Innovation and Continuity: Statute Law of the Saorstat Eireann / Irish Free State 1922-1948

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1. Introduction

Modern Irish legal history is a largely unstudied field.

I want to offer a modest contribution to that study by looking at aspects of the legislation of the Saorstat Eireann / Irish Free State ("IFS") from its creation in 1922 to its effectiveness departure from the Commonwealth in 1948.

My study is based on study of government files in the National Archives of Ireland, particularly the records of the Justice Department, Attorney-General's Office and Parliamentary Draftsman's Office, and from the reports of the debates in the Oireachtas / Irish legislature. I would like to think the staff of the archives for their assistance and particularly for access to a number of files which are normally closed to researchers.

I will be looking particularly at Irish use of precedents from Britain and the other Dominions (especially Canada and Australia) – and occasionally other countries - in the initial period of the setting up of the IFS, in later legislation affecting appeals to the Privy Council and in the area of social legislation and law reform.

I suggest that although nationalist thinking, and political rivalry greatly affected the pattern of legislation and law reform in the Irish Free State, there is nevertheless an underlying continuity in the drafting of legislation which

reflected a very substantial, if frequently understated, use of English precedents.

2. An optional historical sketch

It may also help the reader not acquainted with Irish history to bear in mind that from 1922-1927 the "Treaty-ite" Cumann na nGaedheal party, under WT Cosgrove formed the Government, though its Sinn Fein opponents refused to attend the Oireachtas because they could only take their seats by swearing an oath which promised fidelity to the Crown.[1] In the absence of Sinn Fein TDs the Labour party led the opposition. After the 1927 election, won by the incumbent government, de Valera's Fianna Fail party, the successor to Sinn Fein, returned to the Oireachtas. The Cumann na nGaedheal party was defeated in 1932, and Fianna Fail ruled from then until 1948, though requiring minor party support for most of that period.

Irish politics with complex and often extraordinarily hostile and partisan, but that surface antipathy between the parties should not obscure the fundamental similarity of the times of most Irish politicians - the creation of a truly independent and autonomous Ireland. Both the major parties were radically nationalist but ideologically and socially conservative.[2]

[1] An oath "…which the anti-Treatyites untruthfully labeled the 'Oath of Allegiance' in a marvellous lie of silence that has become institutionalized in Irish popular culture": Tom Garvin, *1922: The Birth of Irish Democracy* (Dublin, Gill and MacMillan, 1996), p17.

[2] Maurice Manning *The Blueshirts* (U Toronto Press 1971), pp 8-9. Eunan O'Halpin "Politics and the State", in J R Hill (ed) *A New History of Ireland* (OUP, 2003) vol 7, p116 points to the laying of foundations for later social welfare reforms by the Cumann na nGaedhael party in the 1920s, but equally to its "equanimity" in the face of social problems it believed it had no resources to address. Compare Brian Girvin "The Republicanization of Irish Society 1932-1948", in J R Hill (ed), op cit, vol 7, pp137-38.

3. The lawmaking process

The formal process of enacting legislation in the Oireachtas - the bicameral legislature composed of the Dail Eireann and the Seanad Eireann[3] - usually required a Bill to go through five stages in the Dail, then four in the Seanad. In the Dail, the five stages were the introduction, the second stage where the principle of the Bill could be debated, a third or committee stage, followed by a fourth stage where the report of the Committee was taken and further amendment was possible, and a final fifth stage where minor verbal amendment only could occur. In the Seanad the later four steps were reprised.[4]

Over the 26 years with which we are concerned, the Irish legislature passed 1057 statutes, or around 40 a year. The largest number in any one year was 62 in 1924, at a time when the machinery of the IFS was being created, and the smallest 22 in 1944. McCracken suggests that almost half of these were aimed at economic issues or public finances; and another third dealt with public and constitutional affairs. The remainder dealt with social issues or miscellanea.[5]

Most government legislation was drafted by the Parliamentary Draftsman, whose office came within the purview of the Attorney-General, in the light of departmental papers setting out what was wanted. In rare cases the Parliamentary Draftsman was given, or took, a freer hand.

In addition a number of important statutes dealing with the IFS's external relations –including those with Britain – were prepared by the Ministry of External Affairs. In 1933, a very atypical year as it marked the first year of the Fianna Fail government, , that Ministry was responsible not only for "constitutional" bills relating to appeals to the Privy Council and the

[3] Except for a brief period 1936-1937, between the abolition of the original Seanad and the creation of a somewhat different version under the 1937 Constitution. See also part 8 below.
[4] See J L McCracken *Representative government in Ireland:A study of Dail Eireann 1919-1948* (OUP 1958), p124
[5] See J L McCracken *Representative Government in Ireland: A study of Dail Eireann 1919-1948* (OUP, 1958), pp170-72.

reservation of Bills by the Governor-General, but for seven general bills, dealing with, amongst others, extradition, immunities for visiting members of foreign armed forces, the taking of evidence in the IFS for use in foreign courts, the enforcement of foreign arbitral awards and diplomatic immunities.[6] It also prepared Bills to provide for compliance with international conventions to which the IFS was a party.

4. On the use of overseas precedents for legislation

The starting point for the IFS was article 73 of the 1922 IFS constitution under which all prior statute law which was not inconsistent with the Constitution continued in force. Thus the vast bulk of Irish law was, and for years continued to be, found in the British statute book.

This presented a problem in reconciling the nationalist thinking of most members of the Oireachtas - who generally wanted to distinguish the new state from the predecessor regime by re-writing the statute book – and the practical problem that there was neither resources nor parliamentary time to undertake major re-writing and re-enactment of the statute law.

The result was, perhaps inevitably, somewhat of a compromise, with a number of statutes being largely copied from British precedents, and others which were independently drafted. There was also a small number of important acts which showed evidence of copying from the legislation of other Dominions, and a smaller number where the drafting may have been influenced by the laws of other states.

It is with the interplay of these different elements that this paper is primarily concerned.

The basic idea that the IFS government drew on English statutes for some of its legislation not new . However there is no adequate study of the full extent

[6] A-G's Office file SR4/128 17/33 Bills to be promoted by Dept of External Affairs, NAI.

of the legislative borrowing from Britain, nor proper consideration of the use of other overseas precedents.
Most importantly, there is no study yet of the frequently ambivalent or equivocal terms in which resort to the use of British precedents was described, justified or resisted.

We may conveniently approach these issues by looking at IFS legislation which was based in whole or part on overseas precedents.

5. Drawing on British legislation

In the first years of the IFS a number of statutes were quite avowedly copied from comparable British legislation. Usually this was so that the relevant Bills could be prepared quickly. In my written paper I describe this process for the Trade Loans (Guarantee) Bill 1924 and the Oil in Navigable Waters Act 1925.

These "quickie" statutes can be contrasted with the extraordinarily sluggish pace of proceedings where the use of derivative legislation was rejected. Nothing illustrates this better than proposals for merchant shipping legislation.[7] It was thought in 1924 that probably the relevant British Acts remained in force, which might provide time for preparation of new legislation. The question of drafting legislation – complicated as it was by questions of legislative competence which were not resolved until 1930 – drifted through the bureaucracy throughout the 1920s and 1930s. In 1939 a comprehensive Merchant Shipping Bill was promised but did not eventuate. As late as 1947 the Minister could argue that there had not yet been time to prepare a comprehensive measure. [8]
Political factors could influence the use, or proposed use, of British precedents. A memorandum from the Parliamentary Draftsman indicates that Hugh

[7] This account is principally based on the documents in file 2001/49/05 1931 Merchant Shipping Bill, NAI.
[8] *Dail* Debates, Volume 108, column2192, 20 November, 1947.

Kennedy, in his brief term as Attorney-General, was "always very averse to adoption of Acts, and insisted on complete re-enactment in every case".[9]:

The utility argument force the use of British precedent was still being made in the 1930s, though not always successfully. When the issue of reciprocal enforcement of maintenance orders was raised in 1937 the Secretary of the Ministry for Justice suggested that legislation copying the British statute be prepared:

> "I wonder whether it would be possible to arrange to have the Maintenance Orders (Facilities for Enforcement Act) 1920 rewritten in the P.D.s office, for re-enactment as one of our own Acts. It would not take very long to do that, and it would be a much neater job that trying to adapt it by means of orders. I imagine the Executive Council and the Dail would pass it without any comment as a routine "reconstruction" measure.[10]

Such a solution was not adopted – the reply being that :

> "I am rather inclined to think that it would be better either to fit these Maintenance Orders into a comprehensive scheme of legislation for the reciprocal enforcement of judgments, or, if it is decided to treat it separately, to follow the scheme of the Extradition Bill rather than the form of the 1920 Act".[11]

However nothing was done, as far as I can discover, during the IFS's existence.

So far I have referred to the use of British models. It is worth looking briefly at a separate influences of Northern Irish and Scots law.

(a) Northern Ireland

In my written paper I indicate there may have been some borrowing from Northern Irish legislation relating to juries. I have found no other significant examples. I note here that in at least one instance the influence of Northern Ireland legislation has been overstated. Norma Dawson has noted the similarities of the National

[9] Matheson to John O'Byrne (Attorney-General) 17 July 1924 in file 2001/49/05 1931 Merchant Shipping Bill, NAI.
[10] S A Roche to P P O'Donoghue, 20 July 1937, in file AGO/2000/10 0119 SR 193/25 (193/25A) Maintenance Orders (Facilities for Enforcement) Act 1920, NAI.
[11] O'Donoghue to Roche, 21 August 1937, in file AGO/2000/10 0119 SR 193/25 (193/25A) Maintenance Orders (Facilities for Enforcement) Act 1920, NAI.

Monuments Act 1926 (NI) and the National Monuments Act 1930, and the fact each protected objects of archaeological interest, and implies the 1930 IFS statute was largely modelled on that of Northern Ireland.[12] It is true there was some borrowing of provisions from the 1926 Northern Ireland Act – and from earlier British law, but there was also a limitation on the export of artworks (apparently taken from Italian law).[13] More importantly, the Irish Bill, which began as a draft Bill prepared in the Department of Finance based on existing legislation in Great Britain and in Northern Ireland, was substantially re-written by the Parliamentary Draftsman because he considered the Ancient Monuments Protection Act 1882 (Imp), on which the Northern Ireland Act had been modelled, had been very poorly drafted.[14]

(b) Scotland

I have found only one case where IFS law adopted or followed Scots law. Thos is the Juries Protection Act 1929, passed after prolonged and bitter debate. It was designed in large part to limit the opportunities for republican sympathisers to put pressure on jurors, by reducing the extent of disclosure of jury panels and of juror's names, and to reduce the likelihood of jury disagreements by bringing in 9-3 majority verdicts.[15] The bill's promoters within the Ministry of Justice advanced a range of precedents as part of the case for majority verdicts – with Scots law as the prime example.

The Bill was vehemently attacked by Eamonn de Valera, on the grounds both that it was in effect coercive legislation of a kind regularly passed by the British parliament for Ireland, and on the basis that the unanimity of jury verdicts was an essential element of the liberty of the subject.

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[12] Norma Dawson "The Giant's Causeway case: property law in Ireland 1845-1995" in Norma Dawson, Desmond Greer and Peter Ingram (eds) *"One Hundred and Fifty Years of Irish Law* (SLS Legal Publications (NI) and Round Hall Sweet & Maxwell, Dublin, 1996), p255.

[13] See *Dail Debates*, volume 32, column 247 (24 October 1929).

[14] See Matheson to Costello 22 November 1928, in File 2000/22/0350-2/1930 National Monuments Bill, NAI.

[15] A majority of a 15-juror panel (in line with Scots practice in criminal cases) had been suggested earlier, but the proposal for 15-juror panels was dropped because they could not be accommodated in the existing courthouses: see correspondence in file AGO/2000/10-0477-0475 SR001/31 Juries Protection Bill, NAI.

The Act was passed, though only as a temporary measure for two years, but was extended for a further period in 1931.

It is not surprising that de Valera tried to avoid mentioning the English origins of jury unanimity.[16] However Government speakers did not hesitate to call attention to the reliance of opposition arguments on "British tradition".[17]
I would observe that this whole debate is very informative on the extent to which political tensions could create surprising results.

6. IFS legislation and a Dominions influence.

I have been interested for some time in the movement of legal information and ideas around the British empire and commonwealth, and so I naturally took a particular interest in considering whether IFS law drew much on that of the other dominions.

The basic, if much resented, constitutional reality of the IFS was the acceptance in the Treaty of that the IFS was to be a Dominion, on the same basis as Canada. Given that, it was inevitable that drafters of the constitution and of legislation to create the structure of the new state should have studied, and drawn from, Dominion models – as did their critics.

(a) the 1922 constitution

There is a significant body of writing about the 1922 Constitution. However relatively little attention has been paid to the diversity of sources of information drawn on by the framers of the Constitution and, to a much lesser extent, by their critics. Canadian law and practice was inevitably most

[16] *Dail Debates*, vol 29, columns 1562-63, 8 May 1929.
[17] *Dail Debates*, vol 30, column 1018, 6 June 1929.

commonly discussed, though we find also references to South African and Australian precedents and history.[18]

Although the Constitution adopted did have a number of novel features which clearly marked it out from the other dominions,[19] there was, overall, an underlying continuation of much English constitutional practice, a continuity which was the more marked because of the lack of use of the novel elements such as extern ministers.[20]

One feature of the new Constitution was the inclusion of provision for binding referenda on Bills passed by the Oireachtas. This was explained as derived from overseas use and particularly suited to IFS conditions:

> "The referendum is a feature of the Constitutions of Australia, America and Switzerland. It is, we consider, particularly suited to this country, in the circumstances of the time. It will impress on the people more forcibly perhaps than would otherwise be the case that henceforth the law of this country is their law, is the creature of their will, is something which they can make, alter, or repeal, as it seems best to them".[21]

Although the debates on the Constitution Bill only rarely ranged outside Dominions and American practice, the drafters of the Constitution had investigated the law of a much wider range of nations, and indeed collected 18 constitutions which were later printed for the use of the Dail.[22]

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[18] For example, Mr R Wilson, *Dail* Debates, volume 1, column 563, 21 September 1922; Professor Magennis *Dail* Debates, volume 1, column 767, 26 September 1922 and George Gavan Duffy, *Dail* Debates volume 1 columns 1417-1418, 10 October 1922.

[19] A G Donaldson *Some Comparative Aspects of Irish Law* (Durham NC, Duke University Press, 1957), p138.

[20] Basil Chubb *The Politics of the Irish Constitution* (Institute of Public Administration , Dublin, 1991), p12.

[21] Kevin O'Higgins, *Dail* Debates, vol 1 columns 1210-1211, 5 October 1922. This view of the sources of the referendum provisions is adopted by Alfred Donaldson *Some Comparative Aspects of Irish Law* (Durham NC, Duke University Press, 1957), p145 and, with acknowledgment of it having been advocated by a Sinn Fein newspaper in being Sin but other writers have suggested that that the IFS model drew more on European models J L McCracken *Representative Government in Ireland: A study of Dail Eireann 1919-1948* (London, OUP, 1958) p 9 (noting that referenda had been advocated by a Sinn Fein newspaper in 1919) and Leo Kohn, *The Constitution of the Irish Free State* (London, George Allen & Unwin, 1932), p238.

[22] Leo Kohn *The Constitution of the Irish Free State* (London, George Allen & Unwin, 1932), p 78.

Perhaps significantly that document appears to have been rarely used in the debates on the draft Constitution, since references to specific overseas provisions were generally to those appearing in a shorter document containing copies of the Canadian, South African and Australian constitutions.[23]

(b) electoral law for the new state

I discuss in the written paper some aspects of the Electoral Act 1923, which continued the use of the single transferable vote and multi-member constituencies from the Government of Ireland Act 1920(Imp).[24]

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The lack of originality was commented on by Edward Darrel Figgis who suggested that the Government should have enquired into practices overseas and selected the best precedents:

> "This Bill… is practically neglectful of very considerable advances that have been made in many parts of the world, and it is practically a gathering together, a mere codification of the existing English law, with some slight changes, none of which are of a very material kind.[25]

We may characterise Figgis's comment as disingenous, because it is clear that considerable attention had been paid to possible overseas models – including some European precedents. Indeed the overseas examples had been canvassed by Figgis himself in a seven page memorandum which set out the franchise rules (under headings of age, sex, citizenship, education, residence and property) for Britain, Canada and Australia (including their constituent states or provinces) and New Zealand, as well as the USA, a wide range of European countries and some Latin American states, as well as Turkey and

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[23] For example, Kevin O'Higgins, *Dail* Debates, volume 1, column 759, 26 September 1922. John M Regan *The Irish Counter-revolution 1922-1936* (Gill & McMillan, Dublin 1999) suggests at p139 that this was originally prepared by pro-Treaty politicians in anticipation of the Dail being convoked.

[24] J L McCracken *Representative Government in Ireland: A study of Dail Eireann 1919-1948* (OUP, 1958) p67. It is however probably inaccurate to suggest that the choice of this model was without real debate, as is alleged by Nicholas Mansergh *The Irish Free State: its Government and Politic*" (London, George Allen & Unwin, 1934), p62

[25] *Dail* Debates, volume 2, column 436, 3 January 1923.

Japan.[26] It is curious that despite the relatively frequent references in constitutional debates to South African experience, neither Figgis nor any other would-be draftsman mentioned the law of South Africa or its constituent elements.

(c) courts

The Judiciary Committee which considered the new Court system was presented with a document on the courts systems of Australasia,[27] with a briefer and very general statement of the American system prepared by a local barrister A F Blood at the request of the Bar Council. I have not found any definite use was made of this material.

However we may specially mention calls for the creation of "courts of arbitration and conciliation" for labour matters, with a motion in favour of them being passed by the Seanad in 1924. The debates on that motion indicate that most Senators had some idea of the nature and operation of the courts in Australia and New Zealand,[28] and indeed Senator O'Farrell cited at great length from a piece by Sir John Findlay, former Attorney-General of New Zealand, on the operation of the Court of Arbitration in that country.[29]

Nothing came of these calls, nor of fresh suggestions in the war years, when trade unions were significantly more active. The Government rejected them, on the less than convincing ground that such an institution could work only when submission to

[26] See documents in file 2002/22/0016 - 12 Electoral Bill 1923, NAI. These include a letter from F McCarthy to the Minister of Local Government, 13 September 1922 to which a memorandum from Figgis was stated to be attached. The attachment has not survived, but another archival collection, file 2002/14/1022 The Electoral Bill 1923 contains an unsigned and unattributed carbon copy of a "Memorandum on matters affecting the preparation of the present Franchise Bill" which would appear to be Figgis's 1922 memorandum. See also Department of Taioseach Constitution Committee 1922 file S7 Correspondence and memorandum concerning the Franchise in other countries, NAI. Various correspondents supplied a very eclectic range of material for consideration by the Constitution Committee, see Department of Taioseach Constitution Committee 1922, file S4 NAI.

[27] Blood, "Memorandum on the Constitution of the Courts and Judiciary etc of the Australian Commonwealth and of New Zealand" 7 December 1922, in File SR4/128 11/28 Judiciary Committee, NAI.

[28] See *Seanad* Debates volume 2 column 355ff , 20 December 1923, and volume 2, column 341ff, 15 January 1924.

[29] *Seanad* Debates volume 2, columns 347-49, 15 January 1924.

arbitration was compulsory, and - less than accurately - that system had been tried and found a failure in Australia and New Zealand.[30] The Government did give ground some years later, with promises of a Labour Court with arbitration and conciliation functions.[31]

(d) Privy Council

I do not want to traverse in full events leading to the ending of appeals final abolition of Privy Council, but it is worth noting a curious diversity in the arguments for their abolition. Both in the Oireachtas and in the Department of External Affairs the advocates of termination of appeals paid considerable attention to the examples of Canada and South Africa. The Irish archives contain various materials from the 1920s, including press cuttings from Canadian papers, though only extreme partisans could have concluded that the *Manitoba Free Press* (a proponent of Dominion self-determination) was "the most influential paper in Canada".[32]

Yet when legislation to formally abolish the proviso and terminate appeals completely was first mooted in 1930, the draft Bill prepared, and the memoranda on which it was based, have not a single reference to the Dominion equivalents.[33]

[30] See Sean MacEntee, *Seanad* Debates, volume 25, column 2286-92, 7 August 1941.
[31] *Dail* Debates, volume 101, columns 2292-3, 25 June 1946.
[32] Secretary Dept of External Affairs to A-G, 29 March 1926, in file SR4/128 214/25 Canadian Courts and Appeals to PC, NAI
[33] Matheson to McDumphy, 12 November 1930, in file 2000/22/0542 45/1933 Constitution Amendment (PC) Bill 1933, NAI.

7. Mixed British Dominions and others

I note in the written paper some examples of suggestions for he use of Dominion precedents for administrative or governmental models. We cannot discuss them all, but it is interesting to look at two issues which generated widespread reference to the law and practice of a number of overseas jurisdictions.

The first is the Children's Allowances Act 1944, where both in the Dail and the Seanad there were frequent references to the way similar schemes operated in New Zealand, Australia and various European states.[34] Senator O'Sullivan even drew on his personal experiences of New Zealand in 1938, though his claim to personal friendship with the Prime Minister of New Zealand may be suspect given his identification of him as "Martin" (rather than Michael) Savage.[35]

An even broader range of comparators featured in the debate on the Electricity Supply Bill 1927. As Minister McGilligan informed the Dail, he had toured USA and Canada recently and had there had the opportunity to learn about different models of organising large-scale schemes of supply of electricity to large areas. That had focussed attention on the need to look at the best models to use for control and supervision of large state-owned services, with the Government looking at models used in Germany, Sweden and South Africa.[36] The Swedish comparison was examined, not entirely cogently, by other speakers.[37] In addition the Minister indicated in the Committee stage of

[34] See for example in the introductory speech at the second stage by Sean Lemass (curiously since he was Minister of Industry and Commerce, the Minister in charge of the Bill) *Dail Debates*, vol 92, columns 24-27 (23 November 1943); James Larkin, junior, *Dail Debates*, vol 92, columns 123-124 (23 November 1943); John McCann *Dail Debates*, vol 92, columns 172-173 (24 November 1943); Roderick Connolly *Dail Debates*, vol 92, columns 184-186 (24 November 1943).

[35] Seanad Debates, Vol 25, columns 505-506 (14 January 1944). Curiously, a modern author attributes the legislation solely to European models, without acknowledging the Australasian precedent: M Cousins *The Birth of Social Welfare in Ireland 1922-1952* (Dublin, Four Courts Press, 2003), pp6-7. There were other occasions, though not many, where legislators referred to their own experience of other jurisdictions. We find, for example, in the debates on the Betting Bill 1926 Senator Parkinson and Senator Sir Bryan Mahon drawing on their personal experience of the organisation and regulation (or otherwise) of gambling in New York and in India, respectively. *Seanad Debates*, volume 7 column 897 (9 July 1926) and volume 7 column 937 (7 July 1926), respectively. Mahon went on to refer to information he had received second hand about the position in New Zealand (see column 938).

[36] *Dail* Debates, volume 18, columns 1894-1908, 15 March 1927.

[37] See for example Mr Hewat, *Dail* Debates, volume 18, column 1992, 16 March 1927.

provisions for auditing of the new Board's accounts that he had contemplated using a Canadian statute as a precedent.[38]

A feature of the Bill not emphasised by the Minister in the legislative debates was that an important provision of the Bill, the composition of the governing Board, was deliberately copied from a British precedent.[39] Oddly enough an opposition Deputy urged the Minister to look more closely at the British provision as a model,[40] apparently unaware how close in nature were the two provisions.

8 Other external influences

In many ways the most interesting feature of the 1937 Constitution was the extent to which de Valera had attempted to marry the republican and nationalist elements of his ideology with elements of Roman Catholic doctrine. The Constitution contained elaborate provisions concerning personal and family rights and duties, education, private property and social policy which were derived from a series of papal encyclicals of 1929 to 1931 and followed:

> "…closely, in form and content, a synthesis of Catholic social principles known as The Social Code, prepared by the International Union of Social Studies, Malines, Belgium"[41].

The Seanad constituted under that Constitution was also intended to provide for "vocational" representation, another idea derived substantially from Catholic thinking. As critics of the draft Constitution had prophesied, the concept of

[38] Gilligan, *Dail* Debates, volume 19, column 643, 31 March 1927.
[39] See memorandum of drafting instructions by Minister of Industries and Commerce in file 2000/22/0240 27/1927 Electricity (Supply) Bill 1927, NAI. The British model was Electricity (Supply) Act 1926 (Imp), s1.
[40] Hewat, *Dail* Debates, volume 18, columns 1994-95, 16 March 1927.
[41] Vincent Grogan "Toward the New Constitution", in Francis McManus (ed) *The Years of the Great Test 1926-1939* (Dublin, Mercier Press, 1967), p171. For the nationalist and republican ideology, see Ronan Fanning "Mr De Valera drafts a constitution" in B Farrell (ed) *De Valera's Constitution and Ours* (Dublin, Gill and MacMillan 1988). The opposition parties were also influenced by Catholic thinking, see David Thornley "The Blue Shirts" in Francis McManus, op cit, p49.

vocational representation proved a failure, with the Seanad becoming largely the preserve of less successful members of the principal political parties.[42]

It has been said, misleadingly, that the Censorship of Publications Act 1929 was inspired by the Catholic church,[43] but in fact the statute reflected a wide religious and social consensus.[44] It appears that the same is true of the earlier Censorship of Films Act 1923, as that statute was prompted by a joint delegation of representatives from the Irish Vigilance Association, the Catholic Church in Ireland, the Episcopalian Church in Ireland and Presbyterian Church in Ireland.[45] It is notable that proponents of censorship of films had looked widely for precedents, as in the second stage debate Gavan Duffy referred to a Bavarian law barring children under 18 from all but approved films.[46]

9. A legislative examples

As some of the matters I have mentioned would indicate, IFS legislation could have a rather syncretistic character, drawing on a range of sources. In the long paper I set out the process of drafting of the Industrial and Commercial Property (Protection) Bill 1923, which combines both the innovative thinking of Hugh Kennedy who wanted a single statute covering copyright, patents, trade marks and designs, the use of Domnion materials in the form of Canadian copyright legislation and a very extensive use of the Briitsh statutes as legislative models.

[42] For the extent to which the new Seanad was dominated by traditional politics, see J L McCracken *Representative Government in Ireland: A study of Dail Eireann 1919-1948* (OUP, 1958), pp149-151.
[43] See J L McCracken *Representative Government in Ireland: A study of Dail Eireann 1919-1948* (OUP, 1958), p177.
[44] Eunan O'Halpin "Politics and the State", in J R Hill (ed) *A New History of Ireland* (OUP, 2003) vol 7, p119.
[45] See Memorandum "E O'F" to "The Law Officer", 13 February 1923 in File 2000/22/0027-23 Censorship of Films Act, NAI.
[46] *Dail Debates*, volume 3 column 587, 3 May 1923

10 Continuity of nationalist legislation

The advent of the Fianna Fail government in 1932 brought some surface changes, but there is, I suggest, a very important degree of continuity underlying some major statutes, where the incoming government did no more than bring to fruition legislative projects which had been under lengthy consideration and development in official circles for many years.[47] The prime example of this is with a trilogy of 1935 statutes affecting nationality and citizenship issues, the Aliens Act 1935, the Citizenship Act 1935 and the Nationality Act.[48]

Officials began considering possible citizenship legislation as early as 1924, and noted that information would be required as to the law and practice of the other Dominions, especially New Zealand and South Africa which had not then adopted Part II of the British Citizenship and Status of Alien Act 1914. The Secretary also requested a copy of the Canadian House of Commons debates of 19 January 1913 on the Canadian law.[49] Copies of Australian and other Dominion legislation was acquired from the respective High Commissioners in London over the next few months – including a copy of a proposed South African Bill on the status of Aliens.[50]

The issue then apparently was placed in the "too hard" basket for some years, with enquiries from the Department of Finance (which was concerned to be able to determine entitlements to old age pensions) drawing the response that "the

[47] I differ here from the views of See J L McCracken *Representative Government in Ireland: A study of Dail Eireann 1919-1948* (OUP, 1958), pp197, who sees the 1935 legislation as a specifically Fianna fail measure.

[48] As noted earlier, proposals to abolish appeals to the Privy Council furnish a second example. See part 6(d) above.

[49] Minute 10 November 1924, in Department for Justice file H171/32 Citizenship Bill, NAI. Copies of some Canadian legislation had been procured the previous year, see Secretary External Affairs to Secretary Home Affairs 2 May 1923 in the same file, but the reasons for, and process of, the acquisition is not clear.

[50] Secretary External Affairs to Secretary of Justice 24 November 1924, in Department for Justice file H171/32 Citizenship Bill, NAI. New Zealand and Newfoundland legislation was also forwarded later in 1925.

citizenship business bristles with difficulties and it is not particularly urgent" and no progress could be expected for some time.[51]

Paralleling this issue was the related question of control of immigration and "aliens". There was only limited power of governmental control of migration. By 1930, officials had determined there was a need for a brief Aliens statute to complement the intended legislation on nationality and citizenship.[52]

An Aliens Bill was finally prepared in 1934, and enacted the following year. The focus of the debate in the Dail was on the very pointed definition of "alien" as being someone other than a citizen of the IFS – and thus according British or Dominion citizens the same legal status as those from outside the Commonwealth. This was strongly criticised by a range of opposition deputies, but the Fianna Fail majority ensured the Bill's passage.[53]

As noted the Aliens Act was a complement to the Citizenship Act 1935. The critical problem was that Fianna Fail government wished to use a very restrictive definition of citizenship which would distinguish between the citizens of the IFS and other British subjects, contrary to th consensus reached at the 1930 Imperial Conference (after strong argument to the contrary by the IFS representatives) that citizenship laws should be broadly similar throughout the Commonwealth, and no Dominion would legislate separately.
Once the government accepted that its bill was contrary to the decisions of the 1930 conference, it changed tack and argued that the Dominions had been given freedom to legislate as they chose at that conference, and in effect that the general overwhelmed the particular.

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[51] Roche to Codling, 17 December 1926, in Department for Justice file H171/32 Citizenship Bill, NAI.
[52] James Roche, Secretary for Justice, to JJ Hearne (External Affairs), 11 September 1930, in File H266/93 Department of Justice Immigration Act 1931, NAI. It must be said the problem was not pressing. In 1937 it was said in the Dail that there were 7,990 registered aliens in the IFS, of whom 6,342 were American citizens. However many of these, and many of the aliens from other countries had been in Ireland prior to 1922, and thus had a claim to citizenship under the 1935 legislation or under s3 of the Constitution. See statement by Patrick Ruttledge, Minister for Justice, *Dail* Debates, volume 66, columns 719-720, 14 April 1937.
[53] See *Dail* Debates, volume 54, column 2520 ff, 14 February 1935.

The Opposition criticised the Bill, but again and this is less than honest. The archival record makes it clear that prior to the 1930 Conference the Government was planning a citizenship bill which would later make it possible to discriminate against British subjects in the same way as it might discriminate against the nationals of a non-Commonwealth country, although at least in part the aim was to be able to discriminate against businesses not controlled by Irish citizens.[54] The Secretary for Justice took the view that an overt provision allowing discrimination might backfire, given the number of Irish men and women who lived and worked in Britain, but was confident a similar result could be achieved less openly by use of suitable residence requirements.[55]

It is clear that at some point in the drafting of the Citizenship Bill there was some research into the legislation of other states. There was, for instance, consideration of the British, Canadian and American naturalization laws, with the view being taken that the IFS should follow the British system where there remained a discretion to refuse citizenship.[56]

[54] Hearne (External Affairs) to Roche (Secretary for Justice), 9 September 1930, in Department for Justice file H266/91 Irish Nationality Act, NAI. It would appear that Germany, at least, was concerned about the possibility of such discrimination. See the debates on the Aliens Restriction (Amendment) Bill 1931, *Dail* Debates, volume 14, column 509, 12 March 1931.
[55] Roche (Secretary for Justice) to Hearne (External Affairs) 11 September 1930, in Department for Justice file H266/91 Irish Nationality Act, NAI
[56] See the (unfortunately not dated) memorandum on Irish Citizenship and amendments in Department for Justice file H171/32 Citizenship Bill, NAI.

11 Law reform

I want now to turn to look at law reform generally and at specific proposals may give us a better understanding of IFS legislation, particularly of the extent to which proponents of legislation looked to overseas precedents – usually but not always British – for guidance. It is striking that the vast bulk of suggestions for law reform – by officials and legislators alike - were for legislation based on overseas initiatives and almost none for locally developed innovations.

It is also significant that law reform in the IFS was very much dependent on gaining Governmental backing – something which was particularly hard to come by after 1932, since the Fianna Fail government resisted most proposals for a range of reasons, ideological, political and practical.

Even where official support was strong, reform could take decades. In and the return of paper I give details of the long campaign – from 1928 to 1949 - to bring in an offence of infanticide.

In other cases reform took longer than the life of the IFS.
Adoption legislation was finally passed in 1952, though regular calls were made form the 1920s on. passed. The English Act of 1926 was often suggested as a suitable model, though North American precedents were canvassed on another occasion.[57] The delay seems to have been largely due to the influence of the Catholic church.

Similarly regular calls for a Public Trustee Office which could deal with wills and estates[58] went unrewarded until the 1960s. Proposals for such an a reform

[57] See *Dail Debates*, volume 75, column 329 (30 March 1939) and *Dail Debates*, volume 98, column 529 (2 December 1943) (both referring to the British Act of 1926); *Dail Debates*, volume 100, column 2029 (30 April 1946); *Dail Debates*, volume 101, column 2584 (27 June 1946) (referring to the law of Quebec and California) and *Dail Debates*, volume 110, columns 640-641 (14 April 1948).

[58] This account is based on the documents in A-Gs Office files AGO/2000/10 3018 SR 011/44 Public Trustee, NAI. For the establishment of the Public Trustee in England see Polden 'The Public Trustee in England 1906-1986' 10 *Journal of Legal History* (1988) 228. There was in the IFS a Public Trustee

had been made at least as early as 1913 when the Dublin Chamber of Commerce passed a Resolution in favour of the creation of a Public Trustee on the English model, after hearing an address by the Public Trustee for England. Further calls for such an institution were made in the 1920s and 1930s, invoking the success of the institution in New Zealand, Australia and England but it was not until 1944 that it gained the formal backing of the Ministry for Justice, and in 1945 there was Government decision that the Minister for Justice examine the case for the establishment of a Public Trustee on the "English or Dominion model".

(a) Private member's bills and law reform

More reform seems only very rarely to have occurred where there was no specific government backing. This is unlike other jurisdiction where private member's bills could be an effective source of law reform.[59] The IFS position may be due in part to he limited amount of legislative time for private members' bills.[60] It may also have been that there was no culture of striving for law reform (as opposed to the more common political manoeuvring) by such means in a Dail where many TDs rarely spoke.[61]

One of the few significant private members Bills to reach the statute book was the Moneylenders Act 1933, a bill unusual as having been supported by the Dail under both the Cosgrove government and its Fianna Fail successor.[62]

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who dealt with certain forms of government property only. Its operation was apparently controlled by the Public Trustee Rules 1927, SI No 14/1927.

[59] See Jeremy Finn "'Should we not profit from such experiments when we could?': appeals to and use of Australasian legislative precedents in debates in the British Parliament 1858-1940" (2007) 28 JLH 31, 32.

[60] J L McCracken *Representative Government in Ireland: A study of Dail Eireann 1919-1948* (OUP, 1958), pp 124-5.

[61] J L McCracken, *Representative Government in Ireland: A study of Dail Eireann 1919-1948* (OUP, 1958), p135.

[62] *Dail* Debates, volume 33, columns 679ff, 20 Februiary 1930 and *Dail* Debates, volume 44, columns 335ff, 21 October 1932.

There is however a very interesting interplay of government action and a private member's in the passage of the Legitimacy Act 1931, the story of which is intertwined with that of the Illegitimate Children (Affiliation Orders) Act 1930. Both statutes largely followed English legislation.
The affiliation orders measure – which created a process whereby the father of an illegitimate child could be made liable to pay money for the support of the child - was introduced and passed as a Government measure[63]. The Legitimacy Act, by contrast, was introduced as a private deputy's bill, and had as its principal feature the legitimation of children whose parents married subsequent to its birth.

What makes this different history odd is that for several years proponents of reform and officials alike saw the two measures as largely complementary ways to reduce the incidence of neglected children and, at one remove, diminish the apparent social evil of prostitution.[64]
I set out the details of these proposals for change and reform in the written paper, and will not cover them here.

Although the affiliation statute was passed in 1930 with broad support, the government showed no signs of action on the Legitimacy Bill. In December an opposition Deputy, Patrick Little sought leave to introduce a Bill on the subject.[65] The second stage was not reached until March 1930, and the Minister for Justice, James FitzGerald-Kenney gave the Bill a hostile reception, focussing on a number of drafting errors which derived from it largely replicating the British Act of 1926 without regard to the somewhat different Irish statutory setting.[66] However the principle of legitimation by subsequent marriage (founded as it was on canon law)

[63] Previous to this, a father was of an illegitimate child could only be required to contribute to its support where the child was supported by the poor rate of a local body, and an action for support was the appropriate officials, see Fitzgerald-Kenney, *Dail* Debates, volume 32, column 520, 30 October 1929.
[64] See correspondence in Ministry for Justice file H266/40 legislation Department of Justice File H213/2 Legitimacy Act for social moral problems, NAI (reformers) and Department of Justice File H213/2 Legitimacy Act (officials), NAI. A further indication is perhaps that the latter file was apparently listed in the departmental index under the heading "Immorality".
[65] *Dail* Debates volume 32, column 2279, 6 December 1929.
[66] *Dail* Debates volume 34, column 244, 27 March 1931.

was widely supported by speakers in the Dail, and even the Minister was forced to accept that the Bill should proceed, although he maintained that Little had forestalled a better-drafted Government Bill. The Bill then proceeded slowly through the Dail and the Seanad, although a number of amendments which had been prepared by the Parliamentary Draftsman's office were made at Committee stage.[67]

(b) Fianna Fail and law reform

The slow pace of law reform slowed drastically under the Fianna Fail government. There is an interesting, if self-serving comment on the lack of success of law reform in the IFS, and some of its causes, in a letter written in 1940 by the then Minister for Justice to the Attorney-General[68], which was prompted by a speech advocating law reform by Justice Meredith.[69] The Minister indicated that a committee of four judges had been asked a year earlier to prepare an informal report on murder trials, but no report had been received. Similarly a Committee on rent restriction had been set up several years earlier, with a request it report as a matter of urgency. Mr Justice Black, appointed when a barrister as chair of the Committee, had admitted he was the cause of the delay since he had not found the time to do the work.

More generally, the Minister was of the view that bills which should have enjoyed wide support could get caught up in unrelated controversies, and he was therefore reluctant to introduce any technical law reform bills unless he was certain the opposition would support them. This may explain lack of action on proposals for reform of both bankruptcy law and the law governing care in public institutions of the mental defective which had been made by governmental Commissions.[70]

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[67] See Memorandum Matheson to Costello, 27 November 1930, file 2002/22/0397 13/1931 Legitimacy Bill 1929, NAI.

[68] H Boland to Kevin Haugh, nd but April 1940, in A-Gs Office file AGO2000/10/1167 7/35 Justice Meredith "Desirable Amelioration of the Law", NAI.

[69] The speech, delivered on 18 April 1940 to the Statistical and Social Inquiry Society of Ireland was published later, see (1940) 74 ILT 108-09. A copy of the speech is in A-Gs Office file AGO2000/10/1167 7/35 Justice Meredith "Desirable Amelioration of the Law".

[70] (1940) 6 Irish Jurist 17.

The timing of the Minister's letter is also significant, as the advent of the Second World War was seen as justifying inaction on all but the most politically neutral matters.

However there was also, very clearly, a partisan aspect to the lack of progress with law reform. The arguments as to lack of resources could be, and were, countered by pointing to the ready availability of bills drafted by the English law Reform Committee which could be readily adapted for Ireland. Use of these models was advocated both by John Costello, the leading opposition spokesman on legal matters during Fianna Fail's period in office, and later himself Taoiseach.

(c) Costello and the 1941 Bill

In this regard I think we can gain from looking at the protracted debates and discussions on John Costello's Law of Torts (Miscellaneous Reforms) Bill 1941, a private member's Bill. The Bill was very much modelled on the Law Reform (Married Women and Tortfeasors) Act 1935 (Imp), which allowed apportionment of damages between tortfeasors – a change which Costello wished to extend to defamation cases - and also exempted a husband from liability for both pre-marriage debts and post-marriage torts of his wife. The Bill passed its second stage in the Dail and was later reported back without amendment by a Select Committee.

Costello's speech at the second stage was in significant part devoted not to this Bill alone but to encouraging the creation of a permanent law reform committee – a matter which I hope to discuss in a separate paper - and to other desirable amendments included the English legislation but not in his Bill. He also referred to other areas where law reform was overdue , including infanticide, adoption, the law of arbitration, testator's family maintenance and a number of other issues I list in the written paper.

Costello then came to the politically vital question of the degree to which law reform in the IFS might draw on British proposals for reform as outlined in the Reports of the Law Reform Committee – something he saw as both necessary and efficient:

> I do not advocate here or elsewhere that we should slavishly follow British legislation in everything they pass—far from it—but I do say that where there are matters which are common to this country and England, it is desirable that our procedure in law should, so far as our own requirements permit, be much the same and that even the very wording of the statutes which deal with situations common to this country and England should be as closely similar as possible."[71]

To this he added the classic "textbook" argument that it was to the advantage of Irish litigants and lawyers alike that the legislation of the IFS be kept sufficiently similar to that of England that English textbooks and decisions could be relied on for guidance.[72]

Costello acknowledged that the Minister for Justice and his Ministry had been preoccupied with other matters and law reform had had a low priority. The Minister somewhat gracelessly accepted the Bill should go to a Select Committee for further consideration.

Ministry officials had few concerns with Costello's Bill as it stood. A memorandum prepared for the Minister in November was quite supportive of the Bill's passage:

> "…[E]xcept for one Section, the Bill is copied word for word from an English "Law Reform" Act of 1935 …the Parliamentary Draftsman says that the drafting, being for the most part a copy of the English statute, is satisfactory subject to some minor amendments which could be inserted at the Committee stage."[73].

[71] *Dail Debates* vol 85, column 1146, 3 December 1941.
[72] *Dail Debates* vol 85, column 1146, 3 December 1941.
[73] Memorandum for Attorney-General, 26 November 1941, in A-Gs Office file AGO/2000/10 2935 SR 012/41 2221/53 Civil Liabilities Bill: Proposal to amend the Law relating to Torts, NAI.

Costello was later to acknowledge that the relevant provisions of the English Act were not ideal, but he had thought adoption of it would be politically advantageous:

> "Had I been left to myself I would have endeavoured to draft a Bill making the Bill clearer than it is in the British Bill. I felt however that when I introduced the Bill into the Dail that I would have a better chance of getting a hearing if I could point to the fact that it was merely a copy of an English Bill which had carried out similar Reforms[sic] some years before than if I endeavoured to draft a Bill in accordance with my own ideas."[74]

The statement is somewhat ambiguous, as it is not clear whether Costello meant that a Bill based on an English model would receive a better hearing that one locally drafted, or whether partisan politics would have prevented a bill drafted *by Costello* from getting a favourable reception. Either reading suggests Costello considered Fianna Fail and its allies would be motivated to oppose the Bill because of its English origins.

The Bill meandered through the legislative process for years but does not appear to have come back before the Dail until 1950 – by which time Costello was Taioseach!

[74] Costello to Dixon, 5 October 943, in A-Gs Office file AGO/2000/10 2935 SR 012/41 2221/53 Civil Liabilities Bill: Proposal to amend the Law relating to Torts, NAI.

12. CONCLUSION

As we might expect, the legislation of the IFS reflects the influences of the se contrary elements of revolutionary nationalism – and its highly divisive political effects, in an atmosphere of social conservatism and limited resources. There were some statutes which show a high degree of local initiative – particularly de Valera's 1937 constitution – and others which show a careful selection from a range of overseas precedents, such as the 1922 Constitution and electoral law. Dominion precedents were, perhaps naturally, important here. Nationalist policies inspired other important legislation, as with the citizenship and immigration provisions of the 1930s, legislation which is important for showing a continuity of policy under governments of different hues.

However to focus on these landmark statutes is to understate the continuing and most important stream of statutes which were modelled on contemporary British legislation. Reliance on these precedents was sensible both in terms of consistency with the inherited law of the IFS and the resources that would have been required if all statutes had been independently drafted.

As we have seen in the discussion of law reform, there was sometimes considerable resistance to many reform proposals based on British, or occasionally other Dominion, law.

I suggest any study of IFS statute law must consider both the occasional radical legal changes – usually inspired in some fashion by nationalist aims – which might nevertheless draw on Dominion precedents and the more numerous statutes which in form and substance continued to draw on British law. This latter has perhaps been understated by other writers. Both aspects are important and require study. However I suggest that to understand IFS law we must look at the interplay of continuity and change, not at either in isolation.