

## JUDICIAL APPOINTMENTS IN IRELAND IN COMPARATIVE PERSPECTIVE

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### INTRODUCTION

In 1874, Irish parliamentarian Isaac Butt said in the House of Commons that “it would be for the advantage of the administration of justice if the Irish judges were appointed to the same extent as they are in England, upon the recommendation of the Lord Chancellor and without reference to official or political claims”.<sup>1</sup>

While Butt failed to acknowledge that judicial appointments in England and Wales were, to some extent, also subject to “political claim”, he was correct in his concern with such influence in Ireland, particularly in the proliferation of *puisne* judgeships conferred in the mid-nineteenth century. Concern about political claim is, however, only one of a number of issues in relation to judicial appointment that goes to the heart of the need for an impartial and independent judiciary. Yet, since the early days of the creation of an independent Ireland – when attention turned to the creation of a new judiciary – there has been little research on judicial appointments in Ireland.<sup>2</sup> Exceptionally, Bartholomew’s research on the Irish judiciary in 1969 found that the Irish judge was white, male, upper middle-class, urban, a

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<sup>1</sup> 220 H.C. Deb., 3s., 25 June, 1874, col. 430.

<sup>2</sup> For accounts of the judicial systems and judges in pre-Independence Ireland, see, for example, Newark, “Notes on Irish Legal History” (1947) 7 N.I.L.Q. 21; Osborough, “The Irish Legal System, 1796-1877” in Costello, *The Four Courts: 200 Years* (Dublin: Incorporated Council of Law Reporting for Ireland, 1996) p. 33; Elrington Ball, *The Judges in Ireland, 1221-1921*, vol. 1 and 2 (Dublin: Round Hall Press, 1993).

barrister, with a background in politics, and a largely conservative approach.<sup>3</sup> Equivalent research in 2004, though only of superior courts judges, found a not radically different picture.<sup>4</sup> Significant differences in the 2004 study were that there were 13.5% of female judges, as against 0% in 1969. There was a drop of almost 30% in those coming from a background with lawyers in the family, though still high at 40%. There was an increase of almost 3% in those with a background as a solicitor, as against 0% in 1969. And 62% of respondents in 2004 reported no political affiliation at the time of their appointment, as against 12% in 1969.

Within the last 15 years, concern about aspects of this homogeneity, and remaining political influence in the appointments system, received increased attention. In 1994, controversy over one high-profile judicial appointment gave rise to reform of part of the process of judicial appointments. In 1999, the All-Party Oireachtas Committee on the Constitution investigated and reported on judicial appointments through the creation of a Judicial Appointments Advisory Board. It concluded that there was no need for further reform.<sup>5</sup> Nonetheless, concerns about the process of appointment continue to be raised within media,<sup>6</sup> academic<sup>7</sup> and non-governmental<sup>8</sup> sectors. Similar concerns about the independence of the process, and also, about

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<sup>3</sup> Bartholomew, *The Irish Judiciary* (Dublin: Institute of Public Administration, 1971).

<sup>4</sup> Carroll, "You be the Judge: Part I – A Study of the Backgrounds of Superior Judges in Ireland in 2004", (2005) 10 *Bar Review* 153.

<sup>5</sup> The All-Party Oireachtas Committee on the Constitution, *Fourth Progress Report: The Courts and the Judiciary*, (Dublin: Stationery Office, 1999).

<sup>6</sup> Browne, "Time to scrutinize judicial appointments", *Sunday Business Post*, 25 July 2004.

<sup>7</sup> Bacik, Costello and Drew, *Gender InJustice* (Dublin : Trinity College Dublin Law School, 2003); Morgan, "Selection of Superior Judges", (2004) 22 *I.L.T.* 42; Byrne and McCutcheon, *The Irish Legal System* (4th ed.) (Dublin: Butterworths, 2001); Carroll, "You be the Judge: Part I – A Study of the Backgrounds of Superior Judges in Ireland in 2004" (2005) 10 *Bar Review* 153; Carroll, "You be the Judge: Part II – The Politics and Processes of Judicial Appointments in Ireland" (2005) 10 *Bar Review* 182.

<sup>8</sup> Irish Council for Civil Liberties, *Justice Matters: Independence, Accountability and the Irish Judiciary* (Dublin: Irish Council for Civil Liberties, 2007) (hereafter "Irish Council for Civil Liberties").

equality, fair representation and diversity in the judiciary – principally in relation to under-representation on the grounds of gender, ethnicity and disability – have led to reforms in other countries;<sup>9</sup> which provides a basis for measured comparison of the current position on judicial appointments in Ireland.

### I. JUDICIAL APPOINTMENTS: IRELAND

The Government of Ireland Act, 1920 established a Supreme court for Ireland. It also created a High Court of Appeal for Ireland to hear appeals from both Southern Ireland and Northern Ireland, which was abolished upon the creation of the Irish Free State in 1922. However, there existed in Ireland between 1920 and June 1924 a parallel system of courts, the Dáil Courts, established by the parliament, Dáil Éireann.<sup>10</sup> The present system of courts was created in 1924.<sup>11</sup> The superior courts became the High Court and the Supreme Court, which after 1933 became the highest appellate court following the abolition of appeals to the Privy Council at Westminster. The former county courts and quarter sessions courts were merged in a unified court called the “Circuit Court of Justice”. The lowest court is the District Court, from which appeals can be made to the Circuit Court. Appeals from the Circuit Court can be made on civil and family matters to the High Court, or on appeal from indictment to the Court of Criminal Appeal. A Special Criminal Court tries offences where it is determined that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. In addition, the Criminal Division of the High Court (“The Central Criminal Court”) tries serious crime, including murder and rape.

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<sup>9</sup> Malleon and Russell (eds.), *Appointing Judges in an Age of Judicial Power* (Toronto: Toronto University Press, 2006); Levy, “Judicial Selections Reform in Comparative Context”, (2007) 40 *University of British Columbia Law Review* 591.

<sup>10</sup> Kotsonouris, *Retreat from Revolution: The Dáil Courts, 1920-24* (Dublin: Irish Academic Press, 1994).

<sup>11</sup> The Courts of Justice Act, 1924.

Prior to 1995, all appointments to the courts were made upon recommendation by the Government to the President – as provided for in the Constitution.

#### A. Constitution

The Constitution of Ireland sets out a tripartite separation of powers: legislative, executive and judicial, held by the courts to be fundamental.<sup>12</sup> The Constitution makes clear that the powers of the legislature, executive and judiciary “derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of common good.”<sup>13</sup> Article 35.1°i of the Irish Constitution provides that: “[t]he judges of the Supreme Court, the High Court and all other courts established in pursuance of Article 34°i hereof shall be appointed by the President”. Article 13.9°i provides that the President’s powers “shall be exercisable and performable only on the advice of the Government”. In effect, it is the Government which selects the judges.

Controversy arose in 1994 over the Taoiseach’s appointment of the Attorney General to the vacant post of President of the High Court despite a political controversy over the delay by the Attorney General’s office in bringing proceedings against a priest accused of sexual offences. This controversy gave rise to legislative reform of part of the process for judicial appointment, by way of the creation of a Judicial Appointments Advisory Board.<sup>14</sup> Despite well-researched data on low-representation of women in judicial office in Ireland,<sup>15</sup> no apparent programmatic action has been taken in response by the Government, legal profession or judiciary.

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<sup>12</sup> “The doctrine of the separation of powers under the Constitution has been identified by this Court as being both fundamental and far-reaching, and has been set out in various decisions of this Court in very considerable detail” (*Attorney General v. Hamilton* [1993] I.L.R.M. 81, at 96, per Finlay C.J.).

<sup>13</sup> Constitution of Ireland 1937, Article 6.1°i.

<sup>14</sup> Courts and Court Officers Act, 1995.

<sup>15</sup> Bacik, Costello and Drew, *Gender InJustice* (above).

*B. Judicial Appointments Advisory Board*

The Board commenced operation in 1996. Its functions are to identify persons and inform the Government of the suitability of those persons for appointment to specified judicial office.<sup>16</sup> The Board may adopt such procedures as it thinks fit to carry out its functions.<sup>17</sup> It may also: (a) advertise for applications for judicial appointment, (b) require applicants to complete application forms, (c) consult persons concerning the suitability of applicants to the Board, (d) invite persons, identified by the Board, to submit their names for consideration by the Board, (e) arrange for the interviewing of applicants who wish to be considered by the Board for appointment to judicial office, and (f) do such other things as the Board considers necessary to enable it to discharge its functions under this Act.<sup>18</sup>

As acknowledged by the Oireachtas Committee on the courts and the judiciary: “[t]his recent procedure supersedes the rather informal process pursued by successive governments who were seen to appoint, almost invariably, their own supporters to judicial office”.<sup>19</sup> Oddly, the Committee stated: “[t]he short-listing procedure in Ireland compares favourably with those in other common law countries because the opportunity has been taken to combine the best features of those systems”.<sup>20</sup> As will be shown shortly, the procedure in Ireland is deficient when compared to reforms of the procedures for judicial appointments elsewhere.

By 2008, there were 143 judges in Ireland; of whom 22.38% were women. In 1993, women comprised 13% of the judiciary. In general, there has been a consistent year-on-year increase in female representation, as can be seen in Figure 1, below. There has been relatively less change year-on-year on the High Court. In fact, in 1993, women comprised 18% on that court. By 2008, that proportion had dropped to 13.5%. In the

<sup>16</sup> Courts and Court Officers Act, 1995, s. 13(1). The Board’s first annual report was produced in 2002, pursuant to the Courts and Courts Officers Act, 2002, s. 11.

<sup>17</sup> Courts and Court Officers Act, 1995, s. 14(1).

<sup>18</sup> Courts and Court Officers Act, 1995, s. 14(2).

<sup>19</sup> *Fourth Progress Report: The Courts and the Judiciary*, at 7.

<sup>20</sup> *Fourth Progress Report: The Courts and the Judiciary*, at 7.

absence of comprehensive longitudinal data on the pool of eligible candidates, it is not possible to determine decisively whether these trends reflect under-representation of women in terms of the eligible pool. Nonetheless, it is clear that the proportion of women in judicial office in Ireland is low compared to their status in other occupational sectors, and much lower than their proportion in society as a whole.

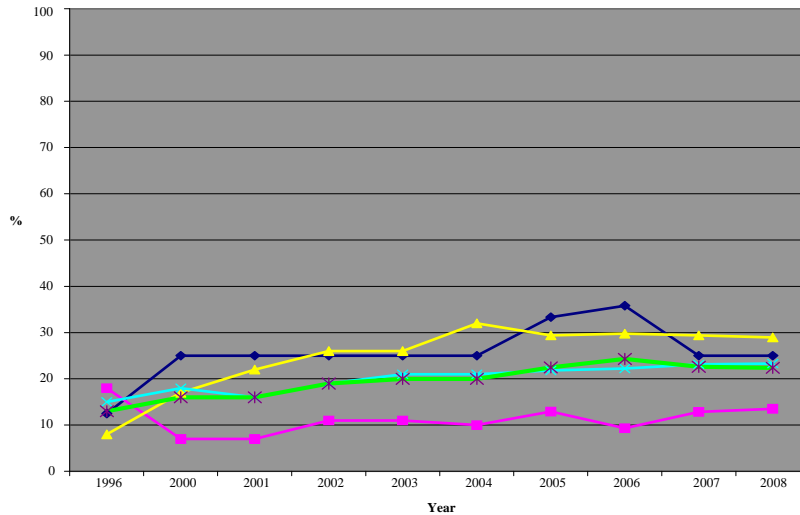


Figure 1. Female representation in judicial office in Ireland, 1996 – 2008

While there remains low representation of women in the judiciary, such low representation is not unique in the workforce. Despite substantial increase in labour force participation by women generally, female participation rates remain below the average for OECD countries for all except the under-thirties.<sup>21</sup>

The low-representation of women in the judiciary and the marked lack of government (or judicial) debate about such low-representation is in marked contrast to the position taken by the government on gender equality elsewhere.<sup>22</sup> Research is needed on the progression of women (and other minority groups) from

<sup>21</sup> OECD Economic Surveys, *Ireland* (Paris: OECD, 2006).

<sup>22</sup> e.g., Department of Equality, Justice and Law Reform, *National Women's Strategy 2007-2017* (Dublin : Stationery Office, 2007).

the point of entry to law degrees through to judicial appointments, including examination of the reasons for exit at key stages such as in law school, before or during professional training, and in practice. There is no evidence within any of the annual reports of the *Judicial Appointments Advisory Board* (beyond monitoring applications on the basis of gender, experience in years and professional background) that it is concerned explicitly with issues of diversity or fair representation, in contrast to the approach of most judicial appointments bodies elsewhere. There are a number of other problems with the Board. Primarily, these reflect the statutory functions and powers of the Board rather than the operation. On occasion, the Board does not appear to go as far as it might in addressing a range of matters, which might be due to limited funding.

### *C. Problems with the Board*

#### *1. Composition of the Board*

The Board consists of seven members who are judges and practising lawyers, plus not more than three lay members.<sup>23</sup> The “legal” members comprise: the Chief Justice of the Supreme Court (who is the chairperson of the Board); the President of the High Court; the President of the Circuit Court; the President of the District Court; the Attorney General; a practising barrister nominated by the Chair of the Council of the Bar of Ireland; and a practising solicitor nominated by the President of the Law Society of Ireland. The “lay” members are appointed by the Minister for Justice, Equality and Law Reform, and must be engaged in, or have appropriate knowledge or appropriate experience of commerce, finance, administration, or have appropriate experience as consumers of the services provided by the courts.

Thus, there is a preponderance of judges and legal professionals over lay representation. This may make difficult the exercise of lay views as against judicial and legal professional views.

The Board has regularly comprised ten members. Of the current ten members only two are women, representing 20% of

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<sup>23</sup> Courts and Court Officers Act, 1995, s. 13(2).

the total. All Board members are white. This racial and gender representation is low. It is inconsistent with government commitments to, at least, larger gender representation on Boards generally.<sup>24</sup> On the Judicial Appointments Commission in England and Wales, women comprise seven out of 15 members, equalling 46.67% of the total, with members from a minority ethnic background constituting two out of 15 members (representing 13.3% of the total). Of course, it might be argued that the low representation of women and minority ethnic members on the Judicial Appointments Advisory Board is due to the fact that seven of the positions are fixed to established posts, such as that of the Chief Justice or the Presidents of the High Court, Circuit Court and District Court, and that the occupation of such posts by men reflects the legacy of a time when few women entered the legal profession and the judiciary. This may be so, but such low representation might then be better addressed by reform of the Board to address such low representation through extension of the number of lay posts. The narrow representation of gender and ethnicity on the Board is problematic in so far as Board homogeneity may militate against recognition of the importance of diversity in the process of appointments. This is compounded by the predominance of legal and judicial representation. Given the risk that lay members may defer to senior legal and judicial members, some commissions have either equal representation of lay and legal/judicial members (as in Scotland) or a majority of lay members (as in Ontario). A further option, as in England and Wales, is to appoint a lay chair.<sup>25</sup>

## *2. Composition of the Board*

The Board is limited in exercise of its functions to a specific range of judicial offices. These are ordinary judges of the Supreme Court; High Court; Circuit Court; and District Court. Thus, the following judicial appointments are not made by the

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<sup>24</sup> Statement by former Minister for Justice, Equality and Law Reform, Willie O'Dea, upon taking office in 2002, to the effect that he would legislate for a 40% gender balance if there was no improvement in womens' presence on state boards.

<sup>25</sup> See Malleson, "The New Judicial Appointments Commission in England and Wales" in Malleson and Russell (eds.), *Appointing Judges*, p. 39.



Board: Chief Justice; President of the High Court, Circuit Court or District Court, and any promotion from a lower court. As Ward notes in a report on behalf of the Irish Council for Civil Liberties: “[o]verall, this means that there are a significant number of persons elevated where an independent body has no role in advising the Government”.<sup>26</sup> This becomes especially problematic where there is an increase in promotions between the Circuit Court and High Court, particularly given the risk of canvassing or lobbying for promotion and the attendant potential to politicise the judiciary.<sup>27</sup>

### 3. *Criteria for appointment*

The eligibility for appointment to judicial office is limited to barristers and solicitors who have standing for a specified period. The limitation on practising barristers and solicitors excludes academics who no longer practice or who have not practised continuously for the requisite period, but who are otherwise suitable for appointment to judicial office. If such an approach had been used in England and Wales, it would have excluded Baroness Hale in the House of Lords, or Jack Beatson, former Rouse Ball Professor of English Law at the University of Cambridge, believed to be the first academic lawyer appointed directly from an English Law Faculty on to the High Court Bench.

Section 16 of the Act provides that the Board must not recommend a person unless, in the Board’s opinion, the person, *inter alia*: “(b) is suitable on the grounds of character and temperament” and “(c) is otherwise suitable”.<sup>28</sup> There are a number of problems with this language. The words “character”, “temperament” and “otherwise suitable” are vague. As Kamlesh Bahl, Chairwoman of the former Equal Opportunities Commission in England and Wales pointed out: “[g]iven the

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<sup>26</sup> Irish Council for Civil Liberties, *op.cit.*, p. 52.

<sup>27</sup> Carroll, “You be the Judge – Part I”. See also Collins, “There is still no separation of party politics and the judiciary”, *Sunday Tribune*, 15 August 2004, 13.

<sup>28</sup> A candidate must also have displayed in his/her practice a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned, and comply with the requirements of s. 19 of the Act.

predominance of men in the senior ranks of the judiciary, the bar and the solicitor's profession, there is an increased risk of stereotypical assumptions being made with regard to "female" as opposed to 'male' qualities and aptitudes".<sup>29</sup> Bahl referred to the risk with criteria such as "decisiveness" and "authority" that "[w]henver there is subjective judgment, sex bias can easily occur".<sup>30</sup>

The historical lack of transparency in appointments to judicial office in England and Wales, associated with the system of "secret soundings", contributed to what was termed a "cloning" tendency in judicial selection.<sup>31</sup> This risk is particularly strong in roles, such as judging, where the concept of the judge is associated with men and masculine attributes.<sup>32</sup> The risk associated with vague criteria that might admit gender bias is one of the reasons for judicial appointments bodies elsewhere specifying criteria that are more explicitly tied to the functions of the judge. In Scotland, the Judicial Appointments Board sets out 17 precise criteria for judicial appointment which aim to preclude bias. These include: "ability to marshal facts and competing arguments and reason logically to a correct and balanced conclusion" and "ability to communicate with all types of court user, including lay people, giving instructions, explaining complex issues and giving decisions clearly, concisely and promptly, either orally or in writing".<sup>33</sup>

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<sup>29</sup> "Judicial Appointments Procedures", Evidence to the Home Affairs Committee in *Minutes of Evidence and Appendices*, Third Report of Session 1995-96, HC 52-II, vol II, at 211.

<sup>30</sup> "Judicial Appointments Procedures", at 211. See, also, concerns in Ireland – Bacik, Costello and Drew, *Gender InJustice* (above).

<sup>31</sup> Kennedy, *Eve was Framed: Women and British Justice* (London: Chatto & Windus, 1992). See also *Her Majesty's Commissioners for Judicial Appointments: Response to DCA Consultation Paper "Increasing Diversity in the Judiciary"* (London: Commission for Judicial Appointments, 2005), and interview with Janet Tweedale, Department for Constitutional Affairs, London, 1st February 2005, regarding the informal system in England and Wales in which it was stated that there was some anecdotal evidence that judges did not appoint those "not like us".

<sup>32</sup> Rackley, "Representation of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor", (2002) 22 *Legal Studies* 602.

<sup>33</sup> The Judicial Appointments Board for Scotland, *Annual Report 2002 – 2003* (Edinburgh: Scottish Executive, 2003) pp. 8-9.

The process adopted in Ireland appears not to follow best practice in jurisdictions elsewhere which also face challenges in social and cultural diversity. In those jurisdictions applicants for judicial office must also show an understanding of the social issues of the day and an appreciation for the cultural diversity of their society.<sup>34</sup>

#### *4. Procedure for application*

Under section 16(2) of the 1995 Act, the Board's recommendation functions are initiated upon request by the Minister where there is a vacancy or forthcoming vacancy in judicial office. In addition, the Board publishes annually advertisements inviting persons who wish to be considered for appointment to any judicial vacancies that may arise to submit their names to the Board. The Board also publishes advertisements from time to time inviting applicants in respect of specific vacancies which have or are about to arise. A person who wishes to be considered for appointment to judicial office is required to so inform the Board in writing, and to provide the Board with such information as it may require to enable it to consider the suitability of that person for judicial office, including information relating to education, professional qualifications, experience and character.<sup>35</sup> The Board requires such persons to provide an application form which requires details of their practice, professional qualifications, education, character, etc. The Board has appointed a sub-committee to consider and advise on the large number of applications to the Circuit and District Courts.

There are also a number of problems with the procedure for application.<sup>36</sup> Applicants must state "why they consider themselves suitable",<sup>37</sup> which privileges those "in the know" and may disadvantage women, who tend to have lower confidence

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<sup>34</sup> *e.g.* Ontario, Canada.

<sup>35</sup> Courts and Courts Officers Act, 1995, s. 16(1).

<sup>36</sup> The Board received a report in October 2005 on aspects of the selection process from a consultancy firm with whom it had contracted. No mention is made in subsequent reports of any action being taken in respect of the report.

<sup>37</sup> Judicial Appointments Advisory Board, *Annual Report 2002* (Dublin: Judicial Appointments Advisory Board, 2002), at 6.

levels than men in applying for judicial posts, tend to be excluded from the informal flows of information in the profession,<sup>38</sup> and tend not to use the same fulsome self-promoting language as men.<sup>39</sup> The time allowed for applications is very short, on occasion two weeks.<sup>40</sup>

The Board has not to date arranged to exercise its power to interview any candidate. This contrasts with the approach adopted by many judicial appointments bodies elsewhere, who have also introduced a further range of mechanisms, such as simulated competency exercises, to test the suitability of applicants. Unsuccessful applicants receive no feedback on why they have been unsuccessful, again in the contrast to the approach increasingly favoured by judicial appointments bodies elsewhere.

The Board is limited to nominating seven candidates, if numbers are sufficient. It is not required to rank the candidates, and has rejected the possibility that it would do so on the basis that it “is conscious ... of the difficulties which might result from such a change, not least the question as to whether it would place unjustifiable constraints on the exercise by the Government of a function which is exclusively assigned to it under the Constitution”,<sup>41</sup> which reasoning has rightly been criticised as unpersuasive.<sup>42</sup> Moreover, the Government is not obliged to select from the list.<sup>43</sup> The Courts and Courts Officers Act, 1995, s. 16(6) provides only that the Government shall firstly consider the names on the list. Section 16(8) of the Act requires the Government to publish notice of an appointment in *Iris Oifigiúil*, and, if applicable, a statement that the named appointee was recommended by the Board. The Oireachtas Committee on the courts and the judiciary concluded that the effect of this section was that “the government is encouraged to choose only persons

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<sup>38</sup> Bacik, Costello and Drew, *Gender InJustice* (above).

<sup>39</sup> Feenan, *Applications by Women for Silk and Judicial Office in Northern Ireland* (Belfast: Commissioner for Judicial Appointments for Northern Ireland, 2005).

<sup>40</sup> Judicial Appointments Advisory Board, *Annual Report 2006* (Dublin: Judicial Appointments Advisory Board, 2006), at 14.

<sup>41</sup> Judicial Appointments Advisory Board, *Annual Report 2002*, at 23.

<sup>42</sup> Morgan, “Selection of Superior Judges” (above).

<sup>43</sup> The Government did not seek the advice of the JAAB when appointing the Hon. Mr Justice Sean Ryan to the High Court in 2003.

recommended by the Board”.<sup>44</sup> It has been suggested that the list should be reduced.<sup>45</sup>

#### *D. Beyond the Judicial Appointments Advisory Board*

Beyond the Judicial Appointments Advisory Board, there is a lack of transparency in the Government’s selection of candidates; both in relation to the Board’s recommendations and in relation to those posts over which the Board has no role. The Government does not publish criteria on the process of selection, nor does it publish reports on its deliberations.<sup>46</sup> What is known of the process is limited. Prior to the introduction of the Board, David Gwynn Morgan stated of the process of appointment:

The selection will often be the outcome of deliberation at a government meeting (as the first item on the agenda). Sometimes this will involve debate if different Ministers champion different candidates (as happens more often for appointments to the lower courts in the hierarchy). Consultation with judges or senior practitioners, as to the merits of the candidates, by way of the Attorney General, sometimes occurs. In any case, the Attorney General will be present at the meeting and the views of a strong Attorney General will be listened to.<sup>47</sup>

Where there is a coalition government, it seems that the Taoiseach consults with the other party leader(s),<sup>48</sup> though it has been noted that “[i]f the Taoiseach ... has a favourite, that man will make the appointment”.<sup>49</sup> Notwithstanding the introduction of the Judicial Appointments Advisory Board, much concern remains that those appointed to judicial office have had connections with the political party or parties whose members

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<sup>44</sup> Oireachtas Committee, p. 7.

<sup>45</sup> Morgan, “Selection of Superior Judges” (above); Carroll, “You be the Judge – Part II” (above), and Irish Council for Civil Liberties (*op.cit.*).

<sup>46</sup> Irish Council for Civil Liberties

<sup>47</sup> Morgan, *The Separation of Powers in the Constitution*, p. 202.

<sup>48</sup> Coakley and Gallagher (eds.), *Politics in the Republic of Ireland*, 4th ed. (London: Routledge, 2005).

<sup>49</sup> Bartholemew, *The Irish Judiciary*, p. 122.

form the Government, which is responsible, in part, for appointments.<sup>50</sup> It is also clear that the Minister for Justice, Equality and Law Reform receives representations from members of the Oireachtas in respect of judicial appointments, and that a number of persons on behalf of whom such representations are made are subsequently appointed to judicial office.<sup>51</sup>

There is no independent audit of the Government process (or, indeed, that of the Judicial Appointments Advisory Board), in contrast to the recent approach elsewhere – such as in Northern Ireland with the former Commissioner for Judicial Appointments for Northern Ireland and his replacement, the Northern Ireland Judicial Appointments Ombudsman.<sup>52</sup> The Ombudsman is empowered to investigate complaints from applicants for judicial appointments where maladministration or unfairness is alleged to have occurred in the process by the Northern Ireland Judicial Appointments Commission, the Northern Ireland Courts Service, or the Lord Chancellor. In the Republic of Ireland, the only legal sanction against the Government or Judicial Appointments Advisory Board would appear to be judicial review.

The reforms elsewhere in terms of transparency and accountability have been introduced primarily in response to under-representation on the grounds of gender and ethnicity. But the need for transparency and accountability also has relevance where politics may affect the process of judicial appointment. Two key dangers arise where the executive is involved in the process of appointment. First, there is the risk to the separation of powers between the judiciary and executive which lies at the heart of any democracy. Secondly, there is a risk that judicial independence may be undermined if either the executive is able to appoint judges whom it believes will pursue a political approach and/or where judges believe that such political appointment permits them to do so. In relation to the first risk, it is not disputed that in a constitutional democracy there needs to be some process by which the judiciary are ultimately held accountable to the people. Indeed, this is reflected in the Irish

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<sup>50</sup> Byrne and McCutcheon, *The Irish Legal System*.

<sup>51</sup> 523 *Dáil Debates* 1186-1187.

<sup>52</sup> Established by the Constitutional Reform Act, 1995, and commenced on 25th September 2006.

Constitution. Nor is it argued that the executive may have some role in the process of appointment. But the system of checks and balances that constitutes a democracy characterised by separation of powers is less about impermeable boundaries than with the nature of the checks and balances.

The problem in Ireland appears to lie in an uncritical assessment by the executive of the relationship between the legitimate, and indeed constitutionally required, role of “the people” in appointments and a process that is more fully transparent, accountable and fair.

This is reflected in the too-easy dismissal by the Oireachtas Committee of the option for reform of the process of judicial appointments, when it states: “[t]he independence of the judiciary might suggest that the executive should have no discretion in the appointment of judges. But, since the judiciary is an organ of state, it must ultimately be held accountable to the people”.<sup>53</sup> The Committee goes on to quote the former Chief Justice, Finlay C.J., who stated in an interview:

At the end of the day somebody must be accountable for the standard and type of judiciary that is appointed. There is a significant amount to be said for making politicians accountable for the standard and type of judiciary that is appointed. They are the ones to whom the people in general can turn if bad judicial appointments are being made. If appointments are being made by some body of people who are relatively anonymous then there is no-one to turn to and blame.<sup>54</sup>

The Oireachtas Committee concluded:

The committee takes the view that our present system of appointing judges should be retained. It feels that the government has sufficient non-partisan advice from the Judicial Appointments Advisory Board and that it, as the executive of the elected representatives of the people should retain the final decision. It is significant that because the

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<sup>53</sup> Oireachtas Committee, at 7-8.

<sup>54</sup> Oireachtas Committee, at 8, citing Finlay C.J. interview in Sturgess and Chubb, *Judging the World* (London: Butterworths, 1988), pp. 413-414.

judicial candidates are already short-listed by the board strictly on merit, the government cannot be open to the criticism that it appoints *only* its own supporters rather than suitably qualified persons when it chooses from the list.<sup>55</sup>

There are a number of problems with these approaches. First, the use of the word “only” by the Oireachtas Committee admits reform only if the entire selection procedure were to be compromised by appointment of its supporters, rather than some of its supporters. Where the Government receives seven names from the Board, even where those names are selected on the basis of “merit”, the Government can still select from these names one of its own supporters. The Oireachtas Committee does not attend to this part of the process of selection. Secondly, the Committee does not address deficiencies in the Board process and in the non-Board process. Instead, it appears to counter-pose the status quo with what it sees as the only alternative – election of judges – by stating that “[i]n the United States where the election of some state judges is made by the people, the judges are made directly accountable to the people on completion of the term for which they are elected”.<sup>56</sup> This positing of one alternative only is then dismissed by the Committee, as follows:

The committee agrees with the view of the Constitution Review Group that an election would expressly politicise the appointments procedure. There is of course the further danger that it would interfere with the impartiality of judges. Given that their tenure is dependent on successive election by the electorate, judges could be persuaded to adopt popular stances on matters coming before the courts so as to guarantee re-election.<sup>57</sup>

Aside from this false dichotomy, the Committee does not seek to disentangle what may be some legitimate degree of participation by elected representations, such as one member from each party, subject to safeguards, in judicial appointments from

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<sup>55</sup> Oireachtas Committee, at 8.

<sup>56</sup> Oireachtas Committee, at 8.

<sup>57</sup> Oireachtas Committee, at 8.



the current process beyond the Board. The Committee goes on to conclude:

The selection and appointments procedures in Ireland are broadly comparable to those that obtain in other common law states. In those states the law provides for consultation, either formal or informal, with members of the judiciary and the legal profession. Moreover, in all those states it is the executive that appoints the judiciary although there is a deviance from this in the United States at federal level ...<sup>58</sup>

In its report, which also examined other aspects of the judiciary, namely security of tenure and other conditions, judicial conduct, removal of judges, public transparency and judicial ethics, the aspect of judicial appointments was the only one in respect of which no recommendations for reform were made. It is noteworthy that the briefing paper upon which the Committee appear to have based their knowledge of judicial appointments in other countries, made no reference to the key critical studies of the appointments procedures in most of the common law countries examined: the United Kingdom,<sup>59</sup> the USA,<sup>60</sup> Canada,<sup>61</sup> and Australia.<sup>62</sup>

The role of the executive in judicial appointments in Ireland would appear to violate the recommendations of the Council of Europe on the selection of judges, which state:

... where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint

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<sup>58</sup> Oireachtas Committee, at 8.

<sup>59</sup> e.g. Griffith, *The Politics of the Judiciary*, 5th ed. (London: Fontana, 1997); McGlynn, *The Woman Lawyer: Making the Difference* (London: Butterworths, 1998); Stevens, *The Judiciary in England and Wales* (London: Justice, 1992).

<sup>60</sup> e.g. Martin, "Men and Women on the Bench: Vive la Difference?" (1990) 73 *Judicature* 204.

<sup>61</sup> e.g. L'Heureux-Dubé, "Making a Difference: The Pursuit of a Compassionate Justice" (1997) 31 *University of British Columbia Law Review* 1.

<sup>62</sup> e.g. Berns and Baron, "Bloody Bones: A Legal Ghost Story and Entertainment in Two Voices – To Speak as A Judge" (1994) 2 *Australian Feminist Law Journal* 125.

judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above [*i.e.* merit, qualifications, integrity, ability and efficiency].<sup>63</sup>

The Council of Europe recommends that one such “guarantee” would be for “a special or independent and competent body to give the government advice which it follows in practice”.<sup>64</sup> The current procedure for appointment of judges in Ireland is neither transparent nor independent of the executive. Moreover, the processes cannot be said to “guarantee” against the influence of reasons other than those criteria legitimated in the Council of Europe recommendation. The proviso within the Recommendation, suggesting how such “independence” might be guaranteed, is hardly satisfied in Ireland where it is unclear that the advice of the Judicial Appointments Board is meaningfully followed “in practice”, and given that a number of judicial appointments are not subject to any such advice from an “independent and competent body”.

The second risk identified with the process of executive involvement in the process of judicial appointment – of facilitating potential political bias in the judiciary – is now worth further examination.

While there is no systematic research data on the effect of political appointment on judicial decisions in Ireland, evidence in the U.S.A. indicates that, at least on judicial appellate panels, the effect of political appointment correlates with judicial votes.<sup>65</sup> There is also some risk, given evidence that judges are more likely to be appointed on the basis of political allegiance where politicians are involved in the appointments process,<sup>66</sup> that such political condoning in the appointment will be seen by the

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<sup>63</sup> Council of Europe Committee of Ministers, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (1994), p. 2.

<sup>64</sup> Council of Europe Committee of Ministers, p. 2.

<sup>65</sup> *e.g.* Sunstein, Schkade and Ellmann, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Washington, D.C.: Brookings Institution Press, 2006).

<sup>66</sup> Madhuku, “Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in South Africa” (2002) 46 *Journal of African Law* 232.

appointee to justify particular political interpretations of the law. But even if it is difficult to prove conclusively, and to the extent necessary, that involvement of the executive in the process of appointments leads to correlative political bias, it cannot be denied that judging involves adjudicating on broad areas of policy where political values may come into play. This is particularly so in Ireland where judges of the High Court and Supreme Court exercise express power of judicial review under the Constitution of Ireland, but is similarly the case elsewhere with expanding powers of judicial review.<sup>67</sup>

There is some acknowledgement in Ireland that judges may express views in judgment that lie outside a strict application of the law. This was acknowledged obliquely by a former Chief Justice of the Supreme Court of Ireland, Tom Finlay, when he indicated that some of his former colleagues approved criticism of the executive or legislature that was not a “manifestly essential ingredient in a judgment or ruling”.<sup>68</sup> Moreover, that “judicial lawmaking” occurs, blurring the nominally strict separation of powers between the legislature, executive and judiciary, has also been acknowledged another former chief justice.<sup>69</sup> This tendency is not limited to Ireland, nor is it one that arises only where the judiciary is appointed largely by the executive.

Therefore, even if “political” bias cannot be proven conclusively, the risk that judges may exercise other bias or prejudice is real. Indeed, the influence of such bias in the law is apparently acknowledged by a former Chief Justice of the Supreme Court in quoting with approval the American jurist Oliver Wendell Holmes, who stated: “even the prejudices which the judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed”.<sup>70</sup>

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<sup>67</sup> Malleon, *The New Judiciary: The Effects of Expansion and Activism* (London: Ashgate Press, 1999).

<sup>68</sup> Finlay, “The Role of the Judge” (2005) 5 J.S.I.J. 1, 4.

<sup>69</sup> Keane, “Judges as Lawmakers: The Irish Experience” (2004) 4 J.S.I.J. 1.

<sup>70</sup> Keane, “Judges as Lawmakers”; quoting Holmes, *The Common Law* (Oxford: Oxford University Press, 1963), p. 1.

These risks underscore arguments for greater transparency and accountability in the process of judicial appointments, particularly where the executive is involved in the process.

## II. COMPARATIVE ASPECTS

This section examines briefly judicial appointments in a small range of common law jurisdictions in order to identify possible reforms of the structures, processes and criteria for appointment in Ireland.<sup>71</sup> The jurisdictions examined are: (A) England and Wales, (B) Scotland, (C) Northern Ireland, (D) Canada, (E) South Africa. In contrast to common law countries, in the civil law countries of continental Europe the judiciary is a career option based on academic qualifications. While gender representation is consistently higher in those countries than in common law countries, though there remains lower representation in the higher levels of the judiciary.<sup>72</sup>

### *A. England and Wales*

In England and Wales, concern about the homogeneity of the judiciary has been more extensively documented over a longer period of time than in the other jurisdictions of the United Kingdom.<sup>73</sup> Appointment to the higher courts by the Lord Chancellor raised concerns about the operation of an “old boy’s network”, “tap on the shoulder” appointments, and a lack of transparency.<sup>74</sup> This was seen to disadvantage especially women and minority ethnic groups.<sup>75</sup> In response, the government created in March 2001 a Commission for Judicial Appointments for

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<sup>71</sup> For other comparative surveys, see, e.g. Levy, “Judicial Selections Reform in Comparative Context” (2007) 40 *University of British Columbia Law Review* 591; Epstein, Knight and Shvetsova, “Comparing Judicial Selection Systems” (2001) 10 *William & Mary Bill of Rights Journal* 7.

<sup>72</sup> Schultz and Shaw, *Women in the World’s Legal Profession* (Oxford: Hart Publishing, 2003).

<sup>73</sup> See, e.g. Griffiths, *The Politics of the Judiciary*.

<sup>74</sup> For a review, see Maleson, “Promoting Diversity in the Judiciary – Reforming the Judicial Appointments Process” in Maleson and Russell (eds.), *Appointing Judges*, 221.

<sup>75</sup> Maleson and Banda, *Factors Affecting the Decision to Apply for Silk and Judicial Office*, Lord Chancellor’s Department Research Series No 2/00.

England and Wales to review the appointments process. A commitment to diversity in judicial appointments appeared in consultations and policies by the new Department for Constitutional Affairs.<sup>76</sup> Subsequently, broader concerns about constitutional arrangements led to the Constitutional Reform Act 2005, providing an opportunity for, *inter alia*, the creation of a Judicial Appointments Commission and, also, a Supreme Court Selection Commission for appointments to the forthcoming Supreme Court.<sup>77</sup> The Judicial Appointments Commission is responsible for recommending candidates for a wide range of judicial offices listed in the Act. The Commission's duties are to: select candidates on merit,<sup>78</sup> select people only of good character,<sup>79</sup> and have regard to the need to encourage diversity in the range of people available for selection for appointment.<sup>80</sup> Both commissions put forward only one name to the Minister for Justice, who will, invariably, approve the recommendation or provide a reasoned request that a new process of appointment be engaged. To protect further against any abuse of the process, Parliament legislated for a Judicial Appointments and Conduct Ombudsman responsible for, *inter alia*, auditing, and complaints about, the appointments process.<sup>81</sup> The Judicial Appointments Commission accomplished, *inter alia*, within its first year the following: a definition of "merit", review of the process of appointment, and development and implementation of a range of outreach activities.<sup>82</sup> The process of appointment will now include qualifying tests as an alternative assessment method to the

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<sup>76</sup> Department for Constitutional Affairs, *Increasing Diversity in the Judiciary*, Consultation Paper CP 25/04; Department for Constitutional Affairs (co-signed by the Lord Chief Justice and Chair of the Judicial Appointments Commission), *Judicial Diversity Strategy* (2006). The Department was replaced in 2006 by the Ministry of Justice.

<sup>77</sup> Constitutional Reform Act 2005, s. 26(5). The Commission commenced work on 3rd April 2006.

<sup>78</sup> Constitutional Reform Act 2005, s. 63(2).

<sup>79</sup> Constitutional Reform Act 2005, s. 63(3).

<sup>80</sup> Constitutional Reform Act 2005, s. 64(1).

<sup>81</sup> Constitutional Reform Act 2005. The Ombudsman commenced work 3rd April 2006. See, also, the first report: *Annual Report 2006-2007* (London: HMSO, 2007).

<sup>82</sup> Judicial Appointments Commission, *Annual Report 2006-07* (London: The Stationery Office, 2007).

previous system of paper-based “sifts”, and extension of the use of role-plays in the selection exercises.

Data kept on judicial appointments in England and Wales now routinely records ethnicity, gender and professional background, with reference to those that have applied, been interviewed, been appointed, or placed on reserve. The introduction of the Judicial Appointments Commission has coincided with a significant increase in applications for judicial appointment by women and persons from a minority ethnic background.

### B. Scotland

Scotland was the first jurisdiction within the United Kingdom to introduce an independent body – the Judicial Appointments Board for Scotland – to select and make recommendations on judicial appointments following concerns about lack of transparency in the old appointments system.<sup>83</sup> The Board is required by virtue of an executive mandate issued in 2001 by the Scottish Ministers to, *inter alia*, recommend to the First Minister candidates for specified judicial office,<sup>84</sup> on the basis of merit, but in addition to consider ways of recruiting a judiciary which is as representative as possible of the communities in which they serve.<sup>85</sup> The Board commenced work in June 2002. In the absence of statutory functions or further executive guidance, the Board has developed, and refined, a range of principles, policies and procedures. Initial principles and policies required adherence to equal opportunities (later modified

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<sup>83</sup> Scottish Executive, *Judicial Appointments: An Inclusive Approach* (Edinburgh: Scottish Executive, 2000).

<sup>84</sup> Judge of the Court of Session, sheriff principal, sheriff and part-time sheriff. The Board currently has no role over appointments to the post of Lord President and Lord Justice Clerk. In 2007, the Board agreed with the Scottish Executive to undertake responsibility for appointments to the new lay justices.

<sup>85</sup> The Judicial Appointments Board for Scotland, *Annual Report 2002 – 2003*, p.3. For discussion of the background to, and brief assessment of, the Board, see Paterson, “The Scottish Judicial Appointments Board: New Wine in Old Bottles?” in Malleson and Russell (eds.), *Appointing Judges*, p. 13. The Scottish Executive has laid draft legislation before parliament – Judiciary and Courts (Scotland) Bill (SP Bill 06) – following consultation to, *inter alia*, put the Board on a statutory footing.

to “diversity”), avoidance of any conflict of interest, and respect for confidentiality.<sup>86</sup> The Board currently monitors applications with particular reference to age, gender, ethnicity, national origin, and disability.<sup>87</sup> In 2007, it created a Diversity Working Group to, broadly, research applications with reference to diversity in the legal profession in Scotland and to suggest measures to increase any under-representation in applications to judicial office. For the purpose of the Working Group, the Board notes that diversity “may” relate to gender, ethnicity, disability, age, religion or belief, and/or sexual orientation.<sup>88</sup>

The application procedure involves two broad stages. First, sift of applications; involving assessment of application forms against published criteria and referees’ assessment. The Board applies 17 criteria for assessing “merit”. The second stage involves interviewing selected candidates, in which each candidate makes a presentation and is then questioned by the panel. The sift stage was modified in 2007-08 to comprise two elements.<sup>89</sup> First, members of the Board individually assess all the application forms received before a preliminary sift meeting against the criteria, and then produce on the basis of initial assessments, a “long list” of candidates. Significantly, the lay members contribute their views first – thus reducing the possibility that they may feel the need to defer to judicial/ legal members. Secondly, the Board members individually assess the applications and referees reports, and agree a short-list of candidates who are invited for interview. The First Minister has never rejected a recommendation of the Board. If the First Minister were to do so, reasons in writing must be given to the Board.

### *C. Northern Ireland*

The Judicial Appointments Commission for Northern Ireland was established on 15th June 2005 to conduct the appointments process and make recommendations to the Lord

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<sup>86</sup> The Judicial Appointments Board for Scotland, *Annual Report 2002 – 2003*.

<sup>87</sup> Because of the slightly different process of “long-listing” in Scotland, the Board also records data on the long-listing process.

<sup>88</sup> The Judicial Appointments Board for Scotland, *Annual Report 2006 – 2007*.

<sup>89</sup> The Judicial Appointments Board for Scotland, *Annual Report 2006 – 2007*.

Chancellor regarding all judicial offices up to and including the High Court; recommend candidates solely on the basis of merit, and engage in a programme of action to secure in so far as it is reasonably practicable that appointments are reflective of the community in Northern Ireland.<sup>90</sup> Prior to commencement of the Commission, appointments were administered by the Judicial Appointments Unit of the Northern Ireland Court Service on behalf of the Lord Chancellor. A Commissioner for Judicial Appointments for Northern Ireland was responsible for, primarily, auditing appointments and handling complaints in respect of appointments to judicial office and silk.<sup>91</sup> That office had, in recognition of Northern Ireland's recent troubled political history, been recommended in 2001 as an interim measure prior to devolution of justice powers to the Northern Ireland Assembly.<sup>92</sup> The audit role of the former Commissioner has now been replaced by that of a Judicial Appointments Ombudsman, appointed 26th September 2006.

The Commissioner's *Audit Report 2003* reported low representation in appointments to judicial office and awards of silk. The Commissioner recommended that while selection should continue to be made on the basis of merit, the selection should be based on competencies which were clearly defined, transparent and publicly announced. A research report on the representation of women in silk and judicial office conducted on behalf of the Commissioner found among women respondents significant perceived obstacles to attaining judicial office.<sup>93</sup> The report made a series of recommendations to enhance the process, including changes to eligibility criteria, the appointments process, judicial working practices, encouragement to women lawyers, and improvement in professional complaints procedures.

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<sup>90</sup> Justice (Northern Ireland) Act 2004, and Justice (Northern Ireland) Act 2002.

<sup>91</sup> From 2001. For background, annual reports *etc.*, see: <http://cjani.courtsni.gov.uk>.

<sup>92</sup> Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland* (Belfast: Criminal Justice Review, 2000).

<sup>93</sup> Feenan, *Applications by Women for Silk and Judicial Office in Northern Ireland* (2005).



Some of the consultation features of the appointments process in Northern Ireland are distinctive. Where the eligibility criteria require a member of the legal profession, the applicant must provide the names of three consultees – all of whom must also be members of the legal profession. The Commission states that it is desirable but not essential that at least one of these should be a holder of a specified judicial office. In addition, for appointment to the High Court comments are automatically sought from the serving Lord Justices of Appeal and High Court Judges in addition to the Chair of the Bar and the President of the Law Society. On the 17th October 2007, the Commission launched a consultation exercise on the policies and procedures for appointment to judicial office – which addresses, amongst other matters, whether such consultation procedures should be changed.

Perhaps of particular interest in relation to judicial appointments in Ireland, the Commission established early a Diversity Committee whose programme of action includes seeking to broaden the pool of potential applicants to ensure that a judicial career is open to as wide a range of people as possible.<sup>94</sup> To this end, the Committee agreed a number of key objectives, including evaluation of each appointment scheme and improvement, where appropriate, to increase the diversity of the applicant pool. The Commission has sought to augment existing “equity” monitoring data on applicants to judicial office since 2004 to include former judicial office holders. This data will cover age, gender, community background, race, disability, and geographical location.

#### *D. Canada*

Within the federation of Canada, judicial appointments are made variously for the federal level or the provincial/territorial level.<sup>95</sup> Appointments to the highest court, the Supreme Court of Canada, are made by the Prime Minister. Alleged lack of

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<sup>94</sup> See its first annual report: *Northern Ireland Judicial Appointments Commission, Annual Report and Accounts 2005-2006* (London: The Stationery Office, 2007).

<sup>95</sup> For further details, consult the website of the Office of the Commissioner for Federal Judicial Affairs: <http://www.fja.gc.ca>.

transparency in this process, and concern about the substantially increased power of Supreme Court justices following the introduction of the Charter of Rights and Freedoms, has prompted calls for reform.<sup>96</sup> Indeed, unprecedented debate in 2004 over government influence in an appointment led to the Government setting up an ad hoc committee of the House of Commons to interview the government's nominee before confirmation of his appointment. Judicial appointments to the superior courts in each province or territory are made by the Governor General on the recommendation of the federal cabinet. Concern about political patronage at the level of provincial courts gave rise to the creation of nominating commissions. These conduct the initial recruitment, screening, and recommendation to the government.

Of particular interest is the approach of the Judicial Appointments Advisory Committee in the province of Ontario. The Committee encourages applications by under-represented groups, through, for example, advertisements that state: “[i]n order to improve the representation of traditionally under-represented groups in the judiciary, applications are particularly encouraged from aboriginal peoples, francophones, person with disabilities, racial minorities and women”.<sup>97</sup> The Committee recommends to the Attorney General candidates to the Ontario Court of Justice Bench. There are 13 members of the Committee: three representing the judiciary, three representing the legal profession, and seven lay members appointed by the Attorney General. The Committee is legislatively required to conduct the assessment of candidates in “recognition of the desirability of reflecting the diversity of Ontario society in judicial appointments”.<sup>98</sup> This is operationalised in the criteria used in assessment of candidates, as follows: “[t]he Judiciary ... should be reasonably representative of the population it serves. This

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<sup>96</sup> Morton, “Judicial Appointments in Post-Charter Canada: A System in Transition” in Malleson and Russell (eds.), *Appointing Judges*, p. 56; Ziegel, “A New Era in the Selection of Supreme Court Judges?” (2006) 44 *Osgoode Hall Law Journal* 547.

<sup>97</sup> Quoted in Omatsu, “The Fiction of Judicial Impartiality” in MacDonald, Osborne and Smith (eds.), *Feminism, Law, Inclusion: Intersectionality in Action* (Toronto: Sumach Press, 2005), p. 70, 70.

<sup>98</sup> The Courts of Justice Statute Law Amendment Act, 1994, s. 43(9)(3).

requires overcoming the under-representation in the judicial complement of women, visible, cultural, and racial minorities and persons with a disability”.<sup>99</sup> This approach may be contrasted with the approach in the United Kingdom, where the need to reflect diversity is not a component of the overall criterion of merit. The reform of the approach to “merit” in Ontario reflected a recognition that the traditional understanding of “merit” might serve to replicate homogeneity, and inhibit diversity – which is, of course, not antithetical to securing the best judge. One other aspect of the approach of the Committee to consultation is noteworthy when contrasted with that of the new judicial appointments bodies in the United Kingdom. The Committee not only carries out named-reference checks, but also makes confidential inquiries of the judiciary, court officials, lawyers, law associations, community and social service organizations.<sup>100</sup>

#### *E. South Africa*

The transformation of South Africa in the 1990s from an apartheid state introduced radical reform of judicial selection.<sup>101</sup> The judiciary under apartheid was widely seen as part of the problem with that system.<sup>102</sup> The method of selecting judges was described as “informal, secret and unaccountable” and “susceptible to abuse and political pressure”.<sup>103</sup> In April 1994, there were 165 judges, of whom three were black males, and two white females. The rest were white. There were no black females. The constitutional changes later that year changed the law, process and political context of appointments. Section 174(1) of the Constitution provides that “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”. Within ten years of the introduction of the Constitution, there was an

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<sup>99</sup> Judicial Appointments Advisory Committee, *Policies and Process*, (Toronto: Judicial Appointments Advisory Committee, 2005), p. 10.

<sup>100</sup> Judicial Appointments Advisory Committee, *Policies and Process*, p. 15.

<sup>101</sup> Du Bois, “Judicial Selection in Post-Apartheid South Africa” in Malleson and Russell (eds.), *Appointing Judges*, 280.

<sup>102</sup> Corder, “Judicial Authority in a Changing South Africa” (2004) 24 *Legal Studies* 253.

<sup>103</sup> Corder, “The Appointment of Judges: Some Comparative Ideas” (1992) 3 *Stellenbosch Law Review* 207, 226.

increase in the proportion of black judges from under 2% to approximately 34%,<sup>104</sup> though the rate of increase for women since 1994 has been much slower.<sup>105</sup>

Section 178 of the Constitution created a Judicial Service Commission to ensure transparency, independence and accountability in the appointment of judges to the higher courts. The Commission's role in respect of High Court and other specified posts is determinative in that the President "must appoint ... on the advice of" the Commission.<sup>106</sup> In respect of appointment to the Constitutional Court – where issues of law and policy may be particularly potent – the Commission must provide the President with "a list of nominees with three names more than the number" of vacancies which exist. If the President finds the nominees "unacceptable"<sup>107</sup> he must advise the Commission of the reasons for this view. The Commission must then supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

While the Commission's powers and functions are set out in the Constitution, it may determine its own procedure. The Commission takes into account the requirement that candidates who are appointed "be committed to the values of the Constitution".<sup>108</sup> The Commission also takes into account the "symbolism" of a particular appointment, by considering: "[w]hat message is projected to the community at large"<sup>109</sup> by such appointment.

The Commission comprises 23 permanent members, including members of the judiciary and legal profession.

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<sup>104</sup> Moerane, "The Meaning of Transformation of the Judiciary in the New South African Context" (2003) 120 *South African Law Journal* 708.

<sup>105</sup> Cowan, "Women's Representation on the Courts in the Republic of South Africa" (2006) 6 *University of Maryland Law Journal Race Religion Gender & Class* 291.

<sup>106</sup> Constitution of the Republic of South Africa, 1996, s. 174(6).

<sup>107</sup> Constitution of the Republic of South Africa, s. 174(4)(b).

<sup>108</sup> Judicial Service Commission, *Annual Report 2004* (Bloemfontein: Judicial Service, 2004).

<sup>109</sup> Judicial Service Commission, *Report on the Activities of the Judicial Service Commission for the Year Ended 30 June 1999*, available at: [http://www.doj.gov.za/reports/1999reports/1999\\_judicial%20service%20comm.htm](http://www.doj.gov.za/reports/1999reports/1999_judicial%20service%20comm.htm).

Significantly, there is a role for members of the executive: six persons, at least three of whom must be members of opposition parties represented in the National Assembly. Significantly, the Commission has also permitted interviews of candidates to be held in public, though not televised or tape-recorded.

The operation of the Commission has generally been seen as having gained widespread confidence,<sup>110</sup> notwithstanding concerns about delays in appointments, and some inappropriate questions in the interview process.<sup>111</sup>

### CONCLUSION

This article has identified a number of problematic aspects in the system of judicial appointments in Ireland, and provided illustrations from a small number of jurisdictions which may provide lessons for reform. Chief among the problems are the ongoing influence, or risk of influence, of Government patronage in the process, and the lack of diversity in the judiciary. The creation of the Judicial Appointments Advisory Board does not adequately address these problems. There remains a perception, even among the judges, that political patronage still plays a part in appointments. The general view of superior judges of the Judicial Appointments Advisory Board is that “it was a good idea in theory, but in practice, it had made very little difference to the political patronage system of judicial appointments.”<sup>112</sup> Indeed, one judge is quoted as saying that “very often the government pick their own supporters. So the idea that people are appointed purely on merit is not necessarily true”.<sup>113</sup>

It is likely that the momentum for reform of judicial selection will increase in Ireland – as it has elsewhere – with the Irish Government’s position on judicial appointments appearing increasingly untenable. The changing demography of Ireland’s population, comprising an increasing number of migrants, will

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<sup>110</sup> Malleon, “Assessing the Performance of the Judicial Service Commission” (1999) 16 *South African Law Journal* 36.

<sup>111</sup> Andrews, “The South African Judicial Appointments Process” (2006) 44 *Osgoode Hall Law Journal* 565.

<sup>112</sup> Carroll, “You be the Judge: Part II” (above), at 186.

<sup>113</sup> Carroll, “You be the Judge: Part II”, at 186.

likely increase pressure for a judiciary that is representative of the diversity of the population.

Where judges reach decisions on matters of public interest, it seems appropriate in a democracy that there be some role for elected representatives in the appointment, and, indeed, removal of judges. This is not incompatible with international principles, such as the UN Basic Principles on the Independence of the Judiciary.

If reform of judicial appointments is to be pursued in Ireland it appears that the most appropriate model would be one that necessarily combines the constitutional requirement for government advice to the President; with a reformed process which draws out the legitimate role for elected representatives in selection, and which is based on fairness, transparency, accountability, and a commitment to representativeness and diversity. In this way, Isaac Butt's exhortation in another place 132 years ago may remain a statement from the past rather than a haunting echo in times present.