

JUDGES IN REGULATORY SPACE: TOWARDS RESPONSIVE REGULATION OF JUDICIAL CONDUCT

Abstract: In formal terms, the regulation of judicial conduct in Ireland has been limited to a single formal procedure for removal of judges set down in the Constitution. However, the absence of formal rules and procedures has not left the regulatory space wholly empty. This article investigates the nature of the regulatory space with respect to judicial conduct to ask how the introduction of new actors, rules and procedures, under the terms of the Judicial Council Act 2019, will affect the regulatory space and what changes might be expected to support a more responsive approach to the regulation of judicial conduct.

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Introduction

Judicial independence is a key principle of democratic governance in Ireland and elsewhere. However, this does not mean that judges are unregulated with respect to conduct. The conduct of judges is a significant contributor to the standing and legitimacy of the judiciary. In formal terms the regulation of judicial conduct in Ireland has been limited to a single formal procedure for removal of judges set down in the Constitution. Thus, as previously observed, judges in Ireland have had a very high degree of independence with respect to their conduct, *even from each other*.¹ However, this does not mean there has been no regulation. A variety of actors have had, sometimes very limited, informal and/or non-mandated, capacity to suggest norms, to feedback instances of allegedly inappropriate conduct and to exert pressures which seek to change behaviours. In other words, the absence of formal rules and procedures has not left the regulatory space wholly empty.

This article investigates the structure regulation with respect to judicial conduct in Ireland to ask how the introduction of new actors, rules and procedures, under the terms of the Judicial Council Act 2019 (the 2019 Act), will affect the regulatory space and what changes might be expected to develop a more responsive approach to the regulation of judicial conduct. The focus is not so much in determining what kinds of behaviours might attract censure. Rather, I examine the interplay of new actors and procedures with those already within the regulatory space, and how new practices for setting norms, monitoring conduct and application of sanctions might develop such as to support compliance with the norms. A key aspect of enhancing regulation of judicial conduct is to balance this with the principle of judicial independence, by enhancing judicial self-governance within the reformed regulatory regime.²

¹ Colin Scott, 'Regulating Judicial Conduct Effectively' in Eoin Carolan (ed), *The Judicial Power in Ireland* (Institute of Public Administration 2018).

² David Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' (2019) 19 *German Law Journal* 1567; Katarína Šipulova and others, 'Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary' (2022) *Regulation & Governance*.

Responsive approaches to regulation emphasise not only the importance of relationships, but also the capacity for learning, both by those who are regulated and by the regulators within regulatory regimes. Any analysis of this kind cannot limit itself to procedures relating to complaints and investigation of conduct but must include a proactive and joined up approach to judicial appointments, to setting conduct norms and to education and training of the judiciary. Accordingly, this article focuses on developing the regulation of judicial conduct as a site for learning as much as a site of control.

Judicial Conduct and Regulation

Judicial conduct refers to behaviours relating to litigation, prior to, during and following the conduct of trials and appeals, including the preparations for and orders relating to litigation, the management of litigation within the court room, the rendering and communication of decisions and perceived or actual conflicts of interest. Judicial conduct may also refer to behaviours with respect to other roles judges may take on, for example with respect to tribunals and inquiries, and also with respect to extra-judicial and even private activity, insofar as behaviours may affect the standing and legitimacy of the judiciary. The American Bar Association Model Code of Judicial Conduct, for example, emphasises in its four canons, independence, impartiality, integrity, competence and diligence in exercise of judicial function, alongside a responsibility to 'conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office' and the avoidance of political or campaign activity 'inconsistent with the independence, integrity, or impartiality of the judiciary'.³

Regulation as a field of practice and of study has a primary focus on the steering of behaviours and thus provides a powerful lens for viewing and evaluating measures relating to judicial conduct. Sometimes a distinction is drawn between the focus of law on rules and their application and the somewhat wider canvas of regulation with its focus on (1) norms (of which rules constitute a sub-set), (2) mechanisms of feedback and monitoring, and (3) mechanisms for enforcement or correction of behaviours which deviate from the norms.⁴ Regulation, as a field of study and practice, tends to draw in a wider range of both formal and informal mechanisms through which behaviour is steered, which may bear directly or indirectly on conduct in order to steer that conduct so it aligns with articulated values, principles and rules. Several aspects of a regulatory approach have particular relevance with respect to the judiciary generally and judicial conduct in particular. First, regulation tends to be proactive looking at achieving overall goals and objectives, rather than simply resolving a particular dispute or a particular complaint and in that way regulation contrasts with the ethos we tend to associate with the common law.⁵ Second, regulatory environments tend to be quite complex, not simply with a regulator regulating a group of regulated organizations or individuals but rather with many actors with some claim of capacity to regulate, frequently involving steering and learning as much as control. Regulation involves a mix of self-regulation and more hierarchical control, but also private alongside state mechanisms and

³ American Bar Association, *ABA Model Code of Judicial Conduct* (2020).

⁴ Christine Parker and others, 'Introduction' in Christine Parker and others (eds), *Regulating Law* (Oxford University Press 2004).

⁵ Compare Richard Devlin and Adam Dodek, 'Regulating Judges: Challenges, Controversies and Choices' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar 2017), 4-5, who suggest five key aspects of regulation, with some differences of emphasis and terminology. My thinking has been influenced by their presentation of these issues.

actors. Finally, regulation is dynamic with change, flux and innovation as essential aspects of contemporary regulation, not least with respect to the judiciary. Devlin and Dodek argue that complaints and discipline mechanisms are often the first thing that comes to mind when coupling regulation with judicial conduct. This is mostly because complaints and discipline dovetails very nicely with traditional common law ways of thinking. From a regulatory perspective complaints and discipline are only one of the multiple forms of regulation experienced by judges and that is even true in respect of judicial conduct.⁶

The next section suggests how these insights about regulation might inform a mapping of the key actors and processes engaged with the judicial conduct in Ireland prior to assessing the potential for change associated with the implementation of the Judicial Act 2019. I will further elaborate on the challenge of complexity of regulation of judicial conduct and deploy the concept of regulatory space. The concept of regulatory space, at its simplest, is the idea that with many regimes there are multiple actors, often with overlapping regulatory capacity, whose relationships are relevant to defining how a regime operates in practice.⁷ The range of actors with overlapping roles generates forms of interdependence and it is helpful to understand that in such regulatory spaces it is difficult for any one actor to assert hierarchical control. As a consequence, formal mandates for action are only one source of relevant regulatory power.⁸ Thus, regulation is often negotiated between interdependent actors, putting an emphasis on learning as a key complement to control. In considering the range of actors and capacities in any particular context, the concept of regulatory space encourages us to think about the relative distribution of power between different actors and how this is affected by changes in the configuration of the space.

Judges in Regulatory Space

Formal Provision for Regulation of Conduct

Prior to the implementation of the Judicial Conduct Act 2019, there was a good deal of complaint, including from academics, from practitioners, from NGOs, from judges and from international bodies to the effect that there was insufficient regulation of judicial conduct in Ireland.⁹ Additionally, it was suggested that complaints about judicial misconduct were not infrequent.¹⁰ But this is not to say the regulatory space was completely empty. As is well known, prior to the taking effect of the new judicial conduct powers in the Judicial Council Act 2019, the main formal measure for regulating judicial conduct is the power in the

⁶ *ibid* 5.

⁷ Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Regulation* (Oxford University Press 1989).

⁸ Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) *Public Law* 329.

⁹ Laura Cahillane, 'Ireland's System for Disciplining and Removing Judges' (2015) 38 *Dublin University Law Journal* 55; Irish Council for Civil Liberties, *Time is Ripe to Boost Accountability of Judges says ICCL* (ICCL 2010); Susan Denham, 'The Diamond in a Democracy: An Independent Accountable Judiciary' (2001) 5 *Judicial Review* 31; GRECO, *Evaluation Report Ireland: Corruption prevention in respect of members of parliament, judges and prosecutors* (2014) paras 124, 146. Donal O'Donnell, 'Some Reflections on the Independence of the Judiciary in Ireland in 21st Century Europe' (2016) 19 *Trinity College Law Review* 5.

¹⁰ Brian Hunt, 'Judge Not...' (2008) 102 *Law Society Gazette* 22.

Constitution for the Oireachtas to remove a judge for stated misbehaviour or incapacity.¹¹ This constitutional power has never been formally used in the sense of reaching the end of the procedure with dismissal of a judge.¹²

I would suggest that the constitutional powers and duties related to the appointment of judges are also relevant to conduct since part of the process of ensuring good conduct amongst judges is appointing appropriate people through filtering character, experience and aptitudes. Indeed, since the judicial appointments process applies to *all* judges a focus on appointments might make a better *ex ante* starting point for addressing judicial conduct than *ex post* measures to address issues of competence of behaviour. The constitutional power of the President to make judicial appointments, on the recommendation of the Government, has been supplemented by the introduction of a statutory procedure for advertising for and vetting candidates by the Judicial Appointments Advisory Board,¹³ noting that this procedure does not apply to promotional appointments to the higher courts (with attendant risks of promotional decisions being shaped by political considerations to a greater extent than in the case of initial appointments and that conduct of judges may be shaped by concerns about preferment).¹⁴ There has been significant concern about appointments procedures for judges,¹⁵ and a long anticipated Judicial Appointments Commission Bill is likely to make significant changes to current procedures.¹⁶ Arguably the key defect in the current appointments regime is the insufficiency of steps to evaluate and develop the competency of candidates for judicial appointment.

We can think also of processes of appeal in litigation as relating to conduct in some instances, for example where such appeals to higher courts relate to conflicts of interest and recusal. Complaints to An Garda Síochána about the conduct of judge, alleging criminal conduct have, in rare cases, also featured in the formal hierarchy of mechanisms for addressing judicial conduct.¹⁷

The formal powers relating to conduct are at the outer edges of a largely hidden system for acting on judicial conduct which we have long assumed is undertaken informally by the presidents of the various courts who, at least implicitly, may be considered to have a mandate by reference to the offices they hold. Whilst it is possible that such informal regulation may have involved notifications of complaints, for example from lawyers or from litigants, relating to inappropriate behaviours to a more senior judge, such as the President of the relevant court, and engagement about the matter, possibly with some consequences in terms

¹¹ Bunreacht na hÉireann Art 35.4. There was provision in legislation for sanctioning judges at District Court level only. See Laura Cahillane, 'Disciplining Judges: The Special Position of District Court Judges' (2009) 5 *Irish Law Review* 14-21.

¹² Cahillane (n 9) 56-63; O'Donnell (n 9) 32.

¹³ Bunreacht na hÉireann Art 35.1; Courts and Court Officers Act 1995, part IV: <[https://www.justice.ie/en/JELR/Pages/General Scheme of the Judicial Appointments Commission Bill 2020](https://www.justice.ie/en/JELR/Pages/General%20Scheme%20of%20the%20Judicial%20Appointments%20Commission%20Bill%202020)> accessed 10 January 2022.

¹⁴ GRECO, *Evaluation Report Ireland: Corruption prevention in respect of members of parliament, judges and prosecutors* (2014), para 132.

¹⁵ Jennifer Carroll MacNeill, *The Politics of Judicial Selection in Ireland* (Four Courts Press 2016).

¹⁶ Department of Justice, *General Scheme of the Judicial Appointments Commission Bill 2020*.

¹⁷ A prosecution following investigation of alleged possession of child abuse images against Judge Brian Curtin led to an acquittal in 2004. Judge Curtin subsequently resigned following the initiation of impeachment proceedings in the Oireachtas. Cahillane (n 9) 55. Judge Heather Perrin was convicted of deception charges in 2012 and resigned. See also Marie O'Halloran and Anne Lucey, 'Gardaí criticised over handling of allegations against retired judge' *Irish Times* (Dublin 29 September 2021).

of sittings, listings and so on, steps towards the regulation of judicial conduct have only rarely been glimpsed, for example as a prelude to the formal constitutional measures for removal. Equally the adequacy or inadequacy of such informal measures for regulating judicial conduct have only occasionally been open to scrutiny where matters have entered the public domain. The recent report with respect to the attendance of Mr Justice Woulfe at an Oireachtas Golf Society dinner demonstrated how inadequate are the current structures for regulating judicial conduct as an aspect of maintaining the standing and legitimacy of the judiciary.¹⁸ We can also think about the role that judges themselves play in peer review both individually and through the establishment, quite recently, of their own Association of Judges of Ireland (AJI), which is also a key part of the normative context, and also the apparatus for setting down norms and of monitoring and steering judges towards or away from particular behaviours.¹⁹ Other formal capacity relevant to judicial conduct may be thought of as more peripheral with respect to the range of norms or the frequency of engagement. One key case relates to the Courts Service, which, under the terms of the Courts Service Act 1998 has a range of duties relating to the support of judges, provision of facilities and supporting and informing court users (although explicitly reserving the administration of justice to the judiciary).²⁰ At a minimum, Courts Service staff are liable to be a key point of interface with courts users with respect to judicial conduct, amongst other matters. More specifically, the provision of facilities, including IT systems, has a strong interface with judicial conduct relating to IT, and is likely to be a central aspect of compliance with data privacy rules as well as more general judicial conduct norms. Within debates on judicial self-governance, the management and resourcing of courts has a particular significance because of the recognition that such functions necessarily do bear on the execution of the judicial role and, in Ireland, senior judges are key members of the Board of the Courts Services.²¹ Other public sector bodies with, perhaps, peripheral roles relating to judicial conduct include the Ombudsman with respect to good administration of Courts Service roles and the Information Commissioner and Data Protection Commissioner with respect to duties under freedom of information legislation and data privacy legislation respectively. Whilst the constitutional commitment to independence of the judiciary limits the powers of oversight of these public bodies to an extent, for example with respect to court records, they nevertheless constitute a part of the broad environment bearing on oversight of judicial conduct.

Non-Mandated Capacity for Regulation of Conduct

This description of formal and informal regulatory power with respect to judicial conduct prior to the implementation of the 2019 Act does not specify all the actors within the regulatory space. First there are a range of national and international organisations and networks which have a strong interest in judicial conduct. The non-statutory Interim Judicial

¹⁸ The Judicial Council published the report by Mrs Justice Susan Denham into the attendance of Mr Justice Woulfe at the Oireachtas Golf Society Dinner, including appendices with a transcript of an interview with Mr Justice Woulfe. Judicial Council, *Statement, Report and Appendices - Review By Ms Justice Denham*, 2021 : <<https://judicialcouncil.ie/news/statement-and-report-arising-from-review-by-ms-justice-denham/>> accessed 12 February 2022. Subsequently the letters exchanged by the Chief Justice and Mr Justice Woulfe were also published. RTE, 'Read in full: Letters between Chief Justice and Séamus Woulfe' (10 November 2020) <<https://www.rte.ie/news/courts/2020/1109/1177081-letters-seamus-woulfe-chief-justice/>> accessed 12 February 2022.

¹⁹ See <<https://aji.ie/>> accessed 10th January 2022.

²⁰ Courts Service Act 1998, s 5. Patrick O'Brien, 'Never Let a Crisis Go to Waste: Politics, Personality and Judicial Self-Government in Ireland' (2019) 19 *German Law Journal* 1871, 1873-1874.

²¹ *ibid.* See also Kosar (n 2) 1585.

Council, the predecessor to the statutory Judicial Council, was established by the judges themselves in 2011 to address issues relating to standards, ethics, education and representation of the judiciary.²² The Interim Judicial Council also represented Ireland in a key international network the European Network of Councils of the Judiciary (ENCJ). The ENCJ is one of a number of international bodies involved both with setting and with monitoring of norms relating to judicial conduct, other key actors including the European Commission, the Council of Europe and the United Nations.²³ These international organisations have been a source of pressure on the Irish government to move from its traditional informal approach to regulation of judicial conduct towards internationally accepted standards through their actions both in setting norms and reviewing and publicising review outcomes with respect to compliance with international norms.²⁴ Thus, we can think of the national system being regulated or meta-regulated internationally.

Whilst we may think of practitioner complaints about members of the judiciary as likely to be sporadic and isolated, the professional bodies of the legal profession, most prominently the Law Society of Ireland and the Bar Council of Ireland, are liable to take a strong interest in relation to matters of judicial conduct which may positively or negatively affect the legal professionals they represent. Professional bodies may amplify the informal complaints of individual members of the profession and seek to gather information towards establishing a pattern of behaviour with respect to a particular judge. Other non-mandated informal roles are played by the media, including press broadcasters and social media, in highlighting both individual instances of alleged misconduct, but also the wider machinery for addressing misconduct. Similarly, academics may deploy their capacity for research, education and wider public engagement to better understand and address issues of judicial misconduct.

So, the regulatory space is not only not empty, it is very full and has been so even before the implementation of the Judicial Council Act 2019 and the introduction of the statutory Judicial Council and Judicial Conduct Committee. The new actors and machinery are very much supplementing what is in the space already and this requires an adaptation of the space, rather than being able to work with a *tabula rasa*. I consider in the next section how the new arrangements are likely to impact the regulatory space and the opportunities for the Judicial Council and Judicial Conduct Committee to engage with other actors in the space.

New Norms, New Actors, New Procedures

Into this complex regulatory space has been thrust the new Judicial Conduct Committee (the Committee) and the (new, statutory) Judicial Council (the Council), two of the key institutional innovations of the Judicial Council Act 2019. The new institutions and functions constitute a move towards a more corporate and less individualised judiciary and whilst there are new powers with respect to oversight and training, these are largely achieved through

²² Details can be found in Niamh Hardiman, Muris MacCarthaigh and Colin Scott, *Irish State Administration Database* (2010-) (www.isad.ie).

²³ A key example of international norms is the Bangalore Principles of Judicial Conduct, promulgated by the UN Economic and Social Committee in 2006.

²⁴ With respect to monitoring and publication of evaluations, the leading international organisation overseeing Ireland is the Council of Europe Group of States Against Corruption (GRECO) of which Ireland is a member. See GRECO, *Evaluation Report Ireland: Corruption prevention in respect of members of parliament, judges and prosecutors* 2014. The European Commission publishes an EU Justice Scoreboard, scoring the legal systems of the EU with respect to key norms including the perceived quality, efficiency and independence of the judicial system: European Commission, 2021 *EU Justice Scoreboard*.

enhanced judicial self-governance, consistent with the principles of judicial independence.²⁵ Addressing the effects of the new arrangements on the distribution of power within the regulatory space, the enhancement and formalisation of self-governance for the judiciary arguably enhances the power of the judiciary as a whole relative to individual judges, whilst at the same time bolstering the power and capacity of the judiciary with respect to the other organs of state as regards the setting and implementation of key norms. But, as noted above, there is no blank slate and the regulatory space is already quite full, and the impact and effectiveness of the new actors will depend not only on how the new structures and powers are deployed, discussed in this section, but also the relationship of these implementation actors to other actors and capacities already occupying the space. Whilst the Council, as the parent body under the new Act, comprises the members of the judiciary,²⁶ the Judicial Conduct Committee comprises judicial and lay members with a judicial majority.²⁷ Thus the judicial self-governance principle is attenuated by the participation of lay people with knowledge and experience of such matters as professional standards, complaints systems, public services and the administration of justice, appointed by government through the public appointments process.²⁸ Consequently it is significant that the Judicial Council retains key powers to approve guidelines and to determine sanctions in processes led by the Judicial Conduct Committee.

Judicial conduct is a core part of the 2019 Act.²⁹ The scope of the Act with respect to judicial misconduct includes acts and omissions of judges, both in the execution of their office, or otherwise, that ‘constitutes a departure from acknowledged standards of judicial conduct’,³⁰ and ‘brings the administration of justice into disrepute’.³¹ The concept of judicial conduct is further amplified by the legislation as follows:

The function of the Judicial Conduct Committee shall be to promote and maintain high standards of conduct among judges, having regard to the principles of judicial conduct requiring judges to uphold and exemplify

- judicial independence,
- impartiality,
- integrity,
- propriety (including the appearance of propriety),
- competence and diligence
- and to ensure equality of treatment to all persons before the courts.³²

²⁵ On the pattern of judicial self-governance in Ireland see O'Brien (n 20).

²⁶ Judicial Council Act 2019 s 8.

²⁷ Judicial Council Act 2019 s 44.

²⁸ s 45.

²⁹ Indeed, the term conduct appears in the Act 369 times. By comparison education appears 4 times, studies 7 times, and training 11 times. Even Council, the main topic of the Act, only appears 278 times. (This is explained partly by reference to the dual meaning of conduct – conducting trials and research, compared to the conduct of a judge). Judging from a search both of case reports and journal articles on Westlaw.IE, the aspects of the Judicial Conduct Act 2019 which are likely to receive the most attention are those relating to the new guidelines the Judicial Council is to set with respect to personal injuries awards and criminal law sentencing. Whilst not directly related to judicial conduct, the salience of these provisions demonstrates the regulatory character of the Judicial Council as a setter of practice norms.

³⁰ The standards are elaborated by principles of judicial conduct referred to in ss 7(1)(b) and 43(2) of the 2019 Act.

³¹ Judicial Council Act 2019, s 2.

³² s 43(2) (bullets added).

From a regulatory perspective, the legislation thus provides an outline of the key norms, but the Judicial Conduct Committee is to prepare draft guidelines on judicial conduct and ethics including recusal for adoption by the Judicial Council.³³ Thus a key role of the Committee appears to be to amplify and develop the norms that are contained in the legislation. The Judicial Council published Guidelines for the Judiciary on Conduct and Ethics in February 2022 with the intention that they should be implemented in June 2022.³⁴ The Guidelines substantially draw on the Bangalore Principles, noted above (n 23). The Committee may issue advice and recommendations to an individual judge or to judges generally,³⁵ the latter providing a further example of norm-setting, the former being tantamount to enforcement.

The main instrument for monitoring or feeding back potential breaches of expectations of judicial conduct is through a duty to consider complaints, made by a person directly affected, a person who is a witness of the conduct complained of, or by a barrister, a solicitor or officers of either the Law Society of Ireland or the Bar Council of Ireland on behalf of a practitioner.³⁶ In addition to the receipt of complaints, the Committee has an own-initiative investigation power in a case where a complaint is withdrawn or where there is otherwise *prima facie* evidence of judicial misconduct and an investigation is merited for the purposes of safeguarding the administration of justice.³⁷ Thus, the Committee has a more regulatory character in proactive monitoring than if it were empowered to act only on complaints. More broadly, the orientation of the 2019 Act to a wider regulatory purpose, drawing on the range of functions of the Judicial Council, is revealed also in the wider powers arising from the investigation of particular complaints. Arising from the outcome of a formal investigation recommendations for safeguarding the administration of justice may be made to the Chief Justice or the Presidents of the various courts or with respect to court procedures, practice directions, distribution of work or other matters³⁸

Enforcement takes the form either of seeking informal resolution or conducting a formal investigation through the appointment of a panel of inquiry.³⁹ With informal resolution the Committee is to set down guidelines (distinct from the more general guidelines on judicial conduct),⁴⁰ and one or more judges are to be designated to make the informal investigation.⁴¹ Informal resolution requires the consent of both the complainant and the respondent judge.⁴² Critically, the resolution of complaint by informal means shall not involve any financial compensation.⁴³ The reference to compensation is interesting, since it implies that any financial penalty elsewhere might be regarded as compensatory rather than punitive, and is suggestive more of a civil law ethos than a regulatory ethos (criminal penalties being typical for regulatory infractions in many sectors). Overall, the informal resolution of complaints provision is suggestive of mediation, perhaps seeking apologies and analogous informal remedies for misconduct. The designated judge may refer the complaint for formal

³³ s 43 (3)(d), s.52.

³⁴ <<https://judicialcouncil.ie/news/judicial-council-conduct-and-ethics-guidelines/>> accessed 3rd March 2022.

³⁵ Judicial Council Act s 43(f).

³⁶ ss 43(3), 50 (1), (3), (4).

³⁷ s 59(1).

³⁸ s 76(2)(6).

³⁹ s 43(3).

⁴⁰ s 43(3)(c). It seems likely that, at least initially, the draft Complaints Procedure, noted below, will fulfil the purposes of these guidelines.

⁴¹ s 61.

⁴² s 62.

⁴³ s 62.

investigation to the Committee if not deemed appropriate for informal resolution.⁴⁴ Perhaps the judge might form the view that the complaint is too serious to be addressed by the more limited remedies under informal resolution. Therefore, there is a mechanism for escalation in this instance and also where the complaint has not been resolved through the informal process.⁴⁵ Formal investigations procedures are to be set down by the Committee both for investigations and the determination of complaints. A Complaints Procedure document, issued in February 2022 under s.52 of the Act, substantially set down the procedures as provided for in the 2019 Act and was stated to be in draft.⁴⁶ Investigations are to be undertaken by panels comprising two judges and one lay member. Panels are empowered to collect information and require witnesses to attend.⁴⁷

A key sanction set down in the legislation is a judicial consent to a reprimand which may be accepted by the Committee after a complaint is accepted for investigation but prior to the inquiry starting if deemed appropriate having regard to the nature, gravity and circumstances of the complaint or during an inquiry.⁴⁸ A further set of procedures apply to the conduct of the case following the completion of the inquiry with the possibility of hearing before the Judicial Conduct Committee prior to determination of the complaint, which may be made in the same terms as the inquiry recommendations relating to the judge or the administration of justice.⁴⁹ Where an inquiry upholds a complaint, the matter is reported to the Council with recommendations for reprimand of the judge.⁵⁰ Recommendations for a reprimand may include:

- (a) the issuing of advice to the judge concerned;
- (b) the making of a recommendation that the judge concerned pursue a specified course of action, including attending a course or training of a specified type;
- (c) the issuing of an admonishment to the judge concerned.⁵¹

Where the Committee finds there is a matter requiring consideration of the removal of a judge under Article 35.4 of the Constitution, it shall refer the matter to the Minister.⁵²

With the exception of the powers of removal, reserved to the Oireachtas, it is unclear what sanctions may be applied to a judge beyond advice, admonishment and a requirement to engage in training. In the non-statutory report relating to the conduct of Mr Justice Woulfe with respect to the incident commonly referred to as Golfgate, it appears from the correspondence that the Chief Justice proposed that Mr Justice Woulfe would forego three months' salary and would have a period not sitting on the Supreme Court bench, tantamount to a fine and a suspension.⁵³ Whilst the draft Complaints Procedure published under s.52 of the 2019 Act makes no provision for sanctions to be applied in determinations beyond those which are set out in the Act itself, the wording of the Procedure with respect to reprimands

⁴⁴ s 63(1).

⁴⁵ s 63(4).

⁴⁶ s 52(1). The draft Complaints Procedure document was published at <https://judicialcouncil.ie/news/judicial-council-conduct-and-ethics-guidelines/> accessed 3rd March 2022.

⁴⁷ ss 67-69.

⁴⁸ ss 58,73.

⁴⁹ s 79.

⁵⁰ s 76(2).

⁵¹ s 76(5).

⁵² s 80(1).

⁵³ RTÉ (n 18).

suggests that the categories of actions which may be recommended to a judge will not be limited to training and may, over time, extend to other measures to fit the particular cases which arise in practice.

Following a good deal of discussion during the passage of the Judicial Council Bill about whether formal inquiries should be public, it seemed clear that as a default position, formal inquiries will be held in public and determinations shall be published. There is discretion to publish a determination where some or all of the hearing has been held in private. Given the duty to publish determinations in most cases, we might not think of publication as another level of sanction.⁵⁴ Giving publicity, through publication and through media reports is likely to be perceived as a sanction by a respondent judge, with considerable discretion on how much engagement the Committee may have with the media to alert them to, and comment on, the publication of determinations. The Woulfe case may again be instructive here as the non-statutory capacity to publish details of the investigation was deployed extensively, albeit in a manner stated to be in alignment with the statutory regime and also with the consent of Mr Justice Woulfe.⁵⁵

A central instrument for setting out expectations with respect to how enforcement will work is the draft Complaints Procedure, published in February 2022.⁵⁶ What we see is that the base of an enforcement pyramid has the potential to include peer pressure, advice and warnings and the capacity for complaints to be managed informally. Warnings and advice, within the current system, come both from peer review and pressure and through the judicial hierarchy of Court Presidents and the Chief Justice. At the apex of an enforcement pyramid is the capacity of the Council to refer a matter to the Minister to implement the procedures for removal of a judge by the Oireachtas. Whilst the base level potential for advice and warnings existed prior to implementation of the 2019 Act, as did the apex sanction of removal, there was little by way of lower-level sanctions.⁵⁷ The capacity to escalate from advice and warnings to intermediate level sanctions will be a critical part of the new regime established by the 2019 Act and Complaints Procedure issued under the Act.

The theory of responsive regulation invokes Theodore Roosevelt's approach to foreign policy 'Speak softly and carry a big stick', operationalised in the form of an enforcement pyramid within which the credible capacity to escalate from low level sanctions through intermediate stages to high level sanctions incentivises those who are regulated to cooperate towards the base of the pyramid.⁵⁸ This approach is advocated both with respect to those who are fundamentally seeking to be compliant and with those 'amoral calculators' who are liable to comply only where forced to do so and will be induced to cooperate by the threat

⁵⁴ Judicial Council Act 2019 s 79 (14), (15). Whereas the Act provides that determinations 'shall' be published in such cases (s 79(14)), the draft Complaints Procedure published under s.52(1) of the Act, above n 46, states that determinations 'may' be published (para 25.1). The significance of the difference may be academic only as the Complaints Procedure notes that 'In the event of a conflict between the procedures set out herein and the 2019 Act, the latter shall prevail'. (para 1.6).

⁵⁵ Some records sought by journalists under Freedom of Information legislation were withheld, that decision being upheld in a complaint to the Information Commissioner *Mr Mark Tighe and the Judicial Council Case* Number: OIC-104934-W0J8T0.

⁵⁶ draft Complaints Procedure (n 46).

⁵⁷ Cahillane (n 9) 67; O'Donnell (n 9) 32.

⁵⁸ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992).

of escalating sanctions.⁵⁹ With a third class of regulated person, the incompetent, it may be appropriate to escalate sanctions immediately, especially where breaches are persistent or egregious, and where lack of competence suggests capacity for compliance is limited.

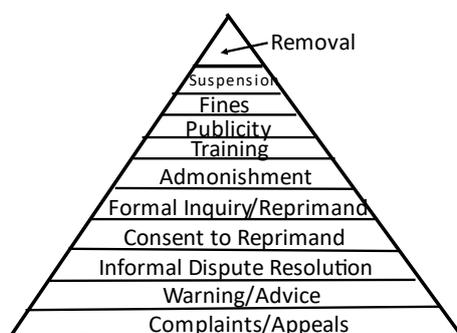


Figure 1 Potential Enforcement Pyramid for Judicial Conduct
Following Implementation of Judicial Council Act 2019
Source: Adapted from Ayres I and Braithwaite J, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992)

In applying this enforcement pyramid model to the regulation of judicial conduct we might expect the vast majority of judges to want to comply with conduct rules and to cooperate with advice and education at the base of the pyramid, whether from their peers or president and, similarly, to be cooperative with informal resolution mechanisms where the parties are able to agree appropriate outcomes facilitated by a judge. A potential enforcement pyramid combining the prior formal and informal capacity for oversight of judicial conduct with the new powers and procedures is at Figure 1.⁶⁰ Where we might have anticipated the specification in the draft Complaints Procedures of some additional mid-level sanctions, notably the capacity to issue fines and suspensions, there is no explicit reference to such measures in the draft Complaints Procedure document published in February 2022. However, the power to develop additional sanctions may be inferred from the power ‘to recommend to the judge a course of action to be pursued by the judge’ which is drawn from the 2019 Act, but is set down on a number of occasions in the draft Complaints Procedure with the modification that reference to attendance at a specified course or training is not included in the Complaints Procedure formulation.⁶¹ Thus it appears a recommendation to undertake training may be but one potential sanction from an unspecified further range of sanctions which may emerge over time to best match the conduct complained of.

⁵⁹ Robert Kagan and John Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Hawkins K and Thomas J (eds), *Enforcing Regulation* (Kluwer-Nijhoff 1984).

⁶⁰ This is my second attempt at modelling an enforcement pyramid with respect to judicial conduct. See Colin Scott, 'Regulating Judicial Conduct Effectively' in Eoin Carolan (ed), *The Judicial Power in Ireland* (Institute of Public Administration 2018). I have elaborated significantly on my first attempt with what we know following the passage of the Judicial Council Act 2019, recognising that many matters will be more fully determined by the implementation practices of the Judicial Conduct Committee and Judicial Council.

⁶¹ Draft Complaint Procedure, n 46 above, paras 17.3(b), 22.3(b).

Where an informal process is not possible, because, for example, the complainant does not agree, the respondent judge can agree to accept a reprimand either prior to or during a formal investigation. In cases where a judge is not wanting to be compliant, for example because they do not accept some or all aspects of the interpretation or jurisdiction of the Council and Committee over conduct, they may still be induced to cooperate towards the base of the pyramid by the credible threat of higher-level sanctions including admonishment, requirements of additional training, the potential for fines or suspension, adverse publicity and, ultimately, dismissal. The availability of mid-level sanctions should thus be seen as an important aspect of the sanctioning structure within the enforcement pyramid, not just relevant to inducing compliance, but also to assuring the credibility and legitimacy of the regime with the wider public such that the 'teeth' of the regime can be plainly seen. We can think of reference for a formal investigation itself as a higher-level sanction (beyond informal resolution and voluntary reprimand). The public character of the higher-level sanctions and the potential for media attention are also likely to be factors inducing compliance. Persistent or egregious misconduct and cases where a judge seeks to continue their career, but are no longer capable of doing so, can be met with fairly rapid escalation towards higher level sanctions including removal. In the few such cases which have started on the dismissal procedures then resignation, a form of compliance which is capable of resolving matters, has preceded the completion of the procedures.⁶²

The responsive approach to regulatory enforcement, partially represented by a pyramidal approach to enforcement, widely used by regulators, has been further elaborated to consider what a *really* responsive approach to enforcement would look like. Significantly for enforcement in a complex regulatory space, advocates of really responsive regulation suggest we move beyond consideration of the posture of those being regulated with respect to compliance and consider also the cognitive and operating frameworks (what is thinkable and doable and how is this communicated between key actors?), the institutional environment (what is the mix of relevant powers/capacities held by others?), regulatory performance and effects (how do we know if regulation is doing a good job?), and an understanding of the limits of regulatory tools.⁶³ Taken together these considerations suggest the need for those exercising regulatory power to understand the wider environment within which they operate in order to use such learning to be effective. These opportunities are addressed in the next section.

Responsiveness, Control and Learning in Regulating Judicial Conduct

With respect to judicial conduct and ethics, generally it is clear that the regulatory space is quite crowded, but that the new legislation has formalised and extended much of the activity and the key relationships between the Judicial Council, the Judicial Conduct Committee and the Government and Oireachtas. Critically, neither the Judicial Conduct Committee nor the Judicial Council control all the instruments for setting norms, monitoring for compliance and enforcement, since respondent judges and complainants are important actors and there are roles also for professional bodies, the media, the Minister and the Oireachtas which affect the operation of the enforcement pyramid. More broadly, as noted above, processes of

⁶² Cahillane (n 9) 55.

⁶³ Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59.

appointment, education and training of judges are also critical to the environment of judicial conduct. And so, for the Committee, there is a need to understand the role of the other actors and processes in the wider environment and then to work, not so much with the aspiration to control, but rather with the capacity to learn. There is an opportunity to work out what are going to be the most effective strategies to secure the overall objective, which is maximal compliance with well understood and appropriate norms around judicial conduct. with the effect of further supporting and enhancing the legitimacy of the judiciary and also maintaining, of course, the independence of the judiciary.

Without setting out the potential role of all the many actors identified as having roles in the complex regulatory space, it is possible to set down a simplified diagram showing some of the key relationships, illustrated in Figure 2. The Figure suggests an environment where a number of key actors shape the environment for judicial conduct including the key new actors of the Judicial Conduct Committee and the Judicial Council, but also those concerned with appointments, education and training and the making of complaints. The figure is simplified in that it leaves out the more peripheral and wider range of organisations (discussed previously in this article as occupying the regulatory space), including other regulators, professional bodies and international and transnational bodies.

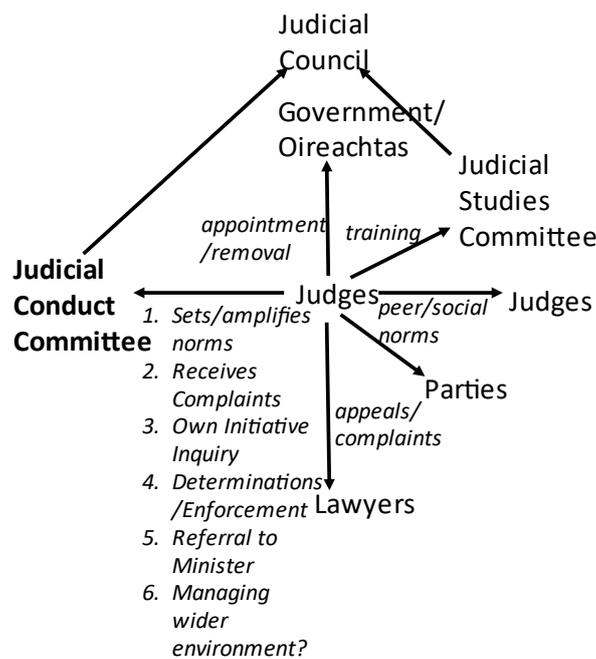


Figure 2 Simplified Model of Regulatory Space for Judicial Conduct

Source: Author's Own Analysis

We still await new legislation on judicial appointments, but it now appears that there will a clear focus on competencies, standards and training as an aspect of the judicial appointments as well as promotions processes which will bear directly on the mechanisms to promote understanding of and capacity for compliance with conduct rules.⁶⁴ Looking beyond the

⁶⁴ Arthur Beesley, 'Judges seeking promotion will be required to complete special training' *Irish Times* (Dublin 4th January 2022).

judicial conduct powers in the 2019 Act, it is clear that the measures directed towards judicial training are central to the objectives with respect to judicial conduct. The Judicial Studies Committee is given statutory recognition under s 17 of the 2019 Act with functions ‘to facilitate the continuing education and training of judges with respect to their functions’ through a wide range of activities including preparing, distributing and publishing materials and providing education and training across a wide range of matters relating to various aspects of law, procedure, IT and communication.⁶⁵ Whilst education and training in judicial conduct and ethics is not explicitly mentioned, it is difficult to think that this will not be a core part of the programme of the Judicial Studies Committee. The Judicial Studies Committee has already commenced a programme of education for newly appointed judges and in judgecraft for the judiciary more generally.⁶⁶ Indeed, when thinking about the behavioural cycle it is likely that education and training will be a key instrument to support compliance with norms of judicial conduct and ethics. Given the importance of education and training, it is striking how little attention it receives in the Act and that, in contrast with the extensive procedural provisions relating to the Judicial Conduct Committee, education and training is not juridified (in the sense that details of rights and duties of key actors are not elaborated), but is simply to be provided to the judicial community under the auspices of the Judicial Studies Committee. The relative lack of attention with respect to judicial studies creates the risk that it will neither be resourced nor prioritised adequately to achieve its objectives (in comparison with judicial conduct provisions).

Peer relationships are likely to remain important in setting, monitoring and enforcing norms through peer pressure, advice and warnings. Parties to litigation and their lawyers are key sources of information with capacity to make complaints. Complainants and respondents have to agree to the use of informal procedures. Respondents have capacity to prevent or terminate an inquiry by accepting a reprimand (if deemed appropriate by the Committee). With respect to sanctions where training is recommended, this is within the control of the Judicial Studies Committee. Whilst the Committee can publish determinations, the media has the capacity to amplify and make them known, offering critique, and academics have a role in this. The apex sanctions of removal are within the control of the Oireachtas following referral to the Minister under the statute.

All this suggests that, in addition to developing and deploying its own powers, the Judicial Conduct Committee might seek to understand the relationship between the range of processes only some of which are within its control. Processes of appointment and training, in particular, offer key supports to appropriate judicial conduct and ethics. The linkage between guidance on conduct and training was explicitly made in Ms Justice Denham’s report relating to the conduct of Mr Justice Séamus Wolfe (‘Golfgate’):

The Reviewer recommends that a Code of Judicial Conduct and Judicial Ethical Guidelines should be introduced as a matter of urgency. It is the opinion of the Reviewer if there had been an introductory programme for newly appointed judges and if Judicial Guidelines had existed at the time, i.e. 19th August, 2020, as they do in most jurisdictions, they would have greatly

⁶⁵ s 17(2)(3). The new Judicial Studies Committee can be seen as a development from the more limited functions of the Committee for Judicial Studies and its predecessor Judicial Studies Institute, established in 1996. O’Brien (n 9).

⁶⁶ Mary Carolan, ‘New to the bench: judges to be trained for the first time’ *Irish Times* (17 September 2021) <https://www.irishtimes.com/news/crime-and-law/new-to-the-bench-judges-to-be-trained-for-the-first-time-1.4676043> Accessed 12 February 2022.

assisted Mr. Justice Woulfe and it is highly unlikely that this situation would have occurred.⁶⁷

Given the fragmented character of the enforcement pyramid, overall there is as much scope for learning as for control.

Conclusions

The modernisation and development of institutions, norms and procedures with respect to judicial conduct in Ireland has been widely welcomed as enhancing the capacity for judicial self-governance over conduct through the development and implementation of new structures and procedures. As with regulatory legislation generally, much of the impact of the Judicial Conduct 2019 will be determined by the manner in which it is implemented. Given the complexity of the regulatory space, and the mixture of actors, roles and capacities, the new Judicial Conduct Committee and Judicial Council have significant opportunities to steer the judiciary towards sustaining and further developing the norms of judicial conduct and compliance with such norms through engagement and learning across the regulatory space. There is a good opportunity to join up the approach taken at all stages of the cycle from appointments to education and training, continuous professional development and mechanisms of monitoring, feedback and enforcement so that each element works with the others towards sustaining and developing the capacity for high standards of judicial conduct in the state.

⁶⁷ Judicial Council, *Statement, Report and Appendices - Review by Ms Justice Denham* (2021) 28.