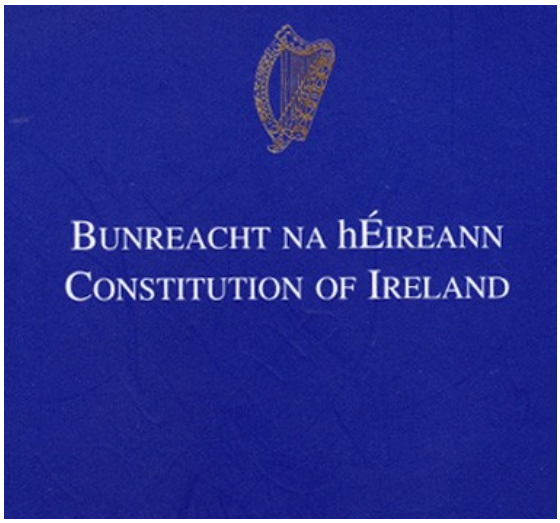

BOOK REVIEW

Constitutional Law of Ireland. By David Gwynn Morgan, LL.M (Lond) of the Middle Temple, Barrister at Law [The Round Hall Press in association with Irish Academic Press, 214 pp. (notes, tables and index 56pp) IR£22.50].

Professor Kelly in his preface to *The Irish Constitution* argues that the 1937 Constitution was "very largely a re-bottling of wine most of which was by then quite old and of familiar vintages". Mr. David Gwynn Morgan, Lecturer in Law at University College Cork, in his book "Constitutional Law of Ireland" writes on aspects of the re-bottling of the wine but does not neglect the vintage setting.

Students are sometimes of the view that Constitutional Law only involves the logical and almost mechanical application of clearly formulated legal norms of inescapable authority as laid down in Bureacht na hÉireann. There is much more to the study of Constitutional Law. The author rightly emphasises that significant aspects of constitutional law flow from Acts of the Oireachtas and from judicial decisions. There is also the question of conventions – the unwritten constitutional rules.

On my first perusal of *Constitutional Law in Ireland*, I mused whether the title of the book was apt. The book does deal with the entire range of Irish constitutional law. However, on a closer examination the author makes it clear that the book only deals with the institutions of government established by Bunreacht na hÉireann. Thus, the book only deals with the "structure, composition, function and inter-relationships of the principal organs of the state viz. the Government, the Oireachtas and the Courts".

Thomas Jefferson wrote in 1816 that

> "Some men look at constitutions with sanctimonious reverence and deem them to be like ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human and suppose what they did to be beyond amendment…."

The author does not look at Bunreach na hÉireann with sanctimonious reverence. However, his book, as he admits, is basically a work of description. Nevertheless the author does criticise the status quo from time to time. The author articulates a criticism of the wave of judicial activism which results in legislation being struck down as unconstitutional. It is the argument based on democratic principles. Judges are appointed not elected. Thus, the judges should not unmake laws passed by an elected Oireachtas. The author argues that far-reaching decisions concerning "the fixing of the balance between governmental income and expenditure and the choice among different types of expenditure" are generally better left to the Oireachtas and the Government. This criticism raises questions relating to the doctrine of separation of powers. From time to time, the Executive has indeed been jealous of the powers of the judicial arm of government. Others with similar constitutions have been provoked to use stronger language. Franklin D. Roosevelt in a radio address in 1937 thundered:

> "We have, therefore, reached the point as a nation when we must take action to save the Constitution from the (Supreme) Court and the court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the

> Constitution – not over it. In our courts, we want a government of law and not of men".

It was U.S. Chief Justice Hughes who once remarked that the U.S. Constitution means what the Supreme Court says it means. Irish judges have not yet been as forthright. Woodrow Wilson said that the Supreme Court resembled a constitutional convention in continuous session. Could the same be said of the Irish Supreme Court? While the Supreme Court may in many respects be the final interpreter of the Constitution, its decisions can be overruled by the people by process of constitutional amendment. It is indeed proper that the highest court in the land and its judgments are open to public scrutiny. Warren Burger in 1968 just nine months before being named as Chief Justice of the United States argued for public scrutiny of the Supreme Court:

> "A court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is the most likely to self-indulge itself and the least likely to engage in dispassionate self-analysis… In a country like ours no public institution or the people who operate it can be above public debate".

We live in an imperfect world. Our existing separation of powers system is probably as good any system. The Court must, of course, defend the citizen's right against any unjust attack but the courts must equally be conscious of threading in the legislative area. In *Attorney General .v. Paperlink* [1984] 1LRM 373 Costello J. refused to consider whether a postal service organised on lines advocated by the defendants was one which met the requirements of the common good. He considered that these were matters for the Oireachtas:

> "But to carry out the inquiry which the defendants ask me to perform and, therefore, make a determination on an alternative to the existing postal service, would amount to an unwarranted and unconstitutional interference with the powers of government exclusively conferred on the Executive and the Oireachtas… Just as the courts must not permit the legislature to interfere with the judicial function, so too they must be astute

to see that they do not themselves depart from their constitutionally defined role".

Chapter headings in the book include "Separation of Powers and Rule of Law"; "The President"; "Government, Taoiseach, Ministers and Departments"; "Finance"; "Procedure in the House of the Oireachtas"; "Parliamentary Privilege"; "Dáil and Senate Elections" and "The Judicature".

The Chapter on the Judicature deals with the independence of the judiciary, the court system, the jurisdiction of the courts including judicial control of administrative action. Judges may be removed from office for stated misbehaviour or incapacity and then only upon resolution passed by Dáil Éireann and Seanad Éireann calling for the judge's removal. Prior to the formation of the State Sir Jonah Barrington was the only Irish Judge to be removed from office. Mr. Morgan states that no removal from judicial officehas occurred since the foundation of the State although one judge did retire after a motion for his removal for incapacity was put down. In another case, the threat of a motion for misbehaviour achieved the desired result. Brief details of this case are described by the author in anecdotal terms in a footnote. Mr. Harry Boland was Minister for Justice at the time. One day he encountered a Circuit Judge for the Western Circuit in St. Stephen's Green, Dublin, at a time when the judge should have been sitting on the bench in Galway. The Minister threatened the judge with a motion for his removal unless he proceeded immediately to his court. The author does not reveal the identity of the judge.

In the chapter on "The Judicature" Mr. Morgan considers the question whether Article 34.3.1, which provides that the "Courts of First Instance shall include a High Court invested with full original jurisdiction and power to determine all matters and questions whether of law of fact, civil of criminal", prevents the Oireachtas from vesting the decision with regard to certain types of justiciable controversy in some court other than the High Court. He referred to the decision of Costello J in *Tormey .v. Ireland* [1985] IR 289. Since the publication of the book the Supreme Court has delivered its judgment in the *Tormey* case and thus has clarified some of the questions posed by the author. According to the *Irish Times* report of 17 May 1985 the Supreme Court held that fundamental fairness, the right to equality

before the law and compliance with the basic purpose of Article 38.2 would all seem to require that it should not be the option of one of the parties to a prosecution to frustrate a trial in the District Court by asserting a constitutional right to a trial in the High Court. In short, the plain meaning of Article 34.3.1 must not be considered in isolation but in the context of other articles of the Constitution. It is interesting to note that the judgment of the court in *Tormey .v. Ireland* was delivered by Henchy J., It will be remembered that Henchy J. with Finlay P, as he then was, delivered powerful dissents in *The People (DPP) .v. O'Shea* [1982] IR 384. There, the majority of the Court argued, inter alia, in favour of a literal interpretation of Article 34.3.1.

The author has written a fluent and lively exposition on aspects of constitutional law. This book will be of particular benefit to persons studying political science. It will also be of benefit to persons interested in constitutional law.

Eamonn G. Hall

[The review of this book was published in the *Gazette of the Law Society of Ireland*, vol.79 No. 5 (June 1985) pp.176,177 and 185. The 2nd edition of *Constitutional Law of Ireland* was published by Round Hall, Sweet and Maxwell, Dublin, in 1992.]]