

## BOOK REVIEW

***Raymond Byrne, Paul McCutcheon, Laura Cahillane and Emma Roche-Cagney, Byrne and McCutcheon on the Irish Legal System (7<sup>th</sup> edn, Bloomsbury Professional 2020), ISBN 9781526515094***

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It probably rarely happens that when working on a book review for publication in a journal one is reminded about the journal's history. However, in Chapter 4 (The Court System, the Judiciary and Administration of the Courts Service) of *Byrne and McCutcheon on the Irish Legal System*, one is reminded that the Judicial Studies Institute was established under the Court and Court Officers Act 1995. In 2001, it established the Judicial Studies Institute Journal 'aimed at the Judiciary', which after a gap of seven years without any edition being published, was relaunched in 2017 as the Irish Judicial Studies Journal.<sup>1</sup> That welcome reminder is indicative of the volume of information and the level of detail in relation to our legal system contained in the seventh edition of this leading publication on the Irish Legal System.

Of course, while the text of this book, containing 17 chapters and stretching over 948 pages, can easily accommodate much detailed information, which is most helpful, what is of more significance is the author's analysis of the nature and features of our legal system as it has developed over nearly nine centuries to the status quo in 2020, recognising at the same time the impact and likely future impact of recent events, for example, Brexit and the Covid-19 pandemic, on our legal system.

It is worth recording that in Chapter 1 (Introduction to the Irish Legal System), the authors state that their study is 'primarily functional in that it concentrates on the relationship between legal institutions and sources of law'.<sup>2</sup> The authors further state that they concentrate 'on the processes of law-making and adjudicating which are central to the legal system and which are the reality of a lawyer's professional life'.<sup>3</sup> Indeed, they might have added that those processes are also the reality of the role and duty of a judge. However, the authors emphasise the importance of being aware of the wider context in which the law operates. In Chapter 1, they set out a jurisprudential overview. They then address a major theme in jurisprudence, namely, the relationship between law and morality.<sup>4</sup> Their analysis of that topic is largely focused on what became known as the Hart – Devlin debate the 1960s. Even for those who, like me, have given little or no thought to the topic since their college days (in my case since the lectures on jurisprudence delivered by Professor John Kelly in UCD in 1968 and 1969), the author's observations on the topic will be of interest. Having observed that the years following the Hart – Devlin debate witnessed a general liberalisation of the criminal law, especially in regard to 'matters that might be considered to lie within the

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<sup>1</sup> Raymond Byrne, Paul McCutcheon, Laura Cahillane and Emma Roche-Cagney, *Byrne and McCutcheon on the Irish Legal System* (7th edn, Bloomsbury Professional 2020), para 4.168.

<sup>2</sup> *ibid* para 1.03

<sup>3</sup> (n 1) para 1.03.

<sup>4</sup> *ibid* para 1.48.

domain of private morality’, the authors give as examples the enactment of legislation in the United Kingdom and decisions of the United States Supreme Court.<sup>5</sup> One of the decisions of the United States Supreme Court cited is *Griswold v Connecticut* (1965) 381 US 479, which concerned the use of contraceptives by married couples. As in my case, that citation is likely to regenerate the interest of the readers in the debate, because the decision of the United States Supreme Court was considered by our Supreme Court in the judgments in *McGee v Attorney General* [1974] IR 284.

Chapter 2 (Development of the Irish Legal System) contains an interesting resumé of the historical development of our legal system from the Anglo-Norman invasion in the 12<sup>th</sup> Century to the creation of two separate jurisdictions on the Island of Ireland in 1921 and 1922. As the authors note, in many respects the legal history of Ireland is also its political history.<sup>6</sup> The authors outline from both a legal and political perspective what happened in 1921 and 1922, which led to the emergence of the Irish Free State. That approach, I believe, gives one a better understanding of the legal system as it existed after the enactment of the 1922 Constitution, which is timely given that the centenary of the relevant events falls this year and next year and no doubt is going to give rise to a lot of academic and public discussion. Chapter 2 also contains a very informative analysis of the route taken by our legal system to its current status via the 1922 Constitution, specifically its replacement by the 1937 Constitution, the coming into effect in 1949 of the Republic of Ireland Act 1948 and the subsequent description of the State as the Republic of Ireland. In particular, the history of the evolution of our current court system is outlined in Chapter 2 and is surprisingly uncomplicated. It starts with the appointment of a Judiciary Committee in January 1923 to recommend the shape of the court system to be established under the 1922 Constitution. The report of the Judiciary Committee was published in May 1923 and the outcome of its recommendations was the establishment of the District Court, the Circuit Court, the High Court, the Court of Criminal Appeal, and the Supreme Court, the recommendations being enacted in the Courts of Justice Act 1924. The authors state that while the 1937 Constitution required the establishment of a ‘new’ court system in 1961, the arrangements put in place by the 1924 Act were repeated at that time, and this layout of the system largely continues to the present day with one important exception. That exception is the creation in 2014 of the Court of Appeal, which has appellate jurisdiction in both civil and criminal matters, and the consequent abolition of the Court of Criminal Appeal.<sup>7</sup> At the end of October 2020, the Report on Review of the Administration of Civil Justice, which was prepared by a review group under the chairmanship of Mr Justice Peter Kelly, former President of the High Court (the ‘Kelly Review Report’) was presented to the Minister for Justice. The narrative in the Kelly Review Report describes the present civil courts system, and in doing so, refers to Byrne and others as being ‘leading commentators’ in this area.<sup>8</sup> The authors include an important caveat in the Preface in that they make it clear that the completion of the seventh edition predated the publication of the Kelly Review Report. They also remark that they are awaiting potentially significant reforms of civil procedure. This is obviously something which must be borne in mind when considering their commentary on, and analysis of, the civil jurisdiction, as distinct from the criminal jurisdiction, within our legal system.

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<sup>5</sup> *ibid* para 1.58.

<sup>6</sup> *ibid* para 2.01.

<sup>7</sup> *ibid* para 2.116.

<sup>8</sup> Department of Justice, *Review of the Administration of Civil Justice: Review Group Report* (7 December 2020), 48-49. The Kelly Review Report refers to the sixth edition of Byrne and other’s book, but the parts referenced also correspond to the text of the seventh edition.

Having explored in very broad terms above the matters addressed in Chapter 1 and Chapter 2, less than 1% of the overall text has been covered. Hence there is a necessity to be selective as to which of the remaining fifteen chapters should be commented on here. In resolving this, the first point to be made is that the chapter division and the structure of the text on such a wide ranging and complex topic as our legal system as adopted by the authors makes access for the reader to a particular area of the law or a particular issue quite easy.

In relation to the organisation of the court system, which is dealt with in Chapter 4, the constitutional and statutory provisions governing the administration of justice are considered first. The court system is outlined by reference to Articles 34 to 38 of the Constitution. There follows a very comprehensive discussion of the judicial composition of each level of the court system, for example, addressing: how the judges sit (whether collegially or not); where they sit; how each judge is addressed; and the manner of noting his or her name in written form. The authors then consider, once again in a very comprehensive manner, how judges are appointed and the qualification necessary for appointment. Judicial independence and judicial ethics are then considered, including some commentary on public criticism of the judiciary in the past and the place of the judiciary in society. The authors also cover matters relating to the vacating of a judicial office and environment. Finally, the management of the court system, in particular, the status and functions of the Courts Service under the Courts Service Act 1998 is outlined.<sup>9</sup>

Complementary to Chapter 4, the jurisdiction and procedures of the courts are considered in the subsequent three chapters. There the authors deal separately with:

1. the jurisdiction of the courts at first instance;
2. the appellate jurisdiction of the courts; and
3. court procedure.

The current first instance, that is to say, original, jurisdiction of the courts in civil and criminal matters is dealt with in Chapter 5. In my view, of considerable assistance to lawyers and judges working at the coalface, is the outline of the relevant constitutional and statutory provisions which demonstrates the extent of the original civil jurisdiction of the courts at each level. These provisions range from the statutory provisions governing the current jurisdiction of the District Court in relation to, say, renewal of alcohol sale licenses, to the constitutional first instance function of the Supreme Court on a reference by the President of a Bill which has passed both houses of the Oireachtas to decide as to its constitutional validity pursuant to Article 26 of the Constitution.<sup>10</sup> As regards first instance jurisdiction in criminal cases, the authors give a very clear overview of the current position from District Court level to Circuit Court level to the Central Criminal Court and then encompassing the Special Criminal Court.

The authors also give a very useful overview of some of the basic rules of civil and criminal court procedure in Chapter 6. They emphasise the differences between the rules and conventions concerning civil procedure as distinct from criminal procedure. They reference obvious differences as to terminology, such as the different titles given to the parties. For example, as regards initiators' titles, in civil cases the term 'plaintiff' is used and in criminal cases the term 'prosecutor' is used. They also reference the 'critical distinction' between civil

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<sup>9</sup> (n 1) para 4.264.

<sup>10</sup> On this point, see (n 1) para's 5.64 and 5.106 respectively.

and criminal cases as to the relevant burden of proof.<sup>11</sup> As one would anticipate, the outline of the court procedure in both civil and criminal cases gives rise to considerable detail and complexity. Nonetheless, the material is presented in a very clear and understandable manner.

Finally, Chapter 7 deals with the appellate jurisdiction of the courts in both civil cases and criminal cases. Once again, the authors have had to contend with very considerable legal complexity. At the outset, they explain that the forms of appeal may be divided into two general types: a full rehearing, a de novo hearing, and an appeal on a point of law.<sup>12</sup> In addressing appellate jurisdiction in civil cases, the authors helpfully follow the chain from the lowest level of the court structure, the District Court, to the highest level, the Supreme Court, having regard to those two general types of appeal. In explaining the overall process, they illustrate the various elements in tabular form in no less than six figures, four in relation to civil procedure and two in relation to criminal procedure. This approach is very helpful in enabling one to have a correct view of each element and of the overall system.

If the use of the word ‘finally’ at the commencement of the previous paragraph gives the impression that the appellate jurisdiction of the courts comprises solely the elements set out in Chapter 7, that is not the case. Indeed, the authors wisely point out in Chapter 7 that the courts at all levels, from District Court up to Supreme Court, have each been conferred with different appellate jurisdiction both in the form of de novo hearings and appeals on points of law, from various adjudicative bodies, tribunals and Ministers in relation to their exercise of administrative or decision making functions.<sup>13</sup> This appellate jurisdiction, which the author’s emphasise should be distinguished from the judicial review jurisdiction exercised exclusively by the High Court, is discussed in Chapter 8.

Lest the forgoing selectivity of material from this book gives a false impression as to the extent to which the authors explain our legal system, it is important to draw attention to some of the other relevant areas of the law and relevant topics which the authors address. These include:

- the legal profession, including the effect of the Legal Services Regulation Act 2015;
- access to the law and the courts, not just in an ‘open to all’ Ritz Hotel manner, but with the benefit of legal aid;
- the remedies and enforcement mechanisms available in civil matters (damages, injunctions, and specific performance) and in criminal matters (imprisonment, fines and alternative measures such as probation and community service);
- alternative dispute resolution processes, including mediation and arbitration; and
- law reform.

The authors also take account of the fact that our legal system is not solely sourced by laws created within the state, but it is also subject to external sources of law. The penultimate chapter deals with European Union Law and, as the authors state, deals primarily with ‘the

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<sup>11</sup> (n 1) para 6.19.

<sup>12</sup> *ibid* para 7.03.

<sup>13</sup> *ibid* para 7.66.

legal effects of the state's membership of the European Union.<sup>14</sup> Nonetheless, the authors also give a very clear picture of the evolution of the European Union as it is today from the 1950s, its institutional framework and the powers and functions of each of its main institutions. Chapter 16 also contains a very useful outline of the adaptation of the Constitution to the European Union legal order.

In the final chapter of this book, Chapter 17 on International Law, the authors discuss public international law, noting that, in practice, international law and international agreements have become increasingly influential in the domestic law of most states, including Ireland.<sup>15</sup> There is also a brief discussion of private international law, otherwise known as conflict of laws. This final chapter gives a complete picture of our legal system in viewing it at global level.

Unquestionably, if one were to assimilate all of the information which the authors present over seventeen chapters, one could feel comfortable about one's knowledge of our legal system. However, the authors go much further, in that throughout the text they discuss the basis and rationale on which the system actually operates. To take legislation as an example, while Chapter 13 contains a comprehensive informative outline of the legislative process from start to finish and examines the end product, whether primary or secondary legislation, in the next chapter the authors consider the interpretation of legislation. They state, in the introduction to that chapter, that in the main they are concerned with the rules, principles, practices, and techniques which are currently employed to determine the meaning of statutory provisions. Among the matters they analyse is the current state of play in relation to the use of parliamentary materials as an aid to statutory interpretation. Predictably, the decision of the Supreme Court in *Crilly v T & J Farrington Limited* [2001] 3 IR 251 features prominently. The authors also consider the recent decision of the Supreme Court in *People [DPP] v Brown* [2019] 2 IR 1. They express the view that 'while, in a strict sense, the use of parliamentary debates has not been formally ruled out, the strength of the judgments in *Crilly*... is such that there can be few doubts as to the current position in Irish Law'.<sup>16</sup>

For completion, a few observations in relation to Chapter 12 on Precedent, which I have found particularly interesting, are appropriate. At the outset, the authors emphasise that access to accurately reported judicial decisions is essential to the effective operation of a system of precedent. They then analyse the application of the principle of *stare decisis* in our courts. One might say in plain terms that, in doing so from top to bottom and from left to right, they give a very useful assessment of the principle. The authors also consider the relevance of the decisions of foreign courts, pointing out that those decisions are of persuasive authority and may be followed at the option of the courts.<sup>17</sup> They then set out in tabular form, again in no less than six figures, the breakdown of cases judicially considered by our courts in certain years since 1921. The fifth figure lists the number of cases judicially considered in the Irish Reports 2011. The authors comment that the current position is that in this jurisdiction, the citation of post-1920 Irish decisions has overtaken reference to English and Scottish precedents, suggesting that 'this no doubt reflects the increase in judicial output in Ireland since 1975'.<sup>18</sup>

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<sup>14</sup> *ibid* para 16.03.

<sup>15</sup> *ibid* para 17.08.

<sup>16</sup> *ibid* para 14.204.

<sup>17</sup> *ibid* para 12.82.

<sup>18</sup> *ibid* para 12.91.

In conclusion, as the forgoing review demonstrates, the authors have comprehensively and with clarity met their objective of covering the processes of law-making and adjudicating which are central to the legal system, are the reality of the lawyer's professional life, and, as is implied from what I observed earlier, are also the reality of the role and duty of a judge. Both the legal profession and the judiciary will definitely benefit from this book, as will academics and students of law.