



BOOK REVIEW

CONSTITUTIONAL LAW IN IRELAND. By James Casey, [London: Sweet and Maxwell, 1987 x1vii and 578 pp paperback IR£25. 88].

The Constitution of Ireland is a dynamic and vibrant document. Much of the dynamism and vibrancy was activated in the 1960s during a period when a full-blown cultural and economic revolution was gently, but firmly, blowing its way through the land. The lethargy of the 1950s, the post-war economic stagnation and the introverted nature of Irish society were all profoundly affected by a new order. The economic philosophy of Whittaker and Lemass (itself influenced by world economic developments), the new communications medium of television, the growing awareness and acceptability of North American developments, all interacting with one another, influenced judicial thinking in the 1960s at least at a subconscious level,

In particular, in the constitutional sphere, legal practitioners and judges became more conscious from the 1960s onwards of one unique endowment which has enriched the art of government – the United States written constitution. Reading Professor Casey's book one becomes conscious of the transplantation in Irish law of some of the rich legal heritage developed by towering figures of the United States Supreme Court. Indeed Mr. Justice Brian Walsh in his

perceptive foreword to the book acknowledges that Irish constitutionalism owes so much to American constitutionalism.

The dynamism and vibrancy of the Constitution of Ireland are richly illustrated in Professor Casey's book. In schematic terms, the author adopts a thematic approach rather than the annotative method adopted by Professor Kelly. Each chapter is devoted to a theme; there are 19 chapters which include themes such as the "Functioning of the Oireachtas", "The Government and Central Administration", "International Relations", "The Courts", "Equality", "Property Rights", and "Freedom of Religion". The first chapter entitled "Historical and General Introduction" traces the pre-1937 constitutional developments. The historical dimension to the 1937 Constitution is often overlooked by writers. Much of the 1937 Constitution is, in Professor Kelly's words, "very largely a rebottling of wine"; a taste of the wine in its former bottles may lead to a greater appreciation of the wine in the new bottles. The chapter with the theme of enumerated and unenumerated rights is of particular importance to practitioners. The sub-headings include a description and the source of the right to privacy, the right to earn a living, the right of access to the Courts, the rights to marry and found a family and the fair procedures in decision making.

Professor Casey writes lucidly and not only provides a commentary on the Constitution but poses questions and provides a critical analysis on appropriate developments. Take the case of *O'Sullivan – v- Harnett and the Attorney General* [1983] ILRM 79 which has perplexed some practitioners. The plaintiff was charged in the District Court under the *Fisheries (Consolidation) Act, 1959*, s. 182(2) which prohibits the unlawful capture of salmon. Section 182 provides for summary trial only and a convicted person is liable to a fine not exceeding £25 with an additional fine of £2 for each unlawfully captured fish. The plaintiff was charged in respect of 900 salmon and faced a possible financial penalty of nearly £10,000. The Supreme Court held that this could not constitute a minor offence and that the District Court summonses must be struck out in that Court for want of jurisdiction. Professor Casey correctly observes that as the relevant section provided for summary trial, the fact that the offences as charged were not minor offences meant that no machinery existed for trying the plaintiff in respect of those offences. The author does not

stop here but postulates a solution to this procedural quagmire. The author states that retrospective legislation could validly be enacted to cope with this judicial development – by providing that the “non-minor” section 182 offences could be tried on indictment. He argues that such legislation, being purely procedural, would not amount to declaring criminal acts which were not so at the time of their commission, thus such legislation would not violate Article 15.5. (Prohibition of retroactive penal legislation). The author does observe that such legislation should not run counter to the rule against double jeopardy.

When reading Professor Casey’s book your reviewer became conscious of the complexity and sensitivity of issues which judges,

particularly in the constitutional sphere, are called upon to determine. Oftentimes there are no neat solutions. Perhaps too much is expected of a judge deciding a grave constitutional issue without the assistance of any research team – save the legal team presenting and defending the case. Judges and lawyers interpreting a constitution must express themselves in words. Words, in the language of Learned Hand, a masterful judge, “are utterly inadequate to deal with the fantastically multi-form occasions which come up in human life”. [(1961) *N.Y.S.B.J.* 419, 423]. Layfolk and lawyers may overlook the effort and the agony that go into the preparation of a judgment. Judge Irving R. Kaufman of the United States Court of Appeal put the issue succinctly: “There is an agony, no less severe because it is intellectual rather than physical, in dealing with problems that have no neat resolutions, that defy precision, that mock finality.” [(1970) 45 *N.Y.U.L. Rev.* 716]. It is an agony that the judges cannot pass.

Boswell, in the ardour of ambition for literary fame, regretted to Dr. Johnson that an eminent judge had no literary ability and therefore would leave no perpetual monument of himself to posterity. “Alas, sir, (said Johnson) what a mass of confusion should we have, if every Bishop and every Judge, every lawyer, physician and Divine, were to write books”. Professor Casey is too young for your reviewer to suggest that *Constitutional Law in Ireland* is the author’s perpetual monument of himself to posterity. But Professor Casey’s book can

most usefully be added to the library of any law maker, law declarer, practitioner and law student.

Eamonn G. Hall.

[This review was published in the *Gazette of the Law Society of Ireland*, vol 82, No 4 (May 1988) pp.109-10. The 3rd edition of *Constitutional Law in Ireland* was published by Round Hall, Dublin, in 2000.]

