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# Inheriting the Royals: Royal Chartered Bodies in Ireland after 1922

John Biggins<sup>1</sup>

## 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 (ISAD) indicates that the functions performed by these pre-1922 bodies ranged from the delivery of specific services to sectoral regulation. 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 paper 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, at least explicitly, of a pre-1922 royal prerogative to grant and amend royal charters presented legal conundrums for royal chartered bodies and the State. These conundrums were mitigated by a mixture of tailored public and private legislation of the Oireachtas.

These dynamics are interrogated through the lenses of temporality and legal pluralism. Post-1922 Irish Governments sought an accommodation with royal chartered bodies, themselves conceived under a variant common law system predating the emergent Irish State. Faced with a temporal collision between alternative conceptions of common law authority rooted in different moments in time, the State ultimately chose to co-opt royal chartered bodies. It is argued here that this was achieved by transitioning royal chartered bodies to the legal timeline of the new State. The success of this operation is attested by the fact that a number of these bodies remain important today in discharging functions with public impacts. These dynamics are amplified using a case study of a particular royal chartered body, the Institute of Chartered Accountants in Ireland.

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## I. Introduction

The persistence of royal symbols in the Irish constitutional order post-1922 was a particularly thorny political issue. This was evident during negotiations on the Anglo-Irish Treaty and, subsequently, on the draft Constitution of the Irish Free State (Saorstát Éireann). 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 about the broader legal infrastructure the new state was to inherit. Michael Collins reportedly accused the British government of trying to force the English common law upon Ireland. This raises a tantalising question as to whether Irish leaders had been contemplating a substantial break with English legal norms. As the core of Collins’ complaint has not been identifiable,<sup>3</sup> alas this question remains open. What can be said with greater confidence is that 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, akin to the physical re-painting of red letterboxes in green after 1922 - the simultaneous adoption and adaptation of still useful structures.<sup>4</sup> 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 of them 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. A number of them have benefited from public funding over the years.<sup>5</sup> This is particularly evident in the

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<sup>2</sup> L. Cahillane, *Drafting the Irish Free State Constitution* (Manchester University Press, 2016) p. 54

<sup>3</sup> Ibid.

<sup>4</sup> Thanks to Professor Colin Scott for this analogy.

<sup>5</sup> 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,

realms of education and professional accreditation. RCBs are, therefore, exemplars of administrative resilience.

As the sands of political and constitutional authority shifted in 1922, RCBs initially faced an uncertain future. Officers of the British administration formerly assigned governance or approval roles under royal charters, such as the Lord Lieutenant of Ireland, had ceased to exist in 1922. This initially presented operational difficulties for RCBs. 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. 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 difficulties for the Oireachtas from a normative standpoint, these private legislative patterns nonetheless accentuated the *sui generis* nature of the RCB inheritance.

The RCB inheritance was also a politically awkward one. A parliamentary debate in December 1949 exemplified how the visible trappings of a historical monarchy could be politically 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>6</sup>

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

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>7</sup>

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*Appropriation Accounts* (various years): <https://www.audit.gov.ie/en/find-report/publications/appropriation%20accounts/> (last accessed 9 November 2022).

<sup>6</sup> Dáil Éireann Debate, *Questions from Proinsias Mac Aogáin to the Taoiseach* (7 December 1949).

<sup>7</sup> Dáil Éireann Debate, *Response of Taoiseach to questions from Proinsias Mac Aogáin* (7 December 1949). Incidentally, the Taoiseach (John A. Costello) making this statement had, in his earlier guise as Attorney General in 1926, provided advice on thorny legal issues relating to royal

It is intriguing that RCBs with roots in an earlier common law order different in complexion to that of the post-1922 Irish State have so successfully endured. An attempt is made here to unpick this phenomenon. The paper opens with a general outline of some key themes from the law and time<sup>8</sup> and temporal legal pluralism literature.<sup>9</sup> Those themes are taken up in the RCB context at various points later in the paper. 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, 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 uniquely 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.

## **II. Royal Chartered Bodies: Temporal Legal Pluralism and Legal Timelines**

The persistence of RCBs and their relationship to the Irish State begs a normative question about the nature of the legal zone they occupied post-1922. 'Legal pluralism' offers a framework to conceptualise this. 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 of 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

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charters. Politics aside, he must have been keenly aware of the archaic administrative and legal challenges these entities presented for the new State, Letter, dated 1st 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.

<sup>8</sup> E.g. E. Grabham and S.M. Beynon-Jones, 'Introduction' in *Law and Time*, eds. S.M. Beynon-Jones and E. Grabham (Routledge, 2019).

<sup>9</sup> E.g. N. Wheatley, 'Legal Pluralism as Temporal Pluralism: Historical Rights, Legal Vitalism and Non-Synchronous Sovereignty' in *Power and Time: Temporalities in the Making of History*, eds. D. Edelstein et al. (University of Chicago Press, 2020)

practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.<sup>10</sup>

Legal pluralism has frequently been deployed in analyses of systems shaped by colonialism,<sup>11</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>12</sup> This paper engages the opposite scenario – husbandry, by the Irish State, of overtly colonial institutions in a post-colonial context. RCBs are, in their own way, artefacts of colonialism insofar as they draw upon vestigial rights located 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>13</sup> so often accompanied by various legal and social injustices. 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 post-1922.

The Irish State's indulgence of RCBs could, therefore, be perceived as legal pluralism in a 'weak' sense, as articulated by Griffiths.<sup>14</sup> In this conception 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 overarching common law-based system adopted by the Irish State post-1922. But 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 describing the peculiar challenges posed by RCBs.

More significant, perhaps, was that RCBs were rooted in a lapsed form of 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 present or a new sovereign

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<sup>10</sup> J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1 at 39.

<sup>11</sup> See, e.g., K. von Benda-Beckmann & B. Turner, 'Legal Pluralism, Social Theory and the State' (2018) 50 *The Journal of Legal Pluralism and Unofficial Law* 255.

<sup>12</sup> Taken further in G. Teubner, "Global Bukowina": Legal Pluralism in the World Society' in *Global Law without a State*, ed. G. Teubner (Aldershot 1997).

<sup>13</sup> See, e.g., S. Dorsett, 'Since Time Immemorial: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry' (2002) 26 *Melbourne University Law Review* 32.

<sup>14</sup> Griffiths above n. 10, at 5.

legal order. 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>15</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>16</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 towards the present (or, conversely, into siloed dead ends of historical oblivion).<sup>17</sup>

Temporal legal pluralism may be considered within a broader theoretical framework of ‘law and time’ or the ‘times of law’.<sup>18</sup> In these frameworks, time itself is a legitimate object of study. This contrasts with some traditional assumptions of time as merely an implicit prop or background noise, 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 constructive feature of law’.<sup>19</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>20</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>21</sup> But this ostensibly non-historical common law precedent can (and often does) flexibly adapt or shapeshift as evolving contexts may demand.<sup>22</sup> What Hale branded as the ‘insensible’ variation of common law over

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<sup>15</sup> Wheatley above n. 9, p. 53.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid., at p. 55.

<sup>18</sup> E.g. Grabham and Beynon-Jones above n. 8.

<sup>19</sup> R. Mawani, ‘The Times of Law’ (2015) 40 *Law & Social Inquiry* 253, at 255.

<sup>20</sup> Grabham and Beynon-Jones above n. 8, p. 2.

<sup>21</sup> K. M. Parker, ‘Law “In” and “As” History: The Common Law in the American Polity, 1790-1900’ (2011) 1 *UC Irvine Law Review* 587, at 600.

<sup>22</sup> Mawani above n. 19, at 257.

time underplays this inherent flexibility.<sup>23</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>24</sup>

The intersection between the 'non-historical' time of the common law and a 'foundational and teleological'<sup>25</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>26</sup> One reason given is that the common law carried considerable 'ideological freight'<sup>27</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>28</sup> Another reason offered is the prominent role of 19<sup>th</sup> century American common lawyers in articulating law to societal constituencies for whom the administrative State was not yet present in the way it would later become.<sup>29</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>30</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>31</sup> It is, though, otherwise difficult to discern a substantial 'ideological freight'<sup>32</sup> conceded to the common law in the Irish revolutionary fervour of the 20<sup>th</sup> century, not least because of its association with land injustices over the previous centuries. 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 unjust 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 the Judiciary

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<sup>23</sup> M. Hale, *History of the Common Law* (Charles M. Gray, ed., University of Chicago Press, 1971) pp. 39-40.

<sup>24</sup> Mawani above n. 19, at 255.

<sup>25</sup> Parker above n. 21, at 606.

<sup>26</sup> *Ibid.*, at 594.

<sup>27</sup> *Ibid.*, at 595.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, at 596.

<sup>30</sup> *Ibid.*, at 596-597.

<sup>31</sup> M. Kotsonouris, *Retreat from Revolution: The Dáil Courts 1920-24* (Irish Academic Press, 1994), p. 98.

<sup>32</sup> Parker above n. 25, at 595.



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>33</sup>

Enthusiasm for the common law was thus less overt in the post-1922 Irish context than it may have been in the 19<sup>th</sup> century American order. Still, Parker's temporal observation pertaining to the American experience could, as will be illustrated later in this paper, just as easily have been written about 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>34</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 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>35</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.

### III. The Post-Colonial Administrative Legacy

7 January 1922 saw ratification of the Anglo-Irish Treaty 1921, or the 'Articles of Agreement for a Treaty between Great Britain and Ireland', in the Second Dáil (Parliament). 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

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<sup>33</sup> Kotsonouris above n. 31, p. 99.

<sup>34</sup> Parker above n. 25, at 606.

<sup>35</sup> G. R. Painter, "'Give us his name": Time, Law and Language in a Settler Colony' in *Law and Time*, eds. S.M. Beynon Jones and E. Grabham (Routledge, 2019), p. 109.

April 1922.<sup>36</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>37</sup> Part I of the schedule to that order confirmed transfer of responsibility of a number of bodies established prior to 1922. Of particular note, the listed transferred functions in that schedule were framed in open terms. For example, the functions transferred to the Provisional Government Ministry of Education were described as follows:

*The administration of services in connection with Education, including functions hitherto performed by the following existing [British] Government departments and officers:—*

*The Commissioners of National Education in Ireland;*

*The Intermediate Education Board for Ireland; and*

*The Commissioners of Endowed Schools.*

The word ‘including’, used in similar manner throughout the schedule, implied that the new state’s administrative inheritance was, in totality, much broader. The Irish State Administration Database (ISAD)<sup>38</sup> confirms this. ISAD indicates there were 64 active public administrative bodies (‘units’) in Saorstát Éireann as at 1 January 1923, excluding Government Ministries and related executive offices.<sup>39</sup> The functions of a large number of these pre-1922 bodies transferred to the Provisional Government of Ireland were inherited by Saorstát Éireann and, in some cases, continued well beyond that. Of these administrative bodies, 14 were originally birthed by royal charter prior to 1922. These are coded as ‘chartered corporations’ in ISAD and are the focus of this paper.

It should also be noted that some chartered corporations are not captured in ISAD due to the fact that they do not have an explicit, formal nexus with the State, e.g. in terms of legislative control, governance or funding. Chartered Accountants Ireland (formerly the Institute of Chartered Accountants in Ireland) falls into this category of RCB not currently captured in ISAD. However, as will be

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<sup>36</sup> Order in Council, *The Belfast Gazette* (7 April 1922), pp. 379-384 issued under the *Irish Free State (Agreement) Act 1922* (13 Geo. 5 Sess. 2 c. 1).

<sup>37</sup> For discussion of ambiguities regarding the formal emergence of the Irish State see, e.g., T. Mohr, ‘Law and the Foundation of the Irish Free State on 6 December 1922’ (2018) 59 *Irish Jurist* 31, particularly at 50-51.

<sup>38</sup> On ISAD generally, see <http://www.isad.ie/>; See also, e.g., N. Hardiman and C. Scott., ‘Ordering Things: The Irish State Administration Database’ (2012) 27 *Irish Political Studies* 1; M. 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 (18 October 2021): <https://publicpolicy.ie/governance/the-irish-state-administration-database/>

<sup>39</sup> Hardiman et al., *The Irish State Administration Database*. <http://www.isad.ie> (last accessed 5 January 2023).

explored later in this paper, it turns out public influences have weighed on that body in more subtle, but impactful, ways.

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>40</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*<sup>41</sup> and the *Expiring Laws Acts* which facilitated the adaptation and extension of pre-1922 legislation in Saorstát Éireann. However, a particular challenge did present itself around the status of royal charters.

#### **IV. Brief Primer on Royal Prerogative and Royal Charters**

In the case of *Re Irish Employers*,<sup>42</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.

This was initially a loose discretion, exercisable by the English (later British) crown without significant checks or constraints. Royal prerogative was progressively restricted as power and authority shifted from the crown to Parliament.<sup>43</sup> It is notoriously difficult to define with uniform precision.<sup>44</sup> 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>45</sup> A variant description

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<sup>40</sup> No. 1 of 1922.

<sup>41</sup> No. 2 of 1922.

<sup>42</sup> [1955] I.R. 176.

<sup>43</sup> UK House of Commons, *The Royal Prerogative*, Briefing Paper Number 03861 (17 August 2017), pp. 21-23, accessed at: <https://researchbriefings.files.parliament.uk/documents/SN03861/SN03861.pdf> (last accessed 19 January 2023).

<sup>44</sup> UK Ministry of Justice, *The Governance of Britain: Review of the Executive Royal Prerogative Powers: Final Report* (2009), p. 7, accessed at: <https://webarchive.nationalarchives.gov.uk/ukgwa/20110310111923/http://www.justice.gov.uk/publications/docs/royal-prerogative.pdf> (last accessed 19 January 2023).

<sup>45</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., 1959) p. 424.

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>46</sup>

In the *Case of Proclamations*<sup>47</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>48</sup> Similarly, in the more recent case of *R (Miller) v The Prime Minister*,<sup>49</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>50</sup>

The broader survival (or not) of royal prerogatives in the Irish legal order beyond 1922 has been a matter of considerable judicial and academic debate.<sup>51</sup>

Treatment of that debate is outside the scope of this paper. That is because, 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 (explicitly) shrouded in royal prerogative, equivalent forms of executive and legislative initiatives sustained RCBs after 1922 (addressed further below).

Royal charters, the constitutional documents of RCBs, were historically granted upon a petition under the crown prerogative of 'letters patent'.<sup>52</sup> These are proclamatory orders confirming or establishing a particular legal right, title, body or jurisdiction. Costello describes the pre-1922 procedure thus:

...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>53</sup>

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<sup>46</sup> William Blackstone, *Commentaries on the Laws of England, a facsimile of the first edition of 1765-1769* (1979), p. 111.

<sup>47</sup> *Case of Proclamations* (1611) 12 Co. Rep. 74.

<sup>48</sup> *Ibid.*, at 76 (Sir Edward Coke).

<sup>49</sup> [2019] UKSC 41.

<sup>50</sup> *Ibid.*, at para. 47.

<sup>51</sup> Well treated in L. Cahillane, 'The Prerogative and its Survival in Ireland: Dusty Antique or Positively Useful' (2010) 1 *Irish Journal of Legal Studies* 1.

<sup>52</sup> UK National Archives, *Royal Grants in Letters Patent and Charters from 1199*: <https://www.nationalarchives.gov.uk/help-with-your-research/research-guides/royal-grants-letters-patent-charters-from-1199/> (last accessed 19 January 2023).

<sup>53</sup> K. Costello, 'The Expulsion of Prerogative Doctrine from Irish Law: Quantifying and Remediating the Loss of Royal Prerogatives' 32 (1997) *Irish Jurist* 145, at 150.

As such, RCBs are incorporated under royal charters and usually operate in accordance with detailed bye-laws made thereunder. 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>54</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 a 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 authorise the seal to be affixed, the act of the corporation is complete.<sup>55</sup>

RCBs today may (depending on their activities) also be captured by public legislative provisions applicable to incorporated and charitable bodies more generally.<sup>56</sup> The RCBs of specific interest in this paper are those originally established prior to 1922, surviving into Saorstát Éireann and beyond – a broad church encompassing educational, health, professional and sporting bodies.

## V. 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>57</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>58</sup> and Irish parliamentarians were required to swear an oath of allegiance to the crown.<sup>59</sup> The emergent State in 1922 also remained within the orbit of the British Empire as a Dominion.<sup>60</sup> While these qualifications to sovereignty diminished as time went on, they undoubtedly influenced the new State’s formative years.

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<sup>54</sup> [1910] 1 IR 370.

<sup>55</sup> [1910] 1 IR 370, at 383-384.

<sup>56</sup> For example, the *Companies Act 2014* (No. 38 of 2014); *Charities Act 2009* (No. 6 of 2009).

<sup>57</sup> See the discussion in Cahillane above n. 51, at 100-103.

<sup>58</sup> E.g. Article 51 of the *Constitution of the Irish Free State (Saorstát Éireann) Act, 1922* (No. 1 of 1922).

<sup>59</sup> Article 14 of the *Constitution of the Irish Free State (Saorstát Éireann) Act, 1922* (No. 1 of 1922).

<sup>60</sup> Article 1 of the *Treaty between Great Britain and Ireland signed at London December 6, 1921*.

After the transfer of administrative authority in 1922, the crown no longer exercised a role in founding or sustaining<sup>61</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>62</sup> As will be demonstrated below, a mixture of public and private legislation, as well as executive orders, were deployed to fasten RCBs to the post-1922 Irish State. In this way, RCBs not only survived 1922 but were actively sustained by types of legislation and executive orders tailored specifically 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 been allocated governance functions or exercised important powers to approve new or amended bye-laws. For example, charters contained references to the ‘Lord Chancellor of Ireland’ or ‘Our Privy Council in Ireland’. Those offices no longer existed in Saorstát Éireann. With the legality of royal charters ‘cleaved apart’<sup>63</sup> in 1922, it thus became necessary to ensure officers of Saorstát Éireann were 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 which RCBs initially occupied.<sup>64</sup> In July 1924 the RCPI had modified its bye-laws governing examinations for candidates seeking to become members of that body. The RCPI’s 1878 royal charter required that such bye-laws 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 bye-laws within 3 months, subject

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<sup>61</sup> With a couple of peculiar exceptions, such as the Office of Arms. See S. Hood, *Royal Roots Republican Inheritance The Survival of the Office of Arms* (Woodfield Press and National Library of Ireland, Dublin, 2002).

<sup>62</sup> Houses of the Oireachtas, *Select Committee Adaptation of Charters Bill, 1925 debate – Thursday, 18 Feb 1926*: [https://www.oireachtas.ie/en/debates/debate/select\\_committee\\_adaptation\\_of\\_charters\\_bill\\_1925/1926-02-18/2/](https://www.oireachtas.ie/en/debates/debate/select_committee_adaptation_of_charters_bill_1925/1926-02-18/2/) (last accessed 19 January 2023).

<sup>63</sup> Wheatley above n. 9, p. 55.

<sup>64</sup> Letter from Royal College of Physicians of Ireland to the Attorney General of Saorstát Éireann, found in NAI, TAOIS/S4966 (‘RCPI letter’).

to the advice and consent of the Privy Council of Ireland (a defunct pre-1922 executive body).

After adopting new bye-laws in July 1924, the RCPI duly submitted them to the representative of the crown in Ireland, the Governor General for Saorstát Éireann.<sup>65</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>66</sup> As it transpired, the Governor General had consulted the Attorney General (AG) on the matter, though the Governor General had seemingly not disclosed that fact in his response to the RCPI.<sup>67</sup> The RCPI then engaged a Senator, Sam Browne K.C., who advised the RCPI that the charter did not come within the ambit of the *Adaptation of Enactments Act 1922* (‘the 1922 Act’).<sup>68</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>69</sup> The RCPI submission to the AG went on:

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>70</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 recommended that ‘it would be reasonable that the Government should

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Letter, dated 20 January 1925, from Attorney General to Secretary to the Executive Council of Saorstát Éireann, found in NAI, TAOIS/S4966.

<sup>68</sup> RCPI letter above n. 63.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

undertake such legislation as would be necessary to meet that difficulty', which 'could be general in form'.<sup>71</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>72</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>73</sup> Temporal salvation for the RCPI and other RCBs came via the *Adaptation of Charters Act 1926* ('the 1926 Act'),<sup>74</sup> a public act of the Oireachtas. The 1926 Act authorised the Government to issue orders (statutory instruments) adapting or modifying royal charters. 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 is 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:

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 underpinned by, pre-1922 parliamentary legislation.<sup>75</sup> Ambiguity around the intended scope of Article 73 prompted some 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 pre-existing (i.e. pre-1922) 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

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<sup>71</sup> Ibid.

<sup>72</sup> Wheatley above n. 9, p. 55.

<sup>73</sup> Grabham and Beynon-Jones, above n. 8, p. 21.

<sup>74</sup> (No. 6 of 1926).

<sup>75</sup> For example, *Bank of Ireland Act 1781*.



technical language is called legal signification...they would not come in if this whole thing is based on Article 73...<sup>76</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>77</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>78</sup>

However, the perspective of the President of the Executive Council (Prime Minister) during 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>79</sup>

In this interpretation of the constitutional position, RCBs were confronted by a version of what Chalmers coined as 'law with two faces, contorted in varying expressions of recognition and denial'.<sup>80</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 invocation, i.e. through legislation.

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 Prime Minister 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

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<sup>76</sup> Mr Jameson, above n. 62.

<sup>77</sup> (Unreported, 16 July 1926).

<sup>78</sup> Costello above n. 53, at 151, fn. 22.

<sup>79</sup> The President of the Executive Council, above n. 62.

<sup>80</sup> S. Chalmers, 'Terra Nullius? Temporal Legal Pluralism in an Australian Colony (2020) 29 *Social and Legal Studies* 463, at 480.

utterance and to the circumstances of the utterance’.<sup>81</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.

Shorn of this (parliamentary) interpretation, Article 73 did not otherwise offer an impenetrable shield for RCBs. Its wording, and particularly the phrase ‘the extent to which they are not inconsistent therewith...’, left leeway for royal charters to be deemed inconsistent with the new constitutional scheme. No such determinations appear to have been made, or even countenanced, and it is unclear exactly how they would have been made (or by whom). It is also unclear what the precise legal effect of such a finding could have been. In any case, once it was accepted in principle that royal charters fell within the rubric of ‘laws’ under Article 73 (be they granted under pre-1922 common law prerogatives and/or legislation), then the Oireachtas theoretically had other options to the one it chose under the 1926 Act.

On the authority of Article 73, the Oireachtas may have been entitled to simply do nothing in response to pleas from RCBs if it had formed a view that a particular charter, or charters, were somehow repugnant to the new constitutional scheme. Alternatively, the Oireachtas may have been competent to enact amending or revocatory legislation on public policy grounds affecting specific RCBs. Nonetheless, such moves would probably have been cast by the affected RCB/s as a substantial interference with private property rights and would likely have been challenged in the Courts.

Ultimately, the Oireachtas chose to transpose RCBs’ into the post-1922 legal order. Section 1(1) of the 1926 Act refers to ‘...any Charter which by virtue of Article 73 of the Constitution has the force of law in Saorstát Eireann...’. While open to interpretation, this may have conferred a blanket statutory grant of legality to all royal charters, sidestepping any potential questions of ‘inconsistency’ under Article 73. No doubt the centrality of certain RCBs to economic and social life underpinned the pragmatic philosophy behind the 1926 Act. In so doing, the 1926 Act renewed RCBs’ ‘legitimacy’ and granted them a revamped ‘source of normativity’,<sup>82</sup> which they otherwise lacked in the legal time zone of the new State.

The rebuttable presumption of constitutionality in Article 73, affirmed in the 1926 Act, was later recast in Article 50(1) of *Bunreacht na hÉireann* 1937. Over

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<sup>81</sup> Painter above n. 35, at 123.

<sup>82</sup> Wheatley above n. 9, p. 55.

time, the Courts also adopted a generous interpretation of the constitutional transitory provisions with respect to RCBs. In *Geoghegan v. Institute of Chartered Accountants in Ireland*<sup>83</sup> it was argued that the royal charter establishing the Institute of Chartered Accountants in Ireland (to which this paper will return) did not survive the Constitution of Saorstát Éireann 1922 and *Bunreacht na hÉireann* 1937. But Murphy J was satisfied that:

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 independent Irish State. Certainly any other result would be chaotic in the extreme.<sup>84</sup>

Once it had been settled within Parliament that royal charters could benefit from the protection of Article 73, there was no obvious agitation in 1925-26 for particular charters to be cancelled or withdrawn, though the use of 'royal' monikers was occasionally challenged in later years.<sup>85</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 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>86</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>87</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

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<sup>83</sup> [1995] 3 IR 86.

<sup>84</sup> [1995] 3 IR 86, at 95.

<sup>85</sup> Costello above n. 53, at 150.

<sup>86</sup> Sir James Craig, *Dáil in Committee – Adaptation of Charters Bill, 1925 – Wednesday 11 Nov 1925*, vol. 13 no. 2: <https://www.oireachtas.ie/en/debates/debate/dail/1925-11-11/39/> (last accessed 19 January 2023).

<sup>87</sup> *Ibid.*, Mr Johnson.

within the personal custody of the bodies affected by them'.<sup>88</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 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>89</sup> This intimates a political intention that the 1926 Act should primarily deal with RCBs whose activities affected cohorts in society, i.e. 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 bye-laws 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, 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>90</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.

Articles 4 and 5 of the *Royal Hibernian Academy (Adaptation of Charter) Order 1940*<sup>91</sup> provide:

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 *Adaptation of Enactments 1922* ('the 1922 Act') and section 9 of the *Ministers and Secretaries Act 1924* ('the 1924 Act').<sup>92</sup> The net effect is:

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<sup>88</sup> Exchange between Mr Wyse Power and the President of the Executive Council above n. 62.

<sup>89</sup> President of the Executive Council above n. 62.

<sup>90</sup> S.I. No. 38/1926

<sup>91</sup> S.I. No. 331/1940

<sup>92</sup> (No. 16 of 1924).

- 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 bodies) performing ‘public service’ functions and arrange for their jurisdictions, powers, duties, and functions etc., to be subsumed into Ministerial Departments.

Significantly, the phrases ‘function of government’, ‘public duties’, ‘public service’ and ‘public administration’ are not defined for these purposes, leaving the Government a wide latitude to implement these measures if or when seen fit (although they have seemingly not been exercised).

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 Bank of Ireland (BOI), insofar as BOI might incidentally perform ‘government functions’ as a custodian of public monies.<sup>93</sup> It was urged by the President of the Executive Council that the respective sections should not be construed as applying to these entities,<sup>94</sup> though legislative amendments were not favoured either.<sup>95</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, i.e. from December 1922. But it was contended in parliamentary debate that this retrospective application could ‘take away’ RCB-related rights existing prior to enactment of the 1926 Act. While the precise

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<sup>93</sup> An explicit exemption for Bank of Ireland did not ultimately appear on the face of the legislation itself and this was probably due to an opinion of the Attorney General that such an amendment ‘was not merely unnecessary but might conceivably be productive of unexpected and harmful results’ (Letter, dated 24 February 1926 from the Attorney General to the President of the Executive Council, Adaptation of Charters Bill: Senator James’s Motion, found in NAI, TAOIS S/9488).

<sup>94</sup> Response of President of the Executive Council to motion moved by Mr Brown, *Seanad Éireann debate - Wednesday, 24 Feb 1926 Vol. 6 No. 10*: <https://www.oireachtas.ie/en/debates/debate/seanad/1926-02-24/7/> (last accessed 19 January 2023).

<sup>95</sup> *Ibid.*, the President of the Executive Council observed: ‘There is a danger that if this amendment were put into this Bill there would be doubt about its being held that Section 7 [of the 1922 Act] did not cover Universities...’.

nature of such rights was not made particularly clear,<sup>96</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>97</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>98</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 new State’s broad sovereign authority over RCBs and the assertion 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. Even if those powers would not be exercised, a sovereign authority that had been implicit in the past since 1922 was made explicit in the present of 1926 and in the future beyond. RCBs were brought firmly into the legal time zone of the new State. Nevertheless, the official 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>99</sup>

Compounding this official reticence, there were also limits to what could be achieved under the 1926 Act. While statutory orders could adapt royal charters, they could not substantively amend them (although, perhaps, a fine line conceptually). So it would become necessary for the State to go even further in order to facilitate more substantive changes to RCBs’ charters to ensure

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<sup>96</sup> Mr T.J. O’Connell above n. 86.

<sup>97</sup> Wheatley above n. 9, p. 55.

<sup>98</sup> Ibid.

<sup>99</sup> President of the Executive Council above n. 62.

continued alignment between RCB and State legal time-zones. Enter the private act.

## VI. 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, i.e. 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). Nonetheless, 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>100</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. 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>101</sup>

Private acts of parliament should not be confused with ‘private members’ (public) Bills, i.e. Bills for a public general Act of Parliament proposed by individual parliamentarians rather than the government. Private legislation has been defined as:

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<sup>100</sup> Houses of the Oireachtas, *Report on the Revision of Standing Orders Relative to Private Business 1939* (7 November 2012) (on file with author).

<sup>101</sup> *Ibid.*, p. 17.

[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>102</sup>

Private legislation has its ultimate 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>103</sup> Private legislation historically generated a substantial amount of parliamentary business in England, subsequently Great Britain and then the United Kingdom, 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>104</sup> By the 19<sup>th</sup> century the majority of parliamentary business was still taken up with private legislation.<sup>105</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>106</sup> From the mid-seventeenth to nineteenth century private legislation also featured, albeit less prominently, in the pre-Act of Union Irish Parliament, amounting to 13.8 per cent of the total legislation there.<sup>107</sup>

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>108</sup> ‘Hybrid’ legislation, i.e. 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>109</sup>

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<sup>102</sup> Erskine May, *Parliamentary Practice* (24th ed., Lexis, 2011), at [para. 42.1].

<sup>103</sup> R. Byrne and J.P. McCutcheon, *The Irish Legal System* (4<sup>th</sup> ed., LexisNexis Butterworths, 2005), p. 420.

<sup>104</sup> J. Hoppit, ‘Patterns of Parliamentary Legislation’ (1996) 39 *The Historical Journal* 109, at p. 116.

<sup>105</sup> House of Commons Library, *Private Bills in Parliament: House of Commons Background Paper* (SN/PC/06508) (7 January 2014), <https://commonslibrary.parliament.uk/research-briefings/sn06508/> (last accessed 19 October 2022).

<sup>106</sup> D. Bogart and G. Richardson, ‘Property Rights and Parliament in Industrialising Britain’ (2011) 54 *The Journal of Law & Economics* 241.

<sup>107</sup> J. Kelly, ‘The Private Bill Legislation of the Irish Parliament 1692-1800’ (2014) *Parliamentary History* 73, at 74.

<sup>108</sup> Hoppit, above n. 104, at 116.

<sup>109</sup> Houses of the Oireachtas, Report above n. 100, p. 21; assumed to be the *Limerick Harbour Tramways Act 1931* (No. 1 Private) of 1931.



Private legislation can be delineated into two very broad categories - 'personal' and 'local' acts - which are further subdivisible within themselves.<sup>110</sup> 'Personal acts' have become very rare in recent decades but were previously promoted by, and passed for, the benefit of certain individuals. Such legislation usually aimed to redress a specific wrong or obtain authorisation for an otherwise restricted or prohibited activity, such as changing a name, securing a divorce or marrying within a prohibited degree of relationship.<sup>111</sup> Public legislation now regulates these matters.

Personal legislative acts could also recalibrate property settlements and estates in a more cost effective manner, or in ways not attainable at common law or equity. Such legislation was not uncontroversial.<sup>112</sup> An Irish example is the *Altamont (Amendment of Deed of Trust) Act 1993*,<sup>113</sup> altering the trust title to Westport House, County Mayo. This sought to resolve a situation where the settlor had originally intended the property to pass to a male heir but, having produced none, an amendment of the settlement was sought to ensure the settlor's daughters could inherit instead. This result could only be achieved at the time via a dedicated private statute. This episode influenced the Law Reform Commission in recommending legislative improvements in the area.<sup>114</sup>

'Local acts', including 'statutory authority' acts, were generally sought by local authorities or specially constituted organisations, often to advance transportation and urban improvement objectives. By way of examples, legislation might be promoted for the building of roads, railways and canals; for cemeteries; prisons; accommodation and relief of the poor. Organisations established for these purposes might or might not be profit motivated.<sup>115</sup> Some such organisations were afforded substantial powers, for instance to acquire rights to land and/or to levy local taxes and tolls.<sup>116</sup> Evolution in popular expectations of the administrative state spurred a gradual migration of certain policy areas previously conceived as private or local, into the ambit of the public.<sup>117</sup> Historically key areas of private legislative focus, such as planning,

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<sup>110</sup> House of Commons Information Office, *Tracing Acts of Parliament* (September 2010), <https://www.parliament.uk/globalassets/documents/commons-information-office/l12.pdf> (last accessed 19 October 2022).

<sup>111</sup> House of Commons Library above n. 105, p. 3.

<sup>112</sup> Hoppit above n. 104, at 123-124.

<sup>113</sup> No. 1 (Private) of 1993.

<sup>114</sup> Law Reform Commission, *Report on the Variation of Trusts* (LRC 63-2000), <https://www.lawreform.ie/fileupload/Reports/rVTs.htm> (last accessed 19 October 2022).

<sup>115</sup> Bogart and Richardson above n. 106, at 246.

<sup>116</sup> *Ibid.*, at 246-247.

<sup>117</sup> Houses of the Oireachtas, Report above n. 100, pp. 20-21.

public utilities and public services provision are now typically advanced in conventional public (as opposed to private) legislation.

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>118</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.

Promoters of private legislation may be individuals or organisations and can be opposed by petition. Applications to parliament are subject to payment of fees. Promotion of a private bill must conform to strict procedures in parliamentary standing orders.<sup>119</sup> In Ireland, a notice of any proposed private bill must be published in a newspaper published or circulated in the relevant locality, as well as in *Iris Oifigiúil* and on the Oireachtas website. Applications must also be deposited with the Office of the Attorney General and every Government Department, plus the Charities Regulatory Authority if the promoter is of charitable status. If the entity promoting the private legislation is a RCB, proof must be adduced that the application has been approved by an ordinary simple majority resolution of the RCB's members.

A Joint Committee on a Private Bill, drawing its membership from both Houses of the Oireachtas, convenes to consider a private legislative proposal before issuing a report to the Seanad (Senate - Upper House) and the Dáil (Lower House). The promoter and, if any, a petitioner (opposer) may, if they wish, be represented at the Joint Committee hearings by a registered parliamentary agent (solicitor) and legal counsel. The Joint Committee is also competent to determine the *locus standii* of any petitioners. Accordingly, parliamentary proceedings on private legislation are, to some extent, of a judicial character.<sup>120</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

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<sup>118</sup> (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.

<sup>119</sup> Houses of the Oireachtas, Report above n. 100, Appendix 2.

<sup>120</sup> *Ibid.*

other former British colonies, particularly New Zealand.<sup>121</sup> And it is still *the* legislative vehicle for substantively amending the charters of most RCBs in Ireland. As such, private legislation is simultaneously highly relevant for RCBs but almost irrelevant in every other sector. RCBs availing of private legislation to effect substantive alterations to their charters have included:

- The Governor and Company of the Bank of Ireland (1929 and 1935);
- National Maternity Hospital, Dublin (1936);
- The Royal Hospital for Incurables, Dublin (1953);
- The Convalescent Home, Stillorgan (1958);
- The Institution of Civil Engineers of Ireland (1960 and 1969);
- The Royal College of Surgeons in Ireland (1965 and 2003);
- The Institute of Chartered Accountants in Ireland (1966);
- The Royal College of Physicians of Ireland (1979);
- Trinity College Dublin (2000).

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>122</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>123</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

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<sup>121</sup> Ivor Richardson, ‘Private Acts of Parliament’ (2010) 41 *Victoria University of Wellington Law Review* 653.

<sup>122</sup> E.g. section 9 of *The Royal College of Surgeons in Ireland (Charter Amendment) Act 1965* (No. 1 Private of 1965); section 13 of *The Institution of Civil Engineers of Ireland (Charter Amendment) Act, 1969* (No. 1 Private of 1969); section 14 of *The Royal College of Physicians of Ireland (Charter and Letters Patent Amendment) Act, 1979* (No. 1 Private of 1979).

<sup>123</sup> Wheatley above n. 9, p. 55.

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 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 some notable exceptions.<sup>124</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>125</sup> This was a ‘contested’ private bill, i.e. it was opposed by petition.

The backdrop here was the *Universities Act 1997* (the 1997 Act),<sup>126</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>127</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 official promotion of the Irish language and culture has been very much a post-1922 public policy objective, unlikely to have historically featured in the charters of many (if any) 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.

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<sup>124</sup> An instance outside the RCB context was *Cane v. Dublin Corporation* [1927] IR 582 involving an attempt by a landowner to recover costs incurred when opposing private legislation which was subsequently withdrawn by its promoters.

<sup>125</sup> (No. 1 Private of 2000).

<sup>126</sup> (No. 24 of 1997).

<sup>127</sup> Specific provisions for Trinity College have also been included in the more recent *Higher Education Authority Act 2022* (No. 31 of 2022).

In the final stages of parliamentary committee scrutiny, Desmond O'Malley Teachta Dála (TD)<sup>128</sup> argued that, coupled with drafting issues in the private bill itself, a number of procedural irregularities had arisen. TCD (as promoter) had, *inter alia*, allegedly relied on a flawed internal ballot and on a premature notice published in *Iris Oifigiúil*. It was also claimed that internal consultation and approval within the University of Dublin had not been secured. The Oireachtas Private Bills Office had seemingly not been made aware of these irregularities and they only came to light during parliamentary hearings on the legislation.<sup>129</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>130</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>131</sup>

This episode is loaded with temporal significance. Here was a scenario whereby TCD, a 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. In so doing, things got somewhat messy. The

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<sup>128</sup> The Irish designation for a member of Parliament.

<sup>129</sup> Desmond O'Malley TD, *Private Business. - Trinity College, Dublin (Charters and Letters Patent Amendment) Bill, 1997 – Report and Final Stages, Dáil Éireann debate – Thursday 26<sup>th</sup> October 2000, Vol. 525, No. 1: <https://www.oireachtas.ie/en/debates/debate/dail/2000-10-26/7/> (last accessed 19 January 2023).*

<sup>130</sup> *Ibid.*, Dick Roche TD.

<sup>131</sup> *Ibid.*, Enda Kenny TD. In fact, such reform was hiding in plain sight. Section 76 of the *Health Act 1970* (No. 1 of 1970) empowers the Minister for Health, following consultation with the Charities Regulatory Authority, 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 section 76 is subject to adoption by the Houses of the Oireachtas. The Minister's powers on this score have been further expanded in subsequent amending legislation. As such, it is not necessary for hospitals constituted by royal charter to undergo a private legislative procedure in order to secure charter amendments.

frustrations of parliamentarians during debates on the matter were palpable and not without justification. This episode is 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>132</sup>

## **VII. Interactions between a Royal Chartered Body and the Public Authorities**

Records from the early years of the State exemplify the precarious constitutional landscape in which RCBs found themselves, as they strove to identify the correct legal authority to effect charter adaptation and have their bye-laws approved. Drawing on archival materials, here follows a summary of select interactions between a RCB, the Institute of Chartered Accountants in Ireland, and the Irish public authorities in the course of amending the Institute's bye-laws 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.

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<sup>132</sup> Wheatley above n. 9, p. 55.

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>133</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 of private bodies whose members were approved to act as auditor of a company incorporated under the Irish Companies Acts.

#### *Bye-Laws and Sovereign Dynamics*

In the decades following charter adaptation, the Institute periodically approached the Government requesting bye-law 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 bye-law amendments are granted in the form of Governmental orders (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>134</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 in this paper.

#### What's in a name?

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<sup>133</sup> S.I. No. 479/1941.

<sup>134</sup> Internal Minute of Department of the Taoiseach, dated 26 July 1955, found in NAI, TAOIS/S12305B.

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>135</sup> stipulates that the description of the State is the 'Republic of Ireland'. Under the *Bunreacht* as it stood prior to 1998 the State claimed sovereignty over the whole island of Ireland, i.e. 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 twenty six 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>136</sup>

In 1955 the Institute sought approval for certain bye-law amendments, including an increase in membership fees, amendment of the 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 bye-laws used the phrase 'Republic of Ireland' to delimit the area of the twenty six 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 of' 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>137</sup> Similar issues would recur again on numerous occasions.

In 1957, when considering bye-law 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 bye-laws which defined 'Ireland' as the 'Territory

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<sup>135</sup> (No. 22 of 1948).

<sup>136</sup> Government Information Bureau, *Statement on Modes of Referring to the State in English*, Dated 17 June 1953, found in NAI, 2013/100/67.

<sup>137</sup> 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.



comprising both the Republic of Ireland and Northern Ireland'.<sup>138</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>139</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 bye-laws. The Taoiseach at the time queried whether this should be recast as 'Government of Ireland'.<sup>140</sup> Consideration was given within the Department of the 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, i.e. 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>141</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>142</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>143</sup>

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<sup>138</sup> 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.

<sup>139</sup> Ibid.

<sup>140</sup> Letter from Department of the Taoiseach to Department of Foreign Affairs, dated 21 January 1983, found in NAI 2013/100/67.

<sup>141</sup> Internal Memorandum of Department of the Taoiseach, dated 2 March 1983, found in NAI 2013/100/67.

<sup>142</sup> Internal Memorandum of Department of the Taoiseach, dated 20 January 1983, found in NAI 2013/100/67.

<sup>143</sup> Letter from Department of Foreign Affairs to Department of the Taoiseach, dated 16 February 1983, found in NAI 2013/100/67.

Handwritten notes in the margins of an internal memo indicate that the civil service was inclined to let matters lie. It was observed that the Institute was not 'under our control'<sup>144</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>145</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 bye-laws.<sup>146</sup>

Similar wrangling occurred in relation to the descriptions of universities in the Institute's bye-laws. In 1955 requests were made that the Institute consider referencing universities by their geographical locations, i.e. 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 Northern Ireland'.<sup>147</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 bye-laws 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 bye-laws were acceptable to, or were already approved in, the other jurisdiction.<sup>148</sup> Copies of executive orders made at Hillsborough enabling bye-law amendments are recorded in the Irish Departmental files (a transcribed example is included 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

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<sup>144</sup> An arguable point, given that amendments to the Institute's bye-laws required Governmental approval.

<sup>145</sup> 20 January letter above n. 142.

<sup>146</sup> 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.

<sup>147</sup> 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.

<sup>148</sup> E.g. Letter from Northern Ireland Office to Institute of Chartered Accountants, dated 5 September 1973, found in NAI 2004/21/91.

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>149</sup>

During the processing of bye-law amendments in 1957 a technical issue arose over the precise date of the Institute's bye-law 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>150</sup> These suboptimal communication dynamics did not make for speedy Governmental approvals of bye-laws 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.

#### *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. Based on legal counsel opinion, the solicitors suggested this could only be achieved by an amending charter or a Private Bill. The solicitors signalled that the Northern Ireland authorities would grant an amending charter, rather than proceed with a Private Bill, and queried whether the 'Government of the Republic' would be 'prepared to grant an amending charter'.<sup>151</sup>

With respect to Ireland, an internal memo from the AG's office confirmed:

Since 1922 no charter has been granted. Even where there was a charter in existence, amendments were effected by private bills...Though it may appear anomalous that there will or may be an amending charter in Northern Ireland, the only course open here is to proceed by legislation.<sup>152</sup>

This was presumably made clear to the Institute as, in April 1965, the Institute's solicitors confirmed they had lodged a private bill, the *Institute of Chartered Accountants in Ireland (Charter Amendment) Bill 1965*<sup>153</sup> with the Oireachtas.<sup>154</sup>

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<sup>149</sup> Internal Minute of Department of the Taoiseach, dated 10 March 1941, found in NAI TAOIS/S/12305A.

<sup>150</sup> 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.

<sup>151</sup> Letter from Solicitors for Institute of Chartered Accountants in Ireland to Office of the Attorney General, dated 3 April 1964, found in NAI 2013/16/1244. As things ultimately transpired, the Northern Ireland authorities opted for private legislation.

<sup>152</sup> Internal Minute of Office of the Attorney General, dated 7 April 1964, found in NAI 2013/16/1244.

<sup>153</sup> Enacted as the *Institute of Chartered Accountants in Ireland (Charter Amendment) Act 1966* (No. 2 Private of 1966).

<sup>154</sup> Letter from Solicitors for Institute of Chartered Accountants in Ireland to Office of the Attorney General, dated 27 November 1964, found in NAI 2013/16/1244.

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 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’. 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 dispense with the need for Ministerial approval of bye-laws made by the Institute. The compromise reached between the Institute and the Department was for future bye-laws 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 epitomised 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 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*

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<sup>155</sup> *Institute of Chartered Accountants in Ireland (Charter Second Amendment) Bill, 1972.*

<sup>156</sup> 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.

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

<sup>158</sup> See above in this paper p. 19.

The projection of public authority over 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 other RCBs from a temporal standpoint. This in turn may assist in understanding the degree of public administrative interest in retaining an approval role with respect to the Institute's affairs, as evidenced when 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, undoubtedly, 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 paper. Still, public administrative anxieties around the use of nomenclature for the State betrays a broader theme. In these moments, the public administration pondered, though ultimately resiled from, requiring the Institute to align its internal concept of sovereign legal time with the State's external aspirational concept, as expressed through its (contested) constitutional territorial claim. The fact this was even countenanced is temporally significant.

The State wanted its name, as defined in the State's own constitutional norms, to be styled in the same way within the Institute's internal 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 norms outwards to other political constituencies involved with the Institute in a sort of legal Venn diagram. Objectively, however, the problem for the State was that its 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> He goes on:

...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.

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

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<sup>159</sup> Grabham and Beynon-Jones, above n. 8, p. 5 citing D. Scott, *Omens of Aversity: Tragedy, Time, Memory, Justice* (Duke University Press, 2014) p. 71.

territory claimed (Northern Ireland), the definition itself could only aspire to a future legal time. The State then attempted to project that definition to other political constituencies in the present. The Institute, as an all-island body, entered the frame as a possible conduit for the preferred definition.

The State ultimately stopped short on pragmatic grounds and, in that moment, the State was also 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 bye-law amendments), those of the State (Ireland) and those of Northern Ireland. 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.

### VIII. Conclusions

In this paper, there has been an attempt to survey and conceptualise the inheritance of royal chartered bodies (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 how the Irish State transitioned RCBs from a past legal time of the 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, relying on tailored and archaic legislative mechanisms to navigate conflicting legal timelines. 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>160</sup>

It has also been demonstrated how an all-island RCB (the Institute of Chartered Accountants in Ireland) could bridge and harmonise various legal timelines, operating as a unifying force in an otherwise fragmented political and legal landscape, at least in relation to its own professional constituency. 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.

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<sup>160</sup> Wheatley above n. 9, p. 55.

**Annex X<sup>161</sup>**

Instrument

allowing alterations of Bye-Laws of

The Institute of Chartered Accountants in Ireland

WHEREAS by a Charter granted on the 14<sup>th</sup> 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:

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

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<sup>161</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.

\_\_\_\_\_ day of  
\_\_\_\_\_ 1983

**Annex Y<sup>162</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 14<sup>th</sup> 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 8<sup>th</sup> 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.

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<sup>162</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.



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 6<sup>th</sup> 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 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 6<sup>th</sup> day of November, 1954, and an adjournment thereof on the 24<sup>th</sup> day of November, 1954, and on the 17<sup>th</sup> 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