Introduction

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This volume follows from a conference hosted by the School of Law and Government at Dublin City University in September of 2014, which brought academic scholars and judges together to consider themes flowing from the often complex relationships between 'law' and 'politics', 'adjudication' and 'policy-making', the 'judicial' and the more obviously (some might say more overtly) 'political' branches. The whole atmosphere of the conference was open and authentically scholarly: papers were delivered in an accessible and deliberative way, making for sessions that developed into meaningful intellectual exchanges (sometimes on high-minded theoretical themes or discrete historical questions, other times on practical or policy matters). The consensus was that it was the kind of conference that really warranted a follow-up edited collection. That aspiration has been realised in the form of this volume: it is thanks to the participants for following up their immediate post-conference commitments by developing their ideas on foot of the exchanges and delivering them in book chapter form.

In the Introduction to the fourth edition of the by now famous *Hogan and Morgan's Administrative Law*, David Gwynn Morgan bemoans the dearth of deep thinking about 'the character of the Irish State' and 'consequently [about] the values underlying its administrative law'.[1] The same might have been said until recently of Irish public law more generally; of constitutional law and indeed the constitutional order in the broader sense. It is hard to think of subdisciplines in which broader work of this kind is more urgent: public law and the constitutional order are concerned in the most fundamental way with the relationship between the citizen and the state (or rather between various communities of individuals, an overall community of citizens and the state). It engages the deepest of questions around liberty, equality and justice. We

certainly do not present this volume as a definitive or comprehensive work that fills that gap. Far from it: most of the chapters address quite discrete questions. But we would hope that the book contributes in a small way to what seems to be a kind of emerging movement among contemporary Irish public lawyers – exemplified by the work of the Northern/Irish Feminist Judgments Project or Gerry Whyte's updated edition of *Social Inclusion and the Legal System* among so much besides – to bring broader insight to bear and to go beyond what is arguably a stifling and insular 'black letter' tradition.[2]

We have arranged the volume in five parts. Part I addresses questions concerning the nature and extent of judicial power from a largely theoretical perspective. The chapters engage with abstract work on democracy and legitimacy in the context of the wielding and exercise of public (particularly judicial) power. The volume opens with a general defence of judicial supremacy by Fiona de Londras. Her thesis can certainly be read as a general one, although it is applied here in the context of the Irish constitutional system. It may be understood as a rallying cry for legal constitutionalism: de Londras defends judicial power generally based on her claims that it leads to better outcomes and that it should be understood as just one part of a broader and ongoing constitutional 'ecosystem'. Her chapter is followed by a starkly contrasting contribution from Eoin Daly, which casts a sceptical eye on judicial supremacy. Daly argues that the doctrine goes almost unquestioned in Irish constitutional scholarship (and practice) and that its value and potential is vastly overstated, while its costs – particularly its tendency to stultify rights discourse in the sphere of ordinary politics – go largely underappreciated.

Gerard Hogan's chapter turns to a more specific theme, revisiting the famous case of *Ryan v. Attorney General*. He considers the consequences of the reliance by judges in the case on extra-textual norms (e.g. on the 'Christian and democratic nature of the state'), arguing that they could instead have relied on norms that had a clearer textual basis. Their failure to do so, he argues, distorted the rights elements of Irish constitutional jurisprudence in part through a related failure to develop a thorough analysis of the meaning of the rights that were expressly enumerated in the text itself.

Tom Hickey's chapter turns back to general theory, responding to a great extent to the chapters that precede it. So far as a model of constitutionalism is concerned, it may seem to prescribe something of an intermediate position between those defended by de Londras and by Daly, respectively. It argues for a model that formally combines judicial and legislative power over rights on the basis that each brings particular strengths to bear, but that at the same time appropriately accounts for

what he sees as the costs of vesting exclusive authority (and, by extension, responsibility) for rights in either branch. He defends a constrained form of judicial review on the basis of its capacity to identify and develop deliberative understandings of rights that might seem to correspond with the common good, but challenges the tendency to invest excessive faith in judges both on this front and more generally, using the de Londras and Hogan chapters as different exemplars of that tendency.

Part II takes the form of a debate: it addresses the particular case of *O'Keeffe v. Hickey*.[3] It opens with an overall account of the case, in James Gallen's chapter, which discusses the challenges facing Louise O'Keeffe in holding the state responsible for its failure to prevent the child sexual abuse she endured. Gallen discusses the evolution of the case from Irish courts to an appeal to the European Court of Human Rights, previews the arguments of the other contributors in Part II, and notes the potential impact of the decision for the European Convention of Human Rights and for victims of child sexual abuse in Ireland. Mr Justice Adrian Hardiman delivered the keynote address to the 2014 conference. His chapter critiques the decision of the Strasbourg Court, in particular claiming the reasoning employed marks a notable departure from prior jurisprudence and fails to respect the subsidiary role of the Convention in national legal systems. In reply, Conor O'Mahony argues that the reasons offered by the Court were sufficient in themselves to declare the case admissible, and that the decision was entirely in line with the jurisprudence of the ECtHR on admissibility. The discussion between these authors reveals the tension between the principle of subsidiarity and the right to effective protection and an effective remedy in the Convention.

Part III comprises chapters that address questions around the process of appointing judges and judicial representation or dialogue between the judicial and executive branches. Laura Cahillane's chapter begins with an appraisal of the current system of appointing judges in Ireland and proceeds to suggest some potential reforms in this area with the aim of opening the debate on this topic. David Kenny's chapter also considers the judicial appointment process but his focus is specifically on the 'politics' of the appointment process: he argues that we can never eliminate politics from this process (and that this should not be seen as a necessarily bad thing) and so that the way forward lies in appropriately engaging with, rather than concealing, the politics at play in judicial appointments. O'Dowd concentrates on the relationship between the executive and judiciary, specifically the communication, or lack thereof, between these institutions. He refers to some recent controversial episodes where this lack of communication has been problematic and suggests looking to Canada for potential solutions.

Part IV is devoted to certain historical questions pertaining to judges and adjudication. Thomas Murray's chapter begins this part by proposing an alternative interpretation of the Constitution which views the document from the perspective of those constitutionalised. He examines the squatting campaigns of the Dublin Housing Action Committee in the late 1960s and early 1970s to demonstrate the tension and differing interpretations of property rights as commodity versus social need. Donal Coffey's chapter[4] takes another look at the case of *National Union of Railwaymen v. Sullivan*, a case which, he argues, has been undervalued in terms of its historical importance.[5] Coffey makes the argument that the case undermined the vocational project in Ireland, which was an ongoing concern in 1945 when the decision was handed down and that it also marks a decisive turn in the development of judicial review in Ireland. Rory Milhench considers the Irish Constitution from the perspective of Ulster Unionists. He examines the relationship between Ulster Unionists and successive Irish governments, with particular emphasis on how certain Articles of the Irish Constitution helped form the Unionist image of the Irish Republic and how this conditioned the relationship between the two parties. Finally, Tomás Finn considers one particular judge as a historical figure and examines the impact he had on the Irish constitutional landscape.

Finally, Part V comprises three chapters, each of which has a quite specific focus but all engaging questions pertaining to judicial power and political processes. Oran Doyle's chapter addresses a discrete rule-of-law question around control of discretionary power granted under legislation to public actors. He traces and critiques the uncertain emergence of a new judge-made constitutional doctrine responding to the concern that individuals subject to such discretionary power may be diminished by their vulnerability to power that – at least in the absence of this judicial intervention – would be insufficiently checked. Although conscious of the lack of a clear textual basis for this development (and thus perhaps in some ways in tension with Gerard Hogan's argument), Doyle claims the judicial development of the doctrine is justified through rule-of-law values around certainty and predictability.

David Prendergast examines the judicial development of Article 16 and the role of the judiciary in safeguarding the Irish electoral process. He rejects the idea that Article 16 forms a 'total code' for Dáil elections, but argues that the courts' work can be characterised overall as seeking to protect the electoral process, but not perfect it. Claire-Michelle Smyth's chapter examines the question of socio-economic rights in the Irish Constitution. She argues that it is possible to identify the avenues

for constitutionalisation of socio-economic rights without the need for express incorporation by way of referendum.

Notes

1 See D. Gwynn Morgan, *Hogan and Morgan's Administrative Law* (4th edn, Round Hall, 2012) p. 8.
2 See www.feministjudging.ie (accessed 20 October 2015); G. *Whyte, Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn, Institute of Public Administration, 2015).
3 [2009] 2 IR 302.
4 Donal's chapter won the Irish Legal History Society prize for best paper with a historical dimension at the conference.
5 [1947] IR 77.