Review of Jennifer Carroll MacNeill, *The Politics of Judicial Selection in Ireland* (Dublin: Four Courts Press, 2016)

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This informative book on the behind-the-scenes operation of the judicial appointments system in Ireland, published in June 2016, has assumed increased relevance in the wake of the political controversy surrounding the appointment of former Attorney General, Máire Whelan, to the Court of Appeal in June 2017. While Whelan's qualification for appointment to the bench is not in question, the process by which she was appointed is. The furore around her appointment highlights that, despite the author's conservative approach to the reform of the judicial appointments system in Ireland, more radical reform is arguably needed. In this review I will first summarise the contents of the book, then note its invaluable contribution to our understanding of the functioning of the Judicial Appointments Advisory Board (J.A.A.B.), and finally raise some minor criticisms.

In the introduction chapter Carroll MacNeill presents her central argument which is that the political motivations that prompt the reform of how judges are selected dictate how effective that reform is in meeting its stated objectives. In chapter 1 the author looks at the judicial selection processes in Australia, Canada, New Zealand, England and Wales, Scotland, Northern Ireland, the United States, Israel and Ireland and the different roles that governments play in each. She also considers the reasons why reforms were proposed in each country and whether or not those reforms were implemented. She finds that Ireland was a unique case because unlike these other countries, there was not a period of considered political debate where policy reasons for the change were assessed. The impetus for reform in Ireland was a short-term political crisis and its relatively hasty legislative resolution lacked consultation with stakeholders. Moreover, she found that even those countries that

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ultimately rejected institutional change had higher rates of political commitment to change than Ireland did.[1]

In chapter 2 the genesis of the *Courts and Court Officers Act 1995* (*1995 Act*), which established J.A.A.B., is considered. First the chapter outlines the old process under which then-Attorney General Harry Whelehan was appointed to the office of President of the High Court in 1994 and the negative reaction to this appointment which led to his decision to step-down and the collapse of the Fianna Fáil-Labour government. Then it supplements contributions from the Dáil debates during the debate over two Bills which sought to reform the process with interviews with key political figures who were involved in the promotion of those Bills. These interviews suggest that the year's lapse between the first and second Bills being proposed meant that the issue was no longer politically important so the new coalition government was less keen to reduce its influence over the judicial appointments process. It was therefore unsurprising that the second Bill, which became the *1995 Act* after further revisions, was weaker than the first in terms of placing constraints on the executive in the exercise of their discretion on judicial appointment.

Chapter 3 looks at J.A.A.B. and how it has operated since its inception and finds that its existence has not significantly reduced the government's discretion in who is appointed as a judge. This is for two reasons. The first is the terms of the *1995 Act* itself which, as chapter 2 showed and chapter 3 elaborates, meant that J.A.A.B. was, to paraphrase Morgan, a mouse.[2] The second is decisions that J.A.A.B. has taken in how it approaches its task which have served to further weaken its influence in the judicial appointments process. These will be discussed later. In this chapter, Carroll MacNeill presents excerpts from her original research interviews with two Taoisigh, nine Attorneys General, six Ministers for Justice, and a number of senior members of government or political advisors who held their positions between 1982-2007, *i.e.* those who were involved in the judicial appointment process both prior to and post the establishment of J.A.A.B. She also interviews nineteen members of J.A.A.B. from 1995-2007. The chapter additionally provides a useful summary of Bartholomew's ground-breaking

[1] J. Carroll MacNeill, *The Politics of Judicial Selection in Ireland* (Dublin: Four Courts Press, 2016) at 51 [hereinafter Carroll MacNeill]. Political commitment is assessed with reference to two variables. First, whether judicial reform appeared in a party manifesto, a programme for government or in a statement by a government politician. Second, if there was any formal consultation process established. *Ibid.* at 50.

[2] The complete quote is: "[g]iven the ballyhoo with which it was established, in the aftermath of a fall of a Government, it is incredible that the mountain should have produced such a mouse." D.G. Morgan, "Selection of Superior Court Judges" [2004] 22 I.L.T. 42.

1971 research on who Irish judges were,[3] updated by the author's work in the early 2000s with senior judiciary who were appointed pre and post 1995,[4] in order to ensure that a complete picture of the process is painted.

Chapter 4 looks at the creation of the independent office of the Director of Public Prosecutions (D.P.P.) in Ireland in 1974, which removed the power to instigate criminal investigations from the politically appointed Attorney General, to show that an Irish government has previously chosen to divest itself of a source of power that is or could be politically useful. It also briefly notes that there is a more thorough appointments process for the appointment of the office of the Comptroller and Auditor General, a constitutional office that, like the judiciary, can hold the government to account. The judicial selection approach in Scotland is also considered, and some important procedural differences are noted, including the rule that lay members give their opinions first in the Scottish system versus last in ours.[5] This is done to prevent lay members giving any undue deference to the views of senior judicial or practitioner members.

Chapter 5 looks at the recent appetite for reform of the process in Ireland, looking specifically at the consultation process begun by then-Minister for Justice Alan Shatter in December 2013 and three opposition private member's bills published in 2013-2014. The author critically examines key submissions made to the consultation process and the three Bills. This chapter also notes some changes that have been made to the system by which judges are appointed to the European Court of Human Rights and to the European Court of Justice, demonstrating that there is an impetus towards reform more generally. Very helpful tables summarising this analysis are provided. This chapter also sets out Carroll MacNeill's views on the nature of the reform that she favours. Specifically she recommends improving the existing system by providing increased professional institutional supports to J.A.A.B. to allow it to take a more proactive role and fulfil its original function to narrow the field of application rather than more wide-reaching structural reforms. She writes, "[w]e should be slow to make changes that restrict the breadth of the powers given to J.A.A.B. before it has

[3] P.C. Bartholomew, *The Irish Judiciary* (Dublin: Institute of Public Administration, 1971).
[4] Carroll MacNeill's earlier study was conducted for her 2004 M.A. thesis. She published two articles summarising her findings in 2005: the first was J. Carroll, "You Be the Judge: A Study of the Backgrounds of Superior Court Judges in Ireland in 2004 – Part I" [2005] 10 (5) Bar Review 153, the second J. Carroll, "You Be the Judge: A Study of the Backgrounds of Superior Court Judges in Ireland in 2004 – Part II" [2005] 10 (6) Bar Review 182.
[5] Carroll MacNeill, *supra* note 1 at 169 (Scotland); at 115 (Ireland).

an opportunity, in a properly resourced manner, to fully utilize those powers."[6] She also makes specific statutory reform recommendations such as establishing the "merit" criterion and that lay members are given a stronger role. Some final thoughts on what the Irish case study of J.A.A.B. tells us about effective institutional change are offered in the brief Conclusion chapter.

For those interested in how the current judicial appointment system works this book is vital reading. The degree of access Carroll MacNeill has obtained to those involved in the appointment of judges is remarkable. Only five people from the relevant period were unable to participate due to being seriously ill or deceased.[7] It cannot be overstated how valuable these interviews are. Too often political and bureaucratic processes are abstracted from the persons who perform them, yet in the excerpts from the interviews utilised throughout the book the reader gets a real sense of the seriousness with which the various interviewees took their role in the judicial appointment process and their frustrations with its limitations, self-imposed or not. Some of these limitations are long acknowledged, and are woven into the fabric of the *1995 Act*. These include the ability of the government to appoint a new judge directly without their having to go through the J.A.A.B. process, as occurred in the Whelehan controversy in 1994 and in the Whelan one in 2017, and the exclusion of J.A.A.B. from instances when a judge is elevated from one court to another.

The self-imposed limitations are less well-known and these are choices J.A.A.B. has made in its procedures that have undermined its already statutorily confined filtering function. The first significant fettering derives from the ambiguous phrasing of section 16(2) of the *1995 Act* which provides, in part, "the Board shall recommend to the Minister at least seven persons for appointment to that judicial office." When originally formed, J.A.A.B. recommended just seven "suitable"[8] candidates per vacancy, however in the early 2000s it changed this practice to one where the names of all candidates considered to be "not unsuitable" are forwarded for the consideration of the government. The reason for this change was that J.A.A.B. were concerned that narrowing the field to seven would unconstitutionally impede on the government's role in judicial selection.[9] A practical

[6] *Ibid.* at 224.
[7] *Ibid.* at 92.
[8] One of the criteria that J.A.A.B. must consider when determining if a candidate is eligible for consideration is their suitability, in terms of their "character and temperament" and more generally "otherwise", pursuant to s.16(7), *1995 Act.*
[9] Carroll MacNeill, *supra* note 1 at 127.

consequence of this decision has been the dramatic increase in the number of candidates being referred to the government, which widens rather than narrows their discretion to make political appointments and lends an air of legitimacy to those appointments because the applications have been processed by J.A.A.B. Of even greater concern to Carroll MacNeill was the lack of knowledge that the Oireachtas had regarding this change of process. They only became aware of it when she testified before the Joint Oireachtas Committee on Justice and Equality in November 2014.[10] She correctly observes, "[i]t should be a matter of concern to policy makers and legislators in Ireland that such a fundamental change could occur, largely unnoticed by the body politic, to the institutional functioning of a statutory body performing a delegated role on behalf of the government."[11] She also notes in the conclusion chapter the "conspicuous silence" from the government about this change.[12] They either did not notice, she writes, or they acquiesced.[13] Neither answer is satisfactory.

The author further critiques the extent to which J.A.A.B. have even performed this lesser function of determining whether a candidate is "not unsuitable" because they have also chosen not to use their statutory power to interview applicants. Apart from the fact that interviews would benefit the applicants as it would give them the opportunity to clarify any confusion that may have arisen in respect of their application,[14] it also serves to compromise the ability of the lay members on the Board to assess the applicants as they, unlike the practitioner and judicial members of J.A.A.B., do not "know" the candidates either personally or professionally.[15] Carroll MacNeill reports the assurances issued to the then Minister of Justice in February 2014 that J.A.A.B. would use its power to interview.[16] Unfortunately, the annual reports of J.A.A.B. state that no such interviews were conducted in 2014 nor subsequently. This is unsurprising in light of the fact that one of the reasons for not holding interviews is the lack of sufficient support provided to J.A.A.B., a problem that has not been addressed.[17]

In its belief that the current process is flawed but not in need of radical overhaul to improve it, the book also challenges some of criticisms of the current system, in particular the

[10] *Ibid.* at 129.
[11] *Ibid.*
[12] *Ibid.* at 236.
[13] *Ibid.*
[14] *Ibid.* at 113.
[15] *Ibid. a*t 112-3.
[16] *Ibid.* at 204.
[17] *Ibid.* at 205.

common criticism that judicial appointees are politically connected to the party in power. First, Carroll MacNeill argues that it is not necessarily contrary to judicial independence for politicians to play a role in judicial appointment. She explains this by expanding the definition of what is political beyond the narrow confines of party political affiliation, noting that it is political to want to promote diversity on the bench or to choose judges with particular legal expertise to address deficiencies in the judicial ranks.[18] However she agrees that it is important that the appointments process be transparent, and so recommends making visible the criteria that the government will be utilising, *e.g.* when a judicial vacancy arises if the government wishes J.A.A.B. to target individuals with particular legal expertise and/or who represent particular groups then it should do so in writing.[19] J.A.A.B. could then advertise noting the desirability of candidates who meet this identified gap. Second, Carroll MacNeill does not deny the fact that political affiliation is a factor in judicial appointment. For those seeking appointment at higher levels, where two candidates are equally qualified, political affiliation could be the deciding factor. However she finds that it is personal knowledge of the attributes of the candidate that is more significant.[20] Political affiliation assumes greater relevance at the level of the District Court, both because these candidates as less likely to be "known" to the Dublin-dominated J.A.A.B. and because decisions in District Courts are more likely to directly affect a T.D. or Minister's constituents.[21]

It is here that that I make my first criticism of Carroll MacNeill's impressive work. While I would agree with the author that issues such as judicial diversity need political will to be addressed, the issue of political affiliation has been dismissed too easily. It is not reassuring to learn that party politics impacts mostly at District Court level. The fact that it impacts at all is the issue. In addition, it seems to me that the categories of those who are known to those in power by their legal reputation or "merit", a potentially loaded gendered and classed term that can militate against diversity, or because of political affiliation are not necessarily as discrete as the author seems to suggest. Even if they were, the problem of perception remains which is a more serious issue than the author seems to accept. Despite the recent comprehensive study of Supreme Court judgments between 1963 and 2006 which found no evidence of partisanship in decision-making,[22] negative political reaction to

[18] *Ibid.* at 210-13.
[19] *Ibid.* at 225-6.
[20] *Ibid.* at 137.
[21] *Ibid.* at 139.
[22] R. Elgie, A. McAuley & E. O'Malley, "The (not-so-surprising) non-partisanship of the Irish Supreme Court" [2017] Irish Political Studies 1.

Whelan's appointment would have received more media attention than this study and it supports the narrative of a system blighted by cronyism whether or not in fact it is. This narrative is a damaging one for our judicial system and needs to be acknowledged as such.

In a sense, events have overtaken the cautious approach to reform that Carroll MacNeill proposes. Her position is that J.A.A.B. should be given the time and resources to perform a proper screening function of judicial candidates and that more significant reforms should only be considered if there was still dissatisfaction with J.A.A.B.'s operation. Before the recent political controversy, this wait and see approach was arguably a valid one. However, that time has passed and even if it had not, I would be sceptical of the ability of a reinvigorated J.A.A.B. to be more proactive, an opinion that has been bolstered by Carroll MacNeill's comprehensive evaluation of how and why J.A.A.B. stymied itself. Whether or not J.A.A.B. is better resourced in the ways Carroll MacNeill proposes, as a body dominated by legal professionals it will inevitably take a cautious approach to how it interprets the legislation governing it for fear of being subject to judicial review. Therefore some of the legislative changes recommended by Carroll MacNeill are likely to fall victim to the same conservatism that ultimately undermined J.A.A.B.'s role under the current legislation.[23] It seems to me that the medium term reforms suggested by Carroll MacNeill that would only be considered after a period of reflection, such as increasing the lay membership of the Board or of having a lay Chair,[24] should be an immediate priority.

A second criticism is that Chapter 4 is frustratingly brief in its discussion of the office of the Comptroller and Auditor General and its appointments process. It amounts to merely a page in total.[25] This is insufficient in light of the important point it is introduced to make and the important point that it could make. Carroll MacNeill cites the office as an example of a case where the legislature (rather than the executive alone for judicial appointments) has curtailed its discretion in the appointment of a constitutional office-holder and has established a transparent and rigorous recruitment and appointments process. It is however difficult to assess this claim as very little information is given about the process, and it is striking that this example makes no further appearance in the either the conclusion of chapter 4 or of the book. The lack of information provided in this brief section is also a missed opportunity in

[23] See in particular recommendations 6 and 7 which rely on the discretion of the Board. Carroll MacNeill, *supra* note 1 at 226.
[24] *Ibid.* at 230.
[25] *Ibid.* at 162-3.

terms of responding to the frequent argument that constitutional reform would be required to allow for a more rigorous judicial appointments process in Ireland. If the recruitment process for the constitutional office of Comptroller and Auditor General can be transparent and rigorous without contravening the Constitution, then there is no obstacle to a similar process for judicial appointment. The absence of reference to the Irish constitutional framework and how it differs from that in Scotland was also noticeable in the discussion of the Scottish appointments system and what impact this would have if there were proposals to transplant the Scottish system into Ireland.[26] The fact that they are "both common law systems and … parliamentary democracies with dominant executives" is not the complete picture.[27]

Finally, I suspect that some readers may find chapter 1, though important, a bit tedious. There is simply too much description of too many jurisdictions. My recommendation would be to postpone reading it until after chapters 2-5 when its comparative value (particularly its useful tables summarising quite a lot of descriptive detail) becomes more evident. For most readers, the brief introduction chapter and the history of the *1995 Act* in chapter 2 provide sufficient grounding for chapters 3-5, which is where the real meat of the book is, and which is why these chapters are fascinating if sometimes repetitive reading. This repetition was present not only between chapters but also within chapters, for example in the discussion of the differences between the 1995 and 1995 Bills in chapter 2[28] or in explaining why the office of the D.P.P. was set up.[29] However my view on the degree to which the writing is too repetitive may simply be a matter of taste and other readers may find the repetition helpful.

In conclusion, while I ultimately think Carroll MacNeill's reform suggestions do not go far enough, this position has been informed in part by a political controversy that had not yet occurred when the book was published and has been given weight by the important original research contained in her book. This book should be required reading for politicians before they reform the judicial appointments system. It is only by understanding what the problems are that they and we can develop solutions to fix them.

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[26] Carroll MacNeill is clear that she is not saying that the Scottish system is better than the Irish one. She is merely comparing them to "assess the impact of a given institutional change relative to the stated objective of its introduction." *Ibid.* at 175.

[27] *Ibid.* at 172.

[28] *Ibid.* at 78-87.

[29] *Ibid.* at 157-60.