

WHO AM I TO JUDGE? - THE APPOINTMENT OF ACADEMICS TO THE IRISH JUDICIARY

Abstract

Legal academics will for the first time be applicable for appointment as judges in Ireland per the Judicial Appointments Commission Bill 2017. This article discusses the provision and compares it to the law in England and Wales under the Tribunals, Courts and Enforcement Act 2007. While the proposal is to be welcomed in principle it needlessly limits the potential pool of academic candidates by imposing onerous requirements regarding their academic contract and adopts narrow criteria for relevant academic experience. The law in England and Wales allows for a broader and more diverse range of academics to be appointed as judges.

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Introduction

This article seeks to examine the proposal as outlined in section 35(4) of the Judicial Appointments Commission Bill 2017, presented to the Dáil on the 30th May 2017 by the Minister for Justice and passed by the lower house on the 31st May 2018. At the time of writing, March 2019, the Bill is currently before the Seanad. Should the relevant section of the Bill be passed it will expand the range of potential candidates for judicial office by allowing legal academics to apply for the role across various courts for the first time. This article is broken into three segments, firstly providing a general discussion of the appointment of academics as judges with a summary given of contemporary commentary, both academic and political. Secondly, undertaking an analysis of the relevant section in the 2017 Bill and thirdly, providing a comparison with the equivalent provision in England and Wales, a jurisdiction from which we continue to model many aspects of our legal system, through analysing section 50 of the Tribunals, Courts and Enforcement Act 2007.

Academics as Judges

To the layperson the prospect of a legal academic being appointed a judge may be viewed as a rather unremarkable occurrence. Giving speeches, reading large volumes of material and writing to a high standard are skills many are likely to consider the essential basics of both roles. This may betray a tendency to oversimplify descriptions of the jobs of others in comparison to our own.

The Judicial Appointments Commission Bill 2017 has proven controversial since first proposed but that is centred on the new method by which members of the judiciary shall be chosen, creating the Judicial Appointments Commission to replace the Judicial Appointments Advisory Board.

That however is outside the scope of this article; the focus here shall be on a section of the Bill that has attracted only passing comment amongst politicians and the wider media. It is a proposal that merits closer scrutiny, ultimately judges are at the very heart of our legal order, and their decisions can have a long lasting impact on the functioning of our State and the personal lives of its citizens. As noted by Michael Collins SC:

Independent judges are the constitutional heroes of our democratic system. They stand between the citizens and the State, protecting them from abuses of power in a myriad of ways. Choosing our judges carefully on merit and safeguarding their independence are therefore critically important issues.¹

The prospect of an entirely new set of individuals being allowed to take up judicial office must therefore be examined to ensure an appropriate balance is being struck between having a legal system which is sufficiently flexible in meeting the needs of the 21st century, whilst still ensuring that the appropriate standards necessary to perform the role are being maintained. Collins further elaborates on this concept of ‘merit’:

The criteria for choosing good judges are not difficult to identify. Merit should be the sole criterion, albeit various factors can feed into the merit of a candidate for a particular judicial office. A very useful set of guidelines on such factors has been set out in the UK by the Judicial Appointments Commission, which recommends a single candidate, solely on the basis of merit, to the Lord Chancellor. The guidelines on merit are elaborated upon under headings such as intellectual capacity, personal qualities, ability to understand and deal fairly, authority, and communication skills and efficiency.²

Merit is an attribute which the judiciary themselves have placed special emphasis upon for candidates seeking to join their ranks. The Judicial Appointments Review Committee, which was composed of the Chief Justice, presidents of the various courts and a number of other judges representing the remainder of their colleagues, stated:

The Committee has outlined how the only criterion upon which quality appointments can be made to the difficult and important job of judge, is merit.

An essential element of merit to which particular weight should be given is that of practical experience in the conduct of litigation and advocacy. There is no substitute for this and no amount of formal academic training in judicial skills or experience in other branches of the law can equate with actual practical experience of the conduct of litigation in court.³

They go so far as to suggest that the statutory period of practice as a barrister or solicitor ‘should be extended to fifteen years’ for all courts.⁴ Whilst the emphasis upon the desirability of candidates possessing long periods of courtroom experience is understandable, Feenan has outlined how such a provision is not without its drawbacks:

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.⁵

¹ Michael Collins, ‘Choosing judges carefully’ (2017) 22(2) *The Bar Review* 56.

² *ibid.*

³ Judicial Appointments Review Committee, *Preliminary Submission to the Department of Justice and Equality’s Public Consultation on the Judicial Appointments Process* (30 January 2014) para 149 – 150.

⁴ *ibid* para 151.

⁵ Dermot Feenan, ‘Judicial Appointments in Ireland in Comparative Perspective’ (2008) 1 *Judicial Studies Institute Journal* 37, 45.

In a similar vein Morgan has noted:

[T]he total overlooking of academic lawyers which has meant one huge loss, namely that the Bench was deprived on the services of John Kelly, a pillar of learning and common sense, who would have been a great asset during the 1970s and 80s, at a time of rapid, probably too rapid, Constitutional law making.⁶

The former Minister of Justice, and author of the seminal textbook on family law in Ireland,⁷ Alan Shatter, advocated for a discussion on substantive reforms to the courts systems. This included, '[e]xtending the eligibility for judicial appointments to distinguished academic lawyers, who need not be either qualified or practicing barristers or solicitors, whose specialist knowledge would enhance legal expertise within our court system'.⁸

Jim O'Callaghan TD and SC noted the following when the Bill came before the Select Committee on Justice and Equality, of which he is a member:

I think there have been a number of judges who were legal academics and, in general, the experience has been very positive. It is also common in other countries. In America many people appointed straight to the Supreme Court come from an academic background. It is important, however, to maintain, particularly in courts of first instance, a practical knowledge of how courts operate. I would be concerned if legal academics were, say, put straight into the High Court, the Circuit Court or the District Court without any experience of appearing before courts and practical experience of how the rules of evidence operate.⁹

The United States Supreme Court is an institution that attracts much attention and scrutiny. Barton undertook a study of the roles served by members of that court over numerous decades, prior to their appointment. He outlines in relation to the current court, led by Chief Justice John Roberts, that:

What the Roberts Courts lack in practice experience, they make up in law teaching experience. With ninety-five collective years in legal academia, Roberts is again first among all Supreme Courts in years spent in legal academia. Interestingly, the gap is not as large as it is in some other categories; two Courts from the 1940s (Hughes and Stone) are just behind with ninety-four total years spent in legal academia. Unsurprisingly, given the rarity of law school training in the nineteenth century, most Supreme Courts during that period have no experience teaching law.¹⁰

As a counterpoint to the emphasis on the necessity for practical courtroom based experience for judicial appointees, Cahillane notes the following:

An approach which includes the appointment of academic lawyers should be considered in Ireland. Arguments against this approach include the fact that many academic lawyers will not have the requisite knowledge of court procedure. However, such concerns were also expressed in relation to appointments of solicitors but yet the extension of the qualification criteria of the superior courts to include practising solicitors has not proved

⁶ David Gwynn Morgan, *A Judgement Too Far? Judicial Activism & the Constitution* (Cork University Press 2001) 114.

⁷ Alan Shatter, *Family Law* (4th edn, Bloomsbury Professional 1997).

⁸ Alan Shatter, 'How to really improve the way we appoint judges' *The Irish Times* (Dublin, 1 December 2016).

⁹ Select Committee on Justice and Equality Deb 7 February 2018, 34-35.

¹⁰ Benjamin H Barton, 'An Empirical Study of Supreme Court Justice Pre-Appointment Experience' (2012) 64 *Florida Law Review* 1137, 1156.

to be a problem. Furthermore, Section 19 of the 1995 Act¹¹ already specifies that an individual must agree to undergo training, which could easily be provided in order to equip the successful candidate with the requisite knowledge of court procedure. Furthermore, it could be argued that academic lawyers are naturally suited to the types of cases that arise in the Supreme Court, which require detailed analysis of legislation and constitutional provision. Such a move would also open up more opportunities for women and other minorities interested in judicial office. This may be a controversial suggestion but it is one which should at least be considered.¹²

Similarly O'Dell, a faculty member of the law school at Trinity College, has written on his blog:

This is the usual argument against the eligibility of academics for appointments as judges. It has many flaws. I'll briefly mention three. First, this argument is strongest in the context of appointments to a busy single-judge court of original jurisdiction, such as the High Court; but, even there, lawyers (such as Mr Justice Max Barrett) whose careers were in transactions rather than litigation have served with distinction. Second, this argument loses force in the context of appointments to multi-judge courts of appellate jurisdiction, such as the Court of Appeal and the Supreme Court, where the various lawyers can bring different perspectives; one can bring sensitivity to the trial court procedures, where another can bring academic analysis to bear. And, third, in many other similar jurisdictions, not only academics have been appointed to the bench, but the world has not stopped spinning on its axis.¹³

It is of interest that the legal professional bodies are divided on the merits of broadening eligibility for judicial appointment to academics. Both organisations made submissions to the Department of Justice on the Scheme of the Judicial Appointments Commission Bill 2016. The Bar Council stated that '[t]he inclusion of legal academic candidates is inconsistent with the requirement for candidates to demonstrate knowledge, experience and competence'. They go on to express the view that 'first-hand knowledge of the courts as an advocate either in his/her own capacity or in the capacity of instructing litigator is an essential requirement for judicial appointment'.¹⁴

It should be noted that the Scheme of the 2016 Bill outlined a relevant legal academic was a person 'who has qualified as a barrister or as a solicitor, whether or not that person has practised as a solicitor or as a barrister'.¹⁵ As will be discussed in detail later, a required period of practice of at least four years was subsequently included in the Bill put forward by the Minister. The Law Society by contrast:

¹¹ Court and Court Officers Act 1995.

¹² Laura Cahillane, 'Judicial appointments in Ireland: the potential for reform' in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 123, 131-132.

¹³ Eoin O'Dell, 'Why should legal academics not be judges?' (cearta.ie, 15 December 2015) <www.cearta.ie/2015/12/why-should-legal-academics-not-be-judges/> accessed 4 March 2019.

¹⁴ The Bar of Ireland, 'Submission by Council of The Bar of Ireland to the Joint Committee on Justice and Equality on the Scheme of Judicial Appointments Commission Bill 2016' (The Bar of Ireland, 23 January 2017), 5 <www.lawlibrary.ie/Membership/Submission-on-Heads-of-Judicial-Appointments-Commi.aspx> accessed 4 March 2019.

¹⁵ Scheme of Judicial Appointments Commission Bill 2016, Head 26, 42 <www.jusce.ie/en/JELR/scheme_of_judicial_appointments_commission_bill_2016.pdf/Files/scheme_of_judicial_appointment_s_commission_bill_2016.pdf> accessed 1 April 2019.

[S]upports the government's proposal to make legal academics eligible for judicial appointment. It is important for the independence and quality of the judiciary to make the widest pool of legal practitioners and experts eligible for judicial appointment.¹⁶

It is clear that there is a wide range of opinion on the merit or otherwise of considering legal academics for appointment to the bench. It is my view that any initiative to broaden the diversity of the judiciary whilst still maintaining high standards for prospective appointees should be welcomed. While understanding the hesitance of those who place a primary focus upon practical experience before the courts this should not be regarded as an insurmountable barrier for a legal academic to overcome. Practice takes many forms and there are a considerable number of legal professionals in Ireland whose day to day involvement with the law is outside of the courtroom. It is difficult to accept that a legal academic, particularly one who has already qualified as a solicitor or barrister, could not become well versed in matters of court procedure within a relatively short time frame.

Judicial Appointments Commission Bill 2017: An Analysis

I will now undertake an analysis of section 35(4) of the Judicial Appointments Bill 2017, which inserts the following after section 45 of the Courts (Supplemental Provisions) Act 1961:

Qualification of certain legal academics for appointment to judicial office

45A. (1) A person who is for the time being a legal academic of not less than 12 years' standing shall be qualified for appointment as a judge of the Supreme Court, the Court of Appeal, the High Court, the Circuit Court or the District Court, but this is subject to subsections (2), (3) and (5).

The ambit of the section is clear from the outset, this will not be a broad expansion of the entitlement to seek judicial office to a wide range of legal academics, but rather 'certain' holders of that role, a precursor to precise boundaries being laid out. The use of the phrase 'who is for the time being' would suggest that individuals who depart academia for alternative roles such as working with the Law Reform Commission or as policy researchers with non-governmental organisations, regardless of their period of service as an academic, could not be appointed to the bench by virtue of this section. I will leave aside the concept of a 'legal academic' momentarily as it is defined in a subsequent subsection and focus on the temporal requirement that the person be of '12 years' standing'. The precise definition of the role will allow us to pinpoint when this time period commences, of present interest is how the figure of 12 years was chosen. Though both the explanatory notes and speech by the Minister for Justice in the Dáil are silent on the matter it would appear reasonable to surmise that the figure was chosen to ensure parity of professional experience with those drawn from the legal professions, the position of Supreme Court, Court of Appeal and High Court judge is currently restricted to practising barristers or solicitors of not less than 12 years standing.¹⁷ Should this have been the inspiration for the provision an immediate inconsistency becomes apparent. Appointments for the position of Circuit Court¹⁸ and District Court¹⁹ judge are presently restricted to a practising barrister or solicitor of not less than 10 years' standing, yet the proposed law shall require two additional

¹⁶ Law Society of Ireland, 'Submission on the Scheme of the Judicial Appointments Commission Bill 2016' (Law Society of Ireland, 22 March 2017), 21 <www.lawsociety.ie/globalassets/documents/submissions/jac-bill-submission-230317.pdf> accessed 4 March 2019.

¹⁷ Courts (Supplemental Provisions) Act 1961, s 5 as amended by the Courts and Court Officers Act 2002, s 4 and the Court of Appeal Act 2014, s 11.

¹⁸ Courts (Supplemental Provisions) Act 1961, s 17(2) as amended by the Courts and Court Officers Act 1995, s 30 and the Personal Insolvency Act 2012, s 188.

¹⁹ Courts (Supplemental Provisions) Act 1961, s 29(2).

years of service by legal academics before consideration for appointment to the lower courts. It is difficult to discern what the Minister feels justifies this difference in treatment or what it is intended the academic will acquire in those additional two years. In an academic context, a period of twelve years' experience does not necessarily denote the person holds a senior or supervisory position though in a university setting it is reasonable to assume a lecturer would have advanced from below the bar to above the bar and in an institute of technology from assistant lecturer to the grade of lecturer.²⁰

(2) Without prejudice to subsection (5), a person of such standing shall have been employed as a legal academic for a continuous period of not less than 2 years immediately before such appointment.

This provision would appear to be mirroring the existing criteria for appointment to the Supreme Court, Court of Appeal and High Court, which require that practising lawyers being appointed to the role have 'practised as a barrister or a solicitor for a continuous period of not less than 2 years immediately before such appointment'.²¹ However, it should be noted that the Minister has proposed a different treatment in law compared to solicitors and barristers, for appointment to the District Court or Circuit Court they must have 10 years' experience in legal practice however it is not necessary that at least two years of those were immediately prior to appointment as judge. An example may illustrate the potential shortcomings of this law. Take two hypothetical individuals, the first practised as a barrister for 10 years, was elected to the Dáil, left their legal practice and then served as a TD for a further 10 years. The second was a law lecturer at an NUI university for 10 years, was elected to the Seanad on the NUI panel, left their academic role and then served as a Senator for a further 10 years. The Senator could be said to have a similar degree of what may be broadly termed as legal experience as the TD. However were the TD to rejoin the Law Library he would be immediately eligible for appointment to the District Court, the Senator would have to regain an academic role and hold it for a further two years before earning the same eligibility. I would suggest that to achieve consistency across the various legislative provisions, the requisite period should be lowered to 10 years' standing for legal academics to be considered for appointment to the Circuit Court and District Court and that the provision requiring two years continuous service prior to appointment to those courts be removed or that a shorter duration be contemplated, such as one academic semester.

(3) Subsection (1) shall only apply to a legal academic—

(a) who, at the time of the appointment referred to in that subsection, is a barrister or a solicitor, and

(b) who has practised as a barrister or solicitor for a continuous period of at least 4 years,

and subsequent subsections of this section, in so far as they relate to a person who is referred to in them as a 'head of a faculty' or 'head of another faculty', shall not be construed as enabling such a person to be the subject of such an appointment unless the person—

(i) at the time of the appointment, is a barrister or a solicitor, and

(ii) has practised as a barrister or solicitor for a continuous period of at least 4 years.

This subsection seek to address the concerns of various commentators, and indeed members of the judiciary, as discussed earlier in the article, who hold the view that a working knowledge of

²⁰ See for e.g. 'Accelerated Progression from Lecturer below bar to Lecturer above bar' (Dublin City University, November 2010) <www4.dcu.ie/sites/default/files/hr/pdfs/AccProgressionNov10V3_0.pdf> accessed 4 March 2019.

²¹ Courts (Supplemental Provisions) Act 1961, s 5 as amended by the Courts and Court Officers Act 2002, s 4 and the Court of Appeal Act 2014, s 11.

the courts is a crucial attribute for any new judge. Whilst there is a certain logical appeal to this perspective, it must be considered that many individuals entering new positions are required to undergo a degree of ‘on the job’ training. Legal academics already possess considerable knowledge on the workings of these institutions, much of their professional lives have been spent discussing and writing about the rulings of the various courts. It is also a reality that after four years many lawyers would still be at a very junior point in their legal careers, rather unlikely to have lead important or complex cases before the superior courts, it is questionable therefore whether this degree of exposure would greatly contribute to their abilities as a judge.

This provision obviously precludes legal academics who have not obtained a qualification as either a solicitor or barrister from seeking judicial appointment. Inevitably it will exclude a considerable portion as many pursue a career path from undergraduate and postgraduate studies into academia without an intervening period of vocational studies at the Law Society or Honorable Society of King’s Inns. One may question therefore if this will act as an unnecessary restriction on the potential pool of academic applicants. However as previously noted, whenever scepticism has been raised by various commentators to the proposal of appointing legal academics to the bench it has focused upon their perceived lack of practical experience before the courts. It may be a necessary compromise therefore that in order to achieve this first incremental reform to judicial appointment eligibility a requirement of qualification as a solicitor or barrister be retained. A liberalisation of this requirement could perhaps become more widely acceptable in subsequent years as the appointment of academics to the judiciary becomes more commonplace.

- (4) Without prejudice to subsection (5), in this section ‘legal academic’ means a permanent member of the academic staff of an educational establishment who—
- (a) teaches one or more subjects in the field of law, or
 - (b) carries out, or supervises the carrying out, of research in one or more such subjects, whether or not in conjunction with the carrying on by him or her of administrative duties relevant to that teaching, research or supervision.

This subsection focus on the nature of the academic role that must be held by a candidate for judicial office, it concerns essentially two aspects, the scope of their duties and the nature of their contract.

The broad range of duties which will satisfy this provision are to be welcomed, as it caters for the diverse form working lives of academics may take. Those with a light teaching load but onerous research commitments, and vice versa, come within the definition of this act. Likewise academics whose entire focus may be on teaching or those solely devoted to research will reach the requisite threshold.

The other key aspect of this subsection, the terms of the academic’s contract, is in my view problematic and unreasonably restricts the potential pool of judicial candidates. The provision requires a ‘permanent member of the academic staff’.

The issue of increasing casualisation in the third level sector has been of considerable comment amongst early career lecturers and in the media.²² Courtois and O’Keefe have undertaken research of this area and have come to the conclusion that a culture in which there is replacement of permanent jobs with low-paid, temporary employment has become endemic

²² Peter McGuire, ‘The increasingly precarious life of an academic’ *The Irish Times* (Dublin, 12 May 2015) and Peter McGuire, ‘Is this the end of job security in academia?’ *The Irish Times* (Dublin, 4 April 2017).

within the higher education sector. They note some difficulties that have arisen in the collection of data from official sources:

Since 2013 the statistics produced by the HEA [Higher Education Authority] no longer distinguish between temporary and permanent full-time academic staff. There are no data on the amount of contact hours taught by temporary hourly-paid workers including graduate students. Only the proportion of researchers on temporary contracts is officially known; it currently stands at 80%.²³

In part as an attempt to counteract this lack of data they designed a questionnaire that sought to query casual academics about their current and past working practices. It was circulated by means of an aggressive social media campaign and through email by a national trade union for academics.²⁴ They acknowledge their purpose was 'primarily as an organising tool and not a pure social scientific exercise',²⁵ but that their research is firmly located within a long established and social movement friendly tradition known as Participatory Action Research. Their survey made a number of findings which are a matter of interest for our current purposes. Firstly, in relation to the age of casual academics:

[T]he average age of our sample is 39 with only 19% of respondents in their twenties. This suggests those engaged in precarious work are not just freshly minted PhDs. Many respondents in our sample report having worked in the third-level sector for long periods of time. It is significant that older workers are stuck in precarious, unstable work at this stage in their lives and that precarity is not the preserve of the young as we are often led to believe.²⁶

Secondly, women would appear to be disproportionately represented amongst casual academics compared to men:

The gender discrepancy becomes more visible towards the lower end of the status hierarchy, with women concentrated in hourly-paid and pro-rata work, the most precarious of the forms of casual labour identified in our sample.²⁷

Lastly, the authors found casual workers were in this position for a worryingly prolonged period of time:

Casual workers have been working an average of 7.2 years in higher education. Of these, the most startling finding is that hourly-paid workers are more likely to have worked in academia for on average of 5 years, all of whom bar one respondent reported an income of less than 10,000 euros a year.²⁸

The net effect of all this is that the inclusion of a requirement that the legal academic be a 'permanent member of the academic staff' may substantially lessen its practical value. Additionally, the entire section could be interpreted in a manner that the legal academic does not actually receive 'standing' until their contract become permanent, that is they must wait the

²³ Aline Courtois & Theresa O'Keefe, 'Precarity in the ivory cage: Neoliberalism and casualisation of work in the Irish higher education sector' (2015) 13(1) *Journal for Critical Education Policy Studies* 43, 48.

²⁴ *ibid.*, 50.

²⁵ Courtois & Theresa O'Keefe (n 23), 49.

²⁶ Courtois & Theresa O'Keefe (n 23), 56.

²⁷ *ibid.*

²⁸ Courtois & Theresa O'Keefe (n 23), 57.

better part of a decade to achieve permanency and then another 12 years again before consideration for judicial office.

Additionally, one should note that the use of the word ‘permanent’ in this legislation could potentially exclude one form of academic, section 9 of the Protection of Employees (Fixed-Term Work) Act 2003 provides that where a fixed-term employee has been employed on two or more fixed-terms contracts, the aggregate of which amounts to 4 years or more, they shall then be entitled to a contract of indefinite duration unless another fixed-term contract can be objectively justified. A report commissioned by the Minister for Education, colloquially known as the ‘Cush Report’, has recommended that in the context of higher education this aggregate period be reduced to two years.²⁹ A leading textbook in the area of employment law notes:

The term ‘contract of indefinite duration’ is not defined in the 2003 Act but it has been judicially defined outside the context of the 2003 Act as meaning no more than a contract terminable upon the giving of reasonable notice.³⁰

Therefore, it is similar to a permanent role but does not bear that title. This is not a merely pedantic point, a judge’s decisions are subject to legal challenge if the appropriate formalities have not been observed on their appointment. The Minister would therefore be sensible to revisit this provision, not merely due to the number of academics it excludes but because its interpretation could prove a difficulty for the Government in the years to come.

Both subsection 5 and 7 are technical sections related to heads of faculty which would appear to be in line with the logic of the remainder of the section and do not require further analysis.

(6) In this section ‘educational establishment’ means—
(a) a university to which the Universities Act 1997 applies,
(b) the Honorable Society of King’s Inns, or
(c) the Law Society of Ireland,
and in computing, for the purposes of this section, any period that a person must have served as a legal academic, successive employment of the person by 2 or more of any of the foregoing educational establishments shall suffice.

An Irish Times guide to studying law in Ireland notes the following:

There are many options for studying law in Ireland, with Trinity College, UCD, NUI Galway, UCC, Maynooth University and UL all offering general law degrees. Griffith College, a private third-level college, also has a strong reputation for the quality of its law courses. DIT, WIT, Letterkenny IT and Dublin Business School private college also offer them, while Athlone IT and IT Carlow have business and law degrees.³¹

Only six of the thirteen above-mentioned institutions are ‘educational establishments’ for the purposes of the Bill. The academic staff of the institutes of technology and private colleges, regardless of their contribution to legal scholarship or abilities teaching law, are excluded from consideration under this provision. There is no doubt that the teaching load at institutes of

²⁹ Michael Cush, ‘Report to the Minister for Education and Skills of the Chairperson of the Expert Group on Fixed-Term and Part-Time Employment in Lecturing in Third Level Education in Ireland’ (Department of Education and Skills, May 2016) <www.education.ie/en/Publications/Education-Reports/Report-to-the-Minister-of-Education-and-Skills-of-the-Chairperson-of-the-Expert-Group-on-Fixed-Term-and-Part-Time-Employment-in-Lecturing-in-Third-Level-Education-in-Ireland.pdf> accessed 4 March 2019.

³⁰ Ailbhe Muprhy and Maeve Regan (eds), *Employment Law* (Bloomsbury Professional 2017) para [13.39].

³¹ Peter McGuire, ‘Law opens other doors too’ *The Irish Times* (Dublin, 16 June 2015).

technology is heavier for the average staff member than at universities, where traditionally the staff had a greater degree of focus upon undertaking research. However, we have already seen that teaching just one legal subject would suffice to be considered a legal academic with research not being mandatory, on that basis it is difficult to rationalise why a criminal law lecturer at Trinity College fulfils the necessary criteria but the same lecturer at WIT does not. The fundamentals of the module they would teach would presumably be substantially similar, yet one is being accorded a privileged position under the proposed law. It should also be noted that the Honorable Society of King's Inns, an 'educational establishment' for the purpose of this Bill, requires students to hold an approved degree before being allowed to undertake the entrance examinations for the Degree of Barrister-at-Law. The comprehensive list of approved degrees includes law degrees from Waterford, Letterkenny, Carlow, Athlone and Dublin Institutes of Technology (now Technological University Dublin) and a number of private third level institutions.³²

Mick Barry TD remarked during the second reading of the Bill in the Dáil, 'There is an interesting detail in the Bill in terms of class, which is that judicial appointments will now be permitted, if the legislation is passed, to come from the ranks of legal academics but only those from universities, not institutes of technology'.³³ Furthermore, with the recent passage of the Technological Universities Act 2018, it would appear there will be a whole new category of institutions whose staff shall be excluded from consideration for judicial office. Additionally time spent as a staff member of any foreign university or other educational establishment, regardless of its reputation, will be disregarded for the purposes of this section, which in an increasingly globalised world where academics in particular tend to spend a portion of their professional life abroad would appear to be a rather short-sighted omission.

England and Wales Legislation: A Comparison

The criterion for appointing the judiciary in England and Wales is governed by the Tribunals, Courts and Enforcement Act 2007. In many respects the act is a far more inclusive and broad-minded provision than its Irish equivalent. The explanatory notes provide the context which lead to the adoption of this law:

A consultation paper, *Increasing Diversity in the Judiciary*, published by the Department for Constitutional Affairs (now the Ministry of Justice) in October 2004, invited views as to whether these statutory eligibility requirements constituted an obstacle to greater diversity in the judiciary. Responses to consultation indicated that the eligibility requirements were considered an obstacle to greater diversity in several respects.³⁴

Section 50 outlines the eligibility conditions for judicial appointment:

In order to satisfy the "judicial-appointment eligibility condition", an individual has to hold a "relevant qualification" (i.e. as a barrister, a solicitor or a holder of another specified legal qualification) for a specified minimum number of years (generally five or seven, in place of the seven or ten specified in existing legislation), and has to have gained experience in law for the specified minimum number of years, while holding a relevant qualification.³⁵

³² The Honorable Society of King's Inns, 'Schedule of Approved Degrees' (The Honorable Society of King's Inns 2014) <www.kingsinns.ie/cmsfiles/entrance-examination/Schedule-of-Approved-degrees-2014.pdf> accessed 4 March 2019.

³³ Dáil Deb 27 June 2017, vol 955, no 3, 98.

³⁴ Explanatory Notes to the Tribunals, Courts and Enforcement Act 2007 (UK), para 287.

³⁵ *ibid*, para 289.

Unlike in Ireland where both barristers and solicitors are actually required to practice for a specified period, the position in England and Wales prior to the passage of the 2007 Act was that they simply had to possess the qualification for the requisite number of years, engaging in practice during that time was not a condition. However, it is now necessary for prospective candidates for the bench to ‘have gained experience in law’, which is elaborated upon in section 52. Subsection 2 to 5 provide:

- (2) A person gains experience in law during a period if the period is one during which the person is engaged in law-related activities.
- (3) For the purposes of subsection (2), a person's engagement in law-related activities during a period is to be disregarded if the engagement is negligible in terms of the amount of time engaged.
- (4) For the purposes of this section, each of the following is a “law-related activity”—
[...]
(h) teaching or researching law;
(i) any activity that, in the relevant decision-maker's opinion, is of a broadly similar nature to an activity within any of paragraphs (a) to (h).
- (5) For the purposes of this section, an activity mentioned in subsection (4) is a “law-related activity” whether it—
(a) is done on a full-time or part-time basis;
(b) is or is not done for remuneration;
(c) is done in the United Kingdom or elsewhere.

This provision widens the potential pool of judicial candidates to a much greater degree than its Irish equivalent. Focusing specifically on academic candidates a similarity can be drawn between subsection (4)(h), ‘teaching or researching law’, and section 35(4)(4) of the Judicial Appointments Commission Bill 2017 which requires the legal academic to be exercising one of these duties as part of their role. Clear distinctions can be drawn with the two laws from that point onwards though.

Firstly, the 2007 act places no requirement on which educational establishment law must be taught at or the organisation for which the research must be undertaken. Therefore, an individual lecturing law anywhere from Oxbridge to a post-1992 university (formerly ‘polytechnics’) would come within the scope of the act. Indeed, as no requirements are laid down by the act, it is arguable that a person would qualify once they were lecturing law in a structured form at any institution, regardless of the qualification the student who take those classes will ultimately obtain. This is a marked contrast to the Irish approach, which excludes lecturers from numerous third level institutions. In relation to research it is not necessary under the 2007 act for it to be undertaken in the formal environment of higher education, work undertaken for a NGO that for example scrutinised the legal and policy implications of a particular government policy would appear to satisfy the statutory requirements. For the purposes of the Irish provision only research carried out under the aegis of select educational institutions will be sufficient.

Secondly, section 52(5) of the 2007 act opens the prospect of judicial office to a much broader array of academics than the Irish provision. Whilst the 2017 Bill applies to a ‘permanent member of the academic staff’ the 2007 act covers both those working ‘on a full-time or part-time basis’ or where it ‘is not done for remuneration’. The issues of temporary contracts and those who eventually become entitled to a contract of indefinite duration are not a concern in the context of the 2007 act as anything from a permanent staff member to a volunteer are covered.

Additionally academics that spend a period of their careers abroad will not have that discounted from their years of service, as occurs under the Irish provision, as the teaching or research may be undertaken ‘in the United Kingdom or elsewhere’.

It is difficult to determine the number of academics that have been appointed to the judiciary in recent years, but the number appears to be low. The 2016 Judicial Attitudes Survey, a very comprehensive undertaking conducted with all the salaried judges of the England & Wales courts and UK tribunals, included a question on what legal role was held prior to being appointed to the judiciary. The answer to this particular question however, does not appear amongst the findings of the survey.³⁶ The Judicial Diversity Statistics for 2018 provide greater insight on this point noting that:

Representation of those with a non-barrister background varied by appointment for both courts and tribunals, with higher proportions of judges in lower courts from a non-barrister background. Non-barrister representation has fallen by 3 percentage points since 2014 for court judges, and by 1 percentage point since 2015 for tribunal judges.

[...]

A third (34%) of court judges and two thirds (66%) of tribunal judges had a non-barrister professional background. The non-barrister group were virtually all solicitors.

It further outlines:

Some ambiguity in professional background may exist where individuals have had multiple prior roles. Figures will not capture the full prior professional legal background in such cases, and will represent the most recent legal role at the time of appointment.³⁷

No specific mention of legal academics is made in these statistics.

The difficulties in recruiting certain legal professionals to the bench was considered in a House of Lords Select Committee on the Constitution report in 2012 on judicial appointments. It quotes from the oral evidence of Lord Falconer, former Lord Chancellor:

We have been incredibly timid about going to government lawyers, prosecution lawyers, in-house counsel, academics, people who work in law centres—there is a whole group of places you could reach. We tell these people that they can apply, but you are never going to convince people that they will be appointed unless you start making appointments from this diverse group. By and large, most people would assume that they would not get through the process, and they are right.³⁸

A follow up report by the same committee in 2017 contained reference to remarks by Lord Neuberger and Lady Hale, then President and Deputy President of the Supreme Court of the United Kingdom respectively:

Lord Neuberger drew attention to the pool of potential candidates in academia who could be considered for the judiciary: “one thing that we have been doing is to cast the

³⁶ UCL Judicial Institute, ‘2016 UK Judicial Attitude Survey’ (Courts and Tribunals Judiciary, 7 February 2017), 124 <www.judiciary.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf> accessed 4 March 2019.

³⁷ Lord Chief Justice of England and Wales, ‘Judicial Diversity Statistics 2018’ (Courts and Tribunals Judiciary, 12 July 2018), 9 <www.judiciary.uk/wp-content/uploads/2018/07/judicial-diversity-statistics-2018-1.pdf> accessed 4 March 2019.

³⁸ House of Lords Select Committee on the Constitution, *25th Report of Session 2010–12: Judicial Appointments* (HL 2010-2012, 272) para 118.

net more widely. The Supreme Court is quite limited in who it can look for. There is obviously the academic world and practising lawyers”.

Lady Hale added: “clearly, some previous judicial experience is desirable, but of course there are lots of different ways in which you can get previous judicial experience ... I was an academic lawyer for a great deal of my career ... Most people are still going to have come through the normal channels, but with 12 justices and so many vacancies there is room for a greater variety of all sorts. Diversity has many dimensions”.³⁹

The committee went on to conclude:

We welcome the outreach work undertaken by the Judicial Appointments Commission and the professional bodies to ensure that there are development opportunities and tools available to assist potential applicants for judicial roles

However, we are concerned about the disparities that remain between the number of solicitors and chartered legal executives applying for judicial roles and the number being recommended for appointment. Non-barrister applicants may still perceive that those with advocacy experience are preferred as candidates, and that this is in part responsible for the low application rate. A significant cultural shift is required to address this.⁴⁰

Considering the restricted nature of the proposed change of law in Ireland to that in England and Wales, it would suggest that the number of legal academics seeking appointment to the bench could be quite low at the outset, as this ‘cultural shift’ could also take time to embed itself within the Irish system.

Conclusion

The initiative by the Minister for Justice to expand the range of qualifying candidates for appointment as members of the judiciary is to be welcomed. Judicial reform in Ireland is traditionally a slow and incremental process. However, in this instance it has proven to be needlessly restrictive. On the one hand, the Government is opening the door to legal academics to bring their training to implement and reshape the laws they have been spent years researching and writing about. Yet on the other it imposes such a narrow definition of a legal academic that it renders the initiative practically meaningless to many. The provisions of the Tribunals, Courts and Enforcement Act 2007 have been in place in England and Wales for over a decade, it takes a bold and broad view of the variety of candidates who could apply for judicial office, a transparent and robust application and interview process has ensured the proper implementation of these rules and the integrity of the judicial system has not been diminished.

In my view a number of improvements could be made to enhance the effectiveness of this proposed law:

1. To reduce the requisite period from 12 to 10 years’ standing for legal academics to be considered for appointment to the Circuit Court and District Court and that the provision requiring two years continuous service prior to appointment to those courts be removed or that a shorter duration be contemplated.
2. To reconsider the requirement of 4 years practice as a solicitor or barrister for legal academics and instead adopt a similar approach to the equivalent provision in England

³⁹ House of Lords Select Committee on the Constitution, *7th Report of Session 2017–19 Judicial Appointments: follow-up* (HL 2017-2019, 32) para 96.

⁴⁰ *ibid* para 112-113.

and Wales. This could entail retaining the requirement for qualification as a solicitor or barrister but removing the required period of practice in that role.

3. Removing the requirement that the legal academic be a 'permanent' member of staff on the basis that this needlessly excludes from consideration a wide range of academics.
4. Broadening the range of 'educational establishments' from which legal academics may be selected to all third level institutions at which law is taught including equivalent foreign institutions.

The Government has taken a positive first step with this proposed reform, it should consider taking the matter further.