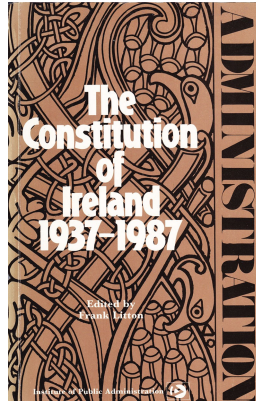


BOOK REVIEW



The Constitution of Ireland 1937-1987 By Frank Litton (editor) Special Issue of *Administration*, volume 35 No. 4 1987 (Dublin: Institute of public Administration, 1988, 225 pp. £6)

Frank Litton, the editor, in a perceptive but short introduction to this Festschrift on the fiftieth anniversary of the people's adoption of the Constitution rightly pronounces that "Constitution-making requires that the cunning of a Machiavellian prince be joined to the wisdom of a philosopher king". Constitutional interpretation demands similar qualities.

Some of our modern Irish legal philosophers and interpreters of our Constitution contribute essays in the form of analyses and critiques of the Constitution. The most lengthy of the contributions was written by Dr. Dermot Keogh. Dr. Keogh documents the often painstaking processes involved in the drafting of the Constitution and Article 44 in particular. The efforts of the clergy to influence De Valera are described in fascinating detail. The writer recounts how the Jesuit community in Dublin in the late 1930s became concerned about a fellow Jesuit, Fr. Edward Cahill, described by Dr. Keogh as "a populariser and prolific publicist". The Jesuit community feared that Fr. Cahill would steal the glory and so the Jesuit community established a committee to draft a preamble and various articles for the new Constitution. Fr. Bartley S.J. was entrusted with the responsibility of controlling his fellow priest, Fr. Cahill, and preventing him from being "too singular" in his ideas on the new Constitution.

De Valera's single-minded vision and sense of purpose concerning the drafting of the new Constitution are described in detail; the drafting process was confined to a small group, "the best civil servants of their generation"; great efforts were

made to avoid leaks and political divisions within the Fianna Fáil party. Dr. Keogh recounts the various “pilgrimages” to the Vatican seeking approval for the articles on religion which ended with the pope’s immortal words: “Ni approvo ni no disapprovo; taceremo”. (“I do not approve, neither do I not disapprove; we shall maintain silence”).

Dr. Enda McDonough, Professor of Moral Theology at St. Patrick’s College, Maynooth, describes the reaction of De Valera to the Pope’s negative attitude to the draft Constitution: “Pius XI was a tough northerner. I have had to deal all my life with tough northerners like Sean McEntee and Frank Aiken so I knew I would have to fight”. Despite the friendship De Valera shared with Dr. John Charles McQuaid ecclesiological differences separated them on certain issues: De Valera

would not yield to the priest’s subtle and insistent endeavors to enshrine the triumphalist doctrine of the Roman Catholic Church in the new Constitution. Yet John Charles McQuaid must have been pleased with his endeavors. On the 29 December 1937, the day the new Constitution came into force, Dr. McQuaid wrote to De Valera:

“This morning again I said Mass for you at dawn, on the eventful day. I am reminded all day of the text in the New Testament: ‘Many have desired to see what we see and have not seen.’”

Walsh J. writes on constitutional rights. Incidentally, Barrington J. recalls Tommy Conolly, S.C. describing Brian Walsh in the 1960s as the person who was “writing the constitutional law of this country”. Professor John Kelly, who had the opportunity of reading the contributions, described Walsh J.’s essay as being “full of material provoking either challenge or applause.” Walsh J. in a wide-ranging essay describes the natural law and the nature of fundamental rights in the Constitution. Many interesting observations are offered to the reader: the observation that in the context of Irish Jurisprudence and the issue of compensation the case law indicates that it is possible that there may be cases where justice – the determining force in this matter – does not require the payment of any compensation is quite interesting.

The courts and the Constitution are considered by Barrington J. The learned judge describes the expanding influence of the Constitution from its early days to the present time. He describes how the judges were fearful in the early days of the State, least any form of judicial activism in interpreting the Constitution would involve them in political, social and economic issues in which the judges had no special competence. Those days are gone forever. Barrington J. makes many interesting observations but of particular interest is his description of Tommy Conolly, S.C. as the father of modern Irish Constitutional law. Barrington J. states that Tommy Conolly operated on the churlish principle that the judge’s point was the best point. Thus, he never formulated his argument as a syllogism

but “skirted around it” until one of the judges in the supreme Court saw the point and formulated the issue for him. Tommy Connolly would then pause, consider the judge’s point and respectfully beg leave to incorporate it as part of his argument. These anecdotes, in the sense of constituting narratives of private details of history, are priceless.

Keane J., judge, prolific jurist and president of the Law Reform Commission, in a masterly essay considers issues relating to Administrative and planning Law in the context of the Constitution. He reflects on the immense growth in the public service and dominant role it plays in Irish life and he notes that challenges to

actions of the executive meet with a more sympathetic and less skeptical response in present times than in former times.

Anthony Coughlan, a senior lecture in Trinity College, Dublin, writes on the Constitution and social policy. Among many interesting facets of social policy in the legal context considered by him, the view that law is congealed politics is an interesting observation. Yet the writer describes the potential of the Constitution for meeting new situations.

Constitutional theory and political practice are the themes selected by Brian Farrell. He makes the effective point that the role of the Dáil and Seanad in the making of legislation is exaggerated in the Constitution and that the real dominance of the government is obscured by an emphasis on parliamentary accountability.

The issue of the interpretation of the Constitution is dealt with by Gerard Hogan, one of our foremost legal writers and a lecturer in Trinity College, Dublin. Quoting Hughes J. of the United States Supreme Court, “the Constitution is what the judges say it is”, Gerard Hogan rightly emphasises that one of the important political developments of the last twenty years has been the growing significance of the courts in interpreting the Constitution. The jurisprudence of original intention has always intrigued your reviewer. Gerard Hogan does not refer to this concept in these terms but deals with this issue in a skilful manner under the heading of the historical approach. The other approaches adopted by the courts in interpreting the Constitution, the references to natural law and other extra constitutional principles together with the issue of the literal versus harmonious interpretational approaches also dealt with. These issues are of enormous practical significance.

Dr. Enda McDonough, Professor of Moral Theology at St. Patrick's College, Maynooth, offers philosophical and theological reflections on the Constitution. Dr. McDonough notes that bureaucratic attitudes and practice in the States as in the Church protect the bureaucrats more than they serve their clients and that a renewed ministry in the church ought to offer at least an alternative model. We are far from our Utopia.

Professor John Kelly in the concluding section of the book with the intriguing title "The Constitution: Law and Manifesto" demonstrates his remarkable fondness for the 1922 Constitution. In a classic statement he argues that something in the Irish character "recoils from plainness, from simplicity, from minimums, from the unequivocal, from the bare, undecorated truth". He argues that much in the

Constitution was conceived as a manifesto rather than as a bare law and thus has given rise to considerable difficulties since the enactment of the Constitution. He instances Article 44 with the reference to the special position of the Roman Catholic Church and Article 3 which refers to the exercise of jurisdiction over the whole island of Ireland. The Irish Free State Constitution was, he states, quite "free of holy flapdoodle".

The Constitution of Ireland 1937-1987 is a remarkable book; it is not a standard textbook in the accepted sense of that term, nor does it purport to be such. The perspectives offered in the book are of considerable interest and deserve to be read by those who cherish our fundamental law.

Eamonn G. Hall.

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