



# Inheriting the royals: royal chartered bodies in Ireland after 1922

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## ABSTRACT

The establishment of the Irish Free State (Saorstát Éireann) in 1922 did not occur on a blank canvas. A slew of administrative bodies and agencies with pre-1922 origins now found themselves under a new jurisdiction, still familiar in some respects but alien in others. The Irish State Administration Database indicates that the functions performed by these pre-1922 bodies included the delivery of public services and regulatory oversight. The resilience of pre-1922 bodies arguably ensured a greater degree of day-to-day administrative continuity and stability after 1922 than may otherwise have been the case.

This article focuses on a particular subset of these pre-1922 entities – royal chartered bodies – carried into Saorstát Éireann and beyond. Of special interest are the peculiar legal mechanisms through which these bodies were sustained in an altered constitutional landscape. The discontinuation of a pre-1922 royal prerogative to grant and amend royal charters presented legal conundrums for royal chartered bodies and the state. This was mitigated through a mixture of tailored public and private legislation of the Oireachtas. These dynamics are interrogated through the lenses of temporality and legal pluralism.

**Keywords:** public administration; royal charters; legal pluralism; private legislation.

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## INTRODUCTION

The persistence of royal symbolism in the Irish constitutional order post-1922 was a thorny political issue. This was evident during negotiations on the Articles of Agreement for a Treaty between Great Britain and Ireland (the Anglo-Irish Treaty 1921) and, subsequently, in discussions on the draft Constitution of the Irish Free State (Saorstát Éireann).<sup>1</sup> A requirement for members of the Irish Parliament (Oireachtas) to swear an oath of allegiance to the crown was especially problematic. Even the British Prime Minister, David Lloyd George, acknowledged that the Irish were ‘fed up with the Crown this, and the Crown that, and no wonder’.<sup>2</sup> Grievances were also aired on the Irish side about the broader legal infrastructure the new state was to inherit. Michael Collins, revolutionary leader and Chairman of the Provisional Government of Ireland, reportedly accused the British Government of trying to force the English common law upon Ireland.<sup>3</sup>

A number of bodies with an explicit royal heritage firmly rooted in the pre-1922 common law have continued in existence to this day. Typically discernible by the prefix ‘Royal’, they trace their origin to ‘royal charters’ or ‘letters patent’ granted by the British sovereign (the crown) under royal prerogative powers. In symbolic terms, the survival of these royal chartered bodies (RCBs) could be seen as a form of legal greening,<sup>4</sup> akin to the physical re-painting of red letterboxes in green after 1922 – the simultaneous adoption and adaptation of still useful structures.<sup>5</sup> But just below the surface, RCBs (as with those letterboxes) remained adorned in the regalia of a monarchical past. The royal prefix still used by most RCBs clearly harks to their pre-1922 pedigree. Today, although ostensibly private entities in nature, a number of RCBs remain integral to the delivery of services with clearly public dimensions, such as education, the arts and professional accreditation. Many of them have benefited from public funding over the years.<sup>6</sup> RCBs are, therefore, exemplars of administrative resilience.

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1 See, eg, Gretchen Friemann, *The Treaty* (Merrion Press 2021) 186–194; Laura Cahillane, *Drafting the Irish Free State Constitution* (Manchester University Press 2016) 52–55.

2 Cahillane (n 1 above) 54, fn 54.

3 Ibid.

4 For a broader discussion of legal and administrative greening, see, eg, John Biggins, Muiris MacCarthaigh and Colin Scott, ‘Greening the Irish state: early legislative and administrative dynamics’ (2024) *Irish Political Studies* (forthcoming).

5 Thanks to Professor Colin Scott for this analogy.

6 In particular, the Royal Irish Academy, the Royal Irish Academy of Music and, for a time, the Royal College of Surgeons in Ireland. See Office of the Comptroller and Auditor General, *Appropriation Accounts* (various years).

As the sands of political and constitutional authority shifted in 1922, RCBs initially faced an uncertain future. Organs of the British administration formerly assigned governance or approval roles under royal charters (the constitutional documents of RCBs) ceased to exist or operate in 1922.<sup>7</sup> This initially presented operational difficulties for RCBs. As a result, in 1926 the executive authority of the new state was empowered to adapt the original charters of many RCBs to ensure they could continue to perform socially important functions, for example in the education of certain professions. Legislating for these new executive powers threw up peculiar legal, administrative and temporal conundrums. The fledgling Irish Parliament had to grapple with rights anchored in a type of royal sovereignty pre-dating Saorstát Éireann itself, but which demanded recognition in the altered legal order of the present. This exercise also tested the parameters of a transitional provision in the Constitution of Saorstát Éireann. Navigating this challenge was complicated by the fact that the Executive Council (Government) did not, initially at least, have a clear sense of how many royal charters lurked in the wilderness. The fuller administrative implications of the state's policy decision to preserve the rights of RCBs therefore only became clear over subsequent years, as it responded to individual requests for charter adaptations. Later on, certain RCBs also exploited an outmoded form of parliamentary legislation imported from the Westminster tradition, known as the Private Act. While not presenting significant difficulties for the Oireachtas from a normative standpoint, these private legislative patterns nonetheless accentuated the *sui generis* nature of the RCB inheritance.

The RCB heritage was politically awkward. A parliamentary debate in December 1949 exemplified how the visible trappings of a historical monarchy could be weaponised when the Taoiseach (Prime Minister) was asked whether:

before the Estimates for the coming financial year are completed, he will communicate with organisations which use the word “Royal” in their names or descriptions, and particularly with those which are in receipt of grants from the Exchequer ... with a view to securing their consent to eliminating the word “Royal” from their names or their descriptions.<sup>8</sup>

It is notable that the Taoiseach's response was loaded with temporal language, simultaneously characterising RCBs as being symbolic of history but also of more recent progress:

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7 Such as the Lord Lieutenant of Ireland. See Irish Free State (Consequential Provisions) Act 1922, 13 Geo 5 Sess 2, c 2.

8 Dáil Éireann Debate, *Ceisteanna—Questions. Oral Answers – Use of title ‘Royal’* (7 December 1949, vol 118, no 14).

The view I take of this word 'Royal' is that it marks merely the historic evolution of our own country and that the fact of its being there emphasises and underlines the progress which has been made ... It is in that sense that I regard the use of this word 'Royal' by these people. It is a matter of no consequence so far as I am concerned; it is of no importance and not worth wasting time over ... In many instances the word 'Royal' derives from a patent and is implicit in the patent and might be difficult to change ...<sup>9</sup>

It is intriguing that RCBs with roots in an earlier legal order have so successfully endured. An attempt is made here to unpick this phenomenon. The article opens with a general outline of some key themes from the law and time<sup>10</sup> and temporal legal pluralism literature.<sup>11</sup> Those themes are taken up in the RCB context at various points later in the article. There then follows a brief primer on the post-colonial administrative legacy, the nature of royal prerogative and charters. The peculiar executive and legislative devices used to fasten RCBs to the post-1922 Irish state, to the legal time zone of the new constitutional order, are then examined.

Subsequently, a case study of one particular RCB, the Institute of Chartered Accountants in Ireland (the Institute), further illuminates these dynamics. It will be demonstrated how that body's attempts to reconcile its pre-1922 philosophy and internal rules (or its original legal time zone) with post-1922 exigencies played into political anxieties around sovereignty and oversight in both the present and future. Light is shone on the Institute's experience of reconciling to the new legal time of the post-1922 Irish state. Precisely because of its RCB status straddling different legal time zones, it is shown how the Institute has been well positioned to harmonise the professional regulatory regimes for accountancy on the island of Ireland notwithstanding territorial partition. Finally, an attempt is made to draw some general conclusions.

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9 Ibid. Incidentally, the Taoiseach (John A Costello) making this statement had, in his earlier guise as Attorney General in 1926, provided advice on complex legal issues relating to royal charters. Politics aside, he must have been keenly aware of the archaic administrative and legal challenges these entities presented for the new state. See, eg, Letter, dated 1 December 1926, from Attorney General to Assistant Secretary of the Executive Council of Saorstát Éireann regarding the definition of 'charter', found in NAI, TSCH/3/S4998.

10 Eg Emily Grabham and Sian M Beynon-Jones, 'Introduction' in Sian M Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2019).

11 Eg Natasha Wheatley, 'Legal pluralism as temporal pluralism: historical rights, legal vitalism and non-synchronous sovereignty' in D Edelstein et al (eds), *Power and Time: Temporalities in the Making of History* (University of Chicago Press 2020).

## ROYAL CHARTERED BODIES: TEMPORAL LEGAL PLURALISM AND TIMELINES

In order to frame the remainder of this article, this section exhibits concepts of ‘legal pluralism’, particularly ‘temporal’ legal pluralism in a common law context, as a means to perceive the relationship between RCBs and the Irish state. It is suggested that these concepts can assist in better understanding the nature of the legal zone RCBs have occupied since 1922.

At its core, legal pluralism sees that:

law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another so that the ‘law’ which is actually effective on the ground floor of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.<sup>12</sup>

Legal pluralism has frequently been deployed in analyses of systems shaped by colonialism,<sup>13</sup> for example where customary or indigenous rights have competed with, or been facilitated by, (imposed) official or state law during or after a colonial experience.<sup>14</sup> This article engages the opposite scenario – husbandry, by the Irish state, of overtly colonial-era institutions in a post-colonial context. RCBs are, in their own way, artefacts of colonialism insofar as they draw upon vestigial rights rooted in a time prior to 1922.

Legal pluralist challenges associated with RCBs are, though, less acute than those presented by distinct systems of native customary rights.<sup>15</sup> After all, RCBs are creatures of a common law heritage which was, with variations, retained and replicated by the Irish state post-1922. While RCBs were originally founded in a different constitutional and administrative landscape, in many respects the common law did not *radically* change in post-1922 Ireland.

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- 12 John Griffiths, ‘What is legal pluralism?’ (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, 39.
  - 13 See, eg, Keebet von Benda-Beckmann and Bertram Turner, ‘Legal pluralism, social theory and the state’ (2018) 50 *Journal of Legal Pluralism and Unofficial Law* 255.
  - 14 See, eg, Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale University Press 2023). Taken further in Gunther Teubner, ‘“Global Bukowina”: legal pluralism in the world society’ in Gunther Teubner (ed), *Global Law without a State* (Aldershot 1997).
  - 15 See, eg, Shaunnagh Dorsett, ‘Since time immemorial: a story of common law jurisdiction, native title and the case of tanistry’ (2002) 26 *Melbourne University Law Review* 32.

The Irish state's indulgence of RCBs could, therefore, be perceived as legal pluralism in a 'weak' sense, as articulated by Griffiths.<sup>16</sup> In this concept of legal pluralism, the state is prepared to recognise pockets of pre-existing, or customary law, but always subject to an overarching or controlling 'state' legal system. RCBs could be categorised as pockets of variant common law within an ultimately common law-based system adopted by the Irish state post-1922. As such, we are dealing here with two common law value systems (pre and post-1922) which were, fundamentally, sisters of one another. Reliance on this concept of weak legal pluralism is not, then, entirely satisfactory in understanding the peculiar challenges posed by RCBs for the fledgling state.

More significant, perhaps, was that RCBs were rooted in a lapsed form of royal common law sovereignty. After 1922, RCBs required not just recognition of their pre-existing common law rights, but also demanded actively tailored legislative solutions so that they could be transitioned to the new sovereign legal order of the present. Accordingly, the concept of 'temporal legal pluralism', particularly as elaborated by Natasha Wheatley, offers a further useful prism through which to view the post-1922 conundrums presented by RCBs. The framework of temporal legal pluralism is more focused on dynamics of time, rather than space, in the shaping of legal orders. From this standpoint, pre-existing rights claims carried into a new sovereign order:

can linger as deep-set sovereign qualifications – as legal remainders that the establishment of the state was not a totalizing phenomenon ... These are rights 'from' the past that refuse to be simply 'of' the past ... even if they are politically or philosophically at odds with the current sovereign order.<sup>17</sup>

Temporal legal pluralism thus conceives the state being forced to 'wrestle with bodies of law and bundles of rights that stemmed from a time before the advent of [the state's] own sovereignty'.<sup>18</sup> Perceived from this angle, legal pluralism:

turns less on the (uneven) dispersal of rights throughout space than on their (imperfect) survival through time – on the patchy, friction-filled transference of law along temporal vectors toward the present (or, conversely, into the siloed dead ends of historical oblivion).<sup>19</sup>

Temporal legal pluralism may be considered within a broader theoretical framework of 'law and time' or the 'times of law'.<sup>20</sup> In this framework, time itself is a legitimate object of study. This contrasts

16 Griffiths (n 12 above) 5.

17 Wheatley (n 11 above) 53.

18 Ibid.

19 Ibid 55.

20 Eg Grabham and Beynon-Jones (n 10 above).

with some traditional assumptions of time as merely an implicit prop, or something taken for granted in a linear, plodding evolution of law. Instead, it is possible to think of time itself as 'an ontological, requisite, or constitutive feature of law'.<sup>21</sup> Conversely, law may also be capable of shaping or reshaping notions of time. In this way, time, or different legal timelines, can be perceived as non-linear, or a collection of 'polytemporalities'.<sup>22</sup>

Common law systems (such as that in Ireland) are especially suitable to this type of interrogation. In certain ways, common law draws its potent authority from a kind of 'non-historical' ancient precedent, extending back behind the mists of time immemorial.<sup>23</sup> But this ostensibly non-historical common law precedent can (and often does) flexibly adapt or shapeshift as evolving contexts may demand.<sup>24</sup> What Hale branded as the 'insensible' variation of common law over time underplays this inherent flexibility.<sup>25</sup> Indeed, it has been suggested by Mawani that 'common law has its own internal temporal rhythms ... Oriented to the past while reaching to the unforeseeable future, the common law is always becoming.'<sup>26</sup>

The intersection between the 'non-historical' time of the common law and a 'foundational and teleological'<sup>27</sup> time of political history can be instructive. Parker has examined this in relation to the American Revolution. There the persistence of English common law after independence might seem puzzling, given American political aspirations to break with England.<sup>28</sup> One reason proffered is that the common law carried considerable 'ideological freight'<sup>29</sup> in the specific context of the American Revolution. That struggle was often shrouded in the language of vindicating *common law* rights and freedoms against the British administration.<sup>30</sup> Another potential reason is the prominent role of nineteenth-century American common law lawyers in articulating law to societal constituencies for whom the administrative state was not yet present in the way it would later

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21 Renisa Mawani, 'The times of law' (2015) 40 *Law and Social Inquiry* 253, 255.

22 Grabham and Beynon-Jones (n 10 above) 2.

23 Kunal M Parker, 'Law "in" and "as" history: the common law in the American polity, 1790–1900' (2011) 1 *UC Irvine Law Review* 587, 600.

24 Mawani (n 21 above) 257.

25 Matthew Hale, *History of the Common Law*, Charles M Gray (ed) (University of Chicago Press 1971) 39–40.

26 Mawani (n 21 above) 255.

27 Parker (n 23 above) 606.

28 Ibid 594.

29 Ibid 595.

30 Ibid. Although, of course, law reform was also broached in the revolutionary American context. See, eg, Gordon S Wood, *The Creation of the American Republic 1776–1787* (University of North Carolina Press) 299–305.

become.<sup>31</sup> Added to that, concepts of political democracy were initially novel, underdeveloped and viewed with some suspicion. In that milieu, there was acceptance of some pre-existing, familiar legal constraints on political action.<sup>32</sup>

Some of the above chimes with the Irish revolutionary and state-building experience, not least the role of lawyers steeped in the common law tradition perpetuating it in a new political context.<sup>33</sup> It is, though, otherwise difficult to discern a substantial 'ideological freight'<sup>34</sup> conceded to the common law in the Irish revolutionary fervour of the twentieth century. Even so, the subsequent political and legal architects of the fledgling post-1922 state were careful to distinguish between the substance of common law itself and the manner in which it had been administered in Ireland. This circumspect stance on law reform is well illustrated in a backhanded compliment paid to the common law in a letter from the President of the Irish Executive Council (Prime Minister) to a Judiciary Committee tasked with devising proposals for a new court system, when he stated:

The body of laws and the system of judicature so imposed upon this Nation were English (not even British) ... A remarkable and characteristic product of the genius of that people, the manner of their administration prevented them from striking root in the fertile soil of this Nation.<sup>35</sup>

Enthusiasm for the common law was less overt in the post-1922 Irish context than it may have been in the nineteenth-century American order. Still, Parker's observation pertaining to the American experience could, as will be illustrated later in this article, just as easily have been written about some Irish constitutional and legislative exercises post-1922, not least in the handling of RCBs:

The times of the common law and the times of history brushed up against each other, informed each other, constituted each other, without destroying each other. History was a method of acting upon the common law; the common law was a method of realizing history. History produced an external perspective on the nonhistorical common law, but at the same time, the nonhistorical common law produced an external perspective on history.<sup>36</sup>

Within this overarching framework, it is also possible to isolate particular moments when a previously unified or linear (legal) narrative can be shattered by an act of speech or language. Such language might

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31 Ibid 596.

32 Ibid 596–597.

33 Mary Kotsonouris, *Retreat from Revolution: The Dáil Courts 1920–24* (Irish Academic Press 1994) 98.

34 Parker (n 23 above) 595.

35 Kotsonouris (n 33 above) 99.

36 Parker (n 23 above) 606.



either affirm or reshape the legitimacy of pre-existing law or reorder legal timelines in fundamental respects. Through this lens, Painter observes how social actors can ‘speak the law into existence and bring the law’s authority into the present and the future through their speech acts’.<sup>37</sup> In the Irish case (further addressed below), contributions made during parliamentary debates may have fulfilled this function. Whatever their legal import, these parliamentary interventions sorted through, and actively contributed to, a (re)legitimation of pre-1922 common law norms underpinning RCBs.

## THE POST-COLONIAL ADMINISTRATIVE LEGACY

The 7 January 1922 saw approval of the Anglo-Irish Treaty 1921 in the Second Dáil Éireann (Assembly of Ireland). On Friday 7 April 1922 a notice appeared in *Iris Oifigiúil* and the *Belfast Gazette* confirming an ‘Order in Council’ made at Windsor Castle on 1 April 1922.<sup>38</sup> This order, *inter alia*, transferred key administrative functions from the British Government to the Provisional Government of Ireland, albeit some of this was ultimately done in a piecemeal and ambiguous fashion.<sup>39</sup> The Irish State Administration Database (ISAD)<sup>40</sup> indicates there were at least 65 active public administrative bodies (units) in Saorstát Éireann as at 1 January 1923, excluding government ministries and related executive offices.<sup>41</sup> The functions of a large number of these pre-1922 bodies transferred to the Provisional Government of Ireland were then inherited by Saorstát Éireann and, in some cases, continued well beyond that. Of these administrative bodies, 16 were originally established by royal charter prior to 1922. These are coded as ‘chartered corporations’ in ISAD and are the focus of this article.<sup>42</sup>

37 Genevieve R Painter, “‘Give us his name’: time, law and language in a settler colony” in Sian M Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2019) 109.

38 Order in Council, *The Belfast Gazette* (7 April 1922) 379–384 issued under the Irish Free State (Agreement) Act 1922 (13 Geo 5 Sess 2, c 1).

39 For discussion of ambiguities regarding the formal emergence of the Irish State, see, eg, Thomas Mohr, ‘Law and the foundation of the Irish Free State on 6 December 1922’ (2018) 59 *Irish Jurist* 31, particularly 50–51.

40 On ISAD generally, see the ISAD [website](#). See also, eg, Niamh Hardiman and Colin Scott, ‘Ordering things: the Irish State Administration Database’ (2012) 27 *Irish Political Studies* 1; Muiris MacCarthaigh, ‘Agency termination in Ireland: culls and bonfires, or life after death?’ (2014) 92 *Public Administration* 1017; Biggins et al, *The Irish State Administration Database* ([publicpolicy.ie](http://publicpolicy.ie) 18 October 2021):

41 Niamh Hardiman et al, *The Irish State Administration Database*.

42 It should be noted that some chartered corporations are not currently captured in ISAD due to the fact that they do not have a sufficiently explicit, formal nexus with the state, eg in terms of legislative control, governance or funding.

Of further relevance here is that legal provisions enacted post-1922 did not trigger an immediate, fundamental overhaul of the legislative and administrative order inherited from Westminster. The Constitution of the Irish Free State (Saorstát Éireann) Act 1922<sup>43</sup> contained transitory provisions preserving the legislative, administrative and judicial *status quo* pending future action by the new Irish Parliament (Oireachtas). This was buttressed by legislation such as the Adaptation of Enactments Act 1922 (the 1922 Act)<sup>44</sup> and the Expiring Laws Acts which facilitated the adaptation and extension of pre-1922 legislation in Saorstát Éireann. However, the status of RCBs originally established pursuant to royal prerogative posed a special challenge.

In the case of *Re Irish Employers Mutual Insurance Association Limited*,<sup>45</sup> Kingsmill Moore J usefully synthesised the origin of 'royal prerogative' in the English common law:

[t]he prerogative originated in a period when modern conceptions of the nature of sovereignty and government had not yet arisen. The structure of society was still feudal; property law was built on a feudal skeleton; loyalty was an essentially personal matter; the king was looked on more as a feudal overlord than as the embodiment of national power and aspiration; and the royal revenues, feudal by nature, were regarded as the king's personal possession, which could be spent by him according to his personal desires and without restriction by ministerial or parliamentary interference.<sup>46</sup>

Royal prerogative was initially a loose discretion, exercisable by the English (later British) crown without significant checks or constraints. It has been described as '[t]he residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown'.<sup>47</sup> A variant description brands it a power 'the [crown] enjoys alone, in contradistinction to others, and not to those [it] enjoys in common with any of [its] subjects'.<sup>48</sup> This power was gradually restricted as authority shifted from the crown to Parliament.

In the *Case of Proclamations*<sup>49</sup> it was confirmed that an Act of Parliament would trump any conflicting prerogative as 'the King hath no prerogative, but that which the law of the land allows him'.<sup>50</sup>

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43 No 1 of 1922.

44 No 2 of 1922.

45 [1955] IR 176.

46 Ibid 215.

47 A V Dicey, *Introduction to the Study of the Law of the Constitution* 10th edn (Macmillan 1959) 424.

48 William Blackstone, *Commentaries on the Laws of England, a Facsimile of the First Edition of 1765-1769* (University of Chicago Press 1979) 111.

49 *Case of Proclamations* (1611) 12 Co Rep 74.

50 Ibid 76 (Sir Edward Coke).

Similarly, in the more recent case of *R (Miller) v The Prime Minister*,<sup>51</sup> prerogative was described as the ‘residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation’.<sup>52</sup>

The survival (or not) of royal prerogatives in the Irish legal order beyond 1922 has historically been a matter of considerable judicial and academic debate.<sup>53</sup> Full treatment of that debate is outside the scope of this article. But it is notable that the status of royal prerogatives was left somewhat ambiguous following the litigation in *Geoghegan v Institute of Chartered Accountants in Ireland*<sup>54</sup> (to which this article will return), albeit the royal prerogative question was *obiter* in those proceedings. In the High Court, Murphy J adopted the earlier position of Finlay CJ in *Webb v Ireland*<sup>55</sup> that, *inter alia*:

no royal prerogative in existence prior to the enactment of the Constitution of Saorstát Éireann, 1922, was by virtue of the provisions of that Constitution vested in the Irish Free State ...<sup>56</sup>

However, in the Supreme Court in *Geoghegan*, O’Flaherty J seemed not to entirely shut the door on royal prerogatives when he observed:

[a]s regards the decisions in *Byrne v. Ireland* [1972] I.R. 241 and *Webb v. Ireland* [1988] I.R. 353, since each was concerned with a single question in respect of the royal prerogative (whether the State was immune from civil suit in the one case and the State’s entitlement to treasure trove in the other), it may be that if in a future case a wider question is raised concerning the royal prerogative, the parameters of the judgments in these cases may need to be delineated.<sup>57</sup>

In any event, regardless of the survival of royal prerogatives, RCBs’ continued existence, as well as their entitlement to petition the Executive and Parliament of Ireland, were not ultimately jeopardised. While no longer shrouded in royal prerogative, it will be demonstrated here how equivalent forms of executive and legislative initiatives sustained RCBs after 1922.

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51 [2018] AC 61.

52 Ibid 139.

53 Well treated in Laura Cahillane, ‘The prerogative and its survival in Ireland: dusty antique or positively useful’ (2010) 1 Irish Journal of Legal Studies 1. See also John M Kelly, ‘Hidden treasure and the Constitution’ (1988) 10 Dublin University Law Journal 5; Niall Lenihan, ‘Royal prerogatives and the Constitution’ (1989) 24 Irish Jurist 1; Kevin Costello, ‘The expulsion of prerogative doctrine from Irish law: quantifying and remedying the loss of the royal prerogatives’ (1997) 32 Irish Jurist 145.

54 [1995] 3 IR 86.

55 [1988] IR 353.

56 Ibid 382.

57 [1995] 3 IR 86, at 118.

Royal charters, the constitutional documents of RCBs, were historically granted upon a petition under the crown prerogative of 'letters patent'.<sup>58</sup> These are proclamatory orders confirming or establishing a particular legal right, title, body or jurisdiction. Costello describes the pre-1922 procedure:

a memorial was addressed to the Lord Lieutenant; where the Attorney General advised that the petition be granted, the papers would be sent to London, where a Crown letter would be prepared, and issued under the Royal Sign Manual directing that letters patent be prepared and issued under the Great Seal of Ireland for incorporating the institution described in the memorial. By the nineteenth century incorporation by charter had ceased to be sought by commercial organisations, and was attractive only to public corporations, usually of a vocational or educational nature, seeking such approval as would be conveyed by the grant of a royal licence.<sup>59</sup>

As such, RCBs were incorporated under royal charters and usually adopted detailed byelaws to govern their activities. However, in contrast to other types of corporate entities, RCBs as 'chartered corporations' have traditionally enjoyed a wide latitude not limited by internal articles of association etc. At common law, chartered corporations can exercise rights analogous to natural persons. The broad scope of chartered corporations was confirmed in *Gray and Cathart v Trinity College Dublin*:<sup>60</sup>

A corporation created by charter is one indivisible entity. It has impliedly all the powers of a natural person, save such as are expressly reserved in the charter. It has an inherent right to use a seal ... It can use the seal for all lawful purposes ... within the scope of its powers. It is not now disputed that it can do so without the consent of every individual member of the corporation ... This is settled by a long series of authorities, extending over four centuries of time ... When the majority authorize the seal to be affixed, the act of the corporation is complete.<sup>61</sup>

Of course, RCBs today may (depending on their activities) now also be captured by public legislative provisions applicable to incorporated and charitable bodies.<sup>62</sup> The RCBs of specific interest in this paper are those originally established prior to 1922, surviving into Saorstát Éireann and beyond – a broad category encompassing educational, health, professional and sporting bodies.

58 UK National Archives, *Royal Grants in Letters Patent and Charters from 1199*.

59 Costello (n 53 above) 150.

60 [1910] 1 IR 370.

61 Ibid 383–384.

62 For example, s 1312 of the Companies Act 2014 (No 38 of 2014); s 2 of the Charities Act 2009 (No 6 of 2009).

### **RCBs and the adaptation of charters**

The path forward for RCBs was foggy after 1922. They had originally been conceived in a system where the crown embodied sovereign authority. Sovereignty, though contested, had a more popular hue in the Constitution of Saorstát Éireann.<sup>63</sup> At the same time, the new state retained some trappings of regal authority and symbolism. The British monarch had a nominal role in the executive function of the new state<sup>64</sup> and Irish parliamentarians were required to swear an oath of allegiance to the crown.<sup>65</sup> The emergent state in 1922 also remained within the orbit of the British empire as a dominion.<sup>66</sup> While these qualifications to sovereignty diminished as time went on, they undoubtedly influenced the new state's formative years.

After the transfer of political authority in 1922, the crown no longer exercised a role in founding or sustaining<sup>67</sup> administrative bodies in Ireland. Indeed, there was reportedly an 'absolute refusal' by the crown to alter or update the royal charters of RCBs based in Ireland or the other dominions. Apparently, the crown's view was that this was 'now the business of the legislature'.<sup>68</sup> As will be demonstrated below, a mixture of public and private legislation, as well as executive orders, was deployed to fasten RCBs to the post-1922 Irish state. In this way, RCBs not only survived 1922 but were actively sustained by species of legislation and executive orders tailored to their needs.

The most immediate administrative challenge for many RCBs post-1922 was the fact that their charters referred to pre-1922 offices or authorities that had originally been allocated governance functions or exercised important powers to approve new or amended byelaws. For example, charters contained references to the 'Lord Chancellor of Ireland' or 'Our Privy Council in Ireland'. These had ceased to exist or operate in Saorstát Éireann. So, with the legal scaffolding of royal

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63 See the discussion in Cahillane (n 1 above) 100–103.

64 Eg Art 51 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 (No 1 of 1922). On the limited executive role of the crown see, eg, Costello (n 53 above) 171–179.

65 Constitution of the Irish Free State (Saorstát Éireann) Act 1922, art 14.

66 Art 1 of the Treaty between Great Britain and Ireland signed at London 6 December 1921.

67 With at least one peculiar exception – the Office of Arms. Due to an administrative quirk, it was not transferred until 1943. See Susan Hood, *Royal Roots Republican Inheritance: The Survival of the Office of Arms* (Woodfield Press & National Library of Ireland 2002). Some other bodies were also temporarily reserved by the British until 1923, including the Land Commission, Registry of Deeds, Commissioners of Irish Lights and the Post Office Savings Bank.

68 Houses of the Oireachtas, [Select Committee Adaptation of Charters Bill, 1925 debate – Thursday, 18 February 1926](#).

charters ‘cleaved apart’<sup>69</sup> in 1922, it became necessary to ensure officers of Saorstát Éireann were instead conferred with the requisite authority and, more generally, that the new state’s law became the reference point in royal charters.

These issues came to a head soon after the foundation of the state and, initially at least, there was considerable confusion over how to proceed. Correspondence from the Royal College of Physicians in Ireland (RCPI) to the Attorney General in early 1925 typified the temporal purgatory in which RCBs found themselves.<sup>70</sup> In July 1924 the RCPI had modified its byelaws governing examinations for candidates seeking to become members of that body. The RCPI’s 1878 royal charter required that such byelaws be submitted ‘to the Lord Lieutenant or other General Governor or Governors of Ireland for the time being’. Under a non-objection procedure, the Lord Lieutenant or Governor (as the case may be) had discretion to partly or fully disapprove of such byelaws within three months, subject to the advice and consent of the Privy Council of Ireland (a defunct body).

After adopting new byelaws in July 1924, the RCPI duly submitted them to the new representative of the crown in Ireland, the Governor General for Saorstát Éireann.<sup>71</sup> However, in August 1924 the office of the Governor General indicated to the RCPI that ‘as a result of inquiries which the Governor General has caused to be made, he is informed that he has no power to approve of them’.<sup>72</sup> As it transpired, the Governor General had consulted the Attorney General (AG) on the matter.<sup>73</sup> The RCPI then engaged a senator, Sam Browne KC, who advised the RCPI that the charter did not come within the ambit of the 1922 Act.<sup>74</sup>

The 1922 Act had adapted certain pre-1922 legislation, contracts and offices to ensure they could continue to function in Saorstát Éireann but did not clearly address the status of royal charters. This prompted the RCPI to alert the Government that there was ‘no authority which can approve or disapprove of the proposed new Membership Bye-Laws’. The RCPI noted that this state of affairs prevented it from making modifications to its membership examinations ‘which have become necessary owing to the advance in Medical Science’.<sup>75</sup> The RCPI submission to the AG went on:

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69 Wheatley (n 11 above) 55.

70 Letter from Royal College of Physicians of Ireland to the Attorney General of Saorstát Éireann, found in NAI, TAOIS/S4966 (RCPI letter).

71 Ibid.

72 Ibid.

73 Letter, dated 20 January 1925, from Attorney General to Secretary to the Executive Council of Saorstát Éireann, found in NAI, TAOIS/S4966.

74 RCPI letter (n 70 above).

75 Ibid.

Under these circumstances the President and Fellows [of the RCPI] humbly urge the Government to grant them assistance, either by bringing the Charter within the scope of the Adaptation of Enactments Act 1922, or by constituting some authority which may legally fulfil the terms of the charter.<sup>76</sup>

So here was a possible existential risk for the RCPI. If it could not ensure its incoming members kept pace with medical developments, that may well have called into serious question the RCPI's *raison d'être*. The AG contacted the Secretary to the Executive Council (Government) in January 1925, attaching the RCPI's correspondence. The AG's perspective was consistent with that of the RCPI, accepting that the charter had not been adapted by the 1922 Act, nor did the Executive Council have power under the 1922 Act to effect an adaptation. The AG thus recommended that 'it would be reasonable that the Government should undertake such legislation as would be necessary to meet that difficulty', which 'could be general in form'.<sup>77</sup>

From a legal pluralist standpoint, it could be said that the RCPI's charter (and indeed those of other RCBs) was, at that point, '[i]nassimilable to the state-backed law of the present, yet evading clear consignment to the past'.<sup>78</sup> Another way of looking at the impasse is that the legal timeline of RCBs on the one hand, and that of the new state they inhabited on the other, were temporally mismatched or out of sync. This was a 'clash of temporal orders'.<sup>79</sup>

Temporal salvation for the RCPI and other RCBs came via the Adaptation of Charters Act 1926 (the 1926 Act),<sup>80</sup> a public Act of the Oireachtas. The 1926 Act authorised the Executive Council to issue orders (statutory instruments) adapting or modifying royal charters in limited ways. Section 1(1) of the 1926 Act stipulates:

The Executive Council may from time to time by order make all such adaptations of and modifications in any Charter which by virtue of Article 73 of the Constitution has the force of law in Saorstát Éireann as are in the opinion of the Executive Council necessary in order to enable such Charter to have full force and effect in Saorstát Éireann.

Section 1 of the 1926 Act was backdropped by article 73 of the Saorstát Éireann Constitution. Article 73 embedded a (rebuttable) presumption of constitutionality for 'laws in force' prior to the foundation of the state. It stipulated:

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76 Ibid.

77 Ibid.

78 Wheatley (n 11 above) 55.

79 Grabham and Beynon-Jones (n 10 above) 21.

80 No 6 of 1926.

Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

Certain RCBs owed their existence to charters granted solely under royal prerogative *simpliciter*. Others had also been subject to, or were underpinned by, pre-1922 parliamentary legislation.<sup>81</sup> Ambiguity around the intended scope of article 73 prompted some (at times confused) debate during passage of the 1926 Act as to whether the reference to 'laws in force' in article 73 was wide enough to encompass RCBs solely founded by the administrative grant of a royal charter, without any other underpinning legislation. One such contribution typified the concern:

there are a good many statutory bodies which were established not by any Act of Parliament at all, but by the direct act of the King, and therefore have no, what I believe in technical language is called legal signification ... they would not come in if this whole thing is based on Article 73 ...<sup>82</sup>

This concern foreshadowed a judicial interpretation which emerged in July 1926, shortly after the 1926 Act was enacted. In *British Thomson-Houston Co Ltd v Litton & Co.*<sup>83</sup> Meredith J in the High Court rejected the notion that letters patent issued under the Seal of the British Patent Office had automatically survived the establishment of Saorstát Éireann. Meredith J took the view that, if this had been the constitutional framers' intention, they would have designed a specific provision confirming it, as they had for other types of rights.<sup>84</sup>

However, the perspective of the President of the Executive Council (Prime Minister) during an Oireachtas debate on the 1926 Act was telling. He dismissed the notion that some royal charters somehow escaped the gravitational force of state law and also alluded to a legal reset for RCBs under the 1922 Constitution:

We would not bring a charter into existence or give it the force of law if it has not got that already. It must get that character and it can only get it through the Constitution. There is an idea amongst certain people, I believe, that a charter is above the law, and that it cannot be altered. That is all wrong ...<sup>85</sup>

In this interpretation of the constitutional position, RCBs were confronted by a version of what Chalmers coined as 'law with two faces,

81 For example, Bank of Ireland Act 1781.

82 Mr Jameson, in *Select Committee* (n 68 above).

83 HC, 16 July 1926.

84 Costello (n 53 above) at 151, fn 22.

85 President of the Executive Council, in *Select Committee* (n 68 above).



contorted in varying expressions of recognition and denial'.<sup>86</sup> RCBs were legally repapered under the Constitution of the new state. Any idea that RCBs could have somehow continued to independently exist outside the temporal parameters of that Constitution was not politically entertained, despite ambiguity in the actual scope of article 73. At the same time, it was not explicitly clarified how RCBs would 'get' the force of law under the Constitution, particularly whether the article 73 protection operated automatically or relied on manual activation, namely through legislation such as the 1926 Act.

This statement of the President of the Executive Council is also intriguing as an influential speech act shrouded in a temporality of the present. The fact it was the President making this statement in the parliamentary chamber is significant. It has been suggested elsewhere that performative speech acts 'work' only if they comply with 'a condition of validity, related to the person making the utterance and to the circumstances of the utterance'.<sup>87</sup> The way in which article 73 was politically interpreted here, and pressed into service under the 1926 Act, ensured that RCB charters and past common law rights were revitalised in the present and would be protected into the future.

This presumption of constitutionality in the 1926 Act was later buttressed by the courts. In *Geoghegan v Institute of Chartered Accountants in Ireland*<sup>88</sup> it was argued that the royal charter establishing the Institute of Chartered Accountants in Ireland (to which this article will return) did not survive the Constitution of Saorstát Éireann 1922 and Bunreacht na hÉireann 1937. But, in the High Court, Murphy J was satisfied that:

It seems to me that the laws carried forward by Article 73 of the Constitution of Saorstát Éireann, 1922, and Article 50 of the Constitution of Ireland, 1937, comprise the full range of laws whether customary or statutory and however they have been made or evolved, subject only to their not being inconsistent with either Constitution. I see no reason in principle why a law enacted in Great Britain in medieval times by the Monarch himself in pursuance of the legislative powers which (as well as judicial and executive powers) vested in him not merely as a theoretical concept but as a practical reality could not have passed into the laws of the Irish Free State. The filtering process provided by Article 73 ... related to the content of the law and not its source. I see no reason why the Institute and all comparable bodies, whether formed under public or private legislation or incorporated by Royal Charter as part of the royal prerogative or residual regal legislative power, should not continue to have a valid and effective existence on the formation of the

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86 Shane Chalmers, 'Terra nullius? Temporal legal pluralism in an Australian colony' (2020) 29 *Social and Legal Studies* 463, 480.

87 Painter (n 37 above) 123.

88 [1995] 3 IR 86.

independent Irish State. Certainly any other result would be chaotic in the extreme.<sup>89</sup>

Once it had been settled that royal charters could benefit from the protection of article 73, there was no obvious agitation in 1925–1926 for particular charters to be cancelled or withdrawn, though the use of ‘royal’ monikers was occasionally challenged in later years.<sup>90</sup> If anything, the locus of discomfort during early parliamentary debates was that the Executive might be tempted to interfere with royal charters in ways other than simply ensuring they could continue to operate in the new state.

This was apparent in a parliamentary contribution which noted: ‘if the Government took power to themselves to alter charters, which alterations were not required by the bodies holding the charters, it might become a rather serious matter’.<sup>91</sup> It is also notable that an official stocktake of RCBs was not undertaken in the early years of the state. Indeed, the Oireachtas seems to have been flying blind on the number and nature of RCBs in 1925, as confirmed in the complaint of a parliamentarian who noted:

We are in the great difficulty that we have not any conception of how many charters are in operation, how many institutions are working under charters, and what is contained in those charters.<sup>92</sup>

In response to a question as to whether it would have been ‘well to have prepared a list of all the chartered bodies?’, the President of the Executive Council responded: ‘I do not think you could possibly do that. These charters are within the personal custody of the bodies affected by them.’<sup>93</sup> An indication here that, while the Government was intent on providing a legislative ramp for pre-1922 RCBs to enter the state’s legal timeline, it was disinclined to enquire too deeply about precisely what it was teleporting from the past. The state initially kept a respectful distance from the private legal sphere of RCBs, even as it transitioned them. The President of the Executive Council did, though, hint at a general organising principle when he confirmed: ‘It is only where there is a body exercising a particular function which affects a particular number of people that we come in to enable things to be done.’<sup>94</sup> This intimates a political intention that the 1926 Act

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89 Ibid 95.

90 Costello (n 53 above) 150.

91 Sir James Craig, *Dáil in Committee – Adaptation of Charters Bill, 1925* (11 November 1925, vol 13, no 2).

92 Ibid Mr Johnson.

93 Exchange between Mr Wyse Power and the President of the Executive Council, in *Select Committee* (n 68 above).

94 President of the Executive Council, in *Select Committee* (n 68 above).

should primarily be seen to deal with RCBs whose activities affected a sufficient number of people – RCBs with a degree of public import.

At its core, the 1926 Act was principally concerned with ensuring that pre-existing RCBs could operate smoothly in the new state. There was a sense of urgency to ensure amended byelaws passed by these bodies (such as the RCPI, above) could be given full effect. This was achieved by explicitly anchoring RCBs in the new legal present and by assigning roles, hitherto performed by officers of the British administration, to the Irish Government, ministers, the Taoiseach or specified Irish judicial officers. By way of example, article 4 of the Royal College of Physicians of Ireland (Adaptation of Charters) Order 1926<sup>95</sup> provides:

The reference in the Charter to “the laws, statutes, rights and customs of this our kingdom of Ireland” shall be construed as referring to the laws and statutes of Saorstát Eireann, and the Charter shall have effect accordingly.

Article 5 of the Royal Hibernian Academy (Adaptation of Charter) Order 1940<sup>96</sup> provides:

That portion of the Charter which provides that statutes, bye-laws, and ordinances made thereunder shall not be binding on the academicians until approved of by the Lord Lieutenant of Ireland or other Chief Governor or Governors of Ireland is hereby adapted by the substitution of the expression “the Government” for the expression “the Lord Lieutenant of Ireland or other Chief Governor or Governors of Ireland” and it is hereby ordered that the said portion of the Charter shall be construed and have effect accordingly.

Beyond that, sections 2 and 3 of the 1926 Act subject RCBs to section 7 of the 1922 Act and section 9 of the Ministers and Secretaries Act 1924 (the 1924 Act).<sup>97</sup> The net effect is:

- a) Under section 7 of the 1922 Act the Government can install ‘boards of commissioners’ to exercise the functions of RCBs engaged in ‘any function of government or discharg[ing] any public duties in relation to public administration’; and
- b) Under section 9 of the 1924 Act the Government can dissolve RCBs (except universities and professional regulatory bodies) performing ‘public service’ functions and, if necessary, arrange for their jurisdictions, powers, duties, and functions etc., to be subsumed into Ministerial Departments. This power was exercised in 1955 to dissolve the governors and revoke the charter of the Royal Hospital, Kilmainham.<sup>98</sup>

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95 SI No 38/1926.

96 SI No 331/1940.

97 No 16 of 1924.

98 Royal Hospital, Kilmainham (Dissolution of Governors and Revocation of Charters) Order 1955 (SI No 260/1955).

Concerns were raised during parliamentary debates about whether section 7 of the 1922 Act could apply to universities and professional bodies. A question was also posed as to whether both section 7 of the 1922 Act and section 9 of the 1924 Act could apply to banks established by royal charter, particularly the Bank of Ireland (BOI), insofar as BOI might incidentally perform ‘government functions’ as a custodian of public monies. It was urged by the President of the Executive Council that the respective sections should not be construed as applying to these entities, though legislative amendments were not favoured by the President either.<sup>99</sup> So these perhaps remain open issues of legislative interpretation.

A temporal concern was also ventilated about the original wording of section 2 of the 1926 Act (applying section 7 of the 1922 Act to RCBs). Initially, this had stipulated that RCBs would be deemed ‘always to have been’ within scope of section 7 of the 1922 Act, that is from December 1922. But it was contended in debate that this retrospective application could ‘take away’ RCB-related rights existing prior to enactment of the 1926 Act. While the precise nature of such rights was not made particularly clear,<sup>100</sup> the phrase ‘always to have been’ was duly deleted from the final legislation. Through the prism of temporal legal pluralism, these parliamentary exchanges around the 1926 Act could be seen as a manifestation of ‘rights vitalism’<sup>101</sup> in which there was a contest (here within Parliament) about the ‘vitality and health’ of pre-1926 RCB-related rights. On this reading, ‘rights, like organisms, can live and die and must struggle to survive in unnatural environments’.<sup>102</sup>

From an RCB standpoint, the ‘unnatural environment’ was the new constitutional and sovereign dynamic of Saorstát Éireann. In one sense, the 1926 Act was simply a technical fix to meet a demand from within the RCB movement. But, in another sense, the 1926 Act was highly significant in confirming the emergent state’s broad sovereign authority over RCBs and the assertion of a new legal timeline of the state’s making. RCBs’ pre-existing rights could now only be vindicated inasmuch as they did not conflict with the exigencies of the post-1922 sovereign order. The state also took the opportunity to confer itself with reserve powers, via section 7 of the 1922 Act and section 9 of the 1924 Act, to steer the affairs of (at least some) RCBs. A sovereign authority that had been implicit in the past since 1922 was made explicit in the

99 See, Dáil in Committee (n 91 above); *Response of President of the Executive Council to motion moved by Mr Brown*, *Seanad Eireann Debate* (24 February 1926, vol 6, no 10).

100 Mr T J O’Connell, in Dáil in Committee (n 91 above).

101 Wheatley (n 11 above) 55.

102 Ibid.

present of 1926 and in the future beyond. RCBs were brought firmly into the legal time zone of the new state. Nevertheless, the political attitude towards this peculiar royal inheritance was grudging at best. This was evident in a contribution by the President of the Executive Council during parliamentary debate:

I do not want to have the Executive Council deluged with a number of these things. The Executive Council has no particular appetite for dealing with these things at all. It means that a lot of onerous work will be put upon us as well as detailed examination on the part of our legal advisers to know what the effect of these charters is, and whether a particular case comes within the scope of our jurisdiction in regard to these matters ...<sup>103</sup>

Compounding this official reticence, there were also limits to what could be achieved under the 1926 Act. While executive orders could adapt royal charters, they could not substantively amend them – although, perhaps, a fine conceptual line. So it would become necessary for the state to go even further in order to facilitate substantive changes to RCBs' charters, thereby ensuring continued alignment between RCB and state legal time-zones. Enter the Private Act.

#### *RCBs and the Private Act*

Royal charters provide RCBs with their fundamental legal underpinnings. But the ways and means of achieving, and governing, particular objectives or mandates can or must evolve over time, sometimes in response to supervening public legislation or public policy considerations. With that comes the need to substantively update the constitutional documents of RCBs, namely their royal charters. Both before and after 1922, RCBs could petition the sovereign for charter amendments as a corollary to their inherent common law property rights. Prior to 1922, such amendments to charters were implemented by the crown under royal prerogative or otherwise by amending legislation underpinning chartered corporations.

The crown ceased to have a role in the chartering of RCBs in Ireland post-1922 (per above). However, an inherent entitlement of RCBs to *petition* for charter amendments formed part of the bundle of common law rights carried over by article 73 of the Saorstát Éireann Constitution.<sup>104</sup> And while the 1926 Act (discussed above) facilitates charter *adaptation*, it does not enable the Government, by way of executive action, to substantively *amend* the contents of charters. The Irish Parliament (Oireachtas) thus became the only other authority through which charter amendments could be realised post-1922.

<sup>103</sup> President of the Executive Council, in *Select Committee* (n 68 above).

<sup>104</sup> Houses of the Oireachtas, *Report on the Revision of Standing Orders Relative to Private Business 1939* (7 November 2012) (on file with author).

Private legislation (also referred to as the ‘Private Act’) was the vehicle to that end. Therefore, while the resilience of royal prerogatives in the post-1922 constitutional order has been hotly debated, it has been suggested:

[T]he prerogative, to the extent that it has survived the coming into effect of the Constitution, is arguably given expression in a Private Act of Parliament which is the exercise of the legislative power of the State specifically for the benefit of a private person or undertaking.<sup>105</sup>

Private Acts of Parliament should not be confused with ‘private members’ (public) Bills, that is Bills for a public general Act of Parliament proposed by individual parliamentarians rather than the Government. In contrast, private legislation has been defined as:

[L]egislation of a special kind for conferring particular powers or benefits on any person or body of person – including individuals, local authorities, companies, or corporations – in addition to or in conflict with the general law.<sup>106</sup>

Private legislation has its origins ‘in the medieval practice of petitioning the King for some special privilege or dispensation which he granted in the form of a statute’.<sup>107</sup> Private legislation historically generated a substantial amount of parliamentary business in England, subsequently Great Britain and then the United Kingdom (UK), particularly from the mid-seventeenth to nineteenth century. For example, in the period 1689–1714 Private Acts represented over 60 per cent of legislation.<sup>108</sup> By the nineteenth century the majority of parliamentary business was still taken up with private legislation.<sup>109</sup> Bogart and Richardson illustrate how private legislation played a major role in reorganising rights to land and resources, especially during the industrial revolution in Britain.<sup>110</sup> Private legislation also featured, albeit less prominently, in the pre-Act of Union Irish Parliament. Between 1692 and 1800, Private Acts comprised 13.8 per cent of the total legislation approved there.<sup>111</sup>

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105 Ibid 17.

106 Erskine May, *Parliamentary Practice* 24th edn (Lexis 2011) para 42.1.

107 Raymond Byrne et al, *The Irish Legal System* 7th edn (Bloomsbury Professional 2020) para 13.47.

108 Julian Hoppit, ‘Patterns of parliamentary legislation’ (1996) 39 *The Historical Journal* 109, 116.

109 House of Commons Library, [Private Bills in Parliament: House of Commons Background Paper](#) (SN/PC/06508) (7 January 2014).

110 Dan Bogart and Gary Richardson, ‘Property rights and Parliament in industrialising Britain’ (2011) 54 *Journal of Law and Economics* 241.

111 James Kelly, ‘The Private Bill legislation of the Irish Parliament 1692–1800’ (2014) *Parliamentary History* 73, 74.

The dividing line between Private and Public Acts, and the precise factors determining choices of instrument, have not always been clear. As Hoppit points out in relation to patterns of English parliamentary legislation between 1660 and 1800, the '[private/public] distinction inconsistently reflected the purposes of legislation'.<sup>112</sup> 'Hybrid' legislation, that is legislation processed under both public and private parliamentary standing orders, has also been known to the Westminster parliamentary tradition. At least one such hybrid Act is understood to have been enacted by the Oireachtas after 1922.<sup>113</sup>

In Ireland, continuation of the Westminster private legislative tradition was signalled early on via a 1924 statute adapting pre-1922 legislation regulating the costs of promoting Private Bills. Private Bills were originally defined under the Private Bill Costs Act 1924<sup>114</sup> as:

any bill promoted for the particular interest or benefit of any person, or which interferes with the private property of any person otherwise than in the interest of the public generally and as a measure of public policy, and includes any bill for the confirmation of any provisional or other order and any public bill which has been referred to the Examiner by the Ceann Comhairle or the Cathaoirleach of the Seanad under standing orders made jointly by Dáil Eireann and Seanad Eireann relative to private business.

Under parliamentary standing orders, applications to the Oireachtas for private legislation are governed by strict procedures.<sup>115</sup> A Joint Committee on a Private Bill, drawing its membership from both Houses of the Oireachtas, would typically convene to consider a private legislative proposal before issuing a report to the Seanad (Upper House) and the Dáil (Lower House). The promoter of the legislation and, if any, a petitioner (opposer) may be represented at such Joint Committee hearings by a registered parliamentary agent (solicitor) and legal counsel. A Joint Committee would also be competent to determine the *locus standi* of any petitioners. Accordingly, parliamentary proceedings on private legislation are, to some extent, of a judicial character.<sup>116</sup>

The relevance of private legislation waned over time and it has only occasionally been availed of in Ireland since 1922. It has, though, remained prominent in other former British colonies, particularly New Zealand.<sup>117</sup> And it is still *the* legislative vehicle for substantively

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112 Hoppit (n 108 above) 116.

113 Houses of the Oireachtas, *Report* (n 104 above) 21; assumed to be the Limerick Harbour Tramways Act 1931 (No 1 Private) of 1931.

114 No 52 of 1924. Section 42 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 (No 33 of 2013) later recast this definition.

115 Houses of the Oireachtas, *Report* (n 104 above) appendix 2.

116 Ibid. See also, eg, Byrne et al (n 107 above) paras 13.47–13.52.

117 Ivor Richardson, 'Private Acts of Parliament' (2010) 41 *Victoria University of Wellington Law Review* 653.

amending the charters of most RCBs in Ireland. As such, private legislation has been highly relevant for RCBs but almost irrelevant in other sectors. RCBs availing of private legislation to effect substantive alterations to their charters have included:

- the Governor and Company of the Bank of Ireland;
- the National Maternity Hospital, Dublin;
- the Royal Hospital for Incurables, Dublin;
- the Convalescent Home, Stillorgan;
- the Institution of Civil Engineers of Ireland;
- the Royal College of Surgeons in Ireland;
- the Institute of Chartered Accountants in Ireland;
- the Royal College of Physicians of Ireland;
- Trinity College Dublin;
- the Royal Hibernian Academy.

An interesting aspect of these private legislative initiatives from a temporal standpoint is they have often included a specific provision in the following (or similar) terms: ‘Save as hereby amended, the said Charters or Letters Patent shall be and remain in full force and effect.’<sup>118</sup> These avoidance of doubt clauses betray a lingering insecurity about the legal resilience of RCBs with pre-1922 roots. RCBs may have been transitioned to the state’s legal time zone but any moment of legislative intervention in their affairs is fraught with possible temporal danger – that a charter of the past might become lost to the past when trying to cater for the present and future. This underscores that private legislative initiatives pertaining to RCBs have, in a legal pluralist sense, ‘different temporal properties from regular state law, with its smooth, unselfconscious reliance on the present tense’.<sup>119</sup>

Exploiting this theme further, strictly speaking RCB private legislation is notionally consistent with Irish parliamentary tradition, insofar as the private legislative mechanism itself was inherited from Westminster (as was much else). But this legislative mechanism is anachronistic and now *primarily or only* caters to RCBs. So, a temporal friction permeates not just RCBs’ legislative interactions with the state, but also in the necessity for the state itself to retain a facet of pre-1922 legislative machinery which is, RCBs aside, otherwise largely superfluous in the present and future.

Private legislative initiatives concerning RCBs have, though, seemingly presented relatively few problems over time and this may

118 Eg s 9 of the Royal College of Surgeons in Ireland (Charter Amendment) Act 1965 (No 1 Private of 1965); s 13 of the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969 (No 1 Private of 1969); s 14 of the Royal College of Physicians of Ireland (Charter and Letters Patent Amendment) Act 1979 (No 1 Private of 1979).

119 Wheatley (n 11 above) 55.



be key to understanding the resilience of the mechanism itself. For example, it has been unusual for a private legislative proposal to meet with opposition by way of a petition or indeed to provoke any particular controversy. There have, however, been notable exceptions.<sup>120</sup> An RCB-related example was the Trinity College Dublin (Charters and Letters Patent Amendment) Bill 1997 (hereinafter referred to as the TCD Bill), eventually enacted as the Trinity College, Dublin (Charters and Letters Patent Amendment) Act 2000.<sup>121</sup> This was a ‘contested’ Private Bill, in that it was opposed by ‘petition’.

The backdrop here was the Universities Act 1997 (the 1997 Act),<sup>122</sup> a Public Act of the Oireachtas, which carried important implications for universities, especially in terms of their governance structures. However, section 4(2)–(3) of the 1997 Act contained a time-limited derogation clause for Trinity College Dublin (TCD), the sole constituent college of the University of Dublin, with respect to certain internal governance and rule-making matters governed by the TCD royal charter documents.<sup>123</sup> Section 4(2)–(3) facilitated passage of a Private Act of the Oireachtas amending TCD’s charters and letters patent ‘in a manner consistent with the purpose and substance’ of the 1997 Act. In some respects, the 1997 Act was heavily imbued with temporal objectives. For example, section 31 specifies that:

A University may have a charter, not in conflict with this Act, setting out all or any of the following ... the arrangements it has for the promotion and use of the Irish language and the promotion of Irish cultures.

The promotion of the Irish language and culture has been very much a post-1922 official public policy objective, unlikely to have historically featured in the charters of RCBs. So here again was a concerted effort by the state to align the legal timelines of a set of pre-1922 institutions with its own evolving public policy objectives.

In the final stages of parliamentary committee scrutiny, Desmond O’Malley Teachta Dála (TD)<sup>124</sup> argued that, coupled with drafting issues in the Private Bill itself, a number of procedural irregularities had arisen. TCD (as promoter) had allegedly not followed the correct procedures, relying on an allegedly flawed internal ballot. It was also claimed that internal consultation and approval within the University of Dublin had not been secured. The Oireachtas Private Bills Office had

120 An instance outside the RCB context was *Cane v Dublin Corporation* [1927] IR 582 involving an attempt by a landowner to recover costs incurred in opposing private legislation, which was subsequently withdrawn by its promoters.

121 No 1 Private of 2000.

122 No 24 of 1997.

123 Specific provisions for Trinity College have also been included in the more recent Higher Education Authority Act 2022 (No 31 of 2022).

124 The Irish designation for a Member of Parliament.

seemingly not been made aware of these irregularities and they only came to light during parliamentary hearings on the legislation.<sup>125</sup> In the wake of Deputy O'Malley's revelations, contributions from other parliamentarians were shrouded in temporal language. For example, Dick Roche TD observed:

The complexities he [Deputy O'Malley] has outlined arise from the impenetrable nature of an extraordinary Elizabethan statute – I am speaking about Elizabeth I – which is the basis on which Trinity College, Dublin and Dublin university, the twin universities, are built. It is extraordinary that this arcane legislation should have taken up so much time of the Houses and a joint committee ...<sup>126</sup>

Committee members were evidently fatigued by the affair and keen to bring it to a close. Enda Kenny TD suggested:

There will always be a small number of cases in which Private Bills will be required, but if their objectives have to be achieved by such a torturous process, perhaps the method by which legislation is introduced should be looked at seriously with a view to reform ...<sup>127</sup>

This episode is loaded with temporal significance. Here was a scenario whereby TCD, an RCB, availed of a derogation, or reprieve, from the public or state law of the present. It did so by exploiting an alternative legislative mechanism, the Private Act, itself a creature of the past. The fundamental rationales for doing so also had their roots in the past. The ultimate objective was to facilitate a gradual reconciliation between the present legal time of the 1997 Act and the past legal time of TCD's royal charter. Somewhere along the way, things got messy. The frustrations of parliamentarians during debates on the matter were palpable and not without justification.

More recently, in relation to a less controversial Private Bill amending the charter of the Royal Hibernian Academy, some pertinent questions were posed, albeit from a distinctly republican viewpoint. In a December 2023 Dáil debate, Aengus Ó Snodaigh TD queried as to why state power was being harnessed at all:

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125 Desmond O'Malley TD, *Private Business – Trinity College, Dublin (Charters and Letters Patent Amendment) Bill 1997 – Report and Final Stages*, Dáil Éireann Debate (26 October 2000, vol 525, no 1).

126 Ibid Dick Roche TD.

127 Ibid Enda Kenny TD. In fact, such reform was hiding in plain sight. S 76 of the Health Act 1970 (No 1 of 1970) empowers the Minister for Health to make a draft order amending (as opposed to merely 'adapting') a charter or private Act relating to a hospital. A draft order made by the minister under s 76 is subject to adoption by the Houses of the Oireachtas. As such, it is no longer necessary for hospitals constituted by royal charter to undergo a private legislative procedure in order to secure charter amendments.

My first question is why certain private bodies are required to have such changes made by way of legislation and why, therefore, they have the right to have a Bill initiated in the Oireachtas. It is an anachronism and something we must deal with in some way ...<sup>128</sup>

In calling for the Oireachtas or Law Reform Commission to examine this through the prism of statute law revision, he went on:

We should look at charter bodies that fulfil a vital policy role. If it is important that they be left completely as private entities, then so be it. However, we should change the law in order that they do not have to come back to the House and go through the same process we are going through today. If it is a charter body, then it should be allowed to do its own thing. It should be uncoupled from the State. We run the House, and our laws are based on what is decided in the House rather than an outside body. We should not be concerned with the private business of a private institution in any way unless it is contrary to public policy or if that institution is dependent on the State for funding ...<sup>129</sup>

These parliamentary episodes illustrate the tensions between modern principle and outmoded legislative procedures in efforts to facilitate RCBs, themselves purveyors of historical rights and rhythms in their charters. These episodes also beg wider questions as to where, and on what basis, the boundaries between public and private spheres or interests should be drawn. Such challenges are perhaps well captured in Wheatley's observation that historical rights:

come saturated in temporal language and infect the state with their particular historical grammar, injecting a (sharper) multiplicity of times into the legal order. In resisting alignment with the worlds and times of state law, historical rights and other residual entitlements engender a precarious legal-political chronocenos in which state institutions strain to conceptualize, accommodate and tame laws not of their making.<sup>130</sup>

## **INTERACTIONS BETWEEN A ROYAL CHARTERED BODY AND THE PUBLIC AUTHORITIES**

Records from the early years of the state exemplify the precarious legal and political landscape in which RCBs found themselves, as they strove to identify the correct legal authority to effect charter adaptation and have their byelaws approved. Drawing on archival materials, here follows a summary of select interactions between an RCB, the Institute of Chartered Accountants in Ireland, and the Irish

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128 Dáil Éireann Debate, *The Royal Hibernian Academy (Amendment of Charter) Bill 2023: Second Stage* (13 December 2023, vol 1047, no 5)

129 Ibid.

130 Wheatley (n 11 above) 55.

public authorities in the course of amending the Institute's byelaws and royal charter over time. This body has been selected because the surviving archival records tracking its interactions with the Irish state are particularly expansive. It also happens to be an all-island RCB in circumstances where the island of Ireland is otherwise politically and legally partitioned. Some of the touchpoints between the Institute and the state are striking insofar as broader temporal anxieties around sovereignty and authority were played out in microcosm.

### **Institute of Chartered Accountants in Ireland**

The Institute of Chartered Accountants in Ireland (the Institute – now known as Chartered Accountants Ireland) was incorporated by royal charter in 1888. The original petitioners were public accountants based in Dublin, Belfast and Cork and their rationales for seeking a royal charter of incorporation included:

THAT it is obvious that due to the performance of a profession such as this, a liberal education is essential, and the objects of the Petitioners are to secure that education, and to maintain the efficiency as well as the respectability of the professional body in Ireland to which they belong ... THAT in the judgment of the Petitioners, it would greatly promote these objects, and would also be for the public benefit, if the Petitioners were incorporated by Charter, as, besides other advantages, such incorporation would be a public recognition of the importance of the profession, and would tend to gradually raise its character, and thus to secure for the community the existence of a class of persons well qualified to be employed in the responsible and difficult duties often devolving on Public Accountants.<sup>131</sup>

The Institute was a relative latecomer to charter adaptation. This was done by way of the Institute of Chartered Accountants in Ireland (Adaptation of Charter) Order 1941,<sup>132</sup> which provided that:

That portion of the ... Charter which provides that bye-laws, rules, and regulations made by The Institute of Chartered Accountants in Ireland shall not have effect until they have been submitted to and allowed by 'Our Privy Council in Ireland' is hereby adapted by the substitution of the expression 'the Government' for the expression 'Our Privy Council in Ireland,' and it is hereby ordered that the said portion of the said Charter shall be construed and have effect accordingly.

The Institute ultimately evolved into a well-developed educational, representative and self-regulatory body for the accountancy profession with members drawn from across the island of Ireland. The Institute has not enjoyed a formal monopoly in the practice of the profession of accountancy, although by the 1990s it was one of a limited number

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131 Chartered Accountants Ireland, *Charter of Incorporation*.

132 SI No 479/1941.

of private bodies whose members were approved to act as auditors of companies incorporated under the Irish Companies Acts.

### *Byelaws and sovereign dynamics*

In the decades following charter adaptation, the Institute periodically approached the Government requesting byelaw amendments to enable specific changes, such as increasing members' fees, altering internal governance frameworks, enhancing its regulatory functions, revising its disciplinary procedures etc. This inconvenient necessity for governmental approval stems from provisions embedded within the Institute's royal charter, as adapted under the 1926 Act.

Approvals for byelaw amendments are granted in the form of governmental orders 'allowing' same (an example is transcribed in Annex X). These governmental approval orders have not historically been published, seemingly on the basis that they are not themselves statutory instruments.<sup>133</sup> In any case, broad themes have been engaged in the course of these interactions. Issues regarding the nomenclature used by the Institute to define the different territories in which it operates have been especially sensitive. Next follows a snapshot of these interactions, following which there is an attempt to connect these to broader temporal themes brought out earlier in this article.

### ***War and peace***

While consideration was being given to adapting the charter of the Institute, an altogether more controversial parallel proposal emerged in May 1941. At that time, solicitors for the Institute indicated that they would, following adaptation of the charter, also be seeking certain amendments to the Institute's byelaws. Those amendments would, if approved by the Government, have facilitated the granting of certain concessions or exemptions from the Institute's rules for members who opted to serve in the British armed forces in the context of the Second World War.<sup>134</sup> However, according to the minute of a meeting held on 8 May 1941, a clear signal was sent by the Secretary of the Department of An Taoiseach to the Institute in the following terms:

For the Government to approve of such byelaws would be contrary to the policy of neutrality which had been adopted in the present conflict. The Government could not be a party to the granting of concessions to persons who wish to take part in a war in which this country [Ireland] was not engaged ... there would, of course, be no objection if the rules in

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133 Internal Minute of Department of the Taoiseach, dated 26 July 1955, found in NAI, TAOIS/S12305B.

134 Internal Minute of the Office of the Attorney General, dated 8 May 1941, found in NAI, TAOIS/S12305A.

question confined the concessions to persons who join the armed forces of this country [Ireland].<sup>135</sup>

Here the Institute's preferences risked falling foul of the state's sovereign concerns, though an official at the Office of the Attorney General offered a deft solution contiguous with the state's broader policy of friendly (if sometimes muddled) military neutrality.<sup>136</sup> He suggested that:

perhaps, it would be possible for the Institute to devise some sort of a formula which would give them general discretion to grant concessions of the nature sought to their members in circumstances which need not be specifically stated in the rules.<sup>137</sup>

This pragmatic formula was later reflected in the subsequent civil service memorandum to Government on the subject.<sup>138</sup>

### ***What's in a name?***

Article 4 of Bunreacht Na hÉireann 1937 confirms that, in the English language, the name of the state is 'Ireland'. Section 2 of the Republic of Ireland Act 1948<sup>139</sup> stipulates that the description of the state is the 'Republic of Ireland'. Under the Bunreacht as it stood prior to 1999 the state claimed sovereignty over the whole island of Ireland, that is including the six counties comprising Northern Ireland. A general practice had, however, emerged of 'Republic of Ireland' being used in a geographical sense, limited to those 26 counties under the administrative authority of the Irish state '[p]ending the reintegration of the national territory', notwithstanding the wider constitutional claim. In 1953 the Government Information Bureau released a statement on the correct manner of referring to the Irish state, clarifying:

With respect to the statutory description of the State appearing in The Republic of Ireland Act 1948, namely, 'The Republic of Ireland', care is taken, using that expression to avoid any suggestion that it is a geographical term applicable to the area of the Twenty Six Counties.<sup>140</sup>

In 1955 the Institute sought approval for certain byelaw amendments, including an increase in membership fees, amendment of the

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135 Ibid.

136 See, eg, Robert Fisk, *In Time of War: Ireland, Ulster and the Price of Neutrality* (Gill & Macmillan 1985).

137 See n 134 above.

138 Memorandum for the Government – Approval to Proposed Amendment of the By-laws of The Institute of Chartered Accountants in Ireland, dated 22 October 1941, found in NAI, TAOIS/S12305A.

139 No 22 of 1948.

140 Government Information Bureau, *Statement on Modes of Referring to the State in English*, dated 17 June 1953, found in NAI, 2013/100/67.

composition of its Council members and in its disciplinary procedures. In an internal memo prepared for the Government by the Office of the Taoiseach, it was noted that the Institute's byelaws used the phrase 'Republic of Ireland' to delimit the area of the 26 counties and also referred to 'Northern Ireland' as a distinct entity, grating with southern political sensitivities at that time.

It was recommended in the memo that it would be 'preferable, if practicable' that 'Republic' be deleted. But it was also acknowledged that the 'Six County' (Northern Ireland) authorities would not agree to any alteration to the title of 'Northern Ireland'. The memo's conclusion on these points was that '[w]hile the incorporation of the amendments referred to would be desirable, it seems doubtful whether it would prove practicable to secure their acceptance'.<sup>141</sup> Similar issues would recur again on numerous occasions.

In 1957, when considering byelaw amendments sought by the Institute to facilitate a scheme of integration between it and the Society of Incorporated Accountants, attention was drawn by the Department of External Affairs to a provision in the altered byelaws which defined 'Ireland' as the 'Territory comprising both the Republic of Ireland and Northern Ireland'.<sup>142</sup> This was a functional internal definition to suit the Institute's all-island mandate. While the Department highlighted this characterisation was inconsistent with article 2 of the Bunreacht, a pragmatic view ultimately prevailed over principled misgivings regarding terminology:

the Minister for External Affairs would be reluctant to advise any change, since the proposed alteration of the by-laws must also obtain the approval of the Six-County authorities as well as of the Six-County members of the Institute and any interference could endanger the adoption of the proposed scheme of integration – which, envisaging, as it does in effect, a thirty-two county body for the members concerned of the accountancy profession, the Minister for External Affairs considers to be most desirable.<sup>143</sup>

The matter surfaced again in 1983 when high-level reservations were expressed about references to 'Government of the Republic of Ireland' in the Institute's byelaws. The Taoiseach at the time queried whether this should be recast as 'Government of Ireland'.<sup>144</sup> Consideration was

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141 Memorandum for the Government – Institute of Chartered Accountants in Ireland: Proposed Amended Bye-Laws, from Office of the Taoiseach to the Government, dated 18 February 1955, found in NAI 2013/16/1244.

142 Memorandum for the Government – Institute of Chartered Accountants in Ireland: Proposed Alteration of Bye-Laws, from Office of the Taoiseach to the Government, dated 8 May 1957, found in NAI 2013/16/1244.

143 Ibid.

144 Letter from Department of the Taoiseach to Department of Foreign Affairs, dated 21 January 1983, found in NAI 2013/100/67.

given within the Department of An Taoiseach to informally broaching the matter with the Institute (though it is unclear whether this actually occurred). It was acknowledged that any amending proposal would require three-way support, that is agreement by the Government, the Secretary of State for Northern Ireland and the Institute, and requesting the change would be sufficient to set ‘alarm bells ringing’.<sup>145</sup>

The AG’s view was, reportedly, that the Institute ‘faced a dilemma when defining the meaning of “Ireland”, thus its use of the expressions “Republic of Ireland” and “Northern Ireland” was a diplomatic way of reaching a compromise’.<sup>146</sup> Meanwhile, the Department of Foreign Affairs advised that:

While this Department would, of course, welcome a change in the references to ‘Government of Ireland’, we consider that such a change would be unlikely to be acceptable to either the British or Northern Ireland authorities. Moreover, and perhaps more importantly, such changes could well prove divisive within the Institute itself.<sup>147</sup>

Handwritten notes in the margins of an internal memo indicate that the civil service was inclined to let matters lie. It was commented that the Institute was not ‘under our control’<sup>148</sup> and attempting to change the reference ‘would probably give rise to substantial dissention within that body [the Institute] and might put its All-Ireland status in danger’.<sup>149</sup> The issue does not appear to have arisen on the face of the final memo to Government in 1983 attaching a draft governmental order approving these particular byelaws.<sup>150</sup>

Similar wrangling occurred in relation to the descriptions of universities in the Institute’s byelaws. In 1955 requests were made that the Institute consider referencing universities by their geographical locations, namely by referring to ‘universities in Ireland, England, Scotland or Wales’, rather than by ‘political descriptions’ such as ‘Republic of Ireland’ and ‘United Kingdom of Great Britain and

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145 Internal Memorandum of Department of the Taoiseach, dated 2 March 1983, found in NAI 2013/100/67.

146 Internal Memorandum of Department of the Taoiseach, dated 20 January 1983, found in NAI 2013/100/67.

147 Letter from Department of Foreign Affairs to Department of the Taoiseach, dated 16 February 1983, found in NAI 2013/100/67.

148 An arguable point, given that amendments to the Institute’s bye-laws required governmental approval.

149 20 January letter (n 146 above).

150 Memorandum for the Government – The Institute of Chartered Accountants in Ireland: Instrument Allowing Alteration of Bye-Laws, from the Office of the Taoiseach to the Government, dated 16 March 1983, found in NAI 2013/100/67.



Northern Ireland'.<sup>151</sup> This was not ultimately followed, likely because it would be unacceptable to the Northern authorities.

### ***Coordinating the island***

Although executive action is required in both Ireland and Northern Ireland for the adoption of byelaws made by the Institute (given its all-Ireland scope), historically there seems to have been little or no formal direct coordination between authorities in the two jurisdictions on these initiatives. For example, archived correspondence between the Institute and the respective authorities frequently requested confirmation that proposed byelaws were acceptable to, or were already approved in, the other jurisdiction.<sup>152</sup> A copy of an executive order made at Hillsborough enabling byelaw amendments is recorded in the Irish departmental files (transcribed in Annex Y). However, the Institute itself did the running to coordinate both authorities working separately. This was apparent in a departmental note in 1941 which observed that:

There is a complication ... in that parallel action will also presumably be necessary by the Government of Northern Ireland. This is not a matter which need concern us as presumably the Solicitors acting for the Institute will make whatever contacts are necessary to ensure that action on similar lines and on the same date is taken both here and in the North.<sup>153</sup>

During the processing of byelaw amendments in 1957 a technical issue arose over the precise date of the Institute's byelaw amendments entering into force. An indirect query was conveyed from Belfast to Dublin, via the Institute's solicitors, as to whether 'the same problem has been exercising the minds of the Government of the Republic of Ireland'.<sup>154</sup> These suboptimal communication dynamics did not make for speedy governmental approvals of byelaws on which the island-wide profession depended. In spite of that, the Institute has been successful in maintaining all-Ireland regulatory and policy consistency within its own professional constituency.

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151 Minute of Meeting between Solicitors for Institute of Chartered Accountants in Ireland and Department of the Taoiseach, dated 1 March 1955, found in NAI TAOIS/S12305B.

152 Eg Letter from Northern Ireland Office to Institute of Chartered Accountants, dated 5 September 1973, found in NAI 2004/21/91.

153 Internal Minute of Department of the Taoiseach, dated 10 March 1941, found in NAI TAOIS/S/12305A.

154 Letter from Solicitors for Institute of Chartered Accountants in Ireland to Department of the Taoiseach, dated 12 September 1957, found in NAI TAOIS/S12305C/1+2.

### ***Charter amendments and public administrative sensitivities***

In April 1964 the Institute's solicitors wrote to the AG indicating that the Institute required amendments to its underlying constitutional document, the royal charter itself. The purpose of the legislation was to:

alter the provisions of the Charter in relation to admission to fellowship, the annual general meeting and the appointment of the council and secretary of the Institute and to confer power on the Institute to grant or join with similar bodies in granting diplomas, certificates and awards and for other purposes relating to the Institute.

Notably, section 6 confirmed that: '[a]ny byelaws made by the Institute or any alteration or amendment thereof shall not have effect until they have been submitted to and allowed by the Government'. That legislation seems to have transited through the Oireachtas without controversy.

In 1972 the Institute initiated a second piece of private legislation<sup>155</sup> to further amend its charter but this proved less palatable to the public administration. In particular, concerns were raised by the Department of Industry and Commerce regarding a section of the proposed legislation which would have dispensed with the need for ministerial approval of byelaws made by the Institute. The compromise reached between the Institute and the Department was for future byelaws to be submitted, instead, under a non-objection procedure, whereby they would be deemed approved within a certain timeframe unless the minister indicated otherwise. The Institute's solicitors wrote '[t]his would give a control to the Minister in a manner which would facilitate our clients'.<sup>156</sup> As matters transpired, while the Private Bill was submitted to the Oireachtas by the Institute, it was ultimately abandoned due to a proroguing of the Northern Parliament and failure of an amalgamation scheme with another accountancy body.<sup>157</sup>

This episode demonstrated sensitivities within the public administration at a potential loss of public authority over an influential professional and regulatory body, albeit an essentially private one. By this stage, the state had evidently become much more interested in retaining a formal influence at the Institute. It may be found, on further research, that a similar tendency manifested at other RCBs. This

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155 Institute of Chartered Accountants in Ireland (Charter Second Amendment) Bill 1972.

156 Letter from Solicitors for Institute of Chartered Accountants in Ireland to Office of the Attorney General, dated 10 March 1972, found in NAI 2013/16/1244.

157 Letter of Institute of Chartered Accountants to Department of the Taoiseach, 26 August 1973, found in NAI 2004/21/91.

dynamic, as it evolved over time, sharply contrasted with the starting point (at least outwardly) in 1926 when '[t]he Executive Council [had] no particular appetite for dealing with these things at all'.<sup>158</sup>

### ***Characterising the state–institute relationship***

The projection of public authority over certain RCBs, such as the Institute, throws up puzzles, including from transparency and accountability standpoints. Here we have an independent, privately governed and funded self-regulatory body which must, due to a quirk of history, marshal executive or legislative power in order to organisationally evolve in the present and future. This is not unique to the Institute. But, in important ways, the Institute's status as an all-island RCB puts it into a different category to many other RCBs from a temporal standpoint. This may also help in understanding the degree of public administrative interest in retaining an approval role in the Institute's affairs, evidenced at precisely the moment the Institute attempted to dispense with it.

The fact that the Institute is an influential regulatory body for an economically (and perhaps politically) sensitive professional cohort is likely of relevance. Of course, the Institute also carries the complicated RCB baggage of past legal time and historical rights, inherent in its charter, as explored earlier in this article. Still, public administrative anxieties around the use of nomenclature for the state and broader sovereign policy on neutrality betray a wider theme.

The state successfully diverted the Institute's proposal to embed explicit concessions in its rules for members serving in the British armed forces. Indeed, the state's policy of neutrality was itself a temporal symptom of past unresolved issues of national sovereignty. Interestingly, though, a pragmatic middle way was found here. On the surface, the Institute was reined in and compelled to align with the state's policy of neutrality (such as it was). But, in a more subtle way, the state also left the Institute sufficient room to internally navigate its own heritage and temporal rhythms. In fact, the state itself offered a solution to enable the Institute to grant concessions, in practice, to members serving in the British armed forces.

With respect to sovereign nomenclature, the public administration actively pondered, though resiled from, mandating the Institute to align its internal concept of sovereign legal time with the state's external aspirational concept. The state wanted its name, as defined in the state's own constitutional norms, to be styled as such within the Institute's internal private legal regime. This could be seen as an (abortive) effort by the state both to tie a domestic body more firmly to its own concept of sovereign legal time and also to project the state's

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158 See above in this paper.

norms outwards to other political constituencies interacting with the Institute in a sort of legal Venn diagram. It was clear to all sides that this would be incompatible with the objective of uniting and regulating a single profession on a partitioned island riven with inherently conflicting perspectives on sovereignty, history and the future.

The problem here was that the state's preferred nomenclature spoke both to a lost time in the past and unrealised future time of national unity. In reference to the Grenada revolution of 1979, Scott writes that, after a moment of revolution has been and gone, generations become stranded in 'the present'.<sup>159</sup> Grabham and Beynon-Jones surmise:

in the aftermath of a longed-for event – a revolution, which also, in anticipation, played its own strong role in configuring temporal horizons – the present equates to ruined time and brings with it the task of responding to a loss of political hope.<sup>160</sup>

One of the ways in which the state attempted to remedy the 'ruined time' of partition was to constitutionally define the national territory in a manner of its own liking. But given that the definition embodied a claim not recognised by the territory concerned (Northern Ireland), the definition itself could only aspire to a future legal time. The state then attempted to project this definition to other political constituencies in the present. The Institute, as an all-island body, entered the frame as a conduit for this preferred definition.

The state ultimately stopped short on pragmatic grounds and, in that moment, the state was forced to reconcile itself to a legal present different from its preference. The Institute, meanwhile, was left to navigate multiple non-harmonised legal times – the past, present and future times of itself (as embodied in its charter and byelaw amendments), as well as the non-harmonised legal times of both jurisdictions on the island. Nonetheless, in coordinating authorities on both sides of the island of Ireland, and in successfully keeping its professional constituency together, the Institute *de facto* performed a unifying role across multiple legal time zones. This, perhaps, underscores the promise and potential of certain RCBs.

## CONCLUSIONS

In this article, there has been an attempt to survey and conceptualise the inheritance of RCBs in Ireland after 1922. In one sense, RCBs were a potentially subversive legal pockmark on the new state's sovereign authority. Through lenses of legal temporality, it has been demonstrated

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<sup>159</sup> Grabham and Beynon-Jones (n 10 above) 5, citing David Scott, *Omens of Adversity: Tragedy, Time, Memory, Justice* (Duke University Press 2014) 71.

<sup>160</sup> *Ibid.*

how the Irish state transitioned RCBs from a past legal time of the royal common law to the legal timeline of a new constitutional order. In so doing, the state and RCBs grappled with peculiar legal and political challenges, invoking tailored and archaic legislative mechanisms to navigate conflicting legal time-zones. Having survived this, RCBs could be said to ‘wear time’ in a manner described by Wheatley:

they are everywhere marked by it – moth eaten with periods of lapse, redoubled with cycles of renewal, scarred by the work of resisting destruction, defiant in the face of predicted extinction. They have time texture.<sup>161</sup>

It has also been outlined how an all-island RCB (the Institute of Chartered Accountants in Ireland) could bridge and harmonise various legal timelines for their stakeholders, operating as a unifying force in an otherwise fragmented political and legal landscape. In some ways, this exemplifies the potential of RCBs. Precisely due to their unique heritage in the legal past, at least some of them may have a role to play in ameliorating various temporal conflicts and inconsistencies on the island of Ireland both in the present and future.

## ANNEX X<sup>162</sup>

### Instrument

#### allowing alterations of Bye-Laws of

#### The Institute of Chartered Accountants in Ireland

WHEREAS by a Charter granted on the 14th day of May, 1888, the Institute of Chartered Accountants in Ireland (hereinafter called “the Institute”) was incorporated by that name and, amongst other matters, provision was made for the making and alteration of bye-laws by the Institute:

AND WHEREAS in accordance with section 6 of the Institute of Chartered Accountants in Ireland (Charter Amendment) Act 1966 (No. 2 Private of 1966), bye-laws made by the Institute or any alteration or amendment thereof shall not have effect until they have been submitted to and allowed by the Government:

AND WHEREAS bye-laws altering the bye-laws of the Institute have been duly made by the Institute and submitted to the Government:

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<sup>161</sup> Wheatley (n 11 above) 55.

<sup>162</sup> Annex to Memorandum for the Government: The Institute of Chartered Accountants in Ireland – Instrument allowing Alteration of Bye-laws from Office of the Taoiseach to the Government, dated 16 March 1983, found in NAI 2003/100/67.

NOW, the Government, in exercise of the powers conferred on them by the said section 6, hereby allow the bye-laws (a copy of which is annexed hereto) altering the bye-laws of the Institute.

GIVEN under the Official Seal  
of the Government, this  
\_\_\_\_\_ day of  
\_\_\_\_\_ 1983

## ANNEX Y<sup>163</sup>

### INSTITUTE OF CHARTERED ACCOUNTANTS IN IRELAND

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#### Approval of Amendments to Bye-Laws

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By the Governor of the Privy Council of Northern Ireland

WHEREAS by Royal Charter bearing date the 14th of May, 1888, the Institute of Chartered Accountants in Ireland (hereinafter called “the Institute”) are empowered to make Bye-Laws for the purposes therein mentioned subject, however, as provided by the said Charter, to the approval of the Privy Council in Ireland.

AND WHEREAS the Institute in exercise of the authority vested in them by the said Charter have from time to time made Bye-Laws for the regulation of the affairs of the Institute.

AND WHEREAS by an Order in Council dated the 8th day of April, 1921, certain Bye-Laws so made (therein and hereinafter referred to as “the Bye-Laws of 1921”) were approved by the Privy Council in Ireland.

AND WHEREAS by virtue of Article 2(1) of the First Schedule to the Irish Free State (Consequential Provisions) Act, 1922, the powers of the Privy Council in Ireland are in Northern Ireland exercisable by the Privy Council of Northern Ireland.

AND WHEREAS by an Order in Council dated the 6th day of November, 1942, certain additions and alterations in the Bye-Laws of 1921 were approved of by the Privy Council of Northern Ireland and the Bye-Laws of 1921 as so added to and altered are hereinafter referred to as the Bye-Laws of 1942.

AND WHEREAS it is provided by No. 121 of the Bye-Laws of 1942 that the same may be added to or any of them may be altered or amended

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<sup>163</sup> Letter, dated 9 July 1955, from solicitors for the Institute of Chartered Accountants in Ireland to the Secretary, Department of the Taoiseach, found in NAI 2013/16/1244.

provided that the proposed additions, alterations or amendments are first approved by the Council of the Institute and afterwards adopted at two successive general meetings of the Institute.

AND WHEREAS at two successive general meetings of the Institute held respectively on the 6th day of November, 1954, and an adjournment thereof on the 24th day of November, 1954, and on the 17th day of December, 1954, certain additions to and alterations and amendments in the Bye-Laws of 1942 which had been first approved of by the Council of the Institute were approved and adopted and it was resolved that the same as respects Northern Ireland come into operation and take effect as soon as the same should be allowed by the Privy Council of Northern Ireland.

AND WHEREAS it is considered by the said Privy Council that such proposed additions to and alterations and amendments in the Bye-Laws of 1942 should be allowed.

NOW, THEREFORE, I, JOHN DE VERE, BARON WAKEHURST, KNIGHT COMMANDER OF THE MOST DISTINGUISHED ORDER OF ST. MICHAEL AND ST. GEORGE, GOVERNOR OF NORTHERN IRELAND, by and with the consent of the Privy Council, in exercise of the powers conferred upon me by the said Charter and of all other powers enabling me in this behalf, do hereby approve of the additions to and alterations and amendments in the Bye-Laws of 1942, which have been proposed, adopted and approved by the Institute under the said Charter, and do accordingly order, declare and direct that after the expiration of one month from the date of this Order the Bye-Laws of the Institute shall have effect in the form hereto annexed and in that form may be styled the Bye-Laws of 1955.

GIVEN, at Government House, Hillsborough

this \_\_\_\_ day of \_\_\_\_ 1955