

# JUDICIAL IMPARTIALITY IN THE JUDICIAL COUNCIL ACT 2019: CHALLENGES AND OPPORTUNITIES

*Abstract: The Judicial Council is tasked with promoting and maintaining high standards of judicial conduct. The Judicial Council Act 2019 identifies judicial impartiality as a principle of judicial conduct that Irish judges are required to uphold and exemplify. Despite its ubiquity, judicial impartiality is perhaps under-explained and under-examined. This article considers the nature and scope of judicial impartiality in contemporary Irish judging. It argues that the Judicial Council ought to take a proactive, multi-faceted approach to promote and maintain judicial impartiality, to address contemporary challenges that the Irish judiciary face including increasingly sophisticated empirical research into judicial performance, the proliferation of judicial analytics tools, and more probative and critical media and social media coverage of the Irish judiciary.*

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## Introduction

Judicial impartiality is a core value that judicial systems the world over espouse, and that judges are expected to adhere to. Despite its ubiquity as a principle of judicial conduct, judicial impartiality is under-explained and under-examined. More often than not, it is only meaningfully considered when an allegation of judicial bias or judicial misconduct is made against a judge. However, a more substantive reflection on judicial impartiality is arguably necessary, considering new challenges that judiciaries, including the Irish judiciary, now face. These challenges include:

- the growth of empirical academic research that reveals a multitude of extraneous, non-legal factors that can affect judges' behaviour, performance and decision-making;
- the proliferation of sophisticated judicial analytics tools that lawyers rely on in their practice to measure and predict judicial behaviour and outcomes; and,
- more probative and critical media coverage and social media commentary on judges' performance on and off the bench.

These challenges test judiciaries' and individual judges' efforts to perform and convey judicial impartiality.

The formative years of the Judicial Council present an important opportunity for the Irish judiciary to meaningfully engage in what it means to be an 'impartial' judge. In an age where judging is becoming more scrutinised and more measurable than ever before, the Council ought to take a more proactive and multi-faceted approach towards promoting and maintaining judicial impartiality, to directly address these, and other challenges that the Irish judiciary currently face or will face in the near future.

The Judicial Council Act 2019 (the '2019 Act') mentions judicial impartiality twice. It identifies judicial impartiality as a stated principle of judicial conduct, alongside independence, integrity, propriety (including the appearance of propriety), competence and

diligence and to ensure equality of treatment to all persons before the courts.<sup>1</sup> S7(1)(b) of the 2019 Act, which details the functions of the Judicial Council provides:

The functions of the Council shall be to promote and maintain—

...

(b) 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.

S43(2) sets out the functions of the Judicial Conduct Committee, a committee comprising 13 members to deal with matters of judicial conduct, 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.

Three key points arise from these sections: first, judges must *uphold* and *exemplify* judicial impartiality (among other principles of judicial conduct), second, one of the Council's core functions is to *promote* and *maintain* high standards of judicial conduct, including the principle of judicial impartiality and, third, a committee within the Council, the Judicial Conduct Committee, is specifically designated to this function. The 2019 Act does not define judicial impartiality, nor does it set out specifically how the Council or the Judicial Conduct Committee ought to promote and maintain high standards of judicial conduct, including judicial impartiality.

To briefly outline the work of the Judicial Conduct Committee to date, the Committee was established on 30 June 2020. Three subcommittees were subsequently formed, each focused on dealing with a distinct element of the judicial conduct regime: one dealing with drafting guidelines on judicial conduct and ethics, one tasked with preparing procedures for resolution of complaints by informal means, and one considering and drafting complaints procedures.<sup>2</sup> The Committee submitted draft guidelines to the Council's Board on 28 June 2021, and the Council duly adopted those guidelines on 4 February 2022. The Bangalore Principles, which are discussed further below, formed the basis of the draft guidelines, including the guidelines' treatment of the principle of judicial impartiality.<sup>3</sup>

The principle that judges must be impartial is almost ubiquitous in judicial systems around the globe, yet judicial impartiality is an amorphous concept that does not enjoy a precise

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<sup>1</sup> s 7(1)(b) of the 2019 Act.

<sup>2</sup> Judicial Council, 'Annual Report' (Judicial Council 2020) 26.

<sup>3</sup> Impartiality is set out as 'Principle 2' in the Judicial Council's Guidelines for the Judiciary on Conduct and Ethics. The text adopted by the Council is almost identical to the equivalent text describing impartiality in the Bangalore Principles, except for the addition of Principle 2.6 in the Council's guidelines which provides guidance to judges on the the issue of recusal from a case. See further, Judicial Council, 'Judicial Conduct and Ethics Guidelines' (4 February 2022) <<https://judicialcouncil.ie/news/judicial-council-conduct-and-ethics-guidelines/>> accessed 7 March 2022.

definition. Given it is a central tenet of what we expect from our judges, it is necessary to investigate what judicial impartiality means, and what its scope is, in order to understand how it applies in the 2019 Act, and how the Council can best promote and maintain it.

The remainder of this article is set out as follows: the next section briefly considers the literature explaining and examining judicial impartiality from theoretical and practical perspectives. The section after that outlines how three challenges that the Irish judiciary (and, indeed, other judiciaries) face – probative empirical research on judicial behaviour and decision-making, the proliferation of judicial analytics tools, and heightened media and social media scrutiny of Irish judges and their work – may affect judicial impartiality, and perceptions of it, in Ireland. The article concludes with some reflections on how the Judicial Council might best approach its statutory function to promote and maintain high standards of judicial conduct, with a particular emphasis on judges’ duty to uphold and exemplify judicial impartiality.

## What is Judicial Impartiality?

Judicial impartiality, as a principle of good judicial conduct, has long-standing prominence in several ancient legal systems and foundational works of legal philosophy: the Babylonian code of Hammurbi,<sup>4</sup> and Indian<sup>5</sup> and Mongolian<sup>6</sup> legal systems recognised it as a key value, Socrates identified it as an essential quality of a judge,<sup>7</sup> and Biblical and Roman sources referred to it.<sup>8</sup> It is accepted in key modern international legal instruments such as the Universal Declaration of Human Rights and the Bangalore Principles of Judicial Conduct.<sup>9</sup>

Despite its considerable pedigree as a core principle of judicial conduct espoused by judicial systems the world over, judicial impartiality is ‘rarely subject to sustained theoretical analysis,’<sup>10</sup> and, to borrow a phrase, ‘more easily acclaimed than understood.’<sup>11</sup> Judicial scholar Charles Gardner Geyh wryly observed that judicial impartiality is ‘a feel-good term like ‘puppies’ and ‘pie’ that no decent soul would denigrate.’<sup>12</sup> Judith Resnik took a more withering view: judicial impartiality has been reduced to a ‘buzz word’,<sup>13</sup> with current requirements that ‘seem almost perfunctory – either not to be taken seriously or to be understood as ritualistic incantations of a tradition, the content of which is obscure.’<sup>14</sup>

<sup>4</sup> Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer 2019) 17.

<sup>5</sup> In ancient Indian courts, judges took an oath of the son of Vivasan, the oath of impartiality. The son of Vivasan is Yama, the god of death, considered to be impartial to all living beings. The Hon Justice SS Dhavan, ‘The Indian Judicial System: A Historical Survey’ (Allahabad High Court) 3.

<sup>6</sup> Paul Ratchnevsky, ‘Jurisdiction, Penal Code, and Cultural Confrontation under Mongol-Yüan Law’ (1993) *Asia Major* 161, 162–163.

<sup>7</sup> Bertha Wilson, ‘Will Women Judges Really Make a Difference’ (1990) 28 *Osgoode Hall Law Journal* 507, 508.

<sup>8</sup> McIntyre (n 4) 17.

<sup>9</sup> For an overview of the origins and evolution of judicial impartiality, see ‘Judicial Impartiality: Conceptions of Judicial Impartiality in Theory and Practice’ (Australian Law Reform Commission 2021) Background Paper JI4 4–6.

<sup>10</sup> McIntyre (n 4) 161.

<sup>11</sup> The Right Hon Sir Ninian M Stephens, ‘Judicial Independence - A Fragile Bastion’ in Shimon Shetreet and Jules Deschênes (eds), *Judicial independence: the contemporary debate* (Martinus Nijhoff Publishers 1985) 529.

<sup>12</sup> Charles Gardner Geyh, ‘The Dimensions of Judicial Impartiality’ (2013) 65 *Florida Law Review* 493, 494.

<sup>13</sup> Judith Resnik, ‘On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges’ (1988) 61 *Southern California Law Review* 1877, 1882.

<sup>14</sup> *ibid* 1876–1877. Resnik also points out the irony that in the male-dominated domain of judging Lady Justice is the emblem of the paradigm impartial judge.

Impartiality, in a literal and general sense, involves several overlapping considerations: equality of treatment ('treating all rivals or disputants equally'),<sup>15</sup> an absence of bias and prejudice ('not prejudiced towards or against any particular side or party; fair; unbiased'),<sup>16</sup> and not being involved or invested in the outcome of a decision ('[s]omeone who is impartial is not directly involved in a particular situation, and is therefore able to give a fair opinion or decision about it').<sup>17</sup>

*Judicial* impartiality, then, is simply impartiality applied to the judicial function, with connotations of judging equally, fairly, without bias or prejudice, and without being personally involved or invested in the outcome of a case. However, there is more to it than that. Judges perform their function in a complex and dynamic environment and serve different audiences: parties to litigation, the court they sit on, and the wider public. They also must exercise their functions within set rules of court procedure. They perform their function in a specific institutional, political and cultural context.<sup>18</sup> These layers of the judicial role make putting order on the nature and scope of judicial impartiality that bit more complex. Geyh offers perhaps the clearest and most convincing theoretical framework for understanding the multi-faceted nature of judicial impartiality.<sup>19</sup> He argues that judicial impartiality possesses three dimensions: i) a procedural dimension, ii) an ethical dimension, and iii) a political dimension. Each dimension concerns judicial impartiality as it applies to three different audiences: the procedural dimension concerns judicial impartiality for parties to litigation,<sup>20</sup> the ethical dimension is for judges themselves,<sup>21</sup> and the political dimension concerns judicial impartiality for the body politic and the wider public.<sup>22</sup>

Aside from thinking about judicial impartiality as possessing different dimensions for different audiences, commentators have also considered two main types of values that underpin judicial impartiality: *intrinsic* value and *instrumental* value.<sup>23</sup> Judicial impartiality has *intrinsic* value in that a judge who adheres to the principle acknowledges the dignity of litigants appearing before courts, and recognises that exercising judicial power may affect others beyond the immediate parties to the litigation.<sup>24</sup> Judicial impartiality also has *instrumental* value because it promotes accuracy of fact-finding, and makes people adversely affected by a

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<sup>15</sup> Definition from Lexico (Oxford), <<https://www.lexico.com/definition/impartial>> accessed 12 February 2022.

<sup>16</sup> Definition from Collins English Dictionary <<https://www.collinsdictionary.com/dictionary/english/impartial>> accessed 12 February 2022.

<sup>17</sup> *ibid.*

<sup>18</sup> Impartiality, notes Resnik, is a term that is 'culturally dependent.' Resnik (n 13) 1886.

<sup>19</sup> Geyh (n 12).

<sup>20</sup> Where there is judicial impartiality in a procedural sense, parties enjoy a fair hearing from a judge who adheres to norms of procedural justice (the right to a fair trial, or due process in the United States). Rules of litigation are adhered to. Judges recuse themselves from a case where appropriate. This is all for the benefit of the parties to the litigation.

<sup>21</sup> The ethical dimension refers to the ethics of judging in an impartial way. The main beneficiaries here are the judges themselves. Taking an oath to be impartial and adhering to a standard of judicial impartiality serves their interests: 'impartiality is an end in itself for the good judge.' Geyh (n 12) 523.

<sup>22</sup> *ibid* 529. The political dimension of judicial impartiality refers to impartiality with the end goal of enhancing or preserving a judiciary's institutional legitimacy within the body politic and in the eyes of the public; the beneficiary here is the public.

<sup>23</sup> The paradigm of judicial audiences is also considered by scholars investigating what judicial accountability means. See further, Dejo Olowu, 'Quest for Universal Standards of Judicial Integrity: Some Reflections on the Bangalore Principles' (2013) 69 *India Quarterly* 179, 182.

<sup>24</sup> Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, Thomson Reuters 2017) 644.

judge's decision more likely to accept it, reducing enforcement costs in the decision-making process.<sup>25</sup>

Judges and commentators alike contend that judicial impartiality is fundamental to the public's confidence in a judiciary: its legitimacy 'rests on the perception of judicial impartiality'.<sup>26</sup> Lord Denning observed that '[j]ustice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.<sup>27</sup> These reflections suggest that judicial impartiality is as much about the public's *perception* of it as it is about its actual existence in measurable terms. At a fundamental level, a judiciary's institutional legitimacy depends on public confidence that it will perform its function impartially; judiciaries will not be followed if they are not respected.<sup>28</sup> In this sense, judicial impartiality has a performative quality to it: judges (both as individuals and as part of a collective judiciary) ought to *convey* impartiality outwardly. This is an important facet of impartiality to consider in light of the present-day context in which judges judge both in Ireland and further afield: judges and their decision-making are more visible and under more scrutiny by the public and the media than ever before.

Finally, it is worth considering how the leading international instrument codifying judicial conduct, the Bangalore Principles of Judicial Conduct, addresses judicial impartiality, particularly given the Judicial Conduct Committee relied heavily on it when drafting the Guidelines for the Judiciary on Conduct and Ethics ultimately adopted by the Judicial Council. While the Bangalore Principles set out judicial impartiality as a stated principle, it does not define it, although it emphasises that it 'applies not only to the decision itself but also to the process by which the decision is made'.<sup>29</sup> In terms of the *application* of judicial impartiality, the Bangalore Principles mirror some of the themes set out above in this section; for example, a judge shall perform duties 'without favour, bias or prejudice,' and a judge shall ensure their conduct 'maintains and enhances the confidence of the public'.<sup>30</sup>

The next section considers present and near-future challenges that the Irish judiciary faces when considering judicial impartiality.

## Challenges to the Irish Judiciary

### Measuring Judicial Impartiality: Empirical Research on Extraneous, Non-Legal Factors that Affect Judging

Judicial impartiality is not binary in the sense that a judge is absolutely impartial *or* not. There is a wealth of empirical evidence from a variety of academic disciplines showing that judges in different jurisdictions are susceptible to a range of extraneous, non-legal factors that can affect their decision-making and judicial outcomes. From the mid-20<sup>th</sup> century onwards, political scientists measured the political leanings of judges in their decision-making, starting out by observing decision-making on the higher courts of the US judicial system, and extending the enquiry to many other jurisdictions.<sup>31</sup> From around the 1970s onwards,

<sup>25</sup> *ibid* 622.

<sup>26</sup> Cassandra Burke Robertson, 'Judicial Impartiality in a Partisan Era' (2018) 70 Florida Law Review 739, 739.

<sup>27</sup> *Metropolitan Properties Co (FGC) Ltd v Lannon* (1969) 1 QB 577, 599.

<sup>28</sup> McIntyre (n 4) 174–175.

<sup>29</sup> Value 2, Impartiality.

<sup>30</sup> For background and analysis to the Bangalore Principles of Judicial Conduct, see Olowu (n 23).

<sup>31</sup> See further, Brian M Barry, *How Judges Judge: Empirical Insights Into Judicial Decision-Making* (Informa Law from Routledge 2021) ch 4.5.4 Judges' politics and decision-making: a global perspective.



researchers began exploring correlations between judges' personal and demographic characteristics and their decision-making – for instance, whether judges of different races, ethnicities, genders, ages and religions decide specific types of cases differently. Related to this, researchers have also enquired whether – all other things being equal – judges favour or disfavour litigants with specific personal or demographic characteristics; so-called social biases. Other researchers have investigated what motivates judges as self-interested professionals: how pay, leisure, retirement, prestige and reputation can affect the judge as a career-following professional, and the consequences of these factors for their decision-making.<sup>32</sup>

The bulk of this empirical scholarship has taken an archival approach, sifting through the records of decided cases. However, since the 1990s, researchers at the intersection of psychology and judicial systems have employed experimental research modes to better understand factors that affect judging. These researchers have tested how theories, concepts and phenomena from psychology may affect judicial behaviour and decision-making by conducting experimental studies based on mock trial vignettes to test practising judges' decision-making in controlled environments. For instance, experiments have demonstrated judges' susceptibility to cognitive biases such as hindsight bias, confirmation bias and the anchoring effect when deciding cases.<sup>33</sup> Researchers have also drawn from other psychology literature to test for the negative effects of motivated reasoning and emotion in judicial decision-making and phenomena that affect group decision-making by judicial panels. This experimental research paves the way for empirical triangulation, whereby experimental results are compared against trends from archival data on actual cases to see if the phenomenon still holds in real-world judging.

Scholarship on judicial behaviour and decision-making is increasingly broad in scope, ever more sophisticated and sometimes revelatory. While the overall impression conveyed by the findings of this research is not surprising—judges are human, and susceptible to error in the same way everyone else is—the findings are important for properly understanding the true meaning and nature of judicial impartiality. If judicial impartiality is a principle that judges *must* adhere to, it cannot realistically be equated with *perfect* impartiality because that is an unattainable ideal. Canadian Chief Justice Beverley McLachlin referred to judicial impartiality as an 'impossible quest',<sup>34</sup> while Resnik observes how 'tensions between stated expectations and practice lend an air of unreality to the articulated demands for impartiality.'<sup>35</sup> Although impartiality is sometimes conceptualised as an absolute standard, it is a *principle* – that is, a value-based proposition. Therefore, it may be better to think of judicial impartiality not as an unattainable aspiration, but rather in terms of achieving impartiality to an acceptable degree or point on a spectrum. 'Impartial enough' has, Geyh notes, 'of necessity, become the realistic goal.'<sup>36</sup>

This line of research not only confirms that *perfect* impartiality is indeed an unrealistic and unachievable ideal, but its findings speak to *how* impartial a judge is or is not in their role. Measuring the degree to which specific, extraneous, non-legal factors can affect judges' behaviour and decision-making allows us to grasp what is 'impartial enough.' Put another

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<sup>32</sup> *ibid* 3.

<sup>33</sup> For an overview, see *ibid* 2.

<sup>34</sup> Rt Hon Chief Justice Beverley McLachlin, 'Judicial Impartiality: The Impossible Quest?' in Ruth Sheard (ed), *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales 2003) 17.

<sup>35</sup> Resnik (n 13) 1879.

<sup>36</sup> Geyh (n 12) 493.

way, this empirical scholarship helps to tease out what is acceptable and what is unacceptable of judges on the bench.

Judges often correctly acknowledge their inevitable imperfections, allowing them to improve their craft by addressing the factors that may be at play when they sit on the bench. To offer one example, New South Wales Court of Appeal judge David Ipp noted that the duty of judges is to ‘*suppress* their preconceptions and leanings of the mind [emphasis added].’<sup>37</sup> Here, Judge Ipp accepts judges unavoidably have these preconceptions and leanings of the mind to begin with: the aim is to acknowledge and manage them rather than eradicate them altogether. This evinces the idea that the aim of judiciaries (and, by extension, the Judicial Council) should be to *proactively tackle partiality*, and to do so in a meaningful, tangible sense. Put simply, impartiality must be worked on. Some suggestions in this regard are made in the final section of this article.

## Judicial Analytics

Legal realist and associate justice of the US Supreme Court Oliver Wendell Holmes remarked in 1897 that ‘[f]or the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics.’<sup>38</sup> In the last decade or so, new legal technology tools have made Holmes’ vision a reality, helping lawyers and their clients statistically analyse their chances of success or otherwise, allowing them to better predict case outcomes before particular judges in particular courts against particular lawyers on the opposite side. These tools have had a growing and transformative effect on litigation practice in other jurisdictions in certain areas of law.<sup>39</sup>

Driven by big data, machine learning and natural language processing, judicial analytics tools such as Lex Machina, Premonition, Ravel Law and Solomonix (to name a few) assist lawyers to make all-important calls for their clients on whether to settle or proceed to trial, and what arguments to run if they do go to trial. These tools promise to relieve lawyers from having to rely on intuition, experience or anecdotal evidence and rather, base their litigation strategy on statistical insights into judicial behaviour derived from highly-sophisticated mining and aggregation of past data from the courts.

This technology appears to be at the cusp of infiltrating the legal market in Ireland,<sup>40</sup> with at least one international law firm with a presence in Ireland using predictive tools to identify trends and patterns in judicial decision-making.<sup>41</sup> Some judicial analytics start-up companies

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<sup>37</sup> David Ipp, ‘Judicial Impartiality and Judicial Neutrality: Is There a Difference?’ (2000) 19 Australian Bar Review 212, 212.

<sup>38</sup> ‘The Path of the Law’ (1897) 10 Harvard Law Review 457, 469.

<sup>39</sup> For an overview, see Jena McGill and Amy Salzyzn, ‘Judging by Numbers: Judicial Analytics, the Justice System and Its Stakeholders’ (2021) 44 Dalhousie Law Journal 249.

<sup>40</sup> See Hannah Gallagher, ‘The Deployment of Big Data Analytics Technologies in Law Firms in Ireland and the Potential Impact on the Future Delivery of Legal Services: Risks and Solutions’ (2020) 19 Hibernian Law Journal 45, 53–54; Mary Hallissey, ‘Use Data Analytics to Swerve Poor Litigation Decisions, Lawyers Urged’ (*Law Society Gazette*, 6 October 2020) <<https://www.lawsociety.ie/gazette/top-stories/use-data-analytics-to-swerve-poor-litigation-decisions-lawyers-urged>> accessed 11 January 2022; Rónán Kennedy, ‘Algorithms, Big Data and Artificial Intelligence in the Irish Legal Services Market’ (Oireachtas Library & Research Service 2021) Library & Research Service Spotlight 2 14–15.

<sup>41</sup> Pinsent Masons, ‘Pinsent Masons Partners with Solomonix to Develop IP Disputes Analytics Module’ (29 October 2019) <<https://www.pinsentmasons.com/about-us/announcements/pinsent-masons-partners-with-solomonic-to-develop-ip-disputes-analytics-module>> accessed 11 January 2022.

are developing their presence in Ireland.<sup>42</sup> One Irish solicitor predicts that once there are a few products being used by Irish lawyers, then there will be a ‘cascade effect ... [t]he bigger firms, those with the resources, will do it first.’<sup>43</sup> If experiences in other jurisdictions are anything to go by, it seems inevitable that the Irish legal professions will not be oblivious to market forces and Irish solicitors and barristers will probably employ these tools more and more in the near future in a bid to be more categoric and certain in their advice to their clients.

This has consequences for the Irish judiciary and for how judicial impartiality is perceived. Trends in Irish judges’ propensities and predilections to decide certain types of cases in certain ways will become readily available and scrutinised by Irish lawyers (and, perhaps, interested members of the public and the media). As with any emerging technology, imperfections and errors will inevitably occur. Some tools may prove to be unreliable, poorly developed and unable to capture nuances in individual cases, particularly in their early iterations. Some lawyers may use such tools improperly and crudely rely on the results they generate all too readily.

Nevertheless, judicial analytics tools will become unavoidably attractive to litigators looking to gain an advantage over their competitors in the Irish legal services market, and they will improve and become more powerful as more and more data about the work of courts becomes available. To offer just one example, with the shift to online hearings during the COVID-19 pandemic, and audio-visual recordings of court proceedings, developers of judicial analytics tools may extend the reach of their datasets beyond written judgments to analysing trends during oral argument: for instance, automatically generated transcripts of recorded hearings could reveal patterns in the nature and frequency of individual judges’ questions from the bench.

The Irish judiciary ought to be aware of how this nascent technology may affect how lawyers engage with the Irish court system, who in the not-too-distant-future will likely be armed with detailed information about individual judges’ past performance and information about which judges are statistically more likely to be friendlier to their client’s case than other judges are. Although it is entirely premature to suggest that litigation analytics will damage the Irish judiciary’s reputation, experience elsewhere suggests that such tools have the potential to affect perceptions of judicial impartiality.

In 2016, a French tax lawyer and AI-specialist published data on his website about French immigration judges’ decision-making trends on applications for asylum. The data highlighted wide discrepancies between individual judges on whether to grant asylum seekers asylum in France. Some judges rejected asylum seekers’ claims nearly 100% of the time while others, even colleagues on the same courts, had very low rejection rates.<sup>44</sup> This probative research, a prototype judicial analytics tool of sorts, raised concerns of a lack of judicial impartiality on the French bench.<sup>45</sup> It also provoked criticism by some French judges, who challenged this

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<sup>42</sup> For example, Premonition, an AI service that mines information to present litigators’ winning percentages before specific judges, has an Irish director. See, also, [courtdesk.com](http://courtdesk.com)

<sup>43</sup> David Cowan, ‘The Prediction Predilection’ (2019) 113 *Law Society Gazette* 48, 51. However, one commentator notes that such tools may be of lesser value in Ireland than in other jurisdictions because judges are assigned cases late into the litigation process during a morning call over. Gallagher (n 40) 49.

<sup>44</sup> The data was published on a website, [Supralegem.fr](http://Supralegem.fr), which has since been closed down. Some of the data from this analysis remains available online. Supra Legem, ‘The Impartiality of Some French Judges Undermined by Machine Learning’ (19 December 2016) <<https://medium.com/@supralegem/the-impartiality-of-some-judges-undermined-by-artificial-intelligence-c54cac85c4c4#.yfo64554t>> accessed 12 January 2022.

<sup>45</sup> *ibid.*



interpretation of the data and expressed concern that judicial independence had been compromised by naming individual judges.<sup>46</sup> The official response was sweeping: the French parliament passed Article 33 of the Justice Reform Act in 2019, effectively banning judicial analytics tools in France altogether where they are designed to evaluate, analyse, compare or predict the behaviour of individual judges, the first such ban in the world.<sup>47</sup> The maximum sentence for this offence is five years in prison.<sup>48</sup> The Constitutional Council of France considered the constitutionality of Article 33 of the Justice Reform Act before it passed into law.<sup>49</sup> Arguments contesting the constitutionality of the law included that it inhibited access to information about the judiciary and limited public scrutiny and debate. However, the Council found that judicial analytics may lead to ‘pressure or strategies of choice of jurisdiction likely to alter the functioning of justice’ and that the law ‘did not adversely affect the right to a fair and equitable procedure’ in French courts.<sup>50</sup>

The French law banning judicial analytics raises significant questions about how, and to what extent, such tools ought to be regulated, particularly given that they will likely become less costly and increasingly accessible to lawyers, researchers and the wider public over time.

How do these developments affect how we conceptualise the principle of judicial impartiality? McGill and Salyzyn argue that at a broad, systemic level, ‘mainstreamed judicial analytics tools may change the kind and quantity of critiques of judges and the justice system. Both the impartiality and competence of judges are potential targets.’<sup>51</sup> They further note that should judicial analytics tools reveal trends of entirely superfluous extra-legal factors affecting judicial decision-making, then ‘it will be difficult for a justice system committed to judicial impartiality ... to simply ignore this information.’<sup>52</sup> Public perceptions may also be affected if they have ready access to this type of information, however flawed or lacking in nuance it may be.

Judicial analytics tools may also introduce a new dynamic in individual litigants’ bids to disqualify individual judges from hearing a case for objective or apprehended bias. If a litigant comes to court armed with statistical information generated by judicial analytics tools about the presiding judge’s consistent propensity to disfavour a particular type of litigant in a particular type of case, then arguably that information ought to be considered. Although litigants alleging objective or apprehended bias face a heavy burden of proof, and apprehended bias is a matter of perception, judicial analytics tools ‘have the potential to ease the burden.’<sup>53</sup>

The Irish judiciary may well be forced to respond to these challenges in the near future.

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<sup>46</sup> Michaël Benesty, ‘The Judge Statistical Data Ban - My Story - Michaël Benesty’ (*Artificial Lawyer* 7 June 2019) <<https://www.artificiallawyer.com/2019/06/07/the-judge-statistical-data-ban-my-story-michael-benesty/>> accessed 12 February 2022.

<sup>47</sup> For analysis of this measure, see Malcolm Langford and Mikael Rask Madsen, ‘France Criminalises Research on Judges’ (*Verfassungsblog*, 22 June 2019) <<https://verfassungsblog.de/france-criminalises-research-on-judges/>> accessed 12 January 2022.

<sup>48</sup> Aside from the issue of litigation analytics, it is also important to note that the law also effectively prohibits scholarship on the French judiciary altogether, insofar as individual judges and their decisions must not be identified or analysed. This is a regressive, overbroad, and wholly disproportionate step, and a disservice to the ideals of transparent, better-quality justice.

<sup>49</sup> Décision n° 2019-778 DC, Conseil Constitutionnel.

<sup>50</sup> *ibid* paras 93-94.

<sup>51</sup> McGill and Salyzyn (n 39) 266.

<sup>52</sup> *ibid* 268.

<sup>53</sup> *ibid* 265.

## Media and Public Perception of Judicial Impartiality

Aside from the increase in empirical research and the proliferation of judicial analytics tools, there is also increased scrutiny of judges through media coverage and social media commentary. Lord Neuberger, while President of the UK Supreme Court, observed in 2015 that, alongside academic scrutiny, ‘our work is now being discussed far more by politicians, journalists, and indeed members of the public.’<sup>54</sup> He identified some catalysts for this development: the increased ease of communication, judges being asked to determine more public policy issues, and increasing powers of executive branches of government.<sup>55</sup> Two years later, media criticism of courts became headline news in its own right when *The Daily Mail* ran their now-infamous story about the UK Supreme Court’s judgment in *R (Miller) v Secretary of State for Exiting the European Union*,<sup>56</sup> with the headline and sub-headline: ‘Enemies of the people: Fury over ‘out of touch’ judges who have ‘declared war on democracy’ by defying 17.4m Brexit voters and who could trigger a constitutional crisis’<sup>57</sup>

Of course, this is just one high-profile example of media criticism of judges and their decisions. Earlier examples include the then UK Home Secretary David Plunkett using a newspaper column to opine that ‘it’s time for judges to learn their place.’<sup>58</sup> Other columnists have directed criticisms towards individual judges—for example, one columnist described Lady Justice Hale as ‘the marriage wrecker,’ for her views on gay partnership, heterosexual cohabitation and divorce.<sup>59</sup> Former US President Donald Trump’s presidency was characterised by regular criticism of individual judges in the media.<sup>60</sup> Senator Ted Cruz wrote an editorial describing the US Supreme Court’s decisions endorsing same-sex marriage and upholding the Affordable Care Act as ‘brazen,’ ‘lawless’ and that the Court’s ‘hubris and thirst for power have reached unprecedented levels.’<sup>61</sup>

Criticism of individual judges and courts and their decisions in this vein is a double-edged sword. On the one hand, it may be considered a healthy manifestation of a well-functioning democracy, reflecting robust protection of freedom of expression for media outlets and the public more broadly. On the other hand, criticism of this ilk raises concerns for judicial independence and judges’ latitude to decide cases impartially, particularly if that criticism is irrational, outrageous or unjustified in some way. UK Supreme Court judges, for instance, expressed misgivings about the tenor of the ‘Enemies of the people’ headline and article. Lord Neuberger commented, ‘some of what was said was undermining the rule of law ... if without good reason the media or anyone else undermines our judiciary that risks undermining society.’<sup>62</sup>

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<sup>54</sup> Lord Neuberger, “‘Judge Not, That Ye Be Not Judged’: Judging Judicial Decision-Making” (2015) 29 FA Mann Lecture.

<sup>55</sup> *ibid.*

<sup>56</sup> [2017] UKSC 5.

<sup>57</sup> *Daily Mail*, 4 November 2016.

<sup>58</sup> David Plunkett, ‘It’s Time for Judges to Learn Their Place’ *News of the World* (23 February 2003).

<sup>59</sup> Melanie Phillips, ‘The Marriage Wrecker’ *Daily Mail* (13 November 2003).

<sup>60</sup> ‘In His Own Words: The President’s Attacks on the Courts | Brennan Center for Justice’ <<https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts>> accessed 6 January 2022.

<sup>61</sup> Ted Cruz, ‘Constitutional Remedies to a Lawless Supreme Court’ [2015] *National Review*.

<sup>62</sup> ‘BBC Radio 4 - Today’ (16 February 2017).

The Irish judiciary is also the subject of more commentary and scrutiny than ever before by the media and on social media,<sup>63</sup> albeit media commentary and coverage to date is generally expressed in more sober and less virulent terms than it is in other jurisdictions.<sup>64</sup> There is increased reportage and commentary of judicial proceedings and decisions,<sup>65</sup> and on institutional issues such as ongoing reforms of judicial appointments and disciplinary processes.<sup>66</sup> For instance, it is reasonable to suggest that the recent controversy and media coverage surrounding Mr Justice Seamus Woulfe's attendance at an Oireachtas Golf Society dinner during the COVID-19 pandemic and the investigation that followed caused at least some damage to the public's perception of the judiciary's ability to deal with matters of alleged judicial misconduct.

The use of social media to live report on ongoing legal proceedings is also a recent phenomenon, leading to new practice directions on the use of cameras and electronic devices in courts, including limiting the use of live text-based communications during court proceedings to bona fide members of the news media profession or professional legal commentators.<sup>67</sup>

Because the media, in all its guises—press, television, radio, online discourse and social media platforms—is a filter for how the public receive information about the work of courts, the nature and tenor of media coverage and social media commentary may, in and of itself, have some influence over the public's perceptions of judicial conduct and individual judges' impartiality (or lack thereof). Research demonstrates, unsurprisingly, that members of the public who perceive court proceedings to be largely legalistic tend to offer more positive assessments of the courts.<sup>68</sup> Given judges, courts and their decisions are in the media and social media spotlight more than ever before, this concomitantly increases the media and social media's power to influence public attitudes on the work of judges.

This challenges traditional conceptions that people are socialised to subscribe to the 'myth' that courts rely on legalism and objectivity.<sup>69</sup> Casey observed that this myth relies on courts' ability to stay *out* of the public eye: courts' 'invisibility and distance from the mass public

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<sup>63</sup> O'Donnell CJ recently commented on the proliferation of commentary about Irish judges on social media, see further Shane Phelan, 'Judges Have Become an 'Easy Target' for Social Media Flak, Says Incoming Chief Justice' *Irish Independent* (17 June 2021) <<https://www.independent.ie/irish-news/courts/judges-have-become-an-easy-target-for-social-media-flak-says-incomingchief-justice-40548434.html>> accessed 12 February 2022.

<sup>64</sup> For a history on criticism, see Mary Kotsonouris, 'Criticising Judges in Ireland' (2001) 2 *Judicial Studies Institute Journal* 79.

<sup>65</sup> For example, the extensive media reporting of the murder trial of two boys for the murder of 14-year-old Ana Kriégel in 2018 precipitated debate about how juvenile trials are contemporaneously reported by the media. For analysis, see further, Peo Mosepele, 'Should Ireland Prohibit the Contemporaneous Media Reporting of Juvenile Trials?' (2021) 1 *Irish Judicial Studies Journal* 71.

<sup>66</sup> For analysis of judicial appointments processes, see, for example, Dermot Feenan, 'Judicial Appointments in Ireland in Comparative Perspective' (2008) 1 *Judicial Studies Institute Journal*; Dermot Feenan, 'Judicial Appointments in Ireland: Some Comparative Perspectives' in Eoin Carolan (ed), *Judicial Power in Ireland* (Institute of Public Administration 2018); Laura Cahillane, Tom Hickey and David Kenny, 'Submission to Joint Oireachtas Committee on Justice on Head of Judicial Appointments Commission Bill' (2021). For analysis of judicial disciplinary processes, see Laura Cahillane, 'Ireland's System for Disciplining and Removing Judges' (2015) 38 *Dublin University Law Journal* 55. Former Minister for Transport, Shane Ross, also regularly publishes opinion pieces about the judiciary and individual judges in the *Sunday Independent* and *thejournal.ie*.

<sup>67</sup> See Practice Directions SC18, HC80, CA11, CC20, DC10 on the use of cameras and electronic devices in court introduced in November 2018.

<sup>68</sup> Vanessa A Baird and Amy Gangl, 'Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness' (2006) 27 *Political Psychology* 597, 599.

<sup>69</sup> Christopher D Johnston and Brandon L Bartels, 'Sensationalism and Sobriety Differential Media Exposure and Attitudes toward American Courts' (2010) 74 *Public Opinion Quarterly* 260, 262.

sustain myth and thus legitimacy,' he noted.<sup>70</sup> That invisibility and distance has slowly but steadily been eroded through the proliferation of media coverage and social media commentary of courts, with consequences for the public's perception of judicial legitimacy. Specifically, the manner in which the media portrays courts and judges can influence the public's attitude towards judiciaries. One US study on the media's influence over public attitudes towards judges found that different types of media discussing the work of courts—sensationalist (ie, political radio and cable news) or sober (ie, newspapers and network news)—influenced individuals' attitudes towards those courts in different ways. Individuals exposed to sober media coverage on US courts were more positive in their evaluation of those courts than those who were exposed to media coverage from ideological, partisan and sensationalist sources. Of course, media coverage is a jurisdiction-specific issue, but nevertheless, there are perhaps indications that a milder version of this dynamic may well emerge in Ireland in due course.

Given that there is more media coverage and social media commentary of the work of courts, and the tone of that coverage can affect public perception of judges and their ability to decide cases impartially, then it is perhaps incumbent on judiciaries, including the Irish judiciary through the Judicial Council, to be more publicly engaged than they traditionally have been to date, to make the case to their public that they are doing all they can to do their job to the best of their ability. Of course, a delicate balance must be struck: individual judges staying out of the limelight is no bad thing, particularly when it comes to a judge's proper reticence to discuss or comment on specific legal proceedings. However, there is perhaps a different dynamic at an institutional level. Johnston and Bartels argue that 'the more people know about the courts, the more positive their impressions of court procedures and outputs become,'<sup>71</sup> and point to empirical evidence to support their claim. Citizens who receive more good quality information about the work of courts may be more likely to view those courts favourably.<sup>72</sup> Put simply, '[t]o know the Court is to love it.'<sup>73</sup> Indeed, Frank Clarke's tenure as Chief Justice epitomised this, characterised by increasing public engagement and raising the public profile of the Supreme Court—the most vivid example, perhaps, being the first live broadcast of proceedings in the Supreme Court in 2017.<sup>74</sup> The Supreme Court also sat in different cities during his tenure, and he also led the Court in conversations with secondary-school pupils around the country.<sup>75</sup>

The Judicial Council ought to carefully consider how they address the challenges posed by more diverse, probative and critical media coverage and social media commentary of Irish courts. The Council is, after all, tasked with *promoting* judicial impartiality and public confidence in the judiciary.<sup>76</sup> Promotion, in this sense, is not necessarily merely confined to promoting these principles internally to the judges themselves, but also to promote them externally to the public, by explaining how the Irish judiciary goes about its work, how judges are trained and disciplined, and what specific initiatives are being taken to achieve excellence and high standards of judicial conduct, including judicial impartiality.

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<sup>70</sup> Gregory Casey, 'The Supreme Court and Myth: An Empirical Investigation' (1973) 8 *Law & Society Review* 385, 387.

<sup>71</sup> Johnston and Bartels (n 69) 261.

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.* 263.

<sup>74</sup> Mary Carolan, 'Supreme Court Live: Ireland Broadcasts Judgments for First Time' *The Irish Times* (24 October 2017) <<https://www.irishtimes.com/news/crime-and-law/courts/supreme-court/supreme-court-live-ireland-broadcasts-judgments-for-first-time-1.3266220>> accessed 13 January 2022.

<sup>75</sup> Irish Supreme Court, 'Annual Report' (2018) 72–80.

<sup>76</sup> S7(1)(a) and (f) of the 2019 Act respectively.

## The Judicial Council's Role in Promoting and Maintaining Judicial Impartiality

The first formative years since the establishment of the Judicial Council are, of course, fundamentally important to how it will operate to fulfil its statutory functions into the future. The Council's work in its first two years has necessarily concentrated on forming the committees required under the 2019 Act,<sup>77</sup> and on preparing and adopting guidelines, procedures and mechanisms required by the Act within stipulated time periods.

The Council will soon enter a second phase once these statutory obligations are complete. The Council and its committees will then have an opportunity to take stock, to engage in a broader consideration of how it can best achieve its general functions set out in s 7(1) of the 2019 Act into the future. It is suggested that this should include giving consideration to the nature and scope of judicial impartiality, and how best to support judges in upholding and exemplifying it now and into the near-future. Indeed, the Act expressly sets out that the Council's function is to *maintain* high standards of judicial conduct. This requires the Council to attend to the matter on an ongoing basis, and should involve foreseeing what may undermine or threaten high standards of judicial conduct in the future.

Of course, this specific function of the Council and the Judicial Conduct Committee should not be viewed in isolation and rather, should be considered harmoniously alongside the other functions set out in s 7(1) of the 2019 Act. In particular, the Council's other functions to 'promote and maintain ... (a) excellence in the exercise by judges of their judicial functions ... d) continuing education of judges' and '... (f) public confidence in the judiciary and the administration of justice' all closely link to promoting and maintaining high standards of judicial conduct and to assist judges in upholding and exemplifying judicial impartiality.

To truly *maintain* high standards of judicial conduct in its second operational phase, the Judicial Council ought to reflect on the specific, contemporary challenges the Irish judiciary faces such as those identified here: a) empirical research on judicial behaviour and decision-making, b) the likely proliferation of judicial analytics tools in the Irish legal services market and its consequences for how lawyers interact with, and perceive the Irish judiciary, and c) more probative and critical media coverage and social media commentary of individual cases, individual judges and the Irish judiciary as a collective. Each challenge presents obstacles, sometimes overlapping, to how individual judges, and the judiciary as a collective, perform and convey impartiality. A common thread running through each of these challenges is that each can suggest or reveal, to varying degrees of accuracy, flaws in judges' work that may point to an actual lack of judicial impartiality or give rise to such a perception.

In order for judges to truly uphold judicial and exemplify impartiality, it is better for the Council to help judges achieve the 'realistic goal' of being 'impartial enough,' as Geyh put it, by identifying flaws in the judicial process and in their decision-making by giving judges whatever supports, education, technology tools and information that may be required to mitigate those flaws. Such an approach is more likely to achieve better standards of judging than reflexively acclaiming judicial impartiality as a counsel of perfection that judges must adhere to. In their ongoing review of judicial impartiality, the Australian Law Reform

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<sup>77</sup> The committees are the Judicial Studies Committee, the Personal Injuries Guidelines Committee, the Sentencing Guidelines and Information Committee, the Judicial Support Committee and the Judicial Conduct Committee.



Commission suggests a process of reframing the expectations put on judges, focussed on 'supporting impartiality' as follows:

Rather than the 'good judge' being one who is peculiarly resistant to bias, steps a judge takes to acknowledge and mitigate bias and the appearance of it should be seen as positive contributions to upholding impartiality ... judges should be supported by systems and structures that prevent and mitigate, to the extent possible, challenges to impartiality arising, and properly equip judges to manage them when they inevitably do.<sup>78</sup>

The Commission suggests a 'degree of recalibration to reflect scientific understandings of the extent to which judges, even with their training, experience, and commitment to impartiality, can 'resist bias'.<sup>79</sup> At the heart of this incisive analysis is an acceptance of judges' imperfections and of the science that underpins our understanding of them, and how those imperfections must be worked on.

The Judicial Council could engage in funding external expert research on aspects of judging and judgecraft and court procedure that concern or affect judicial impartiality, and how it can be realised more fully by the Irish judiciary in light of the current and future challenges it faces.<sup>80</sup> Such research ought to be tailored to inform the experiences of Irish judges, present and future, on how they can best perform and convey judicial impartiality in Irish courts, based on extant empirical evidence. This research could lead to recommendations on how to improve judges' efforts to uphold and exemplify judicial impartiality. For instance, judicial training and education programmes could specifically address contemporary understandings of the nature and scope of judicial impartiality and could integrate empirical evidence on judges' susceptibility in multiple jurisdictions and in different judging contexts to a variety of errors, biases and prejudices that affect their behaviour and decision-making. Encouragingly, some efforts appear to have been made recently in this regard.<sup>81</sup> In other jurisdictions where judicial training is more advanced, experimental studies using mock trial vignettes have facilitated judges' meaningful self-reflection on their judging practice. To give some examples, US researchers Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich have a long track record of incorporating controlled experimental studies on judicial decision-making into judicial training days and conferences for US judges at state court and federal level,<sup>82</sup> as well as for specialist judges in administrative law<sup>83</sup> and bankruptcy law.<sup>84</sup> This line of research has branched out to other jurisdictions including Slovenia where judges participated in a

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<sup>78</sup> Australian Law Reform Commission, 'Judicial Impartiality: Consultation Paper' (2021) CP 1 6.

<sup>79</sup> *ibid.*

<sup>80</sup> The Australian Law Reform Commission's report on judicial impartiality is an impressive, comprehensive precedent in this regard. Australian Law Reform Commission, 'Review of Judicial Impartiality' <<https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/>> accessed 14 January 2021.

<sup>81</sup> Mary Carolan, 'New to the Bench: Judges to Be Trained for the First Time' *The 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 13 January 2022.

<sup>82</sup> See, for example, Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Inside the Judicial Mind' (2000) *Cornell Law Review* 777; Jeffrey J Rachlinski and Andrew J Wistrich, 'Gains, Losses, and Judges: Framing and the Judiciary' (2018) 94 *Notre Dame Law Review* 521; Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 *Cornell Law Review* 1; Andrew J Wistrich, Chris Guthrie and Jeffrey J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) *University of Pennsylvania Law Review* 1251.

<sup>83</sup> Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice' (2009) *Duke Law Journal* 1477.

<sup>84</sup> Jeffrey J Rachlinski, Chris Guthrie and Andrew J Wistrich, 'Inside the Bankruptcy Judge's Mind' (2006) 86 *Boston University Law Review* 1227.

series of workshops in 2019 exploring the effects of stereotyping and cognitive biases through experiments based on hypothetical cases.<sup>85</sup> A recent study investigated the effects of anchoring and the level of sympathy on judicial decision-making through an experiment that involved almost 300 judges from seven major jurisdictions (Argentina, Brazil, China, France, Germany, India, and USA).<sup>86</sup> The experiment was integrated into a variety of judicial training events and conferences hosted in these jurisdictions on themes such as ‘law and neuroscience’, ‘how judges reason,’ and ‘behavioural law and justice: aspects of negotiations and decision-making’. The author of this article delivered a training conference to judges on the First-tier Tribunal for Scotland (Health and Education Chamber) in March 2022 incorporating vignettes to tease out issues regarding judges’ susceptibility to cognitive biases. This mode of training will likely become increasingly popular, helping judges to learn from each other in a systematic way, based on data about their own performance in a controlled setting.

Leading judges, at home and abroad, agree on the link between training and its potential to improve judicial conduct. Former Chief Justice Frank Clarke observed that ‘with enhanced training it may well be that there will be in the long run less complaints than might otherwise be the case [of judicial misconduct]’ further noting that ‘not every case of bad conduct can be put down to a lack of training but some can.’<sup>87</sup> Lord Neuberger, speaking extra-judicially in 2015, suggested that ‘the topic of subconscious bias, although in its infancy, should now achieve a more prominent position. ...the time has come to address that thorny issue as part of judicial education.’<sup>88</sup>

Aside from training and education, judges may simply need more resources, more information, and more data about trends in their own performance on the bench in the cases that they decide. Judicial analytics tools technologies could be harnessed by the judiciary themselves. Rather than leave it exclusively to the lawyers to mine the data (however crudely), judges may also benefit from the insights that such tools have to offer in terms of understanding where discrepancies or inconsistencies in judging trends may arise. Indeed, armed with such information, they may be able to better explain why seemingly insidious trends occur and why they are entirely justified, as well as identifying certain trends in certain areas of law that may indicate that some work may need to be done to improve their approach. The opportunity that judicial analytics tools present to acquire this information, however sensitive it may be, ought not to be ignored.

Judicial processes and court rules can also be considered as levers to help improve judicial impartiality. To tackle cognitive errors, bifurcating court trials into different parts to combat confirmation bias, tweaking deliberation techniques to mitigate hindsight bias, and changing how numerical information is described and presented to reduce numerical errors in judging have all been suggested as ways to reduce the harmful effects of cognitive bias, and to improve judicial impartiality.<sup>89</sup> To tackle social biases, implicit bias testing and training, exposure to stereotype-incongruent information (which involves exposing decision-makers to positive examples of people to counter stereotypes), auditing judges’ decisions for trends of bias, and subtle tweaks to court procedure have also all been suggested to remove harmful

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<sup>85</sup> Mojca Plesničar, Katja Šugman Stubbs and Miha Hafner, ‘Deconstructing the Objectivity of Judicial Decisions’ (Annual Meeting of the Law & Society Association, Chicago, 2021).

<sup>86</sup> Of course, in the Irish context, this is a matter of continuing judicial education and falls to be considered by the Judicial Studies Committee, perhaps in tandem with the Judicial Conduct Committee.

<sup>87</sup> Frank Clarke, ‘Keynote Address: Judicial Conduct in Ireland: A Framework Fit for Purpose?’ (2021).

<sup>88</sup> Neuberger (n 54).

<sup>89</sup> For an overview, see Barry (n 31) 28–32 and 54–59.

consequences of social bias against particular litigant groups in judging.<sup>90</sup> Such interventions could be considered by the Council but, of course, interventions of this nature ought to be rigorously pre-tested before being implemented.

Finally, judges and commentators have rightly recognised that judicial impartiality is fundamental to the public's confidence in a judiciary, and to its legitimacy. Geyh's framework for understanding impartiality identifies a political dimension to judicial impartiality: the wider public is a crucial audience to whom judicial impartiality must be conveyed.<sup>91</sup> More probative and critical media coverage and social media commentary present unique challenges to judiciaries trying to perform impartiality from the bench. Recall that the Council's function is to *promote* high standards of judicial conduct and individual judges are required to *exemplify* judicial impartiality. Both of these convey the sense that a crucial part of judicial impartiality is to ensure that the public perceive and believe it.

To this end, public engagement ought to be high on the Council's agenda to clearly communicate the measures the Judicial Council and the Irish judiciary are taking to uphold and exemplify judicial impartiality. Despite recent controversy surrounding judicial conduct, the reality is that the Judicial Council, once all of its mechanisms and processes are fully operational, will very soon have a good story to tell. Indeed, on one level, the so-called 'Golfgate' episode undoubtedly served to highlight the urgent need for a properly and fully-functioning disciplinary process that the Judicial Council is currently working towards.

If research demonstrates that '[t]o know the Court is to love it' then it is incumbent on the Council to explain what it does, how it works, and how the judicial system improves as a result of its efforts. This is likely to persuade more members of the public than not, however sceptical they may be, that the Irish judiciary is striving to be better and to improve how it conducts itself, and that it is more accountable to the public than it has been in years past. Arguably, in its first, formative years, the Council perhaps has been less publicly-engaged than it could have been. To give one example, last year Irish judges participated in unconscious bias training employing role-playing exercises with the help of actors, apparently for the first time. This significant development, one that demonstrates the Irish judiciary's efforts to improve judicial impartiality, only emerged in public discourse through a story in the press by a leading legal journalist.<sup>92</sup> The Judicial Council could concentrate on developing its public profile through increased engagement with the media, more frequent coverage of its activities on its website, by developing social media channels and preparing multimedia content, to ensure that the public is informed about developments in the Irish judiciary. If '[t]o know the Court is to love it', it may even be time for the Judicial Council to start a conversation about whether we ought to follow the lead of the UK Court of Appeal and Supreme Court to offer live streams and YouTube recordings of oral argument.

At the narrower level of individual judges and how they conduct themselves in court, conveying impartiality can be quite subtle. For instance, a judge's demeanour and writing style can convey impartiality.<sup>93</sup> On the latter, Mr Justice Max Barrett's initiative to write litigant-friendly explainers of complex judgments is one laudable example of how judges can demystify the judicial process, helping to engender a sense that litigants have been treated

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<sup>90</sup> For an overview, see *ibid* 183–185.

<sup>91</sup> Geyh (n 12).

<sup>92</sup> Carolan (n 81).

<sup>93</sup> For a fascinating exploration of how Australian judges 'perform' judicial impartiality through observational measures of their demeanour on the bench, see Kathy Mack and Sharyn Roach Anleu, 'Performing Impartiality: Judicial Demeanor and Legitimacy' (2010) 35 *Law & Social Inquiry* 137.

fairly and impartiality, even if the result does not go their way.<sup>94</sup> Further roll-out of this, and other similar measures throughout the Irish judicial system could be encouraged by the Council to impart both the instrumental value of judicial impartiality (it acknowledges the dignity of litigants appearing before the judge) and the instrumental value of judicial impartiality (it helps people adversely affected by a judge's decision more likely to accept it).<sup>95</sup>

All of the above are untested suggestions that may help to respond to some of the current challenges to judicial impartiality that the Irish judiciary currently face, or will face in the near future. Once the Judicial Council's formational work is done, it should reflect on how it can proactively seek out and adopt creative ways to promote and maintain high standards of judicial conduct, including the principle of judicial impartiality, so that it retains its vitality and currency. To emphasise, impartiality is now more tangible and measurable than before, and it ought to be worked on, honed and refined. Impartiality is not just an internal matter for individual judges, particularly in light of the heightened scrutiny that judges now face. The Council is well placed to communicate how Irish judges strive to uphold and exemplify judicial impartiality. Taking the initiative will undoubtedly help to better 'future-proof' the judiciary against threats to judicial impartiality, serving to further preserve the deservedly-high reputation that the Irish judiciary enjoys.

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<sup>94</sup> Ms Justice Nuala Butler observes that judgments ought to be written with the loser, as much as the winner in mind:

The loser ... will care very much. Therefore, it is important that on reading the judgment the loser is made aware, first, that the Judge has heard and understood their argument and, second, why the Judge did not agree with that argument. The judgment should be not only a statement of why the winner has won but mainly a statement of why the loser has lost. It is easier for a party to accept defeat if they understand the rationale behind the outcome.

Nuala Butler, 'Where Do I Begin? (Thoughts from a New Judge on Judgment Writing)' (2021) 2 *Irish Judicial Studies Journal* 47, 51.

<sup>95</sup> Aronson, Groves and Weeks (n 24) 644.