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[European Rule of Law Guidance and Judicial Appointments]

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European Rule of Law Guidance and Judicial Appointments

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1. Introduction

The rule of law is high politics in Europe today. The 'democratic backsliding' that has been a feature of some jurisdictions in Europe in the past two decades has resulted in an increasingly intense focus within the EU on rule of law indicators, both in 'hard law' (especially CJEU case law) and 'soft law' guidance to policymakers. This adds to an existing body of international and European soft law on the independence of the judiciary, which typically focussed on the separation of powers and strict independence of judicial processes (especially for new democracies). There are some reasons for concern at this development. Very robust independence for judges was made a condition for EU membership by former Eastern block countries, but has not always proven successful. Of more relevance to judicial appointments in Ireland is the (often) poor quality of European rule of law reports and their methodology. Reports on Ireland typically misunderstand the role of judges in the Irish common law system, and make self-referential recommendation that are supported not by comparative or empirical work but by a huge body of other soft law on judicial independence and the rule of law.

2. The European Context

The European case law on judicial appointments is permissive and has been developed significantly in recent years. It does not mandate one particular model for appointments (and, given the diversity of legal systems in the EU, could not plausibly do so) and instead focusses on the substance of the independence of judges once they have been appointed. In *Repubblika*, for example, the Grand Chamber of the CJEU held that

> the mere fact that the judges concerned are appointed by the President of a Member State does not give rise to a relationship of subordination of those judges to the latter or doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role.[1]

Instead, the court applies a substantive impartiality test based on the conditions as they actually are in each jurisdiction.[2] Thus in *AK*, which addressed changes to Polish law on judicial tenure and appointments, the CJEU stated its legal position, but highlighted factors in the new arrangements that might tend to create 'legitimate doubts, in the minds of subjects of the law' about the independence of a reformed appointments body and disciplinary chamber.[3]

As Advocate General Hogan (as he then was) put it in his opinion in *Repubblika*, "neither EU law nor, for that matter, the ECHR, impose any fixed, *a priori* form of institutional guarantees designed to ensure the independence of judges". Hogan also noted that political appointment is a feature of many court systems which are, nonetheless, considered to be "resolutely independent".[4] The ECtHR in *Astradsson* held similarly that "appointment of judges by the executive or the legislature is permissible under the Convention, provided that appointees are free from influence or pressure when carrying out their adjudicatory role".[5]

Nonetheless, both CJEU and ECtHR appear in some judgments to express a preference for both more formal and less political appointment systems. This preference is still carefully distinguished from the legal position in both EU and ECHR law that a range of appointment

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[1] Case C-896/19, *Repubblika v. Il-Prim* Ministru, CJEU 20th April 2021, at para 56.

[2] See para 55: it is necessary to ensure that the conditions "cannot give rise to reasonable doubts, in the mind of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been appointed as judges".

[3] Case C-585/18, *AK (Independence of the Disciplinary Chamber)*, 19th November 2019. at para. 171.

[4] Opinion of AG Hogan, *Repubblika.*

[5] *Astradsson v Iceland,* ECtHR 2637/18 1st December 2020. The CJEU has effectively transposed the jurisprudence of the Strasbourg court on judicial independence into EU law, and will normally take the decisions of the Strasbourg court into account. Case C-506/94, *Wilson,* 19th September 2006.

processes are acceptable, but it is possible that in future it may concretise into more formal and more directive approach to appointments.[6]

European Best Practice Guidance

European soft law and best practice guidance on judicial independence and judicial appointments is much more directive and prescriptive than 'hard' law. A host of best practice processes and recommendations are made by bodies like the International Commission of Jurists, the Vienna Commission and – most relevant to this Bill – the Council of Europe and from the EU. In the context of the JAC Bill there are two important bodies to focus on: firstly, the Council of Europe's GRECO body; and secondly, the European Commission, which has taken on a rule of law function in the past decade in response to the phenomenon of 'democratic backsliding' in some member states.

GRECO (Group of European States Against Corruption) is an anti-corruption body that since 1999 has conducted a series of thematic reviews of Council of Europe jurisdictions, focussing in its fourth evaluation round (2012-2016) on parliaments, the judiciary and prosecutors. GRECO operates on a 'peer review' basis, with members evaluating each other on compliance with a range of rule of law criteria. GRECO does not produce general standards of its own, but instead draws on a range of international and European best practice guidelines to evaluate the performance of member states.[7] This approach has, arguably, resulted in inconsistencies (see discussion of the 2017 Bill below).

The approach to judicial independence in the EU was historically much more limited, and normally had to do with whether or not a body proposing to make a preliminary reference to the CJEU counted as a 'tribunal' for the purposes of Article 267 TFEU. The accession of the EU to the ECHR, and the creation of the Charter of Fundamental Rights brought a broader and more clearly rights-focussed approach within EU law. More *political* urgency came with the phenomenon of democratic backsliding and threats to the rule of law in evidence in

[6] See eg *Repubblika* at paras 65-71.
[7] GRECO lists its source materials on its website here: https://www.coe.int/en/web/greco/round4/reference-texts.

some EU jurisdictions; notably Hungary, Poland and Romania. This led to a slew of CJEU cases responding to, for example, the forced early retirement of Supreme Court judges in Poland.[8] With this also came renewed political and EU Commission focus on rule of law. The EU Rule of Law Framework, which provides for a monitoring process that may lead to oversight and fines in some cases, was established in 2014, and has led to action against some states under the general infringement power in Article 258 TEU or the dedicated rule of law sanctions power in Article 7 TEU. From 2020 the EU Commission also began to produce individual country reports on the state of the rule of law in the Union, with additional country reports for each member state. These reports do similar work to GRECO reports, and, like GRECO do not articulate an independent standard, but rather draw on the same body of European best practice guidelines (including GRECO reports). EU Commission Rule of Law reports on Ireland so far have been poor. The reports for 2021, 2022 and 2023 all open with the (factually incorrect) line that "Ireland is a common law jurisdiction, whose judiciary is divided into a civil and criminal branch." The reports also tend towards unsupported self-referential statements, such as the concern expressed in the 2022 report that, despite never having been completed, the judicial impeachment process in Ireland allows for "politicization"; a claim which, upon close inspection, turns out to be supported only by an equivalent unsupported claim made in the 2021 report.

Reports by GRECO and the Venice Commission, to which the EU Commission reports make copious reference, are normally of higher quality. However, reports by all of these bodies tend more broadly to adopt a simplistic "politics bad, independence good" approach in evaluating arrangements for judges, which do not appear to take significant account of the differences between common law and civil law judiciaries.

3. Lay membership and the 2017 Bill

The Judicial Appointments Commission Bill 2017 arose out of a programme for Government agreement with the independent TD Shane Ross, who insisted on it as a condition of joining

[8] Case C-619/18, *Commission v Poland,* 24th June 2018.

the Government. Ross' critique arose out of the nature of the current system for appointments in Ireland. The Judicial Appointments Advisory Board (JAAB), created in 1995[9] created a new system by which application for judicial vacancies are reviewed by a Board comprising the Chief Justice (as chair), together with the four court Presidents, the Attorney General, three lay members, and representative from the Bar Council and Law Society. Influenced by the historical view that *any* restriction on the Government's discretion to choose judges was unconstitutional, the Board is required to recommend *at least* seven names for each vacancy to the Minister for Justice.[10] JAAB's role is further limited in two ways. Firstly, JAAB does not handle promotion of existing judges, which is entirely at the discretion of the Government.[11] Secondly, the Government is not required to appoint from within the list supplied by JAAB, and can even choose to appoint someone who has not applied.[12] Thus JAAB is effectively a partial screening body, rather than a complete judicial appointment body. The JAAB reform was thus largely cosmetic.[13]

The 2017 Bill was very closely modelled on the Judicial Appointments Commission (JAC) for England and Wales. It would have created a big commission, comprising 13 members, and aimed at including both appointments and promotions within its remit. Crucial to the ultimate fate of this Bill was the proposed role for laypeople. The 2017 bill created a lay chair and majority on its proposed commission. This aspect of the proposed commission was loathed by the judiciary. The effective removal of the Chief Justice's existing role as chair of JAAB was described as "a deliberate kick to the teeth" of the Chief Justice by former Supreme Court judge Catherine McGuinness.[14]

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[9] Courts and Court Officers Act 1995, section 13.

[10] Section 16(2) of the 1995 Act.

[11] During an early phase of JAAB's existence, even this limited role was further diluted by the decision of the Board to recommend all appointable applicants for every post. This was apparently done out of concern to preserve Government discretion, as judicial members took the view that to do otherwise would be an unconstitutional restraint on executive discretion. See J Carroll MacNeill*, The Politics of Judicial Selection in Ireland* (Four Courts Press, 2016) at 129.

[12] Section 16(6) of the 1995 Act provides that the Government "shall firstly consider" persons recommended by JAAB.

[13] It is perhaps worth noting that in some cases the expectation in the Act that seven names would be provided to the Minister for each vacant post has proven wildly optimistic. For a Court of Appeal recruitment exercise in 2016, JAAB reported that it could recommend no one, and in 2019 the Board reported only one application for two vacancies on the Supreme Court. These outcomes may arise because knowledgeable applicants are aware that such senior posts are normally filled by the promotion of existing judges.

[14] Mary Minihan, *Judicial reform plan a 'deliberate kick in the teeth' for the Chief Justice*, The Irish Times, 27th June 2017.

In its interim compliance report for Ireland for 2018, GRECO expressed concern about the proposed lay majority and chair, describing it as a breach of European standards.[15] This intervention was reported as a decisive intervention by an eminent European body against the Bill[16] and confirmed the deep-seated view of the judiciary that it was inappropriate to have a lay chair and majority on a commission of this kind. It is clear from GRECO's 2018 interim report that the Irish judiciary lobbied GRECO for this intervention. As the report puts it

> In addition to the information by the Government, GRECO has also received information, directly submitted to it, by the judicial authorities, through the Chief Justice of Ireland, … [and court presidents] … In their submission they stress that the Judicial Appointments Commission Bill 2017 has not been subject to in-depth consultations with the judiciary (contrary to what is stated by the Government) and that the judiciary has consistently opposed the content of the Bill, the components of which they believe is inconsistent with European standards as reflected in the Council of Europe Recommendation CM/Rec (2010)12.[17]

The Council of Europe document referred to recommends that at least half the members of a judicial appointment body should be judges chosen by their peers, and that where constitutional requirements dictate that appointments must be made by a government or legislator, an independent authority drawn 'in substantial part from the judiciary' should make recommendations which the appointing authority follows in practice.[18] GRECO's report does not explain its reasoning, nor whether any comparative work was done to support the conclusion. While it is normal for appointment systems in civil law jurisdictions, which typically have a distinct judicial profession, to be run entirely independently by judges this is

[15] GRECO*, Fourth Evaluation Round, Interim Compliance Report: Ireland*, June 2018.
[16] Eg Shane Phelan, *Ross reforms dropped from new judicial appointments bill proposal,* The Irish Independent 15th December 2020.
[17] GRECO *Fourth Evaluation Round, Interim Compliance Report: Ireland,* June 2018, paras 30-32. Emphasis in the original.
[18] Council of Europe Recommendation CM/Rec(2020)12: *Judges: independence, efficiency and responsibilities, paras. 46-47.*

not true of common law jurisdictions where there is no clear best practice and judicial majorities on appointment bodies appear to be rare (see Table 1).

Table 1: Membership of common law judicial appointment bodies – an unscientific survey

Jurisdiction	**Judicial**	**Legal**	**Lay**	**Total**	**Chair**	**Legal majority**	**Judicial majority**
Scotland[19]	4	2	6	12	Lay	*even*	N
NI	6	2	5	13	Judicial	Y	N
E&W[20]	6	2	6	14	Lay	Y	N
Canada Supreme Court	0	6	2	8	Legal	Y	N
Ontario	3	3	5	11	Lay	Y	N
South Africa[21]	3	5	15	23	Judicial	N	N
Pakistan[22]	5	3	1	9	Judicial	Y	Y
Malta	4	1	1	6	Judicial	Y	Y
Jamaica	2	2	2	6	Judicial	Y	N
India	Only judges may be involved. The Indian Supreme Court has held that this is a constitutional requirement.[23]						
Australia, New Zealand	Judges appointed by the Government on the advice of the Attorney General						
USA	Federal judges nominated by the President and appointed by Congress						

[19] Decisions on the *legal* competence of candidates are made by legal members only.
[20] Lay here includes a lay judicial member (magistrate).
[21] Numbers refer to core membership; flexible composition depending on the appointment; lay members
[22] Lay member is Federal Minister for Law and Justice. Appointment body also includes the Attorney General and a retired judge.
[23] See the three *Judges Cases*.

To characterise the proposed lay involvement as an attack on judicial independence stretches credulity, not least because it mirrored the approach taken on the JAC for England and Wales, which was designed to *strengthen* judicial independence. Not only did GRECO not take the same view in relation to lay involvement on the JAC in its reports for the UK, it *praised* the "proactive" changes to judicial appointments in that jurisdiction.[24] GRECO continues to take the view that the current Irish bill does not comply with European best practice and that its recommendation in this respect has not been implemented. By contrast, the composition of UK judicial appointments bodies has never been raised as an issue by GRECO, despite every UK appointment body lacking a judicial majority.[25]

4. The Path to the 2022 Bill

The 2017 Bill lapsed with the dissolution of the Dáil before the 2020 general election. The lay component of the commission was, as discussed above, ultimately one of the key reasons for the failure of the 2017 bill. The current bill dilutes this lay element and removes the lay chair. Though it is clear that the Chief Justice, for one, would prefer a judicial majority,[26] in fact the 50% judicial representation on the new Commission is higher than any comparable common law model appointment body that I have been able to find (see Table 1), with the possible exception of Malta. (Pakistan operates quite a different system, which brings judges and politicians together into a single stage process). The current Bill largely addresses the objections made by the judiciary to its predecessor. The Chief Justice will be chair of the proposed Judicial Appointments Commission, and the lay majority has been removed (although in a speech in May the Chief Justice apparently still sought a judicial majority). A nine-person Commission will comprise the Chief Justice as chair, three additional judges, four lay members and the Attorney General as a non-voting ninth member.[27] Like the 2017 Bill, the current Bill brings promotions of serving judges within its scope, and includes commitments on diversity in appointments, the use of interviews, and mandatory training.

[24] GRECO *Fourth Evaluation Round, Evaluation Report: United Kingdom,* October 2012, p 26, para 90.
[25] See GRECO, *Fourth Evaluation Round: Second Compliance Report: Ireland*, July 2022.
[26] Mary Carolan, 'Chief Justice criticises aspects of new Bill for reform of judicial appointments system' *The Irish Times* 31st May 2022.
[27] Judicial Appointments Commission Bill 2022, section 9.

The 2022 Bill has been designed to comply with European best practice guidance. The Bill is described in its long title as, *inter alia*, a bill to provide for judicial appointments and related matters

> … having regard to the recommendation of the Council of Europe's Group of States against Corruption (GRECO) … and having regard to Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities …

In this regard, of most importance is the removal of Government discretion in making judicial appointments. The original 2020 Heads of the Bill did not contain any constraint on Government discretion in appointing judges. As with the previous arrangements for the JAAB, Head 51 provided that the Government "shall firstly consider" recommendations from the new Commission. In the bill as introduced and ultimately passed by the Oireachtas, section 51 provides that the Government "shall *only* consider" recommendations from the Commission.[28] Past attempts at reform – the JAAB reform and the 2017 Bill, both preserved the Government's unrestricted power to appoint whoever it wished to judicial vacancies. With this slight change to the wording of section 51 the Government quietly abandoned its previously unshakeable position that the Constitution required unfettered Government discretion in judicial appointments.

It appears that the change was driven by EU guidance. In 2021, the EU Commission's rule of law report for Ireland commented that the proposals in an earlier draft offered too much discretion to the Government, stating that

[28] Emphasis added. Section 51, a mirror provision that applies to Irish appointments to overseas courts, contains identical wording. This provision did not appear in the Heads published in 2020.

> it is important that this reform takes in account Council of Europe recommendations relating to the need for the executive power to follow in practice the recommendations by independent authorities.[29]

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

> The reformed appointments system will be seen to clearly emphasise the principles of meritocracy and independence. It is designed to meet both our own constitutional standards and the standards set by the Court of Justice of the European Union, CJEU, regarding independence and the rule of law in judicial independence.[30]

The 2022 and 2023 reports note the removal of Government discretion contained in section 51 approvingly, though both the Commission and GRECO continue to criticise the absence of a judicial majority on the proposed JAC. GRECO takes the view that the absence of a provision to this effect from the Bill represents a continuing failure on the part of Ireland to comply with its recommendations.[31]

5. Comment

As we have seen, the European case law on judicial independence is permissive, rather than restrictive, when it comes to judicial appointments. Although they sometimes express a preference for a judge-led appointment process, independent of politicians, both the CJEU

[29] EU Commission, *2021 Rule of Law Report: Country Chapter on the rule of law situation in Ireland,* SWD(2021)715, 5.
[30] Dáil Éireann debate, Wednesday 27th April 2022.
[31] GRECO, *Fourth Evaluation Round: Second Interim Compliance Report: Ireland,* November 2020.

and the European Court of Human Rights accept that European jurisdictions have a wide variety of mechanisms by which judges are appointed. Provided judicial independence is respected in a substantive and 'all things considered' sense – that judges are independent once appointed and their tenure is secure – both courts accept that political choice in appointment is compatible with both Article 6 of the ECHR and Article 19(1) TEU joined with Article 47 of the EU Charter of Fundamental Rights. As far as the nexus of European and Irish constitutional law goes, there is no conflict between existing arrangements for appointing judges and EU or ECHR law. More precisely, section 51 cannot be viewed as a measure "necessitated by the obligations of membership of the European Union" for the purposes of Article 29.6 of the Constitution.

So much for 'hard' case law. The soft law of European guidance and recommendations, however, appears to say something different. Recommendations emanating from GRECO and the EU Commission go beyond the European case law on this point, including on judicial membership and on government choice in appointments, which (in the words of the Council of Europe recommendation cited in the long title of the 2022 Bill) require that the recommendations of a judicial appointing body should be "followed in practice" by the government. This does not quite amount to the "shall only" contained in section 51. It is at least arguable that, if the change to section 51 was done to satisfy the concerns of GRECO and the European Commission, the Government has interpreted these recommendations too restrictively. Both allow a range of appointment mechanisms. In some contexts the Government has pushed back against GRECO and EU Commission recommendations. It could have done so here on the legitimate grounds that, as a common law system, the Irish courts operate in a distinctly different environment to many of their European counterparts.

This objection has particular force in connection with the Supreme Court. The 2020 heads of the Bill contained a special process for appointing judges to the Supreme Court which does not appear in the Bill as passed by the Oireachtas. This process would have given the government slightly more input. It would have been easy for the Government to point to other jurisdictions where similar rules exist, especially where courts have strong judicial review functions (i.e. legislative review). For reasons of political legitimacy, both the German *Bundesverfassungsgericht*, and the French *Conseil d'État* (to cite but two examples) have

significant political input into appointments. These concerns apply to the senior Irish courts, which have strong judicial review powers, and *a fortiori* to the Supreme Court. It is hard to see circumstances in which an appointment system that applies to apex or constitutional courts in many other European jurisdictions could be regarded as inappropriate in Ireland.[32]

There are thus strong legal and policy reasons to doubt the approach taken in the JAC Bill. In legal terms it is *prima facie* odd to treat – as the Bill appears to – soft law recommendations as binding when the hard case law of the CJEU and ECtHR say, almost in terms, that they are not.[33] The politics, however, are different. There is a strong *political* incentive to comply with European rule of law guidance. In its compliance report of 2017, GRECO concluded that Ireland's response to earlier recommendations in 2014 had been poor, and was now "globally unsatisfactory".[34] As a result, GRECO began a formal non-compliance procedure which imposes additional progress reports on the defaulting country. In a European environment so heavily focussed on democratic decay this is a diplomatic and political embarrassment for a state that normally finds itself close to the top of the class on democratic and rule of law indicators. By the next GRECO report on Ireland in 2020, this status had been removed. This was almost exclusively as a result of reforms to Irish judicial institutions.[35] More politically unpalatable recommendations – for example on ethics and conflicts of interests for politicians – were (and remain) mostly unaddressed. The greater power and greater political concern of European institutions about democratic backsliding within EU Member States makes it likely that the political pressures within the EU are even greater, and the annual rule of law review process that has existed since 2020 creates a new and stable *locus* for political engagement within the EU on this topic. Within the EU Commission process there is also the ultimately possibility, however unlikely it may be in this case, of enforcement proceedings under the Rule of Law Framework.

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[32] Although, as noted above, precisely this kind of inconsistency is in evidence in the approach taken by GRECO in connection with judicial membership of appointments bodies in Ireland and in the UK.

[33] See for example the opinion of Advocate General Hogan (as he then was) in *Repubblika* (17th December 2020), where he maintains that recommendations from the Vienna Commission are just that; and the judgment of the Grand Chamber in that case at paragraph 56. The Irish Government's previous position that there were 'no internationally binding norms in relation to the composition of judicial selection bodies' is thus arguably correct. See eg the answer by the Minister for Justice and Equality Charlie Flanagan to a Written Question, 5th July 2018; https://www.oireachtas.ie/en/debates/question/2018-07-05/47/.

[34] GRECO, *Fourth Evaluation Round: Compliance Report: Ireland*, June 2017.

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

It is at least arguable that the nature of both the GRECO and the EU Commission reporting processes are such that politicians are incentivised to make reforms that are politically easy. The depoliticisation of judicial administration is an easy win. The primary stakeholders – judges – normally agree with this objective, and it lacks domestic political salience and public interest. Yet many of these best practice recommendations rely on tricky comparisons between judicial systems, are empirically untested, or worse, are made in the face of empirical evidence that completely ring-fencing judges from politics can be counterproductive.[36] Evidence suggests, for example, that the composition of appointing bodies does not matter very much. As you might expect, judges – who normally know the systems, the law, and the candidates in ways that laypersons do not – tend to exert significant influence regardless of the makeup of the appointing body.[37]

There is thus a host of reasons to be sceptical about the best practice recommendations that have been put forward in connection with judicial appointments in Ireland, and for taking a more discriminating and fine-grained approach to making these recommendations a reality in Irish law. At the very least, given that Ireland is now an outlier within the EU – the sole pure common law jurisdiction – reform to judicial appointments requires more thoughtful and rigorous comparative work than appears to be done at present.

[36] On this see eg David Kosar, *Perils of Judicial Self-Government in Transitional Societies* (CUP 2016).
[37] Gee *et al*, *The Politics of Judicial Independence in the UK's Changing Constitution* (CUP 2015).