Trinity College Dublin

Coláiste na Tríonóide, Baile Átha Cliath

The University of Dublin

SCHOOL OF LAW

LEGAL STUDIES RESEARCH PAPER SERIES

PAPER NO. 03/2023

October 2023

[Diversity, the Merit principle, and the Judicial Appointments Commission Bill]

[Laura Cahillane, University of Limerick]

Further information about the Trinity College Dublin School of Law Legal Studies Research Paper Series can be found at
www.tcd.ie/law/researchpapers/

[This paper was presented at a conference organised by TriCON on 14 November 2023.]

Diversity, the Merit principle, and the Judicial Appointments Commission Bill

Dr Laura Cahillane

Introduction

Amongst the provisions referred by the President to the Supreme Court, under Article 26 of the Constitution, for a decision on constitutional validity, is section 39 of the Judicial Appointments Commission Bill. Section 39 directs that recommendations for appointment to judicial office shall be based on merit. However, it also requires that account be taken (to the extent feasible and practicable) of the objectives that the membership of the judiciary in each court should:

(a)comprise equal numbers of male and female members,

(b) reflect the diversity of the population of the State as a whole, and

(c) include a sufficient number of judges with a proficiency in the Irish language to meet the needs, identified by the Commission following consultations under section 56(4), of users of each court with respect to proceedings being conducted in the Irish language.

Interestingly, there was very little discussion on this aspect of the Bill during the long series of debates in the Oireachtas, apart from a couple of complaints from Senator McDowell that 'merit' has no meaning, and as far as I'm aware there was little to no canvasing on the issue of diversity. Sinn Féin did make a point about the necessity to ensure appropriate numbers of judges with proficiency in the Irish language but otherwise this section did not feature in the debates. So first, it may come as a surprise that this provision made it into the Bill in the first place, without very much discussion, given that we haven't had any major conversations about judicial diversity in this jurisdiction, and the fact that the official position of the judiciary seems to be that diversity is not a necessary goal to pursue for the Irish judiciary – we will come back to that issue. But also I think it is surprising that it was included in the reference to the Supreme Court as I find it difficult to see any constitutional deficiency here – we will come back to this also.

First, let's look at why it might have been felt necessary to include a requirement to take diversity into account in judicial appointments.

The Need for Diversity

In 2013, Lady Hale wrote that the need for diversity in judicial appointments 'has in recent years become a truth almost universally acknowledged'[1] but this is not the case in Ireland and this is mainly due to the traditional ideas which persist around the role of the judge in Ireland. Judging, in this jurisdiction is still seen primarily as an entirely formalist affair and

[1] Brenda Hale's foreword in Erika Rackley, *Women, Judging and the Judiciary* (Routledge 2013), xiii. See also Erika Rackley, 're-thinking judicial diversity' in Ulrike Schultz and Gisela Shaw (eds) *Gender and Judging* (Hart 2013), 503.

according to that theory, 'who the judge is' should not matter – the judge is simply the judge.[2]

For a long time, the Irish judiciary was one of the most homogeneous groups in the State, comprising mostly white, male, upper/middle-class members and while this is something which has improved markedly in recent years, there is still some way to go in order to achieve an appropriate balance and diversity on the bench. A study carried out in 2004 described the profile of a typical superior court judge in Ireland as follows:

> '[t]he person who is most likely to be a judge of the Superior Courts in Ireland in 2004 is male, was born in Dublin and grew up in an urban setting. He lived in Dublin and was a practising Senior Counsel at the time of his appointment. He did not necessarily come from a legal family background. He attended a private secondary school and studied at University College Dublin and obtained a Bachelor of Arts degree. ... He was appointed after he was forty-five, but most likely after he was fifty. He describes himself as middle class but believes that it is very difficult to define or apply a social class structure to the Irish context.'[3]

This picture has not changed significantly in the intervening 20 years, though there has certainly been a great improvement in the number of women judges.[4] Socio-economic diversity is a different story. A recent study on elite formation found that while private schools make up only 7% of the entire number of second-level schools in Ireland, 74% of superior Court judges have attended these schools, which gives a small but significant insight into picture of the socio-economic experiences of the senior judiciary.[5]

But should any of this make a difference – does it actually matter who the judge is? In 2014, the Irish judiciary said no; in their submission to the Department of Justice on judicial appointments reform, the Judges' Report noted the question of diversity but said that this was an echo of a larger debate in other jurisdictions and that the same conditions did not apply here in Ireland.[6] The view of judging in Ireland has always been based on the Herculean fairytale that who the judge is does not matter because the judge is simply the

---

[2] For more, see Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton 2010).

[3] Jennifer Carroll, "You Be the Judge, Part I" (2005) 10 (5) Bar Review 153, 155.

[4] The most recent The European Commission for the Efficiency of Justice in Council of Europe Member States Report (October 2022) showed the ratio of women judges serving in Ireland was 42% on 21 October 2022. European judicial systems CEPEJ Evaluation Report (Part 1) 2022 Evaluation cycle (page 69), available at https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279

[5] Hogan, John, Feeney, Sharon and O'Rourke, Brendan K. "Quantitatively comparing elite formation over a century: ministers and judges" Administration, vol.71, no.2, 2023, pp.1-25

[6] While the Judges' Report to the Department on Reform to the Appointments Process stated that a Commission should be set up to take evidence on issues around diversity and suggests further study could be undertaken, the tenor of the Report was that progress had been made and in the absence of any evidence of a problem, the focus should be on judicial education. The report also stated that: "[i]t is not however apparent that alteration of the structure at the point of appointment to the judiciary addresses a real problem. This is important because any such alteration is complex to devise and operate and creates a difficult intersection with the principle of appointment on the basis of demonstrable merit." Judicial Appointments Review Committee, "Preliminary Submission to the Department of Justice and Equality's Public Consultation on the Judicial Appointments Process" (30 January 2014) 21.

neutral arbiter applying the law.[7] However, in most other jurisdictions the conversation has moved on to a point of acceptance that diversity matters and indeed is an important part of ensuring confidence in the administration of justice. As Terence Etherton has argued: 'the personal outlook and judicial philosophy of each judge plays a critical role in the outcome of hard cases and the defining of our society's values; and that a judiciary with a diversity of experience, particularly at the highest levels, is more likely to achieve the most just decision and the best outcome for society'.[8] He also argues that diversity 'is best viewed as diversity of experience in life' and should not be 'restricted to or synonymous, with gender, ethnicity or sexual orientation.'[9]

A number of different rationales have been put forward in relation to the need for diversity. Lady Brenda Hale has often spoken about the need for equal opportunity and fairness or as she describes it, the argument that 'all properly qualified and suitable candidates should have a fair crack of the whip'.[10] This rationale concentrates on fairness in terms of access to the judicial career and the fact that there have not always been equal opportunities for deserving candidates when appointments are made due to political or other reasons. The rationale of democratic legitimacy is usually the one pointed to as most convincing since it is based on the idea that when the judiciary is more reflective of the community at large then this increases public confidence in the judiciary and the administration of justice. It does not mean that a judge should represent any particular interests. On the contrary, the idea is that judges remain impartial but that as a diverse group they can better understand and reflect the diverse nature of the community. Kate Malleson has argued that 'the demands of democratic principles and the need for legitimacy apply to the judiciary as much to any other institution of power'.[11] Brenda Hale, in a similar vein wrote that '[w]e are also the instrument which keeps other organs of the state, the police and those who administer the laws, under control. ... [Therefore,] judges should be no less representative of the people than the politicians and civil servants who govern us.'[12]

Sally Kenney has expanded the legitimacy argument, using the example of geography in relation to appointment of judges to the E.C.J. She argues that courts, particularly supranational and federal courts, are representative institutions and that issues such as representation of geography, nationality, area of legal expertise and other non-merit factors are often factored into the judicial selection process. She points to the fact that the E.C.J. includes a judge from each member state and questions whether individual member states would be willing to accept E.C.J. decisions were it not for this fact. It is never argued that judges from the member states are 'representing' their member state in the decision-making process but yet it adds to the legitimacy of the Court to have all member states included.[13]

---

[7] See for example, Tom Finlay "The Role of the Judge" (2005) JSIJ 1, and Kevin Cross, "Fiat Justicia" (54) Dublin Review of Books (22 April 2014).

[8] Terence Etherton, 'Liberty, the archetype and diversity: a philosophy of judging', (2010) Public Law 727.

[9] Ibid 741.

[10] Brenda Hale, 'Equality and the Judiciary: why should we want more women judges?' (2001) Public Law 489.

[11] Kate Malleson, 'Justifying Gender Equality' (2003) Feminist Legal Studies 1 at 15

[12] Brenda Hale, 'Equality and the Judiciary: why should we want more women judges?' (n 9) 499-500.

[13] Sally J. Kenney, Gender and justice: why women in the judiciary really matter (New York: Routledge, 2013), ch. 6.

The notion of difference used to be regarded as a more controversial rationale – the idea that women judges or minority judges would 'make a difference' if appointed but in recent years many academics and high profile women judges have advanced this argument, albeit in a more nuanced way. Erika Rackley has explained that we should not argue that women judges make a difference but that they bring different perspectives:

> '[p]roperly understood, the promise of judicial difference (however defined) lies in its ability to render the contingent particular but dominant forces of judicial reasoning – that is the incorporation of difference on the bench exposes the extent to which the privileging of particular knowledges, the flattening of difference and the suppression of polytonality both affect and effect women, judging and the delivery of justice.'[14]

This goes to the argument that 'who the judge is' matters. In 2008, Dermot Feenan published the findings of a survey of women judges in Northern Ireland, which appeared to offer new understandings of the role of judging and which emphasised the distinctiveness of background and experience and demonstrated how this can enhance the diversity rationale.[15] The majority of women judges interviewed felt that women judges would make a difference in various ways but not necessarily to the process or outcome of judging. The response of one interviewee sums up the consensus: '[y]ou don't apply the law any differently, but I do think you see things from a different angle.'[16] Even the responses from male judges indicated a recognition of a difference of perspective'.[17] Feenan concluded that the differences that women bring to judging involve 'experiential sensitivities that may inform judging.' He noted that the responses did not suggest that women would decide cases any differently, 'but their responses also reflect nuances in understanding the role of the judicial office that are not shared by male judges.'[18] These results are echoed in studies carried out elsewhere which demonstrated differences in the way women judges approach decision-making.[19]

Indeed, high profile women judges such as Brenda Hale,[20] Ruth Bader Ginsberg,[21] and Beverly McLachlin[22] have all made similar arguments on the need for diversity and the fact that women judges and judges from different backgrounds bring different and unique perspectives that are necessary for good, comprehensive decision-making. As Rackley has put it, 'the promise of a diverse judiciary is not the promise of a multiplicity of approaches

---

[14] Erika Rackley, 'What a difference difference makes: gendered harms and judicial diversity' (2008) 15 International Journal of the Legal Profession 37 at 38.

[15] Dermot Feenan, "Women Judges: Gendering Judging, Justifying Diversity" (2008) 35 (4) Journal of Law and Society 490

[16] ibid. at 512.

[17] ibid. at 516.

[18] Ibid at 517.

[19] See B. Kohn, 'Family Judges in the City of Buenos Aires: a view from within' (2008) 15 (1-2) International Journal of the Legal Profession 111. See also M. C. Bellau & R. Johnson, 'Judging Gender: Difference and Dissent at the Supreme Court of Canada' (2008) 15 (1-2) International Journal of the Legal Profession 57 at 62. The evidence showed that women did not always share the same perspective but a positioning that left them seeing something different.

[20] 'I take the view that 'difference' is important in judging and that gender diversity is a good, indeed a necessary, thing.' Brenda Hale, 'Judicial Diversity', speech delivered in the University of Limerick, 2015.

[21] See for example Emily Bazelon, 'The Place of Women on the Court', New York Times, 7 July 2009.

[22] 'The fourth and most important reason why I believe we need women on our Benches is because we need the perspectives that women can bring to judging.' Beverly McLachlin quoted in Brenda Hale, 'Making a Difference? Why We Need a More Diverse Judiciary' (2005 NILQ) 281, 286.

and values each fighting for recognition, but of a judiciary enriched by its openness to viewpoints previously marginalised and decision-making which is better for being better-informed.'[23]

In a paper such as this, there is not sufficient space to get into further issues such as the studies on diversity and decision-making in collegiate courts etc[24] but this has all been a rather long-winded way of saying that diversity in the judiciary is now recognised as not only a good but a necessary goal in most jurisdictions and so while we may be late to this conversation in Ireland, it is nice to see the Oireachtas getting ahead of the game on this and providing mechanisms to attempt to achieve this goal in the legislation. The Bill also requires the JAC to publish a diversity statement, two years after commencement and then once every four years, which will outline how this objective is being achieved and how diversity can be improved.

So that gives a brief insight into why this diversity issue has been included in the Bill in the first place.[25] Next we must look at the rather more tricky issue of merit.

Merit

In our submissions on the Bill, myself and my colleagues Tom Hickey and David Kenny welcomed the merit-based process but pointed out that there are problems in leaving merit undefined.[26] In many other jurisdictions, further detail is provided in legislation or guidelines to elaborate on what 'merit' means in practice. For example, In England and Wales merit is measured using six core qualities – which are then further broken down:

Intellectual Capacity

- Expertise in your chosen area of profession
- Ability to quickly absorb and analyse information
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary

Personal Qualities

- Integrity and independence of mind
- Sound judgement
- Decisiveness
- Objectivity
- Ability and willingness to learn and develop professionally

An Ability to Understand and Deal Fairly

- An awareness of the diversity of the communities which the courts and tribunals serve and an understanding of differing needs.

[23] Erika Rackley (n 1) xiv.

[24] Eg C.R. Sunstein, D. Schkade, L.M. Ellman and A. Sawicki, Are Judges Political? An Empirical Analysis of the Federal Judiciary (2006)

[25] For more on the issue of judicial diversity in the Irish context see Laura Cahillane, 'Judicial Diversity in Ireland' (2016) 6 Irish Journal of Legal Studies 1.

[26] Laura Cahillane, Tom Hickey, David Kenny, Submission to Joint Oireachtas Committee on Justice on Head of Judicial Appointments Commission Bill, available at https://researchrepository.ul.ie/articles/online_resource/Submission_to_Joint_Oireachtas_Committee_on_Justice_on_Head_of_Judicial_Appointments_Commission_Bill/19830313

- Commitment to justice, independence, public service and fair treatment
- Willingness to listen with patience and courtesy

Authority and Communication Skills

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved
- Ability to inspire respect and confidence
- Ability to maintain authority when challenged

Efficiency

- Ability to work at speed and under pressure
- Ability to organise time effectively and produce clear reasoned judgments expeditiously
- Ability to work constructively with others

Leadership and Management Skills

- Ability to form strategic objectives and to provide leadership to implement them effectively
- Ability to motivate, support and encourage the professional development of those for whom you are responsible
- Ability to engage constructively with judicial colleagues and the administration, and to manage change effectively
- Ability to organise own and others time and manage available resources.[27]

Scotland has a similar set of detailed criteria, measured under various headings: 'knowledge of the law, skills and competence in the interpretation and application of the law, court experience and skills, intellectual capacity and powers of reasoning, personal characteristics, case management skills and efficiency and communication skills.' These are further broken down into sub-headings.[28]

Merit, as a solitary undefined principle, is not a useful basis for judicial appointments because it cannot guide decisions unless it is elaborated upon, informing the JAC what types of candidates are desirable and meritorious. As Beverly McLachlin has put it, 'merit is in the eye of the beholder'.[29] Indeed it has even been argued that there is a danger in leaving merit undefined. For example, Kate Malleson has argued that the merit principle has unfairly disadvantaged some groups due to the fact that it is often identified 'in a way which emphasises some attributes and minimises the importance of others.'[30] This has been well-illustrated by two studies conducted in Northern Ireland,[31] both of which involved interviews designed to elicit views on the nature of merit; how it is perceived and how it might be changing. Interestingly, it was found that 'the current view of merit used in the

[27] These are not included in the 2005 Act but have been developed by the JAC, see for example, The Report of the Advisory Panel on Judicial Diversity 2010 https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/advisory-panel-judicial-diversity-2010.pdf

[28] See Judicial Appointments Board for Scotland Guide to the Appointments Process, available at www.judicialappointmentsscotland.org.uk

[29] Quoted by Brenda Hale (n 1).

[30] Kate Malleson, ' Rethinking the Merit Principle in Judicial Selection ' (2006) 33 Journal of Law and Society 126 .

[31] Propensity to Apply for Judicial Office under the New Northern Ireland Judicial Appointments System: A Qualitative Study for the Northern Ireland Judicial Appointments Commission (2008) and Rewarding Merit in Judicial Appointments? (2013).

appointments process was quite widely seen as based on qualities mainly possessed by the Bar, and to be based on seniority and experience of advocacy in court. … Women generally believed themselves less likely to be seen as having this sort of merit or indeed have the opportunities to gain it.'[32] The report also found 'very considerable differences in attitude between male and female respondents, particularly in regard to the nature of merit required for the High Court. Women respondents were generally much more favourable to non-traditional backgrounds being seen as meritorious.'[33]

The results showed that barristers were most likely to see merit in traditional terms but yet, '[m]erit — in the sense of having the qualities needed for being a good judge — was often defined by respondents more widely than meaning simple technical legal expertise combined with court experience at the higher level. Frequent mention was made of qualities of empathy and judgement, case management, good listening skills and experience as well as problem-solving.' And 'There was a general view that merit in this sense could be found in nontraditional candidates and judicial appointments could and should be made from a broad range of individuals where this idea of merit could be found.'[34]

David Kenny has also demonstrated how merit is not a neutral principle in that it is 'filled with content that is invariably political'.[35] He elaborates on this as follows: 'In Ireland, it is given political content in the focus on professional experience of litigation as the indicator of merit: this selects judges from a small 'interpretive community' of lawyers that are fairly homogenous in terms of legal thought, having been inculcated into the particular values and suppositions that come with traditional legal practice.'[36]

For example, the Judges' Report from 2014 mentioned earlier, argued that in defining merit, 'particular weight should be given [to] practical experience in the conduct of litigation and advocacy.'[37] There is no explanation given as to why this is the key requirement. Indeed as Kenny notes, it is taken as self-evident, which chimes with the findings of the Northern Irish projects on the traditional views of merit amongst sitting judges and barristers. Some judges have called this out, for example Lord Dyson has written that: 'The assumption that the best barristers make the best judges is highly questionable … it is therefore not surprising that not all good barristers make good judges. It is surprising that it should ever have been assumed that they do.'[38] However, as Kenny has pointed out, this argument on defining merit in a traditional way based on aspects such as litigation experience may be less about judicial skills and more about being the right sort of person:

[32] John Morison, 'Finding "Merit" in Judicial Appointments: The Northern Ireland Judicial Appointments Commission (NIJAC) and the Search for a New Judiciary for Northern Ireland' in Anne-Marie McAlinden & Clare Dwyer (eds) *Criminal Justice in Transition; The Northern Ireland Context*, (Hart 2015) 140.
[33] Ibid.
[34] Ibid.
[35] David Kenny, 'Merit, diversity and interpretive communities: The (non-party) politics of Judicial Appointments and Constitutional Adjudication' in Laura Cahillane, James Gallen & Tom Hickey, *Judges, Politics and the Irish Constitution* (Manchester University Press 2016), 136
[36] Ibid.
[37] Judges' Report p.56.
[38] John Dyson, *A judge's Journey* (Hart 2019).

> Discomfort with the idea of a judge who has 'not learned the way things work' is not merely about procedure and technicality. A person who has not practiced at or near the bar would not know the way things should be done; they would not be fully inculcated into the customary practices and unwritten conventions of the Irish judiciary. They would not, in other words, have been inducted into the right interpretive community.[39]

Again, all of this is just a brief demonstration of the fact that merit is not a neutral principle and that it would have been better if the opportunity had been taken in the legislation to provide some guidance as to the definition of merit or provision of characteristics and qualities, to guide the JAC's understanding of merit, as other jurisdictions have done.[40] But none of this is to say that there is any constitutional problem with the principle of merit in the Bill. Here we come to the nub of the issue.

Potential Unconstitutionality?

In order to refer a bill or part of a bill to the Supreme Court, the President is expected to have a concern as to potential unconstitutionality. However, I struggle to see how this particular provision could be seen as potentially unconstitutional. The merit issue could have done with more elaboration and the language on equal numbers of male and female numbers may have been better expressed in terms of equality more generally but there is nothing unconstitutional here. The issue of provision of sufficient numbers of judges with proficiency in the Irish language could even be regarded as imperative based on Article 8, so again no unconstitutionality here.

It is hard to see this issue being linked to the argument on limiting governmental discretion since the section is clearly addressed to the Commission, not the Government. It says the Commission's decision to recommend a candidate shall be based on merit and similarly that the Commission shall take account of the matters mentioned at the start.

The only argument I can see being made is that by requiring the Commission to take these issues into account, this reduces their discretion in making nominations, which in turn further reduces governmental discretion – if government is required to make an appointment from the three names provided for a given vacancy. This argument would be dependant on the principal argument in relation to the limitation on governmental power being successful[41] but even if it is, I think it is a stretch too far to accept that enshrining the public-policy goal of seeking a diverse judiciary would be an unconstitutional fetter on executive power. Even accepting that as a potential argument, the wording only includes a requirement to 'take account' of the issues, not to fulfil any particular quotas; indeed the language still leaves a lot of room and is not at all prescriptive on the issue of diversity. Similarly, it would be hard to see an argument succeeding on the basis of merit as an unconstitutional fetter. First, because merit (in whatever form) has always been accepted both in Ireland and internationally as the basis for judicial appointments – there needs to be

[39] Kenny (n 31) 139.

[40] The intention in the Bill was that the JAC would draw up further guidelines but without specific guidance in the Bill itself, the likelihood is that the traditional notions of merit would subsist even with further elaboration as part of this process.

[41] See Oran Doyle's paper explaining the arguments in relation to executive power.

some standard for ensuring the best candidates are appointed. And secondly, if government is not expected to appoint judicial candidates on the basis of merit then what is to prevent a completely autocratic situation? If an argument such as this was to be accepted as unconstitutional then it would not be possible to provide for any guidance on the issue of judicial appointments and indeed would be tantamount to saying that there has to be absolute governmental discretion with no guidance or control of the process at all – which in turn would mean there would be little point in anything in the legislation. So in sum, while bearing in mind what former Taoiseach Jack Lynch once said (that it would be a brave man who would predict what was or was not contrary to the Constitution), I would not expect the Supreme Court to find any unconstitutionality here.