JUDGING THE MATTER

The appointment of judges in Ireland has sometimes been associated with political parties, says Eamon G Hall. But now he says Government should ensure that selection is as efficient, fair and open as it possibly can be.
The judiciary in Ireland is a branch of government. The centrality of the office of judge in Ireland is emphasised by the declaration made by the newly appointed judge. In the presence of Almighty God, the new judge states that he or she will duly and faithfully to the best of his or her knowledge execute the office of judge "without fear or favour, affection or ill will towards any man," and that he or she will uphold the constitution and the laws. God is asked to direct and sustain the newly appointed judge. The writer argues that the method of appointing judges in Ireland needs to be reviewed.

The manner of selection

Article 35 of the constitution declares that the judges of the Supreme Court, the High Court and all other courts established pursuant to Article 34 shall be appointed by the President. Having regard to Article 13 of the constitution, such function is exercisable by the President only on the advice of the government.

The party or parties in power, in essence, have the final say in the appointment of judges. There are no defined criteria publicly available in Ireland in relation to the appointment of judges. Many judges who have been appointed have had definite associations with political parties. It is a sad reflection on the system of government in Ireland if it were to be perceived that party membership and active support was a necessary pre-condition for appointment as a judge.

Policy of patronage

In a perceptive memorandum to the government on legal appointments, in October 1950, the minister for external affairs, the late Sean MacBride, argued that the practice of reserving a number of appointments such as sheriffs, county registrars and others to the government was a survival of the policy of patronage under which the British authorities relied for the government and domination of Ireland. The minister for external affairs stated that he felt very strongly that political patronage in the making of appointments from the perspective of public administration was unsatisfactory and that it exposed members of the government to serious charges. The minister argued that unless each member of the government was in a position to obtain and sift personally through all the information concerning the applicants for such posts, and in addition to be in a position to interview each of the applicants, there was a grave danger of committing an injustice. It was not part of the government's function to act as a selection board; the government had not the time nor was it equipped to discharge such a function. Furthermore, the minister argued that because these functions were at present vested in the Government, the individual members of the government were subjected to a personal and political canvas whenever certain legal appointments became vacant.
Judicial appointments in England

In 1986 in England the Lord Chancellor published a booklet dealing with the criteria concerning the appointment of judges. The Lord Chancellor noted that the quality of justice was largely determined by the quality of the judges who presided. He therefore regarded the selection and appointment of the judiciary as one of his most important responsibilities.

The Lord Chancellor noted that the growth of the legal profession and the increasing number of judges had brought changes in the methods by which Lord Chancellors discharge their duties in relation to the appointment of judges. The days are gone when the Lord Chancellor could personally assess the field of candidates for every post. Nowadays, with the help of a small team of senior officials, he systematically enlisted the help and advice of numerous serving judges and senior lawyers. He wished to dispel any lingering sense of mystery or obscurity that there may be about how this work was done. Consultations about individuals must obviously be confidential, but, he noted, there was no secret about the general policy or procedure. The arrangements depended on a working relationship between the Lord Chancellor’s department, the judiciary and both branches of the legal profession. Great care was taken as to the selection of candidates, according to the Lord Chancellor, and his department continually sought to improve the system. There was always room for further improvement, and the Lord Chancellor stated that he was always ready to consider suggestions from any quarter. His aspiration was to ensure that the methods of selection of appointment as judges were as efficient, fair and open as they could be and to maintain the highest possible standards of ability and integrity on the Bench.

The Lord Chancellor’s stated policy was to appoint to every judicial post the candidate who appeared to him to be the best qualified to fill it and to perform its duties, regardless of party, sex, religion or ethnic origin. Professional ability, experience, standing and integrity alone were the criteria, with the requirements that the candidate must be physically capable of carrying out the duties of the post, and not disqualified by any personal unsuitability. The overriding consideration in the Lord Chancellor’s approach was always the public interest in maintaining the quality of the Bench and confidence in its competence and independence. In any conflict, this consideration had to take precedence over all else. Subject however to that overriding consideration, the Lord Chancellor stated that he would do his utmost to deal fairly and openly with individual candidates.

Suggestions for improving the system in Ireland

The Minister for External Affairs in his memorandum for the government in 1950 stated that he would like to see the government relieved of the responsibility of making judicial appointments. He recognised however that in the case of appointment of judges, certain considerations may apply which may render it necessary for the government of the day to have some power of selection. The Minister had in mind the difficulties which arose in the United States between president Roosevelt’s administration and the American Supreme Court. However, the Minister suggested that it should be possible to devise as a matter of practice a procedure which would enable the government to seek and obtain advice before making appointments to the judiciary.

The Minister suggested two alternative methods. First of all he suggested the appointment of a board of say five members who could be drawn from the judiciary and senior members of the legal profession who are not themselves potential candidates. Such a board would have the responsibility of furnishing to the government three names from which the government would then be at liberty to choose. An alternative would be that whenever a vacancy arose the Taoiseach or the Minister for Justice and the Attorney General should, as a matter of practice, ask each of the following to suggest three names for the filling of the vacancy; the chief justice, the president of the High Court, the president of the Circuit Court, the president of the District Court and the president of the Incorporated Law Society. Again as a matter of practice it was suggested that the government would then choose from the names that had occurred most frequently in the suggestions made. The Minister concluded by stating that he would like to emphasise that in the propositions made above, the intention was that the ultimate responsibility and choice would rest on the government who would be at liberty to disregard all or any of the names suggested. However, he forcefully concluded that no government would however, be likely to disregard the names suggested lightly or without some strong reason based on public policy.

Appointment to the Bench

The writer calls on the government to publish the criteria for appointment to the Bench. Such criteria should include the statement to the effect that the candidates are appointed to the Bench solely on the basis that a candidate is the best qualified to fill the post and perform judicial duties regardless of party, sex, religion or ethnic origin. Secondly, the writer suggests that there is merit in some form of Judicial Appointments Board which would advise the government on candidates suitable for judicial office. Above all else, there should be no mystery about the criteria for appointment to the Bench.

Eamon G Hall is a practising solicitor, chief internal examiner in constitutional law for the Law Society, chairman of the editorial board of the Law Society’s Gazette, a former president of the Medical Legal Society of Ireland and a former chairman of the Irish Society for European Law.