Judicial Diversity in Ireland

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Judicial diversity is not a subject which is much discussed in Ireland. Despite the fact that our judiciary is still a relatively homogenous group with figures on female judges only recently improving, it seems neither the judges, nor the other two branches of government, see this as an issue which needs to be addressed. This is also in spite of the fact that our current process for appointing judges does not include any incentive or requirement to consider diversity and the recent trend which has seen the appointment of more women to the bench could just as easily be reversed by a future regime. Furthermore, while there has been some improvement in terms of gender balance, it seems there has been no consideration of diversity more generally in judicial appointments. In this context, this article examines whether diversity is an issue which needs to be considered in relation to judicial appointments in Ireland. First, the current profile of the Irish judiciary is illustrated. Then, in order to determine if and why diversity is necessary, the various rationales which have been put forward in favour of judicial diversity are analysed. Finally, the argument in favour of examining this issue in further detail in Ireland is put forward.

I - Introduction

In January 2014, the Department of Justice initiated a consultation process in relation to the appointment of judges in Ireland. Submissions were invited on issues such as: eligibility for appointment; the need to ensure and protect the principle of judicial independence; promoting equality and diversity; the role of the Judicial Appointments Advisory Board, including its membership and its procedures. Ideas were thus being sought on, amongst other issues, how best to promote equality and diversity in the appointments process. However, somewhat surprisingly, it appears the Irish judiciary themselves do not seem to see diversity as a priority, or even an issue which needs to be addressed.¹ For many years in Ireland, the

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¹ 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 [hereinafter Judges’ Report], available <http://www.supremecourt.ie/SupremeCourt/sclibrary3.nsf/(WebFiles)/61E71A71B9961BD680257C70005CCE2D/$FILE/A%20Preliminary%20Submission%20of%20J.A.R.C.%2001.2014.pdf> (date accessed: 18 August 2015).
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The judiciary was one of the most homogeneous groups in the State, comprising mostly white, male, upper-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 on the bench. However, while the need for diversity and equality in the judiciary has been recognised in some quarters, it is not something which is generally accepted in Ireland; it has not prompted any action at policy level and has not generated anywhere near as much discussion as in other common law jurisdictions with similar judicial profiles. Neither the media nor the public views this issue as important. Furthermore, while the consultation process mentioned above was a welcome initiative, it seems no further action has been taken and is not likely before the next general election.

In this context, it is proposed to examine whether diversity is an issue which needs to be considered in relation to judicial appointments in Ireland. First, in order to set the context, the current profile of the Irish judiciary will be established. Then, in order to determine if and why diversity is necessary, the various rationales which have been put forward in favour of judicial diversity will be analysed. Finally, the argument in favour of examining this issue in further detail in Ireland will be put forward.

II - The Profile of Judges in Ireland

A study conducted in Ireland in 1969 displayed an unsurprisingly congruent picture of the Irish judiciary. At the time, there were 57 sitting judges in Ireland. Of these, only one was a woman. Forty-seven percent of all judges and 58% of superior court judges were born in an urban area. Sixty-eight percent lived in Dublin at the time of their appointment. For superior court judges this figure was 94%. Also 59% of all judges and 71% of superior court judges characterised themselves as being upper-middle class.


While the situation with regards to diversity is admittedly much worse in England and Wales, this has led to a multitude of academic commentary and policy reports in that jurisdiction. Much work has also been carried out in other jurisdictions such as Canada, South Africa and Scotland but apart from the works mentioned supra note 2, there is a dearth of material here. This very fact was acknowledged in the Judges' Report. See supra note 1.

This has been the personal experience of the author in presenting at conferences and in media interviews related to other judicial matters.

P. Bartholomew, The Irish Judiciary (Dublin: I.P.A., 1971). Bartholomew’s study involved “nine Supreme Court judges, eight High Court judges, ten Circuit Court judges, and seventeen of thirty-five sitting District Court judges. Thus forty-four judges comprise the group used to develop this profile of an Irish judge.”
A similar, if less extensive, study was carried out in 2004. The judicial landscape had changed but perhaps not as much as one might have expected. The study produced an interesting conclusion in relation to the profile of superior court judges in Ireland:

The 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.

Results of the study show that women made up 13.5% of superior court judges in 2004, over 83% of judges surveyed grew up in an urban environment, all of the Supreme and High Court judges had an address either in Dublin or the counties immediately adjacent to Dublin at the time of their appointment to the judiciary. The most common occupation for a judge immediately prior to their appointment was that of a Senior Counsel (94.6%), and over 93% of the judges surveyed were of “pure Irish ethnicity”.

Eleven years later, and at the time of writing, the number of sitting judges is 161. Of the total number of sitting judges, 33.5% are women: female representation in the Supreme Court is 30%, 20% in the Court of Appeal, 28.5% in the High Court, 44% in the Circuit Court, and 32% of the District Court. Thus, it is clear that significant progress has been made, even in the last year, in the attempt to secure an appropriate gender balance.

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6 The study was carried out as part of the author’s MA thesis and so time constraints meant that the study was limited to superior court judges. Twenty-nine of the 37 available High and Supreme Court judges participated in the study. The results of the study are set out in the following articles: J. Carroll, “You Be the Judge, Part I” (2005) 10 (5) Bar Review 153 [hereinafter Carroll] and J. Carroll, “You be the Judge Part II”, (2005) 10 (6) Bar Review 182.

7 Ibid. at 155.

8 Of course the Courts and Court Officers Act 2002, which changed the eligibility criteria in order to allow practising solicitors to be appointed, had only recently come into effect.

9 In addition, 21% of superior court judges defined themselves as upper-middle class and 52% defined themselves as being middle class prior to their appointment. The phrase “pure Irish ethnicity” was used in the study without explanation.

10 At the time of writing, September 2015, there was one vacancy in the High Court, one vacancy in the Circuit Court and one vacancy in the District Court. These figures are from the “Judicial Gender Balance 2015” Courts Service statistics from April 2015.

11 Of course, one significant problem in relation to gender, particularly with the appointment of more senior judges is that the pool from which many appointees are drawn, the inner-Bar, contains shockingly few women. Of the 166 Silks appointed since 2003, only 41 have been women. While women represent 43% of the entire bar the inner-bar is a different matter, where men make up over 83% of members. This issue was flagged by the Gender in Justice report, see I. Bacik, C. Costello & E. Drew, Women in Law – Gender InJustice Report (Dublin:
For some, these figures appear satisfactory. However, contrast the situation in France in 2003, when almost 80% of those entering the judiciary were women and the Minister for Justice threatened to introduce quotas in order to restore gender balance and maintain public confidence.\textsuperscript{12} If the figures were reversed in Ireland and it were the men who were sitting at about 30%, we would hear a lot more about it. Even apart from gender, it is doubtful that the average superior court judge, as described above in 2004, has changed much in the past eleven years. In fact, a quick appraisal of the biographies of those Justices show that the overwhelming majority are still from Dublin, educated in U.C.D. and from an upper-middle class background. But the judges themselves do not see diversity as an issue which is relevant to judging.\textsuperscript{13}

While things are changing slowly and the increase in female appointments to the bench in recent years provides some evidence of a change, there is a need for action to ensure that the process continues on the right track. Just because the current Government has made a point of selecting outstanding women to judicial office does not mean that the diversity issue has been solved; the current appointments process does nothing to encourage or ensure diversity and there is nothing to prevent a future Government undoing much of the work which has been done. Furthermore, there is no evidence that diversity more generally (apart from gender diversity) has been considered at all in relation to appointments to the judiciary to date. In the 2014 consultation, one of the questions to be answered was: what can be done in order to promote diversity and equality in the legal professions in Ireland? Of course, a more preliminary question is: why is judicial diversity (and diversity in the legal profession in general)\textsuperscript{14} important and do we need it? It is important, if the appointments process is to be reformed, with an eye on diversity, that we first establish that judicial diversity is a necessary goal and that this is recognised by all of the stakeholders involved. Ireland is perhaps coming a bit late to the game in this respect as this is an issue which has only recently become topical here. However, other jurisdictions have already had this discussion and a number of different rationales for the need for judicial diversity have been put forward.

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\textsuperscript{12}T. Rubens, "France has Plenty of Women Judges – Why Don’t We?" The Times (9 March 2004). Also quoted in E. Rackley, Women, Judging and the Judiciary: From Difference to Diversity, (Abingdon: Routledge, 2013) at 19 [hereinafter Rackley].
\textsuperscript{13}Judges’ Report, supra note 1 at 22. Also, see below.
\textsuperscript{14}While the issues of equality and diversity in the legal profession in general are equally pressing, it would not be possible to consider both in such a piece and so this article will focus specifically on diversity in the judiciary.
III - Why do we need a diverse judiciary?\textsuperscript{15}

Various different rationales have been given in answer to questions around the need for diversity. Some are contentious, others less so, but while there does not exist a consensus, it is possible to identify the common and most influential arguments.

A. Equal opportunity and fairness

One quite obvious rationale is that of equal opportunity and fairness. Lady Brenda Hale has described this rationale as the argument that “all properly qualified and suitable candidates should have a fair crack of the whip and an equal chance of appointment, being considered impartially and solely on their merits and not in some other way or for some other reason.”\textsuperscript{16} She specifies further that this involves two aspects – process and criteria. By process, Hale is referring to the appointments process itself, and in particular, the now defunct process then operating in the U.K. which was characterised by a “lack of openness, the continuing role of patronage, the dominance of an elite group of chambers and the need to be ‘known’ in order to be appointed.”\textsuperscript{17} Her arguments about criteria are mainly based on the concept of merit and how this is defined. She also questions the obsession with advocacy as a necessary criterion in the appointments process and asks why there are not more academic appointments. Of course, some of Lady Hale’s criticisms have since been addressed by reforms in the U.K.\textsuperscript{18} but the more general argument around the necessity for equal opportunity remains.

Kate Malleson refers to this argument as the equity principle; the idea that it is inherently unfair that men enjoy a near monopoly of judicial power.\textsuperscript{19} This idea takes as fact that men and women are equally qualified as judges and that “there are no qualities or characteristics, whether genetic or learnt, which make men better suited to public life and justify their domination of decision-making bodies.”\textsuperscript{20} Erika Rackley describes the argument as “essentially one of equal opportunities and fairness: all suitably qualified candidates should

\textsuperscript{15} While these arguments relate to diversity in a general sense, the issue of gender diversity is focused on in particular.
\textsuperscript{16} B. Hale, “Equality and the Judiciary: why should we want more women judges?” (2001) Public Law 1 at 1 [hereinafter Hale].
\textsuperscript{17} Ibid. at 2.
\textsuperscript{18} At the time she was writing, the process for appointments involved the old “tap on the shoulder” and “secret soundings” methods. These have since been replaced by a more transparent system involving applications to a Judicial Appointments Commission. See Constitutional Reform Act 2005.
\textsuperscript{19} K. Malleson, “Justifying Gender Equality” (2003) Feminist Legal Studies 1 at 15 [hereinafter Malleson].
\textsuperscript{20} Ibid.
have a ‘fair crack of the whip’ when it comes to the process of and criteria for judicial appointment.”

21 The principle is almost opposite to the difference argument, outlined below, in that it assumes that women are not necessarily going to transform judicial decision-making but simply that there is nothing about women which makes them less suitable as judicial candidates and thus should not be disadvantaged “by factors which do not relate to their capacity to undertake a particular role.”

22 However, it is this very fact which can also be seen as a weakness in the rationale, as Malleson explains. The argument is more concerned “with the interests of the participants rather than society as a whole.” Given that this argument is individualistic rather than societal, Malleson argues that it is not strong enough on its own to promote the need for diversity and thus it is necessary to combine it with “a rationale which demonstrates that equal participation is a prerequisite for the proper functioning of [society]” – the idea of legitimacy.

B. Democratic Legitimacy

Another quite convincing rational is based on the concept of democratic legitimacy, sometimes linked with public confidence in the judiciary and the idea of having a judiciary that is reflective of society. There is much research which points to the general perception of the public that the judiciary is not representative of society; in fact many people believe that the judiciary is out of touch with society – that it comprises a bunch of “pompous old weirdos” who would not understand the workings of the real world.

24 The fact is that in order to ensure public confidence in the judiciary, it needs to be more representative of the community as a whole and not “mainly male, overwhelmingly white, [and] largely the product of a limited range of educational institutions and social backgrounds.”

25 This 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. The argument is similar to that used to justify the current methods of jury selection, which attempt to ensure representation of a fair cross section of the community.

21 Rackley, supra note 12 at 26.
22 Ibid. at 17.
23 Ibid. at 18.
24 See for example, H. Genn, Paths to Justice: What People Do and Think about Going to Law (Oxford: Hart, 1999) at 241.
25 Hale supra note 16 at 10.
Malleson advances the legitimacy argument on the basis of the “increasing acceptance that the judiciary is a political institution.”\textsuperscript{26} She explains this as follows: “judges at all levels are exercising power and so are engaged in politics as widely defined. As such, the demands of democratic principles and the need for legitimacy apply to the judiciary as much to any other institution of power ....”\textsuperscript{27} Hale has also made a similar argument:

\begin{quote}
[\textbf{c}]he judiciary may or should be independent of government and Parliament but ultimately we are the link between them both and the people. We are the instrument by which the will of Parliament and government is enforced upon the people. We are also the instrument which keeps other organs of the state, the police and those who administer the laws, under control. ... [\textbf{Therefore,}] judges should be no less representative of the people than the politicians and civil servants who govern us.\textsuperscript{28}
\end{quote}

Sally Kenney has expanded the legitimacy argument, linking it with the notion of representativeness and 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.\textsuperscript{29} She points to the fact that 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. Demonstrating the dichotomy between the notions of geographical representativeness and gender representativeness, she asks:

\begin{quote}
[\textbf{w}]hy is it not seen as a deviation from merit to exclude the possibility that the ECJ could consist of twenty-seven German judges but a terrible deviation from merit to prohibit it from being all male? Choosing the best woman judge is not more antithetical to applying Merit standards than choosing the best Cypriot judge. The difference is that requiring diversity of nationality or geography has been accepted as a representative restriction, where gender diversity has not.\textsuperscript{30}
\end{quote}

Kenney also refers to the arguments around the inclusion of women in juries to demonstrate the idea of legitimacy. She notes that in discussions around this issue, courts repeatedly say

\begin{footnotes}
\item[26] Malleson, \textit{supra} note 19 at 18.
\item[27] Ibid.
\item[28] Hale, \textit{supra} note 16 at 10-11.
\item[30] Ibid. at 128.
\end{footnotes}
that it is important not only that justice is done but that justice is also seen to be done. So that “[i]f a black man faces an all-white jury, a woman faces all-male jury, or a Greek national faces an international court made up only of Germans, justice may not be seen to be done.”\textsuperscript{31} The point is that if women are excluded from juries or judging, justice will not be seen to be done and “the process and the result will both lack legitimacy”.\textsuperscript{32}

However, Malleson has also noted that “the notion of representativeness is potentially problematic when applied to the judiciary since it suggests that a judge might in some way have been selected to represent the interests of a particular group.”\textsuperscript{33} Indeed she notes the statement of the 1996 Home Affairs Select Committee on judicial appointments that “it is not the function of the judiciary to reflect particular sections of the community, as it is of the democratically elected legislature.”\textsuperscript{34} This view is echoed in the Irish Judges’ Report:

[n]o one has a right to have their case determined by a judge drawn from any particular group or having any particular characteristic. Single judges make judgments on married people, young judges make decisions about older people, gay judges make decisions about heterosexuals, female judges make judgments about men, atheists and agnostics make decisions about believers and in each case, and obviously, vice versa. This is how it should be.\textsuperscript{35}

Thus, it is clearly felt by the Irish judges that issues of representativeness are irrelevant. However, this view is becoming increasingly difficult to sustain as the judges become more politically active. Professor John Griffith referred to this issue in his evidence to that 1996 Committee that “the fact that both branches of government exercise political power means that it is increasingly legitimate to expect them equally to constitute a ‘fair reflection’ of English society.”\textsuperscript{36} Kenney also notes that it is becoming more difficult to characterise legal decision-making as apolitical and “[o]nce judging is conceived as making choices about public policy, less justification exists for allowing only a narrow segment of the legal profession to serve.”\textsuperscript{37} Furthermore, Rackley provides a solution to this issue by pointing out that the terminology of “representation” is misleading. She explains that it is “more accurate to say that the judiciary ought to reflect the community”.\textsuperscript{38}

\begin{thebibliography}{99}
\bibitem{31}Ibid. at 175.
\bibitem{32}Ibid.
\bibitem{33}K. Malleson, \textit{The New Judiciary; The Effects of Expansion and Activism} (Aldershot: Ashgate, 1999) at 108.
\bibitem{34}Ibid.
\bibitem{35}Judges’ Report, \textit{supra} note 1 at 22.
\bibitem{36}Ibid.
\bibitem{37}Kenney, \textit{supra} note 29 at 129.
\bibitem{38}Rackley, \textit{supra} note 12 at 24.
\end{thebibliography}
should comprise a mix of individuals from a variety of backgrounds, beliefs and perspectives and not one which is essentially “male and pale”. Given the general views held by society mentioned above, this is a particularly strong rationale.

C. Others

Various other rationales have been put forward including a symbolic argument espoused by Beverly McLachlin, Chief Justice of the Supreme Court of Canada. In explaining her reasoning on why increasing the representation of women on the bench will change the legal system for the better, she first mentions the public confidence rationale and then goes on to state as a “second reason” that “[i]n a world where one of the primary functions of the judiciary is to promote equality and fairness, it would be anomalous if the very instrument charged with that goal should itself exclude women from its ranks.” McLachlin C.J. also puts forward a third reason, which she refers to as utilitarian:

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\text{[s]imply put, it represents a sound use of human resources. It seems to me that modern societies cannot afford to lose the intellectual power and energy of half the population ... . Our society is increasingly complex, our birth rates are low. We need the wisdom, not only of wise men, but of our wise women.}\]

Her last reason, and the one she considers most important, is one which requires a little more analysis – that women judges can make a difference.

D. Difference

By far the most controversial rationale, and one that is often most relied upon, is based around the idea of difference. Arguments based on difference claim that women will bring a unique contribution to the bench as a result of their different life experiences, values and attitudes. These arguments go much further than those outlined earlier in that they require not only the presence of more women on the bench but also that these women will actually make a difference when they get there; that because of their biological differences and the

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40 Ibid.
different value-systems they have, women will make different, or even better, decisions than male judges.\textsuperscript{41} Many of these arguments draw on Carol Gilligan’s “ethic of care” theory.\textsuperscript{42}

While this theory is, admittedly, quite persuasive and indeed provides an “almost unanswerable claim for the participation of women in the judiciary”,\textsuperscript{43} there are many dangers in this approach. The first problem is that despite numerous studies which have been carried out on the question of whether women judge differently, there is no conclusive empirical evidence to support the theory.\textsuperscript{44} Another problem arises with regard to impartiality; if women judges were to take a more favourable approach to a woman’s evidence or arguments this would not be compatible with the crucial principle of impartiality.\textsuperscript{45} In one of her earlier articles on this issue, Lady Hale argued similarly “women do not want to claim that they look at things differently from men, partly because this would be manifestly inaccurate in many cases and partly because it would make them less well qualified to be judges”.\textsuperscript{46} Another problem which impacts directly on women judges is that the difference argument places too great a burden on the women who eventually do ascend to the bench. It “raises the expectation of superiority; women judges can ‘hear’ all the different voices which are raised in court … ”.\textsuperscript{47} Thus, women judges would have to prove that they are somehow superior – an obviously impossible task. A related objection is that this rationale risks “reifying certain ‘feminine’ ideals perceived as unique to women and fails to account for significant differences between women.”\textsuperscript{48} Thus it assumes that all women are alike. Finally, the ultimate danger with this rationale is this: “[i]f gender difference is the basis for gender equality, then what happens if it is proved that no significant differences exist? … Or that they do exist but do not improve the quality of justice?”\textsuperscript{49} It is for these reasons that Malleson argues we should abandon the difference argument and focus on the rationales of equity and legitimacy.


\textsuperscript{42} See C. Gilligan, In a Different Voice: Psychological Theory and Women’s Development (Cambridge: Harvard University Press, 1982).

\textsuperscript{43} Malleson, supra note 19 at 4.

\textsuperscript{44} Ibid. at 5-7.

\textsuperscript{45} Ibid. at 9-10.

\textsuperscript{46} Hale, supra note 16 at 13.

\textsuperscript{47} Malleson, supra note 19 at 13.


\textsuperscript{49} Malleson, supra note 19 at 14.
However, in more recent times, the difference argument has resurfaced in a more nuanced fashion. As Rackley has explained, we should not argue that women judges make a difference but that they bring different perspectives. She elaborates that we should not suggest that women judges speak with a “different voice” but:

> [properly 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.]

The point is 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. The majority of female 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: “You don’t apply the law any differently, but I do think you see things from a different angle.” Even the responses from male judges indicated a recognition of a “difference of perspective”. 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.” The results are echoed in studies carried out elsewhere which demonstrated differences in the way women judges approach decision-making.

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51 Feenan supra note 48 at 491. The research was conducted during 2004-2005 and involved questionnaires and interviews with a sample of 45 female judges, representing 27% of the total number of female judges.
52 Ibid. at 512.
53 Ibid. at 516.
54 Ibid. at 517.
While the traditional arguments based on difference, focused on decisional outcomes and essentially reduced law to judgments, this new approach looks at the whole process of judging and the distinctiveness that women and other minorities can bring to this process. As Rackley has put it, difference “is not an end in itself but rather a route to engendering diverse perspectives on adjudication, justice and law.”

Lady Hale has also changed her views on difference. Originally, she was sceptical about the ability of women judges to make a difference, although she always maintained that a more diverse bench “might ... bring about some collective change in empathy and understanding for the diverse backgrounds, experience and perspectives of those whose cases come before them”. In 2004, she acknowledged that “the incorporation of difference on the bench subtly changes and, ultimately improves the judicial product”, and by 2013, she had come to the view that she and other women judges do actually make a difference:

I have come to agree with those great women judges who think that sometimes, on occasions, we may do so (make a difference). That is the result of the lived experience of being a judge for 19 years now and a law lord for nine. Of course, the cases I remember more clearly are the cases where I failed to make a difference, because I failed to persuade my colleagues to see things the same way I did. On those occasions, there is still a benefit in having someone there to voice the minority view, perhaps to lay down a marker for the future, and perhaps to reassure that part of the human race that holds up half the sky that someone up there is listening.

This more nuanced difference approach is more easily reconciled with the other rationales based on equity and legitimacy. Moreover, it provides an even more convincing rationale. As Rackley has commented, “a truly diverse judiciary is not simply apposite (on grounds of, say, equal opportunities or democratic legitimacy) but rather essential if we are to realise the best we possibly can in terms of justice, judgments and judging.”

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56 According to Rosemary Hunter, feminist judges make a difference in four areas: court process, case outcome, reasons given for a decision and extra-curricular activities. See R. Hunter “Can Feminist judges make a difference?”(2008) 15 (1–2) International Journal of the Legal Profession 7. In fact, there is now much research to demonstrate that feminist judges (not necessarily female judges) do make a quantifiable difference in terms of outcome. See for example, R. Hunter, C. McGlynn, & E. Rackley ed., Feminist Judgments: From Theory to Practice (Oxford: Hart, 2010). There are now similar projects in many other jurisdictions which have seen similar results.

57 Rackley, “What a difference”, supra note 50 at 41.

58 Hale, supra note 16 at 9.


60 Ibid.

61 See Feenan, supra note 48 at 518.

62 Rackley, “What a difference”, supra note 50 at 49. See also, Rackley, supra note 12.
It is certainly dangerous to argue that difference involves something in the essence of femininity – women will not necessarily have a shared perspective by virtue of their gender but they may well bring different perspectives to bear in their interaction with the judicial process, as will other judges from non-traditional backgrounds. Whether you can classify this phenomenon as “a different voice” remains, perhaps, controversial.

IV - Reconciling these rationales with the notion of “judging” in Ireland

In order to accept any of these rationales, we have to consider whether they can be reconciled with the notion of judging in Ireland. As noted above, judges in Ireland do not see gender, or indeed diversity generally, as relevant to judging. The Judges’ Report states that what is important is “sympathetic and knowledgeable hearing of the individual case rather than the fact that the adjudicator comes from a particular group.” Indeed the general picture put forward of the role of judging in Ireland is usually one based on objectivity and neutrality, whereby judges are not influenced by their own backgrounds or experiences but simply apply the rules in a detached manner.

In an address to the judges of the Circuit Court, former Chief Justice Tom Finlay enunciated this idea and warned his audience that “indulgence in general pronouncements on the customs, manners and morals of a society” is not a function of the judge. Former High Court Judge Declan Costello acknowledged that judges will have their own views on the moral issues which may arise in the course of their duties but stated that because judges are required to give reasons for their conclusions, they must engage in “self-critical examination … [which also exposes them to] the critical examination of others” and this then leads to “judicial objectivity”.

Justice Cross has elaborated on the role of the judge, explaining that the judge seeks “justice and fairness. These are objective ideals and the judge will apply the law with that objective in mind.” He also proposes that, “decisions should be as objective as possible, based on where the legal evidence leads and not based on a judge’s view of how society ought

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63 See supra note 1.
64 Ibid.
to work. Society rightly expects a judge to set his own bias and prejudices and views aside and apply the rules”. However, as David Kenny has recently pointed out, “[t]he objectivity that Justice Cross perceives in the judicial enterprise is, in part, a product of the largely homogenous philosophy of Irish judges, which is itself a product of the restrictive view of who would make a good judge that he advocates.” Kenny further states that:

“[t]he homogeneous professional backgrounds of our judges result in a narrow interpretive community, which is compounded by homogenous social, cultural, educational and intellectual backgrounds. Because part of the interpretive community will be influenced by life experiences outside of professional background, a lack of diversity further narrows the views within the community.”

In other words, it is easy for Irish judges to talk about neutrality and objectivity when they are generally drawn from a very narrow section of society where the experiences, education and backgrounds may be so similar as to limit the emergence of “different” views. While the politically correct line may be to maintain that “who the judge is” does not matter to the process of judging, it is clear that this does not stand up to scrutiny. Take for example the case of a High Court judge giving an interpretation of the Constitution; Bunreacht na hÉireann is, in many instances, a very vague text and is open to interpretation. There are no clear guidelines and no obvious answers; depending on the philosophy of the particular judge, the interpretation will not always be predictable and indeed a different judge might take a different view. As Kenny has noted:

“[t]he Constitution is dependent for its meaning on what we understand it to be doing, what its goals and objectives are. These understandings are our politics, and without them, the Constitution would be mired in ambiguities. It is the politics that we have – and the sense of direction and purpose that it gives us – that grounds our understanding and gives indeterminate text determinate meaning.”

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68 Ibid.
70 Ibid.
72 Indeed it has often happened in the past that the Supreme Court will take a completely different interpretation from that which was taken in the High Court.
73 Kenny, supra note 69.
Perhaps the reason why we have not yet had this conversation on the need for judicial diversity in Ireland is because the Irish judiciary wishes to preserve the traditional notions of neutrality and therefore avoid the assumption that judging is more than a technical or mechanical process. If you accept this assumption, that judging is an almost automated action, which is not influenced by background or personal or cultural experience, then there is an argument to be made that diversity is not relevant to judging. However, we cannot avoid the fact that, despite what Justice Cross or the Irish Judges’ Report might indicate, judges are influenced by their backgrounds, experiences and education. In order to embrace the idea of diversity and reconcile the rationales for diversity with the notions of “judging” in Ireland, we first have to recognise that fact.

In order to accept the new “difference” rationale or the “different perspectives” rationale, we have to accept that a judge’s perspective matters and in fact is useful in the judicial process. To accept the legitimacy argument we have to also accept that courts are representative institutions. We have already accepted this to a certain extent. Lady Hale has pointed to the fact that in the U.K., there is already a requirement to consider geographical diversity, and has questioned why this cannot be extended to other types of diversity. In addition, in Northern Ireland, the Judicial Appointments Commission is required “so far as is reasonably practicable to do so, to secure that a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is required to select a person to be appointed, or recommended for appointment, to a listed judicial office”. In Ireland, there was a convention, now no longer in use, that at least one member of the High or Supreme Court should be drawn from the Protestant community. Thus, there are existing precedents where notions of representativeness have been accepted. Even if the notion of representativeness causes discomfort amongst those on the bench, we can always accept Rackley’s suggestion that the judiciary should be a fair reflection of Irish society, which in itself will address the issues with the public’s perception of the judiciary and the issue of justice being seen to be done.

74 See, e.g., the work cited supra note 71.
75 Ibid. Section 27(8) of the Constitutional Reform Act 2005, requires that at the same time as appointing on merit, it must be ensured that “between them, the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom.”
76 Justice (Northern Ireland) Act 2002, s.5(10)(b) as amended by the Justice (Northern Ireland) Act 2004, s.3.
77 See D. G. Morgan, Constitutional Law of Ireland, 2nd ed. (Dublin: Roundhall, 1990) at 14.
To accept any of these rationales, it is also necessary to openly recognise that non-merit factors have always been part of the selection process in Ireland. Indeed, it would be difficult to dispute the fact that for many years political allegiance was the most important factor in judicial appointments.\textsuperscript{78}

There is a theory that judges are neutral and objective – the herculean fairy tale – and it seems the Irish judiciary wishes to maintain this fiction. If that were true then perhaps the arguments in favour of diversity would be minimised but the undeniable truth is that judges are human and they do bring their own perspectives to bear when judging; judges, like all other humans, operate from their own perspectives and are influenced by their own experiences and backgrounds – they would not be human otherwise. Judges are certainly not “computers in robes” and nor would we want them to be.\textsuperscript{79} When judges encounter Dworkin’s “hard cases”, for which there are no rules or straight answers, they must use their own discretion and rely on their own judgment with the benefit of their own life experience. For that reason alone, we need to ensure that we have a wide variety of perspectives and backgrounds being brought to bear on the bench. Perhaps it is time for us in Ireland to let go of the fairy tale and accept that diversity and “who the judge is”\textsuperscript{80} matters.

\textbf{V – Conclusion}

It would be easy to point to the recent increase in female appointments to the judiciary as evidence that there are no problems in relation to judicial diversity, at least with regard to gender, in Ireland. However, this is a very cosmetic view of the situation, which accepts that a ratio of about 30:70 women to men in the judiciary is acceptable, and which assumes future governments will be willing to continue this trend. When Ireland’s figures are compared internationally, a more realistic picture emerges: in the 2014 Council of Europe survey on judicial systems, Ireland was placed 7th from the bottom in a table on gender diversity of judicial systems in 47 European countries.\textsuperscript{81} Furthermore, when the profile of the judiciary is

\textsuperscript{78} In the Judges’ Report, it was accepted that party political preference has often played a role in appointments and the Report maintained that “it is simply wrong in principle that consideration of political considerations should form any part of the decision process”; Judges’ Report, supra note 1 at 16.


\textsuperscript{80} See Rackley, “What a difference”, supra note 50 at 41.

more closely examined, we can see that even apart from gender, very little diversity exists within their ranks. Malleson argued in 2003 that, “[i]t is now so widely accepted that the goal of gender equality in … the judiciary … is an unqualified good, that to ask the question why this is necessary seems redundant, if not perverse.”

However, given the apparent nonchalance of the relevant stakeholders in Ireland, it has been deemed necessary to set this issue out here. Whether or not the difference argument is accepted, it is clear that judicial diversity is a worthwhile goal. This is something which has been recognised in the U.K. and has been reflected in its political agenda for at least the last ten years.

While in Ireland, our numbers may seem more favourable when compared with those in the U.K., the problem here is that our judicial appointments system does nothing to ensure that the recent trend, which has improved diversity, will continue. In fact, a future Government could well reverse the trend. Interestingly, Lady Hale believes that politicians are more sensitive to this issue than the judiciary and are more likely to address diversity.

This may be true and while our system, rightly or not, places much power in the hands of politicians, this does not take away the fact that there is currently no requirement to consider diversity. Nor, it seems, is there any political will to examine this issue and set up a taskforce on judicial diversity or some equivalent, as has been done in many other jurisdictions.

The means of promoting and achieving diversity is a discussion for another day. Whenever reform to the judicial appointments process is finally tackled in Ireland, it is to be hoped that methods of insuring diversity will be considered, but at the very least, it is to be hoped that judicial diversity will be acknowledged as a worthwhile and necessary pursuit and one that is vital in maintaining public confidence in the judiciary.

used was from 2012, the closest country above Ireland was Turkey, which had 34.4% women judges and thus would be ahead even using Ireland’s current figures.

82 Malleson, supra note 19 at 1.
83 The Department of Constitutional Affairs 2005 press notice acknowledges this: “The public needs to have confidence in judges who more closely reflect the diversity of the nation, and who have a real understanding of the problems faced by most people.”
84 B. Hale, Lecture given in the University of Limerick (15 May 2015).