STANDARDISATION AND AUTHORITY IN JUDICIAL DISCIPLINE: A COMMENT ON ITALY AND IRELAND'S EXPERIENCES

Abstract: The legislative description of types of judicial misbehaviour and the allocation of authority over cases of alleged misconduct are two of the main features characterizing systems of judicial discipline. While sometimes judicial misbehaviour is only very vaguely defined in the law, in 'standardised' systems specific and concrete disciplinary offences are listed by statute. At the same time, legal systems diverge also in allocating authority over judicial discipline, as different constitutional arrangements of the power to remove judges demonstrate. By comparing Ireland's and Italy's experiences, the Comment argues that standardisation plays a comparatively less important role in contrasting judicial misconduct than the fine-tuned allocation of authority and, particularly, of the power of judicial removal.

Author: Silvio Roberto Vinceti, Postdoctoral researcher (University of Modena and Reggio Emilia); LL.B. (University of Modena and Reggio Emilia); Ph.D. (University Modena and Reggio Emilia).

Introduction

A comparison between the Irish and Italian experiences on judicial discipline can strike as an odd or even reckless enterprise. For one, it means comparing a judiciary that serves almost 60 million people through a workforce of ten thousand judges[1] with one of roughly 170 members whose names can easily be perused on one single webpage and that are expected to address the needs of less than 5 million people.[2] Additionally, there is the longstanding difficulty of making reasonable parallels between civil and common law jurisdictions.[3] For these and other reasons, the risk of comparing apples and oranges cannot be overstated. Fortunately, other elements bode better for the significance of a comparison. As we will see, both Italy and Ireland originally retained an 'unstandardised' system of judicial discipline where misconduct was either unspecified (Ireland) or had to be construed from a generic description of the traits of the 'good judge' (Italy). Moreover, in both countries, recent cases of judicial misconduct have sparked public uproar and called for closer institutional scrutiny. In Ireland, the 'golf-gate' controversy has had commentators calling for rapid

[1] See Consiglio Superiore della Magistratura – Ufficio Statistico, *Distribuzione per genere del personale di magistratura* (4 March 2021) 1. In Italy, it bears emphasising, prosecutors and judges go indistinctively under the heading of 'magistrates.' In February 2021, there were 9,552 'ordinary magistrates,' as prosecutors and judges belonging to the ordinary judicial authority are called to distinguish them from special judges (eg administrative, auditor, constitutional, tax court judges, etc.). Prosecutors and ordinary judges belong to the same judicial order, answer to the same self-governing body, and are subject to the same disciplinary rules. Moreover, the same individual can 'switch roles' (ie from prosecutor to ordinary judge and vice versa) for a limited number of times and only under certain conditions (eg change of place of activity). The mentioned number of judges thus falls short of considering magistrates belonging to special judicial authorities, such as administrative or auditor judges. Since these have their own disciplinary system, however, they are not relevant for the purposes of this Comment that deals only with the ordinary magistrates (ie prosecutors and ordinary judges).

[2] See The Courts Service of Ireland, 'The Judges' (26 January 2022) <https://www.courts.ie/judges> accessed 7 December 2021.

[3] See generally John Henry Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' (1981) 17 Stan J Int'l L 357.

implementation of the Judicial Council Act of 2019.[4] In Italy, longstanding criticisms of judicial self-governance have been fueled by the 'Palamara affair'[5] and as a result the reform of Superior Council of the Magistracy is now considered 'ineludible.'[6] While the different magnitude of the scandals remains a telling sign of different overall health,[7] both systems of judicial discipline can be framed in a transformative phase.

But beyond historical parallels, it is the very matter of debate that lends itself to comparative analysis. In almost every legal system, judicial discipline raises recurring, 'archetypical' dilemmas: Can the judiciary be trusted in impartially adjudicating over its members' behaviour, or does it suffer from 'guild mentality'[8]? How great is the risk that outsourcing judicial discipline to other constitutional branches (e.g., the Parliament) could lead to an impairment of judicial independence? Should accountability and transparency in judicial misconduct proceedings outweigh concerns for the prestige and respectability of the judiciary? In the end, all issues revolve around a common, fundamental question: 'Who watches the watchmen?'.[9]

This article will focus on two typical elements of every system of judicial discipline: the legislative specification of the several types of judicial misconduct – ie 'standardisation' – and the authority who is factually charged with evaluating judicial discipline (ie deciding if the disciplinary provisions apply to a particular case). By contrasting the Irish and Italian systems' legal evolution and their different current state, it will be argued that standardisation

[4] Irish Supreme Court judge Mr. Justice Séamus Woulfe was one of the attendees at a party of the Irish Parliament's golf association that took place in defiance of COVID-19 restrictions. While other high-ranked politicians, such as the Minister for Agriculture or Ireland's EU Commissioner, resigned because of the general outrage that broke out when knowledge of the event became public, the Supreme Court judge refused to do the same. See Ciarán Burke, 'An Irish Tale of Judicial Misconduct' (*Verfassungsblog*, 12 November 2020) <https://verfassungsblog.de/an-irish-tale-of-judicial-misconduct/> accessed 26 January 2022; Conor Casey and Eoin Daly, 'Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland' (2021) 17 European Constitutional Law Review 202; (in press) Laura Cahillane and David Kenny, '(In Press) Lessons from Ireland's Judicial Conduct Controversy' [2022] Common Law World Review.

[5] Luca Palamara, former head of the National Magistrates Association and member of the Superior Council of the Magistracy, was removed from the judicial office on July 2019 after a disciplinary probe demonstrated that he rigged judicial appointments to the highest positions of the Italian judiciary. See Gabriella Mangione, 'Some Brief Remarks on the Controversial Relationship Between the Judiciary and Politics in Italy' (2021) 27 Comparative Law Review 79, 80; Maurizio Catino and Cristina Dallara, 'Le regole dell'apprendimento imperfetto. Norme e prassi nel Consiglio superiore della magistratura' (2021) Stato e mercato 235, 242; Gaetano Azzariti, 'Parlare di giustizia' (2021) Politica del diritto 513, 514; Filippo Donati, 'Dal CSM ai Consigli di Giustizia europei. L'incerta diffusione di un modello costituzionale' (2021) Quaderni costituzionali 355, 367; Giampietro Ferri, 'Il Consiglio Superiore della Magistratura italiano tra diritto e prassi' (2020) DPCE Online 14, 4879; Roberto Romboli, 'La reducción del número de parlamentarios y la propuesta de reforma del sistema de elección del Consejo Superior de la Magistratura en Italia' (2021) Teoría y realidad constitucional 265, 285–87.

[6] Marta Cartabia, 'Minster of Justice's Intervention Before the Court of Cassation for the Inauguration of the Judicial Year' (22 January 2022).

[7] It bears emphasising that we are still comparing the attending of a 'party' by an Irish Supreme Court judge, in the face of COVID-19 restrictions, with a high-ranked judge's systemic rigging of judicial appointments in Italy.

[8] Dmitry Bam, 'Legal Process Theory and Judicial Discipline in the United States' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar Publishing 2021) 348–51.

[9] Mauro Cappelletti, '"Who Watches the Watchmen?" A Comparative Study on Judicial Responsibility' (1983) 31 The American Journal of Comparative Law 1, 62.

plays a less significant role in preventing judicial misconduct than the fined-tuned arrangement of the rules governing the 'authority'[10] of judicial discipline.
The analysis will proceed as follows. The first part will describe the historical trend toward standardisation of judicial misconduct in Italy and Ireland. Taking the scientific literature and public perceptions as starting points, the second part proceeds to describe the different authorities in charge of judicial discipline in Italy and Ireland. At this point, the possible 'illusion of improvement' brought about by standardisation and the implications of the comparison for the theoretical notion of judicial independence will be touched on. The conclusion summarises the main argument of the piece and outlines some of its possible implications for Italy and Ireland.

Standardisation: The 'What' of Judicial Misconduct

Before beginning, it may be useful to clarify what is often meant by 'standardisation' with reference to judicial discipline.[11] The phenomenon is a familiar one, especially in criminal law. 'Standardisation' is the trivial and ubiquitous process of singling out the several referents of a clause to diminish its vagueness or indeterminacy. To resort to an example made by John Decker in the context of the void-for-vagueness doctrine in American criminal law, a New York statute prohibiting the possession of child pornography may have to be very detailed and specific as to what counts as 'child pornography' : 'Realising that a depiction, for example, of a baby in his or her birthday suit could never be sanctioned, the New York legislature described in precise, if not graphic, detail what was contemplated.'[12] In this way, standardisation serves the ideal of the legality principle in criminal law.[13]

Unsurprisingly, listing (ie standardising) approaches are conspicuously relevant to criminal law. With the most fundamental human freedoms at stake, the need to decrease vagueness and indeterminacy is all-important.[14] In this respect, standardisation is useful on both rule-of-law and separation-of-power grounds. On the one hand, it enables every person to know what it is exactly that the criminal norm forbids and better allows to retrospectively evaluate the legitimacy of punishment. In this way, standardisation contrasts criminal law

[10] 'Authority' here refers to the set of institutional actors exerting discipline over judges. In Italy, the authority comprises the General Prosecutor at the Court of Cassation, the Minister of Justice, the Disciplinary Committee of the Superior Council of the Magistracy, and the Court of Cassation sitting *en banc* of all the civil sections. See generally Giuseppe Di Federico, 'Judicial Independence in Italy' in Anja Seibert-Fohr (ed), *Judicial Independence in Transition*, vol 233 (Beiträge für ausländischen öffentlichen Recht und Völkerrecht, Springer 2012) 380–84. In Ireland, the authority used to be divided between the formal and rarely employed power of the Oireachtas to remove judges and the informal methods within the judiciary. See generally Laura Cahillane, 'Ireland's System for Disciplining and Removing Judges' (2015) 38 Dublin DULJ 55. After the Judicial Council Act, a Judicial Conduct Committee was established for the purpose of addressing disciplinary offences not so grave as to warrant the removal of the concerned judge.

[11] Cf Richard Devlin and Sheila Wildeman, 'Introduction: Discipling Judges – Exercising Statecraft' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar Publishing 2021) 8.

[12] John F Decker, 'Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws' (2002) 80 Denv U L Rev 105, 286.

[13] 'The principle of legality forbids the retroactive definition of criminal offences. It is condemned because it is retroactive and also because it is judicial–that is, accomplished by an institution not recognized as politically competent to define crime. Thus, a fuller statement of the legality ideal would be that it stands for the desirability in principle of advance legislative specification of criminal misconduct.' John Calvin Jeffries, 'Legality, Vagueness, and the Construction of Penal Statutes' (1985) 71 Virginia Law Review 189, 190.

[14] See Peter M Tiersma, *Legal Language* (University of Chicago Press 2000) 81–85; and Iwona Witczak-Plisiecka, 'A Note on the Linguistic (In)Determinacy in the Legal Context' (2009) 5 Lodz Papers in Pragmatics 210.

arbitrariness, which is typical of totalitarian regimes.[15] On the other hand, listing the several outlawed conducts contrasts judicial activism by diminishing the room for 'judicial crime creation.'[16] The vaguer the law, the more it can be stretched to meet the personal views of an activist judge. In avoiding the room for 'creative interpretations,'[17] standardisation – or 'codification'[18] – strikes as a common method to contrast the phenomenon of judges who 'make up the law as they go along.'[19]

The virtues of standardisation apply also to judicial discipline. Listing several types of judicial misconduct helps to ensure that judges are not 'at the mercy' of the disciplining authority's possibly erratic appreciation of vague standards of judicial conduct. In this sense, standardisation safeguards the right of the judge to be treated fairly (ie in the same manner as another concerned judge would be treated in the same circumstance), as well as judicial independence (ie the judge's right not to be subject to non-legal, external influences). In this respect, it bears emphasising that this article is almost exclusively concerned with the point of view of the lawmaker, rather than the judge. The objective, in other words, is to isolate the best strategy to diminish the level of judicial misconduct in a given system. It will be shown that, in contrasting judicial misconduct, standardisation appears a less consequential policy than changing the rules governing the authority of judicial discipline. However, it is important to bear in mind that any similar conclusion reached here does not speak to other virtues enshrined in the standardisation of judicial misconduct.

The Irish Experience

Before the Judicial Council Act of 2019, Ireland retained an almost totally unstandardised system of judicial discipline. Albeit clearly pivotal, the only written rule on judicial misconduct was Article 35 of the Constitution, where it is stated that 'a judge of the Supreme Court, the Court of Appeal, or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.'[20] While the provision 'refers specifically only to judges of the Supreme Court and High Court, the same procedure would have to be followed in order to remove a judge of the Circuit Court or the District Court.'[21]

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[15] See Pauline B Taylor, 'Treason, Espionage, and Other Soviet State Crimes' (1964) 23 Russian Review 247, 247.

[16] Jeffries (n 13) 206.

[17] Pierluigi Chiassoni, *Interpretation without Truth: A Realistic Enquiry*, vol 128 (Law and Philosophy Library, Springer International Publishing 2019) 28.

[18] 'Codification […] also reduce[s] judicial activism, or the tendency of Judges to make up the law as they go along.' Michael Arnheim, 'The Problem Underlying the Blackstone v. Archbold War' (2017) 181 Criminal Law and Justice Weekly 750, 750.

[19] This is one of the well-known definitions of judicial activism. See Arthur S Miller, 'Social Justice and the Warren Court: A Preliminary Examination' (1983–84) 11 Pepp L Rev 473, 477–78; Frederick Lee Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Broadview Press 2000) 9; Robert S Summers, 'A Formal Theory of the Rule of Law' (1993) 6 Ratio Juris 127, 134; and Michael J Polelle, 'Selection of Federal Judges: Time for Reform?' (1993) 54 Mont L Rev 57, 66. Black's Law Dictionary defines judicial activism as 'a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usu. with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedent.' Bryan A Garner and Henry Campbell Black, *Black's Law Dictionary* (West 2009) 922.

[20] Constitution of Ireland (1937) Art 35.4.1°.

[21] Gerard Hogan and others, *Kelly: The Irish Constitution* (Bloomsbury Academic 2018) 1198.

If the meaning of 'incapacity' appears uncontroversial in making reference to some form of 'physical unfitness for office,'[22] the notion of 'stated misbehaviour' is evidently 'a more problematic phrase.'[23] Case law thus becomes decisive for the interpretation of the clause. Certainly, the appearance of integrity and impartiality by the judges is relevant to the notion of 'misbehaviour,' as proven by cases concerning the judge's inhibition from practicing as a solicitor,[24] or the inquiry into the judge's personal opinions over contentious issues, such as abortion.[25] Moreover, since the *Curtin* case,[26] there seems to be growing consensus that, for the purposes of judicial removal, the definition of 'stated misbehaviour' is less an objective standard than a discretionary evaluation from the Houses of the Oireachtas.[27]

In building up a Judicial Conduct Committee to address disciplinary offences not so grave as to merit removal from office, the Judicial Council Act of 2019 appears *prima facie* as a moment of relevant standardisation for judicial discipline in Ireland. Section 1 of the legislation defines 'judicial misconduct' as:

> conduct (whether an act or omission) by a judge, whether in the execution of his or her office or otherwise, and whether generally or on a particular occasion, that
>
> (a) constitutes a departure from acknowledged standards of judicial conduct, such standards to have regard to the principles of judicial conduct referred to in sections 7(1)(b) and 43(2), and
>
> (b) brings the administration of justice into disrepute.

The expression 'acknowledged standards of judicial conduct' thus becomes a *renvoi* to two other sections of the Act dedicated to the functions of the Judicial Council and, specifically, of the Judicial Council Committee. The description of the 'acknowledged standards' given in the two sections mentioned by section 1, however, is identical:

> 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. [28]

However, the Judicial Council Act's qualifications of 'proper' judicial conduct do not seem to place Ireland out of the unstandardised spectrum of the systems for judicial discipline. Since the notion of 'acknowledged standards' refers to plainly indeterminate principles, such as 'independence,' 'impartiality,' or 'integrity,' one wonders if these elements were not already clearly understood to be part of the notion of 'stated misbehaviour.' To the extent that we compare an indeterminate notion with numerous other indeterminate ones, it is unclear whether a judge already acquainted with the case law regarding the 'stated misbehaviour'

[22] ibid 1199.
[23] ibid.
[24] ibid 1194.
[25] ibid 1195.
[26] Cahillane (n 10) 66.
[27] Hogan and others (n 21) 1200–01.
[28] Judicial Council Act (Ireland 2019) arts 7.1.b, 43.2.

would consider herself subject to new standards of conduct. In this respect, it seems that the Judicial Council Act simply introduces a more detailed, 'yardstick-type' definition of judicial misconduct in proscribing the violation of the aforementioned standards. Despite the apparent augmentation of the normative verbiage, therefore, Ireland's system should still be described as unstandardised or, at least, 'under-standardised.' If so, what are we to make of these under-standardised definitions of judicial misconduct in Ireland? It means acknowledging that, in this respect, the Judicial Council Act is not a radical departure from Ireland's informal tradition in judicial discipline. However, one wonders why the Irish legislature's choice should have been different. Despite the unstandardised system, there is solid scholarly consensus on the efficacy of Ireland's system of judicial discipline. As Scott notes, 'there is a strong view that the state has been well served by a judiciary and that the judiciary has demonstrated strong independence and competence, with a sense that judicial misconduct has been very much at the margins, the exceptional case.'[29] The academic consensus, moreover, has been buttressed by the European Union's inquiries into the state of justice in European countries, with recent studies consistently ranking Ireland among the leading states for perceived judicial independence.[30]

Unsurprisingly, rather than to address soaring levels of judicial misconduct, demands for a new framework of judicial discipline in the past had been levied to allow punishment of minor misconduct, to set up a procedure to formally address complaints, and to protect the concerned judge's right to a fair disciplinary trial.[31] However, this does not slight the significance of the Judicial Council's enactment. The aforementioned 'golf-gate' controversy vividly demonstrated that public trust in the judiciary can be seriously affected even when alleged misbehaviour may not constitute an offence for which constitutional removal is warranted.[32] Since the Judicial Council Act's procedures were not yet in force in 2020, in fact, no formal investigation or sanction followed Mr. Justice Woulfe's possible misbehaviour.[33] At the very minimum, it seems sensible to think that the whole affair would have been much tidier if the Judicial Council's procedures were already in place at the time.

The Italian Experience

Earlier than in Ireland and quite more significantly, judicial discipline in Italy underwent a strong wave of standardisation in what is often described as the process of 'legalisation' of judicial misconduct. Before the so-called 'Castelli reform' of 2006,[34] in fact, judicial misconduct was very vaguely described in Article 18 of a 1946 statute regulating safeguards of the judiciary: 'the magistrate failing his duties or behaving in a manner that, either within or without the office, makes him unworthy of the trust and consideration that he shall retain

[29] See Colin Scott, 'Regulating Judicial Conduct Effectively' in Eoin Carolan (ed), *Judicial Power in Ireland* (2018) 381; and Cahillane (n 10).
[30] *The 2014 EU Justice Scoreboard* (Publications Office 2014) 26; *The 2015 EU Justice Scoreboard* (Publications Office 2015) 37; *The 2016 EU Justice Scoreboard* (Publications Office 2016) 35; *The 2017 EU Justice Scoreboard* (Publications Office of the European Union 2017) 37; *The 2019 EU Justice Scoreboard* (Publications Office of the European Union 2019) 44; *The 2020 EU Justice Scoreboard* (Publications Office of the European Union 2020) 41; and European Commission, *The 2021 EU Justice Scoreboard* (2021) 41.
[31] Hogan and others (n 21) 1204–05; and Cahillane (n 10) 76–82.
[32] Cahillane and Kenny (n 4) 20–23.
[33] ibid 23–24.
[34] Sergio Di Amato, *La responsabilità disciplinare dei magistrati: gli illeciti, le sanzioni, il procedimento* (Giuffrè Editore 2013) 17–24.

or compromises the prestige of the judicial order, shall be subject to disciplinary sanctions.'[35] The provision replicated an analogous provision of the regulation on the 'Judicial System' (*Ordinamento giudiziario*) adopted in 1941 by the Fascist government.[36]

With the reform package of 2006, numerous types of judicial misconduct have been specified by statute and grouped into three groups. The first and largest group lists disciplinary offences relating to the judicial office. To make only some examples, a magistrate is to be held disciplinarily responsible for: omitting to notify a situation of incompatibility with a case,[37] or neglecting self-recusal in cases indicated by the law;[38] acting constantly or gravely with malice against the parties, their lawyers, the witnesses or whoever enters into contact with the magistrate in the context of the office, or toward other magistrates or clerks;[39] unduly interfering in another magistrate's activity [40] or lacking to notify an undue interference;[41] gravely violating the law,[42] or misconstruing the facts of a case with negligence or recklessness;[43] adopting completely unmotivated measures or having as motivation only the text of the law without reference to the facts of a case;[44] repeatedly or gravely violating norms of judicial organisation or of informatics services;[45] unduly delegating to other the magistrate's proper functions; [46] living outside the municipality of the office without authorisation; [47] failing to be reachable when it is mandatory to be available; [48] leaking documents that should be kept private;[49] rendering improper public declarations on pending cases;[50] unduly promoting publicity on the activity of the office,[51] et cetera.

The second group lists disciplinary offences committed outside of the judicial offices. In this respect, a magistrate is responsible for using the judicial power to gain unfair advantages;[52] associating or making business with individuals the magistrate is investigating on, or that the magistrates knows to be habitual offenders, or to have been convicted for a some grave crimes;[53] accepting extrajudicial appointments without the authorisation of the Superior Council of the Magistracy;[54] obtaining loans or concessions from individuals involved in a criminal proceeding lead by the magistrate;[55] participating to societies that are secret or whose obligations 'objectively' contrasts with the judicial function; [56] joining or systemically

[35] Regio Decreto Legislativo – Guarentigie della magistratura 511 (Italy 1946) art 18.
[36] See Regio Decreto – Ordinamento giudiziario 12 (Italy 1941) art 232.
[37] Decreto Legislativo – Disciplina degli illeciti disciplinari dei magistrati, delle relative sanzioni e della procedura per la loro applicabilità, nonche' modifica della disciplina in tema di incompatibilità, dispensa dal servizio e trasferimento di ufficio dei magistrati 109 (Italy 2006) art 2.1.b.
[38] ibid art 2.1.c.
[39] ibid art 2.1.d.
[40] ibid art 2.1.e.
[41] ibid art 2.1.f.
[42] ibid art 2.1.g.
[43] ibid art 2.1.h.
[44] ibid art. 2.1.l.
[45] ibid art 2.1.n.
[46] ibid art 2.1.o.
[47] ibid art 2.1.p.
[48] ibid art 2.1.t.
[49] ibid art 2.1.u.
[50] ibid art 2.1.v.
[51] ibid art 2.1.aa.
[52] ibid art 3.1.a.
[53] ibid art 3.1.b.
[54] ibid art 3.1.c.
[55] ibid art 3.1.e.
[56] ibid art 3.1.g.

participating with political parties, or mingling with businesspeople that could influence the behaviour of the magistrate, or compromise her appearance of impartiality; misusing the judicial function in a case pertaining to constitutional functions.[57] The third group, eventually, comprises disciplinary offences resulting from criminal proceedings against the concerned magistrate.[58]

As should seem apparent, Italy's disciplinary offences are more precise and in some cases quite more specific than 'high standards' used in Ireland's framework. However, the post-2006 disciplinary regime in Italy is not totally standardised either. Article 1 of the Legislative Decree of 2006, in fact, solemnly describes the 'duties of the magistrate' by stating that 'the magistrate shall discharge the attributed functions with impartiality, correctness, diligence, industry, confidentiality, and equilibrium, and shall respect the dignity of the person in the exercise of his functions.'[59] Any magistrate that violates these general 'duties,' both within and without the judicial office, commits a disciplinary offence.[60] Clearly, these additions introduce significant room for 'play in the joints,' in a way that somehow belies the policymaker's goal of standardisation.

Nonetheless, this evidently 'open-textured' introduction does not seem capable of debunking the general belief that Italy's system of judicial discipline occupies the strongly standardised end of the spectrum. Moreover, the Court of Cassation – which, as we will see, is both the pinnacle of the ordinary magistracy and the authority reviewing disciplinary decisions – has expressly stated that the 'general duties of the magistrate' serve a 'mainly symbolic (or if you will 'pedagogical') and deontological function . . . having significance only in the presence of other general clauses . . . .'[61] 'Outside of those cases,' says the Court, 'the legal syllogism required to declare or exclude the disciplinary responsibility only implies the comparison between the abstract norm and the behaviour of the magistrate.'[62]

Despite the Italian legislature's effort to list numerous types of possible judicial misconduct, however, it is far for evident that Italy has benefitted from the lengthy enumeration of disciplinary offences. If we confront the EU Justice scoreboard used to evaluate Ireland's results, Italy appears as one of the worst countries for perceived judicial independence in Europe.[63] The fact that Italy slightly overperforms Poland and trails behind Hungary should be of grave concern, given the worrisome state of judicial independence in these countries.[64] While the EU surveys do not allow the establishment of clear causal connections between the loss in judicial independence and the quality of judicial discipline, it is hard to ascribe such dismal performance solely to 'external' pressures on the judges, especially in light of the fact that Italy's 'law in the books' is widely regarded as one most judicial independence-enhancing system in Europe.[65] In this respect, it is odd to think that the Italian system of

[57] ibid art 3.1.i.
[58] ibid art 4.
[59] ibid art 1.
[60] ibid arts 2.1.a, 3.1.d.
[61] Corte Suprema di Cassazione, 28 January 2014 no 6827.
[62] ibid.
[63] European Commission (n 30) 41.
[64] See James E Moliterno and Peter Čuroš, 'Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious' (2021) 22 German Law Journal 1159.
[65] See Katarína Šipulová and others, 'Judicial Self-Governance Index: Towards Better Understanding of the Role of Judges in Governing the Judiciary' (2022) n/a Regulation & Governance, 13; Carlo Guarnieri, 'Judicial Independence and Policy-Making in Italy' in C Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of*

judicial discipline does not share in the responsibility of such results. The perception of independence is compromised not only when other constitutional branches attempt to encroach on the judiciary, but also when the judicial function is misused and self-discipline mechanisms do not cut in.

Perhaps the 2006 package is the wrong target of criticism. After all, the prime rationale undergirding the reform was the enhancement of the concerned judge's substantive and procedural rights by changing a situation in which the adjudicatory body was also the *de facto* lawmaker of the standards to be weighed.[66] The aim, for lack of better words, was to make it look more like a real trial, rather than an internal, self-discipline procedure – what is described as the 'jurisdictionalisation' of judicial discipline.[67] In this respect, almost all Italian scholars working in the field concur that the reform package was a necessary and overdue step toward better protection of the disciplined judge's rights and that the lengthy description of judicial misbehaviour was conducive to this end.[68] Two leading scholars, moreover, argue that a list of disciplinary offences is 'constitutionally mandated.'[69]

However, it bears noting that excessive leniency in judicial discipline was also a goal of the 'Castelli Reform':[70] among others, this can be glimpsed in the General Prosecutor's duty to act against malfeasant allegedly malfeasant judges, without possibility to discretionally select which cases to prosecute.[71] But when framed in this public-interest perspective, it seems that the standardisation wave of 2006 had little to no impact on the amount of judicial misconduct in Italy.[72] As Cavallini concludes in her research, '[t]he reform of 2006 was an important step towards a more efficient and transparent disciplinary system, but it did not alter the nature of disciplinary proceedings, which are structured as an interplay among three actors only: the General Prosecutors, the concerned judge/prosecutor and the Disciplinary Commission. No consideration is given to the individual complainant who is neither informed about the final outcome of the complaint, nor able to participate in the proceedings.'[73] Cavallini's words foreshadow what seems to be the real issue in Italian judicial discipline and introduce the main claim of this article: that the main flaw in the 2006 reform was an exclusive focus on the standardisation of judicial misconduct and the lack of significant changes in the rules governing the authority of judicial discipline.

Judicial Power (NYU Press 1995) 247. See also Simone Benvenuti, 'The Politics of Judicial Accountability in Italy: Shifting the Balance' (2018) 14 European Constitutional Law Review 369, 372.

[66] Francesco Dal Canto, *Lezioni di ordinamento giudiziario* (2nd edn, Giappichelli 2020) 280; Nicolò Zanon and Francesca Biondi, *Il sistema costituzionale della magistratura* (V, Zanichelli 2019) 306; Daniela Cavallini, 'La responsabilità disciplinare dei magistrati' in Giuseppe Di Federico (ed), *Ordinamento giudiziario: uffici giudiziari, CSM e governo della magistratura* (Bononia University Press 2019) 372.

[67] Dal Canto (n 66) 284.

[68] Ibid. See also Zanon and Biondi (n 66) 335.

[69] Zanon and Biondi (n 66) 306.

[70] Cavallini (n 66) 372.

[71] Decreto Legislativo – Disciplina degli illeciti disciplinari dei magistrati, delle relative sanzioni e della procedura per la loro applicabilità, nonche' modifica della disciplina in tema di incompatibilità, dispensa dal servizio e trasferimento di ufficio dei magistrati art 14.3.

[72] See Simone Benvenuti and Davide Paris, 'Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model' (2018) 19 Ger Law J 1641, 1664; Daniela Cavallini, 'Why is the Complaints Procedure Still Lacking in Italy? The Difficult Pathway towards a More Transparent, Inclusive and Effective Disciplinary System' in Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges: Contemporary Challenges and Controversies* (Edward Elgar Publishing 2021) 203.

[73] Cavallini (n 72) 203.

Authority: The 'Who' of Judicial Discipline

A comparison of the Italian and Irish experiences leaves the impression that standardisation of judicial misbehaviour does not appear necessarily associated with lowering levels of judicial misconduct. On the one hand, Ireland's informal disciplinary system fared reasonably well despite a very general definition of judicial misconduct. On the other, a very strong standardisation of misconduct in Italy has not been able to move the needle very much, as the general perception remains negative about how judicial discipline is administered in Italy. Now, it is clear that, as everything in the law, judicial discipline is sensible to cultural determinants that cannot be readily modified by legislative innovations. Scholars frequently highlight the salience of cultural and moral determinants in the overall performance of systems of judicial discipline[74]. As it has been recently noted, 'political history and cultural sensitivities of a jurisdiction mean that it has calibrated the various norms (and transformed them into institutions and processes) that tend to be context specific. Consequently, even jurisdictions that might seem to have a similar lineage . . . have very different disciplinary systems.'[75] Policymakers, on their part, seem to share in the assumption, as it is well witnessed by the Italian Minister of Justice's comments on the foreseeable reforms of the Superior Council of the Magistracy: 'reforms will help but will not be conclusive if they are not followed by a renewal of habits, from each [justice] on a personal level, and from the [judicial] class as a whole.'[76]

However, it may be possible to offer a 'legal' (ie non-cultural) explanation for the fact that judicial discipline continues to be a problem in Italy despite the 2006 wave of standardisation, while the lack of a strong standardised framework did not present many difficulties in Ireland. Even with a common trajectory toward standardisation, the comparative analysis of the two countries can be construed to suggest that, more than the instantiation of several types of judicial misbehaviour, what really matters in judicial discipline is not so much the content of judicial discipline but rather the rules governing the composition and the procedures of the authority that factually gets to administer disciplinary proceedings.

If for the sake of evaluating the argument we posit its truth, we expect to find salient differences in the allocation of power over judicial misconduct in Italy and Ireland. As it happens, there are, in fact, momentous differences. Above all, the most salient and eye-catching dissimilarity lies in the procedure for judicial removal. As already mentioned, one defining feature of the Irish system is that the removal of a judge is the province of the legislative power (ie the Oireachtas). In this respect, differently from the failed 22nd amendment to the Irish Constitution, the Judicial Council Act of 2019 did not attempt to alter the constitutional arrangement. On the contrary, the statute explicitly affirmed that '[n]othing in this Act shall be construed as affecting the operation of section 4 of Article 35 of the Constitution.'[77] By contrast, the power to remove judges for misbehaviour in Italy remains fully in the hands of the judiciary. Removal from office is the gravest disciplinary penalty and while it is mandatory in some cases (eg a conviction for specific serious crimes

[74] See Patrick O'Brien, 'Never Let a Crisis Go to Waste: Politics, Personality and Judicial Self-Government in Ireland' (2018) 19 German LJ 1871.
[75] Devlin and Wildeman (n 11) 10.
[76] Marta Cartabia, 'Cartabia ai magistrati: "Per credibilità, oltre a riforme, disciplina e onore"' (*gNews Giustizia news online - Quotidiano del Ministero della giustizia*, 18 June 2021) <https://www.gnewsonline.it/il-ricordo-di-livatino-cartabia-esempio-di-giustizia-autentico-da-cui-ripartire/> accessed 24 January 2022.
[77] Judicial Council Act art 89.

or of obtaining loans or other concessions from a party),[78] it is always possible to adopt it if the circumstances warrant it. What is important to note, however, is that disciplinary sanctions are adopted by the Disciplinary Committee of the Superior Council of the Magistracy.[79] The Committee is composed of the Vice-president of the Superior Council (a lay member), another lay member, and four magistrates from the Superior Council.[80] With a four-to-two judicial majority, it is thus fair to say that the 'first word' on judicial misconduct in Italy is a word from the judiciary itself. And since appeals against the Disciplinary Committee, as mentioned, are reviewed by the Supreme Court of Cassation,[81] it is possible to conclude that judicial discipline in Italy is evidently administered by the judiciary itself.

It is hard to overstate the salience of the different allocation of authority over cases of judicial misconduct. Magistrates in Italy expect that cases of alleged judicial misconduct will ultimately be evaluated and decided by members of their own 'guild.' By contrast, although minor offences will now be evaluated by the Judicial Conduct Committee, Irish judges understand that representatives of the people retain the power to remove them from office on the grounds of 'stated misbehaviour.' More than standardisation of judicial misconduct, the dissimilarity in the arrangement of authority over judicial discipline helps to make sense of the different performance of Ireland's and Italy's systems of judicial discipline with regard to levels of public confidence.

Furthermore, the fact that the Irish Legislative body exerts the power of judicial removal further confronts the Italian scholars with a 'theoretical' difficulty: perceived judicial independence happens to be higher in a constitutional framework where the Parliament has direct influence over judicial discipline, rather than in Italy's system of stronger 'self-governance.' Clearly, the two constitutional arrangements trace back to different understandings of the separation of power. Whereas the Italian framework more closely nears the 'pure theory,'[82] Ireland's constitutional arrangement is reminiscent of the nuanced, check-and-balances model in which the several branches are conceived in a mutually balancing relation.[83] In redesigning the Italian judiciary, therefore, it should not be overlooked that judicial independence not only coexists with but actually thrives in systems where the legislative branch has a 'significant' supervisory function over the judiciary.

This does not entail, to be sure, that the Italian Constitution should be amended to empower the Parliament with direct powers over judicial discipline, as it is in Ireland. Reforms could take 'subtler' forms that are more consistent with Italy's 'more rigid conception of the separation of power':[84] for example, it could be required that the Disciplinary Committee of the Superior Council of the Magistracy be composed by a majority of lay members, or that a parliamentary supermajority could pass a vote of no confidence forcing the renewal of the Committee, or of the Council itself. While these are only examples, it is important to bear in mind that taking stock of Ireland's experience does not mean replicating it wholesale, but rather developing its insights and results in a way that is consistent with Italy's constitutional milieu.

[78] See Cahillane (n 10) 79–82.
[79] See generally Di Federico (n 10) 380–84.
[80] Norme sulla Costituzione e sul funzionamento del Consiglio superiore della Magistratura (Italy 1958) art 4.
[81] ibid art 17.3.
[82] Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (OUP Oxford 2009) 18–19.
[83] Tanya Ward, 'Independence, Accountability and the Irish Judiciary' (2008) 1 Judicial Studies Institute Journal 1, 5.
[84] Vittoria Barsotti and others, *Italian Constitutional Justice in Global Context* (Oxford University Press 2016) 16.

At the same time, Ireland's superior ability in allocating authority over judicial discipline does not seem to be a 'gift' of the past, but an enduring quality. One of most evident flaws in Italy's system of judicial discipline, in fact, is the pre-disciplinary process.[85] Here, the General Prosecutor at the Court of Cassation can dismiss any complaints and, if the Minister of Justice does not oppose the decision, the grounds on which the preliminary dismissal occur will never be known either by the complainant or the concerned judge. As it happens, the Minister of Justice almost never opposes the decision. The absence of a complaints procedure and the secrecy of the pre-disciplinary phase as a whole are widely regarded as the most prominent deficiency in the Italian system of judicial discipline.[86]

By contrast, Ireland's Judicial Council Act sets up a convincing and rights-enhancing pre-disciplinary phase. Any individual can lodge a complaint of judicial misconduct before the Judicial Conduct Committee.[87] The Registrar, a bureaucratic official, is then expected to sift through admissible complaints and reject those that, even if substantiated, would never amount to judicial misconduct,[88] or that appear 'frivolous or vexatious.'[89] However, complainants can seek review of the Registrar's determination that a complaint is inadmissible by sending a request to the Complaints Review Committee.[90] And even if the complaint is ultimately rejected, the Registrar is expected to give the complainant and the concerned judge the 'reasons' for the inadmissibility decision.[91] Nothing of the sort takes place in Italy's current framework.

While Ireland's choices in the allocation of authority over judicial discipline seem to have fared significantly better than Italy's, there are parts of the Irish framework that strikes the comparative eye as possible loopholes. For example, the role of the Public Appointments Service in filtering candidates for the role of lay members of the Judicial Conduct Committee remains puzzling. Although the Judicial Council Act specifies the kinds of expertise a lay member should retain,[92] and the Government retains the final choice, it is unclear whether the administrative body affords democratic control and transparency.[93] In Italy, by contrast, lay members are informally probed by the political parties themselves, although candidates must be either full law professor, or lawyers that have been members of the bar for at least 15 years.[94] While certainly neither the Legislative nor the Executive can be trusted with infallibility, it is unclear why an administrative body should interpose in the selection process, even if for the sake of 'depoliticizing' the appointments. The Italian model, in this respect, appears more coherent with parliamentary democracy.

[85] Rosario Russo, 'Il procedimento disciplinare nei confronti dei magistrati ordinari: archivio perché...archivio!' (2020) Giustizia Insieme; Rosario Russo, 'Giustizia è sfatta. Appunti per un accorato necrologio' (2020) Judicium 18.
[86] Russo, 'Il procedimento disciplinare nei confronti dei magistrati ordinari' (n 85); Russo, 'Giustizia è sfatta Appunti per un accorato necrologio' (n 85); Cavallini (n 72) 203.
[87] Judicial Council Act art 50.1-2.
[88] ibid art 53.2.b.
[89] ibid art 53.2.d.
[90] ibid art 56.1.
[91] ibid art 56.6.
[92] ibid art 65.3.
[93] See Paula Clancy, 'Beholden to No-One: Public Bodies, Patronage and Probity' (2009) 98 Studies: An Irish Quarterly Review 19, 21.
[94] Costituzione della Repubblica italiana (Italy 1947) art 104.4.

In conclusion, if an explanation for the different levels of judicial misconduct in Italy and Ireland cannot be grounded on the standardisation of judicial misconduct, it is possible to argue that the allocation of authority over judicial discipline and the procedures surrounding its proceedings play a far more decisive role in contrasting judicial misconduct than the mere listing of types of judicial misbehaviour. In other words, more than in the *what*, differences in the *who* and *how* of judicial discipline can be held to account for Ireland's positive results and Italy's shortcomings.

As a final note, it should also be mentioned that not only can standardisation be an ineffective strategy, but it can arguably be a detrimental policy choice. Social psychologists claim that 'people are sometimes motivated to perceive an illusion of improvement to enhance their current well-being or self-worth.'[95] Perhaps the same can be said about policymakers and systems of judicial discipline. To the extent that legislatures continue to believe that by stacking up new disciplinary offences they are doing something positive to improve judicial discipline, standardisation may cause an 'illusion of improvement' and put a damper on truly reforming processes, like those pertaining to the allocation of authority and the procedures surrounding judicial discipline.

Concluding Remarks

The persistent state of dissatisfaction with judicial discipline in Italy tells a story that sounds familiar to the Irish experience, albeit in reverse: that the standardisation of recurrent types of judicial misbehaviour is not necessarily associated with lowering levels of judicial misconduct, other things being equal. Ireland had already low levels of judicial misbehaviour before the 2019 Judicial Council Act – in the face of one sole, vague constitutional provision about 'stated misbehaviour.'[96] In Italy, by contrast, judicial discipline continues to raise problems despite the strong standardisation of 2006. But if standardisation is not the decisive factor in contrasting misconduct, this means that the authority concretely charged with administering and adjudicating judicial discipline plays a comparatively more important role. The claim, it bears emphasising, should not be intended as a blanket refutation of the value of standardisation in judicial discipline. While it is possible to think that 'scrupulous' attention to the drafting of several types of misconduct engenders an 'illusion of improvement,' stifling otherwise effective reforms, standardisation may still be conducive to other well-known values of any system of judicial discipline, such as fostering foreseeability of punishment and constraining the discretion of the disciplinary authority. However, when it comes to reducing the overall level of judicial misconduct, a comparison between the Italian and Irish experiences suggests that all things considered, the norms on the proceedings and composition of the authority that disciplines the judges are far more important than the standardisation of judicial misconduct. At least in judicial discipline, in other words, the *who* seems to trump the *what*.

Accordingly, policymakers should be careful not to miss the forest for the tree. In Italy, this means going beyond the 2006 reform and its concentration on standardisation – 'typification' (*tipizzazione*) in Italian[97] – and shifting the normative focus toward the substantive and procedural rules governing the Superior Council of the Magistracy. By sanctioning the

[95] Anne Wilson and Michael Ross, 'Illusions of Change or Stability' in Rüdiger Pohl (ed), *Cognitive Illusions: A Handbook on Fallacies and Biases in Thinking, Judgement and Memory* (Psychology Press 2004) 391.
[96] Constitution of Ireland art 35.4.1°.
[97] Amato (n 34) 19.

incompatibility between members of the Disciplinary Committee and other sections of the Council, the Italian government's recent legislative draft falls within this sounder approach,[98] as well as longstanding scholarly proposals of a 'High Court' disciplining all types of judges,[99] and requests for an adequate complaints procedure.[100] In respect to the latter issue, Ireland's Judicial Council Act provides a promising and well-rounded framework for addressing complaints of judicial misconduct that could be considered for transplantation in Italy.

For Ireland, adopting the authority-trumps-standardisation point of view means, for example, paying attention to the selection process concerning the lay members of the Judicial Conduct Committee. Even though there is no significant evidence in the literature that the Public Appointments Service has ever proved partial or politically orientated,[101] from a comparative point of view it is not clear that its 'filtering' role grants complete transparency and democratic accountability in the pivotal moment of selecting the candidates for lay members. Perhaps, a separate, specific procedure should be considered. In this respect, the Italian Constitution's system of qualified lay members directly appointed by the Parliament appears to better preserve judicial independence and the separation of powers.

[98] 'Il Cdm approva riforma Csm e ordinamento giudiziario' (*gNews Giustizia news online - Quotidiano del Ministero della giustizia*, 11 February 2022) <https://www.gnewsonline.it/il-cdm-approva-riforma-csm-e-ordinamento-giudiziario/> accessed 25 February 2022.

[99] Commissione per elaborare proposte di interventi per la riforma dell'ordinamento giudiziario, 'Relazione Finale' (31 May 2021) 16; Marco Sepe, 'Il giudice tra diritto ed economia: empatia o entropia?' [2018] Analisi Giuridica dell'Economia 287, 296; Nicolò Zanon, '"Sei gradi di separazione." Ovvero come assicurare la terzietà della sezione disciplinare del consiglio superiore della magistratura' (2012) Rivista AIC 14, 3–4; Edmondo Bruti Liberati, 'CSM e ordinamento giudiziario. Quali riforme?' (2021) Pol dir 665, 666–68; Giovanni Serges, 'Un ragionevole punto di partenza per recuperare il ruolo costituzionale del CSM' [2021] Politica del diritto 691, 701; Antonio D'Aloia, 'I Consigli di autogoverno delle magistrature speciali. Bilancio di un'esperienza e problemi (ancora) aperti' [2021] RTSA 1, 20.

[100] Cavallini (n 72) 193–94, 203; Russo, 'Il procedimento disciplinare nei confronti dei magistrati ordinari' (n 85); Russo, 'Giustizia è sfatta Appunti per un accorato necrologio' (n 85).

[101] See Michael JS Moran, 'Impartiality in Judicial Appointments: An Absent Concept' (2007) 10 Trinity CL Rev 5, 19; and Carolan (n 82) 177.