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.
- V. Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.
- VI. Competence and diligence are prerequisites to the due performance of judicial office.

These principles are intended to work like the canons in America and each principle has appended explanatory paragraphs. Although some jurisdictions have officially adopted the Bangalore Principles,⁶⁸ others, such as England and Wales, have chosen to use the Principles as a model and have created their own guide based on the Principles.

The England and Wales guide is quite comprehensive in its consideration of all types of judicial conduct. An example of one of the shorter parts is as follows:

4. INTEGRITY

4.1 As a general proposition, judges are entitled to exercise the rights and freedoms available to all citizens. While appointment to judicial office brings with it limitations on the private and public conduct of a judge, there is a public interest in judges participating, insofar as their office permits, in the life and affairs of the community. . . . Judges should avoid situations which might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as judges. They must also avoid situations which might expose them to charges of hypocrisy by reason of things done in their private life. Behaviour which might be regarded as merely unfortunate if engaged in by someone who is not a

⁶⁸ See Preface to the UN Commentary on the Bangalore Principles of Judicial Conduct, available at https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf Accessed 24 July 2015.

judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.

4.2 A judge's conduct in court should uphold the status of judicial office, the commitment made in the judicial oath and the confidence of litigants in particular and the public in general. The judge should seek to be courteous, patient, tolerant and punctual and should respect the dignity of all. The judge should ensure that no one in court is exposed to any display of bias or prejudice on ... 'irrelevant grounds'. In the case of those with a disability care should be taken that arrangements made for and during a Court hearing do not put them at a disadvantage...

The guide is set out in a manner which gives both judges and the general public a good understanding of the conduct expected of judicial office holders. Areas of contention are carefully mentioned and judges are advised to steer clear of certain situations. However, even a guide as detailed as this cannot cover every possibility and sometimes in order to get around the *inclusio unius est exclusio alterius* argument, it is simpler to avoid detail and rely on general principles. Nevertheless, the guide is a good start to ensuring accountability and discipline and the benefits of having a written document, which judges and others can consult when needed, are obvious.

(iii) Relevance in Ireland

Presumably, these jurisdictions will be considered if it is decided to opt for a code of conduct in Ireland. While the American code has obvious merits in its focus on solid principles which can be developed and added to later, it is submitted that its use in the US as a basis for taking action against judges would not be favoured here. The detailed guide in England and Wales is impressive, and while the lack of existing material or examples to draw upon in this jurisdiction might lead to a guide based more on general principles, it is likely that the approach whereby the guide is framed as advice and assistance to judges rather than a strict, prescribed code, would be preferred in this jurisdiction.

VI. REPORTS AND ATTEMPTS AT REFORM

Certain recommendations for reform, which have been made by various bodies, have been referred to above but it will be useful to provide a brief summary here.

(i) Report of the Constitution Review Group⁶⁹

This report, published in 1996, was critical of existing structures for judicial discipline in Ireland. The group felt that the removal provision is inadequate as it is and recommended the provision of a procedure similar to that of Article 12.10, which provides for an impeachment process for the removal of the president. It also recommended amending Article 35 of the Constitution in order to provide for a judicial council, which would regulate judicial conduct. While this report was generally accepted, there was no move to implement any of the recommendations in this area.

(ii) Fourth Progress Report of the All-Party Oireachtas Committee on the Constitution⁷⁰

This report endorsed most of the recommendations of the Constitution Review Group, although there were some disagreements with the misbehaviour provision.⁷¹ The report recommended the establishment of a council to regulate the conduct of judges, which would comprise judges, retired judges and also a lay element. However, this council would have no power to impose legal sanctions as it was felt that such a power would threaten judicial independence. Instead the report stated that the body could ‘express its disapproval and/or propose counselling/training, make administrative arrangements to avoid a repetition of the problem, issue a written apology to the complainant or publish a summary of its findings’.⁷² It stressed that these are moral rather than legal sanctions. It was also felt that this council should have a constitutional foundation.

⁶⁹ *Report of the Constitution Review Group* (Dublin Stationary Office 1996).

⁷⁰ *Fourth Progress Report: The Courts and the Judiciary* The All-Party Oireachtas Committee on the Constitution (Dublin Stationery Office 1999).

⁷¹ See section on Proposals above, 10–12.

⁷² *Fourth Progress Report*, n 70, 25.

(iii) The Sixth Report of the Working Group on a Courts Commission (The Denham Report)⁷³

This group was established by the Minister for Justice Nora Owen in 1996. The primary recommendation of the Working Group was that ‘an independent and permanent body should be established as an agency of the State to manage a unified courts system’.⁷⁴ In its sixth report, simply entitled *Conclusion*, the group recommended the establishment of a Committee on Judicial Conduct and Ethics,⁷⁵ which would draw up a code of ethics for judicial conduct as well as dealing with matters such as complaints, judicial discipline and judicial studies.

In relation to the establishment of a disciplinary system, the group examined systems in other countries and came to the conclusion that Ireland would benefit from a system whereby a judicial body would consider complaints made against judges. It was submitted that this body would have to be controlled by the judiciary, in order to ensure independence, and the body should also be pre-emptive and objective. The complaints procedure would be structured but informal and a code of ethics would be drawn up.

So, unlike the *Fourth Progress Report*, this report (which was published first) has no mention of lay involvement, and suggested the body be set up on a non-statutory basis. However, both reports are in agreement in preferring moral to legal sanctions.

(iv) Report of the Committee on Judicial Conduct and Ethics (The Keane Report)⁷⁶

This report came from the group that was established following the recommendations of the Denham Report and it contains the most detailed set of

⁷³ *Working Group on a Courts Commission Conclusion* 1998: <[http://www.courts.ie/Courts.ie/Library3.nsf/\(WebFiles\)/96E384ACEAED7F4F80256DA60039A0B8/\\$FILE/court6.pdf](http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/96E384ACEAED7F4F80256DA60039A0B8/$FILE/court6.pdf)> Accessed 24 July 2015.

⁷⁴ This led to the establishment of the Courts Service.

⁷⁵ The first five reports covered areas such as Management and Financing of the Courts (April 1996), Case Management and Court Management (July 1996), Towards the Courts Service (November 1996), The Chief Executive of the Courts Service (March 1997) and Drug Courts (February 1998). The Group also completed a conference, Conference on Case Management (May 1997); and a working paper, Information and the Courts (November 1997).

⁷⁶ *Report of the Committee on Judicial Conduct and Ethics* (Dublin Stationery Office 2000).

recommendations for the establishment of a disciplinary system for the judiciary. The committee took submissions, held a conference and conducted studies in this area before coming to its conclusions. The jurisdictions of Canada, New South Wales, New Zealand, England and Wales, India, Connecticut and California were all considered. The main proposal in this report was the establishment of ‘The Judicial Council’. The details were as follows: All judges would be members of the new council. This council would comprise a board and three committees. The board would consist of the chief justice and the presidents of the other courts, four judges from each court and one other judge, who could be a member of any court, and this position would rotate to a different court every four years. The three committees would be as follows:

1. the Judicial Conduct and Ethics Committee;
2. the Judicial Studies and Publications Committee;
3. the General Committee.

Each committee would consist of the president of each court, four judges from each court and one extra judge for each committee. The Judicial Studies Committee would effectively take over the work of the Judicial Studies Institute and the General Committee would ‘keep under constant review questions of remuneration and the working conditions of judges and present regular reports to the Board’.⁷⁷

(a) The Judicial Conduct and Ethics Committee

The most relevant committee here is the Judicial Conduct and Ethics Committee. This committee would consider ‘all questions of judicial conduct and ethics arising in particular cases’.⁷⁸ There would be a complaints officer, to whom members of the public could make complaints. This official would operate a filtration system so that frivolous or vexatious complaints could be recognised and dealt with appropriately. Serious complaints would be referred to a panel of inquiry. The panel, which would

⁷⁷ *ibid* 57.

⁷⁸ *ibid* 53.

have a wide discretion as to how to conduct its inquiry, would be comprised of two judges and one lay person of standing within the community, to be appointed by the attorney general. There would be no members of the legal profession included in this system. The panel would have all the ‘powers, rights and privileges vested in a judge of the High Court on the occasion of an action’.⁷⁹

The panel would present its findings to the committee in a written report with a recommendation as to what action should be taken, which could be a private or public reprimand or a recommendation that ‘the executive consider the tabling of a resolution in both Houses of the Oireachtas calling for the removal of the judge from office for stated misbehaviour or incapacity’.⁸⁰ There would also be the possibility of a recommendation for counselling or treatment for the judge in question and a request that the judge receive no court duties for a specified time – effectively a suspension. The sanctions were expressed to be moral in nature, as opposed to legal.

The committee would also be responsible for drafting a code of ethics which, when approved, would be published and distributed in the form of a handbook to all newly appointed judges. The board would be required to meet at least once a month and publish an annual report on its activities. It would have to be appointed on a statutory basis in order to ensure adequate funding and to ensure it would have the necessary legal powers to carry out inquiries. All judges would be subject to the council and so the existing provisions providing for the discipline of District Court judges would have to be repealed.

(v) Report of the Irish Council for Civil Liberties – Justice Matters:

Independence, Accountability and the Irish Judiciary

Following years of inaction, the Irish Council for Civil Liberties decided to produce another report on this important issue.⁸¹ Although without actually recommending anything novel, the report covered a very wide range of issues surrounding judicial discipline and interviewed present and past members of the judiciary as well as

⁷⁹ *ibid* 55.

⁸⁰ *ibid*.

⁸¹ See *Report of the Irish Council for Civil Liberties: ‘Justice Matters: Independence, Accountability and the Irish Judiciary’* (Dublin 2007).

various other legal personages. The main recommendation in the report was the establishment of a judicial council as recommended by the Keane Report.

(vi) Developments

While the various reports are in agreement on many issues such as the establishment of a council generally and the preference for moral rather than legal sanctions, there are also disagreements about other matters. The *Fourth Progress Report* (and the Constitution Review Group) recommended a constitutional basis for the body; the Denham report favoured an informal structure; while the Keane Report was based on a statutory proposal. Also, while the Denham report was silent on the issue of lay involvement, the Keane Report agreed with the other reports that the inclusion of lay persons would benefit the council.⁸²

Following all of these recommendations in 2001, it was finally decided to take some action. The response was to introduce the Twenty-Second Amendment to the Constitution Bill. The aim of the Bill was to introduce a body that would be empowered to investigate the behaviour of judges and to give it constitutional protection. Secondly, the Bill purported to change the removal provision in Article 35.4.1° in order to introduce a procedure akin to that of Article 12.10. It was envisaged that this Bill would have been put to the people in 2001 during a referendum in which issues involving the Nice Treaty, the International Criminal Court and the formal abolition of the death penalty were also up for consideration. However, the Opposition objected to various provisions and the Bill was never put to the people.

Although, as we have seen, very detailed reports had previously considered this area and ample proposals had been put forward, the Bill was extremely short, meagre, and disappointing in contrast to the reports, and no organic legislation had been provided for. The Opposition was accused of ‘specious barrack room

⁸²The Keane Report recommended lay involvement in the panel of inquiry which would investigate complaints, although not in the actual council itself.

lawyering⁸³ and opposing the Bill simply for the sake of it but the Bill had serious shortcomings.

The new provision purported to establish a judicial council but there was no guidance as to how such a council would be set up, maintained, how many members it should have, who would be responsible for appointing the members, how long membership would last or what responsibilities it would have. The words of Deputy Shatter during the debates on this Bill are quite accurate:

A constitutional provision for the establishment of a judicial council should have been contained in this Bill but has inexplicably been omitted by the Minister. He has now promised the enactment of legislation at a later date to establish such a council. If it is genuinely his intention to establish such a council, it should be given a constitutional status.⁸⁴

While explaining the Bill, Deputy Brian Lenihan described the new body as ‘a judicial council which, among other things, would provide disciplinary measures for lesser forms of judicial misconduct’.⁸⁵ However, there was nothing in the proposed provision to indicate that the new body would have any such responsibility. Another oversight was that while provision was made for investigating the behaviour of judges on the bench, there was no provision for the investigation of conduct which occurred before the appointment of a judge. The Opposition also criticised the Bill because it blindly followed the Keane Report but that report had been made on the basis that no change would be made to the Constitution. Deputy Howlin pointed out the ‘absurdity of the Minister’s position’ in that he had ‘adopted the committee’s proposals which it drew up as the furthest it could go in the current constitutional climate, but he is proposing to change the Constitution in order to enable it to do something that it can do already’.⁸⁶

The second principal feature of the proposed amendment was the change to the removal procedure contained in Article 35.4.1°. Minister for Justice John O’Donoghue explained the proposed procedure as follows:

⁸³ *Dáil Debates*, vol 535, col 64 (Deputy Lenihan) (1 May 2001).

⁸⁴ *Dáil Debates*, vol 534, col 567 (10 April 2001).

⁸⁵ *Dáil Debates*, vol 535, col 62 (1 May 2001).

⁸⁶ *Dáil Debates*, vol 534, col 581 (10 April 2001).

A charge against a judge must be preferred by either House of the Oireachtas and the proposal to prefer a charge must be made by a notice of motion in writing signed by not fewer than 30 members. When a charge has been preferred by either House, the other House must investigate the charge or cause it to be investigated by any court, tribunal or other body... A charge against a judge must be preferred by either House of the Oireachtas and the proposal to prefer a charge must be made by a notice of motion in writing signed by not fewer than 30 members. When a charge has been preferred by either House, the other House must investigate the charge or cause it to be investigated by any court, tribunal or other body.⁸⁷

It was this provision which caused so much contention. In particular, Fine Gael objected to the fact that the two-thirds majority was required not just to remove a judge but even just to suspend or investigate. They claimed that the provisions constituted an ‘unnecessary barrier to the commencement of any such investigation’.⁸⁸ This argument is actually quite sensible. It is submitted that the provision of the two-thirds majority vote to remove a judge was a step in the right direction and would provide more protection than currently exists, but there was no need to go as far as requiring a two-thirds majority vote for every aspect of the procedure, particularly in order to commence an investigation.

Other shortcomings included the fact that the Bill did not specify the relationship the council would have with the legislature in the event of removing a judge. For example, it did not anticipate what would happen should the new body feel the conduct of a judge was not so serious as to merit investigation but the government or the Oireachtas disagreed or vice versa. What is more, the provision did not specify whether members of the body who had conducted an investigation into allegations of judicial misconduct would be required to give evidence before the Oireachtas or explain their conclusions. Because of the various objections, the Bill was abandoned.⁸⁹

⁸⁷ *ibid* cols 561–62.

⁸⁸ *ibid* col 570.

⁸⁹ John O’Donoghue later commented on the abandonment as follows: ‘I framed proposals to act immediately in this area by proposing a constitutional amendment to be followed by legislation to establish a judicial council and ethics committee. Regrettably the Government felt compelled to withdraw the proposals because of the failure of the main Opposition parties to support them. It is unfortunate that the attitude of the Opposition led to the withdrawal of these proposals, thereby

The possibility of reform was raised again briefly in 2002 when Deputy Howlin tabled amendments to the Courts and Court Officers Bill 2001, which would have brought in a code of conduct for members of the judiciary. The amendments were withdrawn, however, due to a lack of support. He had originally sought to table another amendment which would establish a judicial ethics tribunal to investigate allegations of judicial misconduct, but this was ruled out of order. In rejecting Deputy Howlin's proposed amendments, Minister for Justice, Equality and Law Reform John O'Donoghue expressed the opinion that the Bill did not provide the right context for the proposed provisions and this appears to have been the end of the matter.⁹⁰

During the years following the *Curtin* case, there were negotiations between the government and the judiciary and terms were drawn up for a judicial council. The Attorney General's Office, in consultation with the then Minister for Justice Michael McDowell, was then given the task of drawing up a Bill but when this was then sent back to the judiciary they rejected it, claiming that it was not what they had agreed.⁹¹ The judges then set about drafting their own document on a judicial council. It was later reported that a two-person working group consisting of representatives of the Chief Justice John Murray and the Minister for Justice had been established in order to finalise the particulars for a Judicial Council Bill.⁹² The scheme for a draft Judicial Council Bill was then published in 2010, based on the recommendations in the Keane Report, and while it was generally well received, no further progress was made before the 2011 election, which brought in a new government. The new Minister for Justice⁹³ Alan Shatter expressed a commitment to publish a new Bill and it has appeared on the government's programme for legislation since then.

depriving the judicial system and the public of a new, open and accountable system for investigating complaints and a clear and fair procedure for removing a judge from office should that become necessary at any time in the future.' See *Dáil Debates*, vol 551, col 178 (26 March 2002).

⁹⁰ See *Dáil Debates*, vol 551, col 177 (26 March 2002). Also see quotation above in n 89.

⁹¹ According to information received during the course of interviews conducted with judges. Also see 'Working Group to Develop Judicial Council' *The Irish Times* (Dublin, 17 April 2008).

⁹² See Carol Coulter, 'Minister Backs Setting Up Local Family Court System' *The Irish Times* (Dublin, 28 December 2007).

⁹³ He has since been replaced by Minister Frances Fitzgerald, who has not given any indication of the likelihood of publication of the Bill.

VII. CONCLUSION

Under the current Irish system, there is no mechanism by which members of the public or lawyers or court officers can bring a complaint against a judge. This is a huge oversight in an era of accountability. Even if an instance of judicial misbehaviour comes to light, unless it involves a District Court judge, there is no statutory or constitutional authority for an investigation into the behaviour. Furthermore, even if it is clear that some sort of misconduct has occurred, the only option available is to attempt to remove a judge by joint resolutions in the Houses of the Oireachtas and that process is also very unclear.

The underlying point here is that our current system for disciplining judges needs to be reformed. First, the disciplinary body promised by the enigmatic Judicial Council Bill needs to be established. At the very least, it needs to be clear what sort of behaviour will lead to removal. Due to fears surrounding interference with the independence of the judiciary, it seems inevitable that any such clarification to the constitutional provision will, by its very nature, be ambiguous. However, any of the suggestions mentioned above, such as using public confidence as a yardstick or considering whether the conduct makes the incumbent unfit for judicial office, would be an improvement on the current situation. While it might be useful to have certain examples of what constitutes misconduct in a judicial code of conduct, it is submitted that it would not be suitable to enumerate such categories in legislative form and perhaps an assistive guide would be of more use. Similarly, the question as to the possibility of having lesser sanctions needs to be addressed. It is submitted that having a system of sanctions, rather than presenting a threat to the independence of judges, would actually benefit judges and would provide a boost for public confidence in the system in that members of the public would be assured of accountability amongst some of Ireland's highest office holders. As well as clarifying the grounds for removal and providing for a system of sanctions, the process of removal itself also needs to be clarified. While a confused attempt was made to begin the process of removal for Brian Curtin, the Supreme Court provided

guidance in the case that followed and this should provide the basis for any future procedure.

It is to be hoped that it will not take another judicial scandal for this subject to be finally addressed. It is crucial that this issue is dealt with sooner rather than later, for the good of the system of administration of justice in Ireland and to provide clarity for all involved. Moreover, it is to be hoped that, when discussions around the Judicial Council Bill eventually begin, careful consideration will be given to the issues raised in this piece and to the wealth of research which has already been published in the various reports mentioned.