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Judicial power in Ireland

Eoin Carolan (Ed.) (Dublin: Institute of Public Administration; 2018; ISBN: 978-1-910393-19-2; 432 pp; €35)

Judicial Power in Ireland is a collection of essays edited by Eoin Carolan, a professor of the Sutherland School of Law in University College Dublin, written to evaluate the roles and responsibilities of Ireland's judicial branch, and the factors that shape its legal character. The essays are written by lawyers, legal academics and members of the judiciary, covering a range of topics. Part One addresses the historical context and principles in the founding of the judicial branch. Part Two addresses the philosophies that govern the judicial branch and the practices used in implementing the same. Part Three discusses challenges to the current state of the judiciary. The essays combine a discussion of constitutional interpretation, Irish case law, academic literature and recent political developments. Throughout the text, the authors seek to address the relationship between judicial power understood as a constitutional authority and judicial power understood as the factual and institutional capacity of courts.

Chapter One, written by Bláthna Ruane, SC, discusses the formation of the Irish judiciary. It notes that the current system is a combination of British crown courts and radical Dáil courts, which were created in the period leading up to Irish independence to address the British courts' lack of sympathy toward Irish interests. The Irish judiciary, as was formed out of this tumultuous history, was established through the creation of the Free State Constitution. Thereafter, a number of structural changes resulted in the enduring popular legitimacy of Ireland's judiciary, legitimacy that is both a testament to judicial functioning and a contributor to overall state stability.

In Chapter Two Donal K. Coffey praises the Irish Free State judiciary for functioning on a par with international standards of the time. These standards were reached despite limitations placed on the

judiciary by unfettered amendment powers, as exercised by a legislatively aggressive political class, and a constitution the author describes as ‘academically under-theorised’. Further than commending the judiciary’s ability to function under such circumstances, Coffey notes that the Irish Constitution was singular in Western Europe during this time for placing limits on executive power, a decision he attributes to the uncertainty of Irish judicial remit at the time.

Part Two discusses the principles, practices and procedures that govern the Irish judiciary. A main principle underlying judicial interpretation is the trade-off between freedom and democracy. In this sense, freedom is defined as protection from government interference in people’s lives, and democracy is defined as protection from society. Eoin Daly and Tom Hickey argue that there need not be tension between these two ideas, because there must be control of the government by the people in order for coercive interference by the government to be non-arbitrary. This balance is further demonstrated in Brian Foley’s essay discussing proportionality in legal interpretation. Foley uses the case of *Heaney v. Ireland* to define a proportional ruling as one that is rationally connected to the objective and not arbitrary, impairs the right in question as little as possible, and has effects on rights that are proportional to the objective of preserving the common good.

Oran Doyle demonstrates how the ‘rights v. freedoms’ balance is struck in the concept of judicial constraint. He argues that while no available approach of constitutional interpretation can entirely eliminate subjectivity, if interpretive methods are used in pursuit of the common good and the presence of subjectivity is acknowledged, interpretation remains sound. Regarding checks and balances between branches, the Hon. Mr Justice Fennelly notes that separation of power is not rigid, and allows for overlap, interaction and friction between organs of government. This friction is tempered because constitutional organs are mutually obliged to respect one another’s competences in order to ensure the respect of their own, as noted by the Supreme Court in the matter of *TD v. Minister for Education*. In this case, the Supreme Court stated that the High Court could not assume a policymaking role because it is not answerable to the democratic process.

Moreover, the debate around checks and balances is most apparent in the process for removing a sitting judge. Brian Murray, SC, discusses the case of *Curtin v. Dáil Éireann*, in which a sitting judge

called before the Oireachtas for removal proceedings argued that a judge must be convicted of a crime independently of the Oireachtas before removal proceedings are initiated. The Oireachtas has since established committees whose remit is to independently gather evidence on alleged misbehaviour and pass the findings to the Oireachtas so they might make an unbiased decision. However, the author finds that the ‘scope and definition’ of the term misbehaviour are still unclear, and that the ability of the Oireachtas to bring proceedings against judges continues to threaten the judiciary’s independence.

The judicial branch also exercises checks on issues of social change, as discussed by Gerry Whyte. As an unelected, independent body tasked with overseeing constitutional compliance, the judiciary is reluctant to consider social issues, which are the remit of the legislative and executive branches. Social change through the judiciary is further constrained by the fact that advocacy groups are not legally permitted to litigate on behalf of an individual, which places the risk and burden of litigation on the individual litigant. Whyte concludes that the power of litigation to elicit social change is in the media coverage of legal action, which raises awareness of social issues and puts pressure on other organs of government.

After thoroughly versing the reader in the debate over exercise of judicial power, the essays in Part Two shift to discuss modern amendments and additions to judicial practice. For instance, the Hon. Mr Justice Clarke discusses the thirty-third amendment to the Constitution, which created the Court of Appeal between the High Court and Supreme Court. This was constructed to grant most of the appellate jurisdiction of the Supreme Court to the Court of Appeal; the Supreme Court will be allowed to hear fewer cases, allowing it to focus on cases that will set precedent in constitutional interpretation. However, Justice Clarke notes that the period between establishment of the court in 2014 and the writing of his essay in 2017 has been largely transitional, and has yet to achieve the goal of its establishment.

Moreover, the Hon. Mr Justice Barniville discusses the exercise of domestic case law and adoption of international instruments in defining Ireland’s status as an international legal actor. Internationally, the UN and EU have outlined legal codes of ethics and constructed bodies which measure the same. In the domestic context, Ireland has adopted the Code of Conduct for the Bar of Ireland, and established a Legal Practitioners Disciplinary Tribunal to address legal

misconduct. In particular, the address of legal misconduct by the judiciary mitigates issues of removal of sitting judges by the Oireachtas; if the judiciary can prevent misconduct from reaching the Oireachtas investigation stage, the constitutionality issues around procedure can be avoided entirely. These domestic instruments keep the Irish judiciary functioning on a par with international legal standards.

Further to Ireland's status as an international legal actor, Dr Maria Cahill and Imelda Maher address the relationship between Irish law and EU law. One author discusses case law which dispels misconceptions that the European Convention of Human Rights may be used as superior law in Irish courts. Several cases involving immigration rights have indicated that Irish Law takes precedence over the European Court of Human Rights, and that the judiciary does not have legislative powers to change laws so they better comply with the Human Rights Convention. These cases are significant in maintaining the sovereign authority of Irish law. However, regarding EU law governing trade, the other author finds that Irish case law has often upheld the legitimacy of EU treaties, such as *Pringle v. Government of Ireland*, in which the Supreme Court upheld the validity of the European Court Decision to provide economic assistance to other eurozone members. The author further notes that EU law is frequently referenced in civil law cases and is of increasing significance in criminal law with the introduction of the European Arrest Warrant. Irish courts are also increasingly at the centre of the debate on data privacy, trade and security. As the international issues continue to be addressed through the normative authority of EU bodies, the Irish judiciary will play a significant role in defining the limits the EU may place on Irish sovereignty.

The final section of this collection discusses current issues arising in the Irish judiciary. These include changes to the appointments process and judicial remuneration, a rise in demand for transparency of the judiciary and the global rise in populism. Regarding the appointments process, the presented essays exhaustively cover the issue, ranging in opinion from Colin Scott, who believes changes in the process are necessary to bolster public confidence, to Paul Gallagher, SC, who finds the changes to be 'patently inadequate and potentially very damaging'.

Dermot Feenan's essay contextualises the Judicial Appointments Commission Bill, introduced in 2017 to address partisanship in the judicial selection process, the excess of candidates put forward for

consideration, and gaps in gender and racial diversity of higher-level appointments. Judicial pushback against the bill has given rise to a constitutional question of whether the legislature can act in opposition to informal comments and proposals put forth by the judiciary on judicial issues. Further, if the legislature chooses to proceed without following the proposals of the judiciary, as Jennifer Carroll MacNeill highlights, this begs the question of whether the judiciary has the right to rule on the constitutionality of legislation concerning the judicial process. How the judiciary adapts to the introduction of this recent bill has the potential to create a constitutional crisis.

In addition, the legislature and judiciary must contend with the issue of who has the right to influence judicial appointments. The new bill allows for non-judicial experts' input on the appointments process, for which many lawyers argue lay people lack knowledge. In particular, Dermot Feenan raises the question of ensuring that lay people do not make the process more partisan. Similarly, the Hon Mr Justice O'Donnell raises the concern that changes in the judicial appointments process may fundamentally change the make-up of higher courts, as changes in the selection process will change the types of individuals selected.

Many of the concerns cited by the appointments bill also arise in changes to remuneration of judges. The recent twenty-ninth amendment to the Constitution removes constitutional prevention of the reduction of judges' salaries and allows for the taxation of judges' salaries. Many in the judiciary are concerned that this decision will allow the other branches of government to put political pressure on the process of judicial review by legislating on changes to judges' pay. Members of the judiciary, as discussed in John O'Dowd's essay, cite concerns that a lack of remuneration assurance will change the make-up of the judiciary, as more talented applicants will apply to sectors with better pay guarantees. The public, meanwhile, perceive protections of remuneration of judges as an act of self-interest on the part of the government. At issue is the maintenance of judicial independence simultaneous with maintenance of public faith in the government.

This issue gives rise to the debate between judicial transparency and judicial accountability. Historically, greater weight has been placed on the importance of judicial independence rather than judicial accountability, as discussed in O'Dowd's essay. This has resulted in a significant gap between implicit and informal regulation of judicial conduct and the formal constitutional mechanisms for removal of

judges accused of misconduct. Some authors argue that the creation of institutional mechanisms such as the Judicial Council and the Judicial Misconduct Committee represents a threat to the independence of the judiciary. Meanwhile, Michael M. Collins, SC, notes that there has been a comparative shift towards greater judicial transparency in other countries' governments, and that the adoption of accountability mechanisms increases monitoring, enforcement, transparency and confidence in the judiciary. He describes the current mandate of bodies like the Judicial Council, to support the education, training and supply of resources to lawyers and judges to prevent misconduct. Regarding the institution of a complaints process to address misconduct of individual judges, there are concerns that this process would be abused, overwhelm the court system and damage the Irish judiciary's current clean record and high international standing.

Finally, Paul Gallagher's essay addresses the global rise of populism and its effect on the judiciary. Examples include US President Trump disparaging a judge for blocking his immigration order, effectively condemning the judiciary for exercising its right to check the executive and its right to remain independent of the administration's political agenda. Also cited is a *Daily Mail* article in the UK, branding High Court judges as 'enemies of the people', as well as populist attacks on the judiciary in Hungary. Gallagher, addressing the risk of populism, concludes that rule of law can be quickly eroded without bolstering the independence of the judiciary, while the current trend toward transparency is weakening judicial independence.

Judicial Power in Ireland grants interested readers a greater understanding of the principles and limitations governing judicial practice. While denser sections outlining legal theory require enthusiasm for the subject matter, the outlining of case law in the development of Ireland's judiciary is accessible and intriguing even to readers outside the legal profession. The editor of the text laments the shortage of female contributors to the text, essays providing international and comparative perspectives of law, and everyday accounts of district or circuit courts. Nonetheless, the text provides a comprehensive account of Ireland's judicial branch, combining accounts of legal norms and principles with accounts of the social and political context without which constitutional interpretation would be immaterial.

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