REVIEW: *JUDGES, POLITICS AND THE IRISH CONSTITUTION*

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Judges, Politics and the Irish Constitution is an edited collection arising from a conference hosted by the Dublin City University School of Law and Governance in September 2014. The editors— Laura Cahillane, James Gallen, and Tom Hickey— aim to take up David Gwynn Morgan's call to arms regarding the 'dearth of deep thinking about the character of the Irish state by bringing 'broader insight to bear and to go beyond what is arguably a stifling and insular "black letter" tradition'.[1] In so doing, they reveal fascinating and often competing perspectives on Irish constitutional theory and its influences from other jurisdictions.

Judges and the Oireachtas

The collection is certainly ambitious in its scope, containing 17 chapters in total grouped into five parts. Part I focuses on competing perspectives regarding the legitimacy of judicial power, exemplified by chapters from Fiona de Londras and Eoin Daly. De Londras defends what she terms judicial innovation, stressing how even in jurisdictions like Ireland where judges have the capacity to strike down legislation, this is not the final word on the matter; other branches of government can still engage with the judgment be it through legislation or, in Ireland's case, a referendum to amend the Constitution. In contrast, Daly critiques judicial supremacy in Ireland as resulting in the over-legalisation of political disagreement and 'stultifying' legislative debates. Tom Hickey's concluding chapter in this section defends an intermediary position of sorts, advocating for judges contributing to 'the evolution of commonly avowable norms in a more gradual sense'. Hickey thus endorses the more dialogic conceptions of rights review developed by the 'commonwealth model' of rights adjudication.

Hickey's call for a more restrained approach to judicial evolution of norms is corroborated to an extend by Court of Appeal Judge Gerard Hogan's chapter. Hogan takes issue with the unenumerated constitutional rights doctrine in the seminal case *Ryan v AG*, arguing that while such a doctrine is necessary to make the Constitution function, it deflected attention from the actual text of the Constitution.[2] Hogan offers a number of examples to corroborate

[1] See David Gwynn Morgan and Gerard Hogan, *Administrative Law in Ireland* (4th ed, Roundhall 2010) 8.

[2] [1965] IR 294. This is a recurrent theme in Hogan's extra-judicial writings. See Gerard Hogan, 'Unenumerated Personal Rights: *Ryan's* case Re-evaluated' (1990-92) 25-27 *Irish Jurist* 95.

his contention but his inclusion of *McGee v AG* is the most notable.[3] Hogan contends that *McGee* could instead have been decided by invoking Article 40.5 protecting the inviolability of the dwelling rather than on the unenumerated rights doctrine. In so doing, Hogan contends that that the unenumerated constitutional rights doctrine of *Ryan* was 'the right house on the wrong land, and was put up too quickly'.

I would contend, however, that *McGee's* recognition of the right to 'marital privacy' as distinct from an unenumerated general right to privacy was more than an adequate genuflection to the conservative forces that dominated Irish parliamentary politics at the time. Indeed, linking the right to contraception to the protection of the dwelling could potentially have resulted in a much more dramatic liberalisation of contraception than occurred after *McGee* as Article 40.5 applies to all dwellings, not just those of married couples. In turn, had this been followed, *Norris v AG* may have been decided on this factor and led to the de-criminalisation of homosexuality without the need for Ireland to be dragged before the ECtHR to do so.[4] The resultant pace of constitutional development therefore could have outpaced that which ultimately resulted from *Ryan*. This point is made all the more prescient by Hogan's express endorsement of US Supreme Court Justice White's call for protecting judicial legitimacy by anchoring judgments to the text of the Constitution in *Bowers v Hardwick*; what essentially was the US equivalence of *Norris*.[5]

The Irish Judiciary and the Executive

Constitutional theory can often focus on the relation between the judiciary and legislature to the extent that the executive's relation with these branches is often overlooked. Executive dominance of the Oireachtas may, for example, feed into the stultification of legislative debate discussed by Daly in Part I as the executive hides behind legal advice from the Attorney General to block legislation it does not agree with.[6] *Judges, Politics and the Irish Constitution*, however, complements the focus on judicial-legislative relations in Part I with three subsequent chapters analysing judicial appointments and, by extension, the relation between the executive and the judiciary. John O'Dowd's chapter discussing mechanisms for judicial and executive dialogue is particularly illuminating on this issue. In June 2017, however, just a few months after the publication of *Judges Politics and the Irish Constitution*,

[3] [1974] IR 284.
[4] *Norris v Ireland* [1983] IESC 3; (1989) 13 EHRR 186
[5]
[6]

the Government published the Judicial Appointments Commission Bill 2017, containing mechanisms for such judicial-executive dialogue and substantial reforms to the judicial appointments process. The manner in which the proposals contained therein were decided upon reveals the extent of executive dominance and the difficulties faced by those campaigning for evidence-based decision-making and law reform such as those contained in the chapters by Laura Cahillane and David Kenny.[7]

Of course, to view Irish judges as in constant conflict with a stubborn executive would be inaccurate. Part II illustrates this, focusing on the *O'Keeffe v Ireland* judgment of the European Court of Human Rights (ECtHR) and contains a chapter written by the late Justice Adrian Hardiman. Hardiman's contribution is, unfortunately, an unpersuasive tirade against what he perceived to be the 'radical nature of the expansion of the Strasbourg Court's jurisdiction'. Hardiman's argument is almost exclusively based on *O'Keeffe*—a case centring on state liability for child abuse at a primary school— and, as a result, constructs a straw-man version of the ECtHR which he then denigrates. The influence of Lord Sumption, the UK's judicial crusader against the extravagances of the ECtHR, is not subtle. In contrast, Conor O'Mahoney's rebuttal of Hardiman's position demonstrates a more contextual and broader understanding of the ECtHR's case law, defending *O'Keeffe* by arguing that it is a well-established principle of the Court's case law that domestic remedies do not have be exhausted before the ECtHR is petitioned in instances 'where domestic proceedings would be futile'.

The Contemporary Relevance of the Historical

O'Keeffe is a recent example of the legacy of Catholic dominance on Irish state structures, not least the Constitution. Donal Coffey's contribution adds to this theme through his excellent analysis of *National Union of Railwaymen v Sullivan*, revealing a fascinating insight into the alternative direction that Ireland could have taken. Coffey persuasively argues that *NUM* ultimately prevented Irish state institutions from being organised in line with vocationalism or corporatism manner as envisaged by Article 15.3 of the Constitution and as endorsed by the Catholic Church and the fascist states of the 1930s and 1940s. The implications of this

[7] See Órla Ryan

judgment can still be felt today and demonstrates the profound constitutional change that can occur without the need of formal amendment procedures.[8]

The Catholic influence of the Irish Constitution also features prominently in Rory Milhench's account of Ulster Unionist perspectives of the Irish Constitution between 1970 and 1985. The symbolic importance of constitutional norms and identities discussed in this chapter resonates all the more loudly in the aftermath of the UK's 2016 vote to leave the EU and the prospect of hardening the border on the island of Ireland that may ensue. Relatedly, an excellent chapter from Thomas Murray on squatting families in Dublin in the late 60s echoes the plight faced by many in Ireland's capital today. The contemporary relevance of the historical is thus well-demonstrated by this collection and vindicates the editors' goal of exploring the Irish constitution beyond black-letter doctrinal analysis.

Judges, Politics and the Irish Constitution concludes with three chapters from Oran Doyle, David Prendergast and Claire-Michelle Smyth that focus on different aspects of constitutional theory more generally. These chapters give a distinctly Irish insight into the rule of law, the regulation of election processes and socio-economic rights respectively. In so doing, the collection is brought full circle, complementing well the theoretical debates explored in Part I.

Conclusions

Much has changed since the 2014 Conference held at DCU School of Law and Governance. The two constitutional traditions which influenced Ireland most— the UK and the US—are in the throes of striking changes and Ireland is potentially caught in the middle of both. Constitutions, far from being anchored bastions of stability, are instead in a constant state of flux. What is needed therefore are explanations and understandings of these changes beyond merely superficial description and *Judges, Politics and the Irish Constitution* is immensely valuable in contributing to this. The significant numbers of chapters, however, means that some of them feel quite short, ending right at the point at which the reader becomes immersed. That stated, *Judges, Politics and the Irish Constitution* ultimately succeeds in its ambitions. It is a highly-readable collection containing contributions from Ireland's leading voices on the Constitution that will be of interest to lawyers, historians, political scientists and the general reader alike.

[8] In turn, Coffey's paper teases at the possibility of Irish constitutional norms that may have atrophied or fallen into desuetude as a result of this judgment