British Imperial Statutes and Irish Sovereignty

Statutes Passed After the Creation of the Irish Free State

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This is the second of two articles examining the relationship between British Imperial statutes and Irish law in the early years of the self-governing Irish state. The present article examines the assertion that the Imperial parliament at Westminster enjoyed the right to legislate for the self-governing Irish state in the 1920s and 1930s. Successive governments in the Irish Free State denied the validity of this legislative power. This article examines a number of Imperial statutes passed between 1922 and 1931 that purported to apply to the Irish Free State. These Imperial statutes were seen as serious threats to Irish legislative sovereignty and have never been recognised by the Irish courts as being part of Irish law. This article examines how the controversial power to pass Imperial statutes for the Irish Free State provoked a serious Anglo–Irish dispute at a delicate stage in bringing the Irish Constitution of 1922 into force. It attempts to illustrate the profound consequences of this dispute for the 1922 Constitution. The article also examines the complex relationship between Irish law and the Statute of Westminster as an Imperial statute. The controversies over Imperial statutes and Irish legislative sovereignty are examined in the context of earlier periods of Irish history and also in the context of recent developments in twenty first century Ireland. This permits a consideration of wider questions as to how concepts of national identity influence the acceptance or rejection of particular sources of law.

INTRODUCTION

In 1922 the British Empire welcomed a new Dominion into its fold. The infant 'Irish Free State' was born in difficult circumstances. These included a bitter armed conflict which saw twenty six counties in the south and west of the island of Ireland secede from the United Kingdom. Yet the terms of the 'Articles of Agreement for a Treaty between Great Britain and Ireland', that brought this conflict to an end, made it clear that the self-governing Irish state would remain part of the British Empire. The 'Articles of Agreement' signed by British and Irish representatives on 6 December 1921, a document known in Ireland as simply 'the Treaty', laid the constitutional foundations of the Irish Free State. Article 1 of the Treaty provided that the Irish Free State would remain within the British Empire and would share the constitutional status of the other self-governing Dominions. Article 2 linked key aspects of the constitutional status of the Irish Free State to that of the Dominion of Canada.

The creation of the Irish Free State is widely equated with the attainment of 'independence' in twenty first century Ireland. This popular perception is reflected in an ambitious project seeking to consolidate the corpus of Irish statute law. In 2004 the Irish government announced the creation of the 'statute law revision project'. This project seeks to confine Irish statute law within definite chronological boundaries. The final objective of this project is 'to repeal all the legislation which remains on the statute book which was enacted prior to Irish independence in 1922'.[1] In short, this project proposes to eliminate seven centuries of legislative history in Ireland. All English or British

[1] http://www.attorneygeneral.ie/slru/slrp.html Accessed 24 October 2009.

statutes passed from 1066 to 1922 along with all Irish statutes passed from 1169 to 1800 are to be swept away.

One of the most interesting aspect of this project, apart from its ambitious scope, is its assumption that Irish 'independence' was achieved on 6 December 1922, the date on which the Constitution of the Irish Free State came into force. This assumption reflects a tendency among many Irish lawyers to ignore the position that the 1921 Treaty tied the infant Irish Free State to the status enjoyed by the Dominions of the British Empire. Although the Dominions had made impressive strides in the direction of greater autonomy in the nineteenth and early twentieth centuries it was not clear that they could be considered as being sovereign states in 1922.[2] One of the greatest limits on Dominion autonomy lay in the sphere of legislative sovereignty. The British government insisted that 'Imperial statutes' passed by the parliament at Westminster, sitting as an 'Imperial parliament', applied to the Irish Free State. It was asserted that a considerable quantity of Imperial legislation had been incorporated *en masse* into Irish law in 1922.[3] This included the Colonial Laws Validity Act 1865 which maintained the supremacy of Imperial statutes over the laws of the Dominions.[4] These claims, which were examined in a preceding article, presented serious challenges to Irish governments in the 1920s and 1930s. This article examines the challenges that resulted from the claim that Westminster continued to enjoy the power to pass additional Imperial legislation for the self-governing

[2] For example, see P.J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law* (London, 1929) p. 356 and A.B. Keith, *Responsible Government in the Dominions*, (Oxford, 1928) p. 1234.
[3] The National Archives – Public Records Office (TNA-PRO), CAB 27/153 CP 3653, Report of the attorney general's committee on the legislation required to establish the Irish Free State, 24 January 1922 and TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929.
[4] Section 2 of the Colonial Laws Validity Act 1865.

Irish state after the signature of the Anglo–Irish Treaty and after the drafting of the Constitution of the Irish Free State.

This article will begin by examining the issue of Irish legislative sovereignty in a wider historical context. It will examine the Anglo–Irish political controversy that erupted in 1922 concerning the assertion that Westminster continued to enjoy the power to legislate for the Irish Free State. This controversy coincided with the final stages of bringing the Constitution of the Irish Free State into force and threatened to derail the entire settlement represented by the draft Constitution and by the 1921 Treaty. This article will also examine a number of statutes that were passed by Westminster in the 1920s and 1930s that were seen by the British government as applying to the Irish Free State. Successive Irish governments have denied that Imperial statutes passed after 1922 enjoy any status under Irish law. This article will examine why an Irish government that came to power in 1932 considered a major reversal of this policy. It will conclude by examining the legacy of the controversial relationship between British Imperial statutes and Irish law and its relevance to wider issues in the field of Irish legal history.

HISTORICAL CONTEXT

The assertion that the parliament at Westminster could pass new legislation for the Irish Free State raised unfortunate precedents from Irish history. The dispute as to Westminster's powers to legislate for the Irish Free State in the 1920s and 1930s echoed an earlier Anglo–Irish dispute that reached a particular intensity in the seventeenth and eighteenth centuries. In 1698 William Molyneux published a tract entitled 'The case of

Ireland's being bound by acts of parliament in England, stated'. This tract contained a robust denial of the assertion that Ireland was in any way bound by such statutes.[5] The controversy continued until 1720 when the enactment of the Declaratory Act confirmed Westminster's powers to legislate for Ireland beyond any doubt.[6] Irish lawyers and statesmen were determined to avoid a similar defeat over legislative sovereignty in the twentieth century.

There were also parallels from more recent periods of Irish history that hardened the attitude of the first Irish government towards the assertion that Westminster continued to enjoy legislative powers with respect to the infant Irish Free State. Irish opponents of the 1921 Treaty often compared this assertion to provisions in the legal instruments that envisaged the creation of Irish 'home rule' in the late nineteenth and early twentieth centuries.[7] The legislation and draft legislation that purported to establish Irish home rule stressed the continued powers of the parliament at Westminster to legislate for Ireland.[8] A similar claim was made by the British government with respect to the Irish Free State in 1922 and this was reflected in the provisions of the Imperial statute that purported to bring the Free State Constitution into force.[9] The supremacy of statutes passed by Westminster over statutes passed by an Irish parliament was also

[5] W.N. Osborough, 'The Legislation of the Pre-Union Irish Parliament' in *The Irish Statutes, 1310-1800* (Dublin, 1995), p. D.
[6] 6 Geo. 1, c. 5. Section 1 of this Act recognised that the parliament at Westminster had 'full power and authority to make laws and statutes of sufficient validity to bind the Kingdom and people of Ireland'.
[7] For example, see *Poblacht na hÉireann,* 22 June 1922
[8] Preamble to the Irish Government Bill, 1893; Section 1(2) of the Government of Ireland Act 1914 and Section 75 of the Government of Ireland Act 1920. It was often asserted that these provisions were unnecessary since nothing could impair the supreme authority of the Imperial parliament at Westminster. See Erskine Childers, *The Framework of Home Rule* (London, 1911), p. 323 and J.H. Morgan, 'The Constitution: A Commentary' in J.H. Morgan (ed) *The New Irish Constitution* (London, 1912), pp. 11-15. No such provision appeared in the Irish Government Bill, 1886.
[9] Section 4 of the Irish Free State Constitution Act 1922.

reflected in the 'home rule' bills and statutes.[10] These measures often made use of the provisions of the Colonial Laws Validity Act as a model.[11] These parallels should not have been the cause of much surprise given that Dominion models were often used in drafting home rule legislation. Nevertheless, the first Irish government was deeply uncomfortable with analogies between the legal status of the Irish Free State and the measures aimed at securing Irish home rule. The Irish government was anxious to show that the 1921 Treaty had created a position of sovereignty that was far in advance of any of the various proposals for home rule within the United Kingdom.[12] Opponents of the 1921 Treaty delighted in emphasising Westminster's powers to pass Imperial legislation for the Irish Free State in order to undermine the position of the Irish government in the early 1920s.[13]

It is important to emphasise one great difference between the proposals for Irish home rule and the position claimed by the parliament at Westminster under the Dominion settlement created by the 1921 Treaty. Although it was argued that Westminster retained the right to pass additional Imperial statutes for the Irish Free State, it was recognised that these statutes could only be created on the basis of Irish consent. The important convention of securing Dominion consent before passing an Imperial statute had been recognised at the Imperial conference of 1918 and been followed in

[10] Section 32 of the Irish Government Bill, 1893; Section 41(2) of the Government of Ireland Act 1914 and Section 6(2) of the Government of Ireland Act 1920. It is interesting to note that Erskine Childers foresaw the incorporation of a similar provision to that of Section 32 of the Irish Government Bill, 1893 in his 1911 proposal for a future home rule bill. Erskine Childers, *The Framework of Home Rule* (London, 1911), p. 222. J.H. Morgan insisted that it was not necessary to place such a provision in the home rule statutes on the basis that the superior position of Westminster legislation was a corollary of the doctrine of the supremacy of parliament. J.H. Morgan, 'The Constitution: A Commentary' in J.H. Morgan (ed), *The New Irish Constitution* (London, 1912), p. 14.

[11] See Erskine Childers, *The Framework of Home Rule* (London, 1911), p. 222 and Alan J. Ward, *The Irish Constitutional Tradition* (Dublin, 1994), pp. 79-80.

[12] For example, see *The Free State* 11 November 1922.

[13] For example, see *Poblacht na hÉireann*, 22 June 1922.

practice from a much earlier date.[14] No such consent had been required under the proposals for Irish home rule.

The convention under which Imperial legislation could only be extended to the Irish Free State on the basis of the consent of the Irish government did little to dampen down the ensuing political controversy. Irish opponents of the 1921 Treaty, either out of ignorance or by design, tended to overlook this convention. The opponents of the Treaty who did pay attention to the convention were seldom impressed. It should be recalled that the opponents of the 1921 Treaty, who constituted a sizable proportion of the Irish electorate in 1922, had a deep distrust of the Irish provisional government that supported the Anglo–Irish settlement. They also displayed a predictable distrust of British governments and it was often asserted that although the British adhered to this convention in its dealings with the likes of Canada and Australia it would not do so with respect to the Irish Free State.[15] Even Irish supporters of the Anglo–Irish Treaty, who did recognise the efficacy of the safeguard of consent, had real difficulties with the practice of new Imperial legislation being extended to the Irish Free State. They objected to the very principle of Westminster continuing to assert the power to enact legislation that would affect the Irish people notwithstanding the creation of a self-governing Irish state. In addition, the prospect of legislation passed by Westminster enjoying a superior position to the laws of the infant Irish Free State, as reflected in the provisions of the Colonial Laws Validity Act 1865, was deeply offensive to both opponents and supporters of the 1921 Treaty in Ireland.

[14] Henry Harrison, *Ireland and the British Empire, 1937* (London, 1937), p. 148.
[15] For example, see *Poblacht na hÉireann,* 3 January 1922.

The preoccupation of Irish statesmen with the unfortunate history of their country ensured that parallels from earlier eras of Irish history could not be entirely ignored in the 1920s and 1930s.[16] The issue of Irish legislative sovereignty had been a source of discord in Anglo–Irish relations for over four centuries. This struggle reached a new intensity after the enactment of the Irish Acts of Union in 1800. Many Irish people had expected the signature of the 1921 Treaty to finally put this issue to rest. By the end of 1922 it had become apparent that the British government was not prepared to accept that the creation of the Irish Free State would be accompanied by the achievement of full Irish legislative sovereignty. The realisation that Westminster was continuing to assert powers to legislate for the infant Irish Free State was a bitter disappointment to many Irish nationalists.

IMPERIAL STATUTES AND THE CONSTITUTION OF THE IRISH FREE STATE

The nature of the relationship between Irish law and British Imperial law was never clarified in the negotiations that preceded the creation of the 1921 Treaty. This important issue was also neglected in the Anglo–Irish negotiations that redrafted the Constitution of

[16] Incidents from earlier periods of Irish history frequently intruded into Anglo-Irish negotiations in the 1920s and 1930s. For example, the circumstances surrounding the enactment of the Act of Union 1800 were discussed during the negotiations that took place in the London in the summer of 1922 over the final form of the Constitution of the Irish Free State. TNA-PRO, CAB 43/7 22/N/163, titles of honour, June 1922. Lloyd George exploited this pre-occupation with Irish history when he played on Irish convictions of a purported legacy of British duplicity with respect to honouring treaties. He expressed confidence that the Irish would not like to be found guilty of similar charges. Lloyd George used this line of reasoning to put pressure on the Irish provisional government to conform to his interpretation of the Anglo-Irish Treaty of 1921. TNA-PRO, CAB 43/6 22/N/60(8), conference on Ireland with Irish ministers, 27 May 1922 and CAB 43/7 22/N/162, meeting between the British and Irish signatories, draft Irish Constitution, 27 May 1922.

the Irish Free State in 1922. The matter finally came to the fore in the latter half of 1922 when the British and Irish referred the draft Constitution to their respective parliamentary assemblies. By early 1922 it had become clear that the Constitution of the Irish Free State would have to be enacted in parallel statutes passed by the Imperial parliament at Westminster and by the Irish house of representatives known as 'Dáil Éireann' sitting as a special 'constituent assembly'. It became apparent during the passage of these parallel statutes that consideration of the important issue of Imperial legislation could no longer be avoided.

In June 1922 *The Times* published a letter from Professor Arthur Berriedale Keith. Keith taught at Edinburgh University and was the author of many scholarly works on the subject of British Imperial law.[17] The letter analysed a number of key provisions in the draft Irish Constitution that was soon to be considered by the parliament at Westminster and by the Irish constituent assembly. Keith touched on a number of important questions concerning the relationship between Imperial legislation and the Irish Free State. These included the issue of whether the Imperial parliament would still be able to pass Imperial statutes that applied to the Irish Free State after the 1922 Constitution came into force. Keith seemed convinced that Westminster would enjoy this power. He recommended making it clear in the text of the Constitution that the Irish parliament, which would soon be known as the 'Oireachtas', would have sole and exclusive legislative powers. This would ensure that the parliament at Westminster

[17] (1866-1955) Keith's entry in the Oxford Dictionary of National Biography notes that 'He was prone to sharp and sometimes prejudiced judgement, and aroused controversy. None the less his works were authoritative, and were often quoted on both sides of a constitutional crisis within the Commonwealth. … His histories and collections of documents continue to be consulted and valued, and in many areas his works are the starting place for scholarly research.'
http://www.oxforddnb.com/view/article/34258?docPos=12 Accessed 27 April 2010.

would renounce its legislative supremacy over the Irish Free State when it approved the Constitution.[18]

Keith's letter soon found an appreciative audience in Ireland. Its contents were all the more welcome given that they came from a respected British authority on Imperial law. Keith's intervention in the drafting of the Irish Constitution seems to have astonished many Irish nationalists. He was known to be a staunch believer in maintaining the integrity of the British Empire which he saw as a powerful force for good in global affairs. It was not always appreciated that Keith was also convinced that the vitality of the Empire would be reinforced by the creation of a more egalitarian relationship between the United Kingdom and the Dominions. The most surprising aspect of Keith's letter was that the important issues that it identified had not been tackled much earlier.

It is open to speculation why the position of Imperial legislation had not been settled during the Anglo–Irish negotiations that led to the signature of the 1921 Treaty or during the negotiations that accompanied the redrafting of the Irish Free State Constitution in the summer of 1922. It seems likely that this issue was overshadowed by the many other important issues that required agreement during these critical conferences.[19] In addition, it appears that the British and Irish governments both believed that the Treaty and the draft Constitution had already settled this vital issue. The British government was certainly convinced that Westminster, as the 'Imperial parliament', would retain the power to legislate for the Irish Free State.[20] Article 2 of the 1921 Treaty

[18] *The Times*, 19 June 1922
[19] The classic account of the negotiations on the 1921 Treaty can be found in Lord Longford (Frank Pakenham), *Peace by Ordeal* (London, 1935). An account of many of the issues raised during the redrafting of the Irish Free State Constitution can be found in Thomas Mohr, 'British Involvement in the Creation of the Constitution of the Irish Free State' (2008) 30 *Dublin University Law Journal* 166-86.
[20] TNA-PRO, CAB 43/1 SFB 33rd, Articles 12 and 65 of the draft Constitution, 10 October 1922 and HO 45/20026, law officers' opinion of 20 April 1928.

provided *inter alia* that the 'law, practice and constitutional usage governing the relationship … of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State'. This provision could be used to argue that Imperial statutes passed at Westminster would enjoy the same position with respect to Irish law as they did in relation to the law of the Dominion of Canada.

The Irish provisional government was equally convinced that Westminster would not be able to enact legislation for the infant Irish Free State. It placed a great deal of emphasis on Article 2 of the draft Constitution which provided that:

> All powers of government and all authority legislative, executive and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State (Saorstát Éireann) throughout the organisations established by or under, and in accord with, this Constitution.

Irish ministers stressed that it could hardly be argued that the parliament at Westminster was an organisation 'established by or under, and in accord with, this Constitution'. They also relied on the text of Article 12 of the draft Constitution which provided that 'The power of making laws for the peace, order and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas'. The Irish government saw the use of the definite article before the word 'power' as indicating that only the Oireachtas would be empowered to legislate for the Irish Free State.[21]

Although the British and Irish had very different views as to the relationship between Imperial statutes and the law of the embryonic Irish Free State they seemed united in their desire not to engage in an open debate on this question at this delicate

[21] *Dáil Debates*, vol. 1, col. 780, 26 September 1922.

stage of bringing the draft Constitution into force. Keith's well-intentioned letter to *The Times* ensured that the divergent views of the two governments on this important issue could no longer be kept out of the glare of public attention. Portions of the letter were read out in the Irish constituent assembly and voices soon began to call for the amendment of the draft Constitution.

The cause of Irish legislative sovereignty was championed in the Irish constituent assembly by George Gavan Duffy. Duffy moved an amendment that added the words 'sole and exclusive' to the second sentence of Article 12 of the draft Constitution. The intention to exclude the power of the Imperial parliament to legislate for the Irish Free State was obvious. The revised provision would now read:

> The *sole and exclusive* power of making laws for the peace, order and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas.[22]

Duffy enjoyed a certain amount of authority as one of the signatories of the 1921 Treaty. He was also one of the few members of the constituent assembly to have some experience in the field of external affairs. Duffy had served as the first Irish minister for foreign affairs during much of the transitional year of 1922. Unfortunately, Duffy had fallen out with his colleagues in government and resigned from his ministerial post by the end of that year. Duffy had always had serious misgivings concerning many of the provisions of the draft Irish Constitution. This served to widen the gap between him and his former colleagues in the Irish provisional government. He infuriated the provisional government by introducing numerous amendments to the draft Constitution in

[22] My italics.

the constituent assembly. Duffy was forced to suffer accusations from his former colleagues of lacking moral courage, of running away from his responsibilities and of dishonouring his signature of the Treaty.[23] His efforts at amendment were usually rejected with undisguised scorn by his former colleagues.[24] However, the provisional government showed an uncharacteristic tolerance for his attempt to insert the words 'sole and exclusive' into Article 12 and actually accepted his amendment. This unusual act suggests that the provisional government believed that there was a real need to bolster the legislative sovereignty of their embryonic state against the claims of the Imperial parliament at Westminster. Nevertheless, the declaration that the Irish parliament would have the 'sole and exclusive' power to legislate for the Irish Free State opened a dangerous rift between the British and Irish governments at a delicate stage in bringing the Irish Constitution into force.

As far as the British were concerned the denial of Westminster's power to pass Imperial legislation for the Irish Free State was nothing less than a violation of the terms of the 1921 Treaty. Alfred Cope, the *de facto* representative of the British government in Dublin, was sent to register a protest with the Irish provisional government.[25] The provisional government insisted that their amendment of Article 12 of the draft Constitution was in line with the practice and constitutional usage of the Dominions. The Irish added that it was impractical to re-submit the matter to the

[23] *Dáil Debates* vol. 1, col. 544-9, 21 September 1922.
[24] For example see the remarks of W.T. Cosgrave at *Dáil Debates* vol. 1, col. 548, 21 September 1922.
[25] National Archives of Ireland (NAI), cabinet minutes, G 1/3, P.G. 22(a), 30 September 1922 and TNA-PRO, CAB 43/1 SFB 33rd, Articles 12 and 65 of the draft Constitution, 10 October 1922. Alfred Cope (1877-1954) was a British civil servant who served as assistant under secretary for Ireland between 1920 and 1921. Cope won the respect of members of the Irish provisional government and used his influence to consolidate the settlement reflected in the Anglo–Irish Treaty of 1921.

constituent assembly.[26] This refusal to compromise placed the British government in a difficult position. It should be remembered that the draft Constitution still had to be approved by Westminster before coming into force. The British government were now faced with the unpalatable alternatives of openly rejecting the draft Constitution or of recommending a text that they themselves believed was incompatible with the terms of the 1921 Treaty. In the latter scenario, the British government would be forced to secure Westminster's approval for a text that challenged the status and jurisdiction of that assembly as an 'Imperial parliament'. In short, the dispute over Imperial legislation had placed the entire settlement established by the 1921 Treaty in serious jeopardy.

It was clear that something had to be done to break the deadlock. Lionel Curtis, who at this time was serving as a legal adviser to the colonial office, was dispatched to Dublin to place a number of options before the provisional government. These included the insertion of a clause into the Constitution that would link the legislative position of the Irish Free State to that of Canada. The British also offered the alternative of presenting this matter for adjudication at the next Imperial conference.[27] Curtis met with stout resistance from an Irish provisional government that was anxious not to be seen to give way on matters of legislative sovereignty. This stance may have been influenced by advice given by Hugh Kennedy, who held the post of legal adviser to the Irish provisional government in 1922 would go on to become the first chief justice of the Irish Supreme Court.[28] Kennedy insisted that any claim by Westminster to legislate for the Irish Free State should be resisted to the utmost 'even if … it should lead to a

[26] NAI, cabinet minutes, G 1/3, P.G. 22(a), 30 September 1922.
[27] TNA-PRO, CAB 43/1 SFB 33rd, Articles 12 and 65 of draft Constitution, 10 October 1922.
[28] Royal Irish Academy, *Documents on Irish Foreign Policy, Vol II*, p. xxii.

direct hitch with the British government, and a renewal of hostilities, because to give way on this point would be to give way upon the whole'.[29]

As far as the British were concerned the continued power of the parliament of Westminster to pass legislation affecting the self-governing Dominions, in addition to the non-self-governing colonies, was not merely a matter of prestige. There remained a number of areas of law in which the British wished to retain a certain amount of uniformity throughout the Empire. These included succession to the Throne, citizenship, copyright law, maritime law and matters pertaining to the control of British armed forces.

British insistence that Westminster, as an Imperial parliament, continued to enjoy legislative powers over the Irish Free State was also prompted by wider political concerns. It was vital that the Irish Free State be seen to occupy the same position as the existing Dominions and not be seen to have seceded from the British Empire. The collapse of the coalition government led by David Lloyd George in October 1922 meant that no action could be taken on this matter until the end of the following month. This delay undermined British demands that the Irish constituent assembly reconsider the text of Article 12 of the draft Irish Constitution. This course of action would now risk prejudicing the crucial deadline of 6 December 1922 for bringing the Irish Constitution into force.[30]

In late 1922 a new Conservative government came to power led by Andrew Bonar Law, a man of staunch unionist principles. The new administration in London was even less inclined than its predecessor to surrender Westminster's powers to pass

[29] University College Dublin (UCD) Archives, Kennedy papers, P4/347, undated letter.
[30] Article 17 of the 'Articles of Agreement for a Treaty between Great Britain and Ireland' signed on 6 December 1921 given force of law by the parliament at Westminster in the Irish Free State (Agreement) Act 1922.

Imperial statutes for the Irish Free State. Indeed, the new government was largely composed of persons who had opposed the signature of the Anglo–Irish Treaty in 1921. Almost a full calendar year had passed since that time and most of the settlement contemplated by the Treaty was already in place. The new prime minister was forced to admit that even those who had been adamantly opposed to Treaty one year ago would look with horror at the prospect of its failure now.[31] Yet there remained the issue of the apparent denial of Westminster's position as an 'Imperial parliament' in Article 12 of the draft Irish Constitution. The British government finally accepted the solution of inserting a special provision into the Westminster statute that, as far as the British lawyers were concerned, would bring the Irish Constitution into force. The provisions of Section 4 of Westminster's Irish Free State Constitution Act 1922 reinforced the claim that the Imperial parliament would retain the power to pass legislation extending to the Irish Free State:

> Nothing in the said Constitution shall be construed as prejudicing the power of Parliament to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions.[32]

The British also placed a special provision in Section 3 that allowed Imperial legislation passed before 1922 to be extended to the Irish Free State.[33] These provisions were not reproduced in the parallel statute, the Constitution of the Irish Free State

[31] *Parliamentary Debates*, series 5, vol. 159, col. 61, 23 November 1922 (House of Commons).
[32] Section 4 of Westminster's Irish Free State Constitution Act 1922.
[33] Section 3 of Westminster's Irish Free State Constitution Act 1922 provided that 'If the Parliament of the Irish Free State make provision to that effect, any Act passed before the passing of this Act which applies to or may be applied to self-governing Dominions, whether alone or to such Dominions and other parts of His Majesty's Dominions, shall apply or may be applied to the Irish Free State in like manner as it applies or may be applied to self-governing Dominions.'

(Saorstát Éireann) Act 1922, which was passed in Dublin. The dispute concerning Imperial statutes had created a glaring discrepancy between the texts of the parallel statutes that would bring the Irish Constitution of 1922 into force. The absence of consistency between the British and Irish texts was a highly unfortunate development that would be the cause of much controversy in the years that followed. The disparity between the two texts ensured that any authority that sought to interpret the Constitution of the Irish Free State would first have to decide which of the two statutes that purported to bring the Constitution into force should be considered authoritative. The British and Irish courts were never able to agree on this point in the 1920s and 1930s and the issue remains unresolved to this day.[34]

Successive British governments were convinced that Westminster's power to legislate for the Irish Free State was guaranteed by the position that the provisions of the 1921 Treaty overrode the articles of the Irish Constitution.[35] The parallel statutes concerning the Constitution of the Irish Free State that were passed in Dublin and at Westminster both recognised that any Irish law that was repugnant to the provisions of the 1921 Treaty would be 'absolutely void and inoperative'.[36] It should be remembered that Article 2 of the Treaty provided that the Imperial parliament would have the same relationship with the Irish Free State as existed between the Imperial parliament and the

[34] For an Irish perspective see *State (Ryan) v. Lennon* [1935] I.R. 170, *Re Irish Employers Mutual Insurance Association Limited* [1955] I.R. 176 at 218 and *Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129 at 148. For a British perspective see *Moore v. Attorney General* [1935] I.R. 472 and [1935] A.C. 484 and *In the Matter of the Reference as to the Tribunal under Article 12 of the Schedule appended to the Irish Free State Agreement Act 1922*. Cmd. 2214.

[35] In 1928 the law officers concluded that "In so far as Articles 2 and 12 of the [Irish Free State] Constitution are repugnant to Article 2 of the Treaty they are void and inoperative, but in our opinion their provisions may be reconciled with Article 2 of the Treaty and we so read them'. TNA-PRO, HO 45/20026, law officers' opinion of 20 April 1928.

[36] Preamble, Irish Free State Constitution Act 1922. An identical provision appeared in Section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922.

Dominion of Canada. As events transpired, the parliament at Westminster did pass a number of Imperial statutes that purported to extend to the Irish Free State. These Imperial statutes will now be examined in turn.

IRISH FREE STATE (AGREEMENT) ACT 1922

The Irish Free State (Agreement) Act 1922 might be considered the first 'Imperial statute' passed by the parliament at Westminster for the Irish Free State. The main purpose of this statute was to give legal force to the Anglo–Irish Treaty under British law. The status of this Act as an 'Imperial statute', as opposed to a statute passed for a part of the United Kingdom, is open to challenge on a number of different grounds. The potential for dispute is exacerbated by a sense of uncertainty as to the precise date on which the Irish Free State came into existence as a self-governing Dominion. According to British law the Irish Free State came into existence when King George V made a royal proclamation on 6 December 1922 that brought the Constitution of the Irish Free State into force.[37] The Irish Free State (Agreement) Act 1922 was enacted eight months earlier on 31 March 1922. This means that the Irish Free State (Agreement) Act 1922 cannot be seen as an Imperial statute from a British perspective. It is much more difficult to fix the precise date on which the Irish Free State came into existence under Irish law. However, the Irish Supreme Court has held on at least two occasions that the Irish Free State was in

[37] This position is confirmed under Order in Council of 17 March 1932 on the provision for the reciprocal enforcement of judgments in the United Kingdom and in other parts of His Majesty's Dominions under Part 11 of the Administration Act 1920. This provides that 'on the 6th day of December, 1922, the Irish Free State was established under the provisions of an Act of Parliament shortly entitled the Irish Free State Constitution Act 1922 (Session 2)'.

existence by 31 March 1921 at the very latest.[38] This stance would suggest that Irish Free State (Agreement) Act 1922 should be considered an Imperial statute from an Irish perspective. The statute law revision project has resulted in the enactment of legislation that expressly repeals the Irish Free State (Agreement) Act 1922.[39] This has not clarified the question as to whether the Irish Free State (Agreement) Act 1922 was a statute passed by the parliament at Westminster acting as the legislature of the United Kingdom or a statute passed by the parliament at Westminster acting as the legislature of the British Empire. No definite conclusion can be reached on this point in the absence of clarity as to the date on which the Irish Free State came into existence.

IRISH FREE STATE CONSTITUTION ACT 1922

It has already been described how the creation of the Constitution of the Irish Free State was the subject of parallel statutes passed in London and in Dublin in 1922. The statute passed by the Irish constituent assembly in October 1922 was known as the Constitution of the Irish Free State (Saorstát Éireann) Act 1922. In December of that year the parliament at Westminster passed the Irish Free State Constitution Act 1922. The measure passed at Westminster can be considered an Imperial statute in the same manner as the Constituent Acts of the other British Dominions. The New Zealand Constitution Act 1852, British North America Act 1867, Commonwealth of Australia Constitution Act 1900 and the South Africa Act 1909 were all passed by Westminster sitting as an 'Imperial parliament'.

[38] *In re Reade* [1927] I.R. 31 and *Performing Right Society v Bray U.D.C.* [1928] I.R. 512.
[39] See Section 9(4)(b) and Schedule 2, Part 4 of the Statute Law Revision Act 2007.

The Irish provisional government was far from happy with the prospect of its Constitution being the subject of a statute passed at Westminster. Irish ministers had hoped that Irish Free State (Agreement) Act 1922 would mark the end of Westminster's involvement in setting up the new Irish state.[40] Nevertheless, Article 83 of the draft Constitution that returned from the Anglo–Irish negotiations which took place in the summer of 1922 revealed that the Constitution would have to be passed in form of an Imperial statute in addition to its approval by the Irish constituent assembly. Article 83 appeared in the transitory provisions of the Constitution and, at the request of the Irish provisional government, was withheld from publication until after the Irish election of 1922. This deliberate omission reflects the fears of the provisional government as to the reaction of the Irish public to the news that an Imperial statute would play a role in bringing their Constitution into force.[41]

The Irish were obliged to accept the enactment of their Constitution in an Imperial statute when faced with British arguments that the same practice that had been adopted in relation to the other Dominions.[42] British ministers attempted to sooth the fears of their Irish counterparts by assuring them that Westminster would pass the draft Constitution without any alteration on condition that the text was compatible with the

[40] UCD Archives, Kennedy papers, P4/308, memorandum on relationship between the Treaty and the Constitution, 1922.

[41] The provisions held back from publication were Articles 75, 76, 77, 78, 80 and 83 of the final version of the Constitution. TNA-PRO, CAB 43/1 SFB 29th draft Irish Constitution, 10 June 1922; CAB 43/7 22/N/163, thirtieth meeting of the British representatives, 13 June 1922; CAB 43/6 22/N/60(9), conference on Irish ministers, 10 June 1922 and CAB 43/3 SFC 37, draft Constitution.

[42] The Irish were also obliged to agree to show the text of the draft Constitution to the British government before it was made available to the public. NAI, cabinet minutes, G1/1 2 February 1922 and TNA-PRO, CAB 43/6 22/N/60(6), meeting between the British and Irish signatories, approval of draft Constitution, 26 February 1922.

terms of the Treaty.[43] This procedure was seen as advantageous to both sides in that it minimised the chances of an open breach in Anglo–Irish relations. It was also hoped that this procedure would ensure that the parallel statutes passed in Dublin and in Westminster contained identical provisions. As seen earlier, these hopes were dashed by the dispute over Article 12 of the draft Constitution which claimed that the Oireachtas would have 'sole and exclusive' legislative powers over the Irish Free State.

The controversy over Article 12 was exacerbated by a wider Anglo–Irish disagreement over the significance of their respective statutes concerning the Constitution of the Irish Free State. In the inter-war years British governments and courts tended to ignore the Irish statute and instead emphasised the statute passed by their own parliament.[44] By contrast, the Irish courts and successive Irish governments have denied that Westminster's Irish Free State Constitution Act 1922 played any role in giving legal force to the Constitution. Irish lawyers in the 1920s and 1930s tended to see this statute as little more than an endorsement of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 passed by the Irish constituent assembly. They insisted that Westminster's Irish Free State Constitution Act 1922 merely recognised the change represented by the creation of the Irish Free State under domestic British law.[45] This position had its roots in an insistence that the Irish Free State was an autochthonous entity.

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[43] NAI, department of the Taoiseach, S8952, constitution committee, report of first meeting, 24 January 1922.

[44] See TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX, Special considerations affecting the Irish Free State, May 1929 and *Moore v. Attorney General* [1935] I.R. 472 and [1935] A.C. 484 and *In the Matter of the Reference as to the Tribunal under Article 12 of the Schedule appended to the Irish Free State Agreement Act 1922.* Cmd. 2214.

[45] For example, see Hugh Kennedy, 'Character and Sources of Constitution of the Irish Free State' (1928) 14 *American Bar Association Journal* 437 at p. 443 and 'The Association of Canada with the Constitution of the Irish Free State' (1928) 6 *Canadian Bar Review* 747 at p. 755.

The long-established refusal to recognise that Westminster's Irish Free State Constitution Act 1922 had any direct impact on Irish law has been complicated in recent years by the statute law revision project. This project resulted in the inclusion of the Irish Free State Constitution Act 1922 in a list of statutes that were expressly repealed by the Statute Law Revision Act 2007.[46] It should be noted that the 2007 Act has also repealed the Irish Free State (Agreement) Act 1922 and a number of other statutes enacted at Westminster after the signature of the 1921 Anglo-Irish Treaty.[47] The apparent recognition of Westminster's Irish Free State Constitution Act 1922 by an Irish statute creates certain difficulties for legal historians. It could be seen as casting doubt on the 'Irish origin' of the 1922 Constitution, as maintained by Irish lawyers since the early 1920s.[48] More seriously, it could be seen as casting doubt on the autochthonous nature of the Irish Free State itself. This arises from the assertion, recognised by British law, that Westminster's Irish Free State Constitution Act 1922 not only created the Irish Constitution of 1922 but also created the Irish Free State itself.[49] The provisions of the Statute Law Revision Act 2007 make it clear that the inclusion of a statute in the list of legislation that is specifically repealed shall not be taken as evidence that the statute, or any provision of it, was of full force and effect immediately before the passing of the

[46] Schedule 2, Part 4, Statute Law Revision Act 2007.
[47] *Ibid.*
[48] *Dáil Debates*, vol. 1, col. 1458 and 1464-5, 11 October 1922. The Irish origin of the 1922 Constitution is also asserted by a number of provisions passed by the Oireachtas. For example, Section 2(9) of the Interpretation Act 1923. See also *State (Ryan) v. Lennon* [1935] I.R. 170 and also *Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129 at 148.
[49] For example, see Order in Council of 17 March 1932 on the provision for the reciprocal enforcement of judgments in the United Kingdom and in other parts of His Majesty's Dominions under Part 11 of the Administration Act, 1920. This provides as follows:
'And whereas on the 6th day of December, 1922, the Irish Free State was established under the provisions of an Act of Parliament shortly entitled the Irish Free State Constitution Act, 1922 (Session 2)'.

2007 Act.[50] However, this does not exclude the argument that the inclusion of a statute in the list of legislation that is specifically repealed by the 2007 Act constitutes evidence that the statute was in force in Ireland at some stage. This argument is not without its difficulties.[51] Nevertheless, this issue illustrates the significance and complexity of the relationship between Imperial statutes and the Irish Free State. It also highlights the challenges and potential pitfalls faced by the statute law revision project.

ROYAL AND PARLIAMENTARY TITLES ACT 1927

The Royal and Parliamentary Titles Act 1927 changed the title of the King as used throughout the British Empire. In the mid 1920s King George V still bore the title that had been laid down in 1901. This was:

> George V, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India.

The failure to recognise the change that had occurred with the creation of the Irish Free State was a source of considerable embarrassment to the Irish government. The Irish raised the issue at the Imperial conference of 1926 and secured agreement for a revised title:

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[50] Section 3(3), Statute Law Revision Act 2007.
[51] For example, the list of statutes that are specifically repealed in Schedule 2, Part 4 of the Statute Law Revision Act 2007 includes statutes that British and Irish governments of the 1920s agreed did not apply to the Irish Free State e.g. Colonial Courts of Admiralty Act 1890. 'The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929', Cmd. 3479, para. 110.

George V, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India.[52]

The main alteration was the insertion of a comma in place of the word 'and' between 'Great Britain' and 'Ireland'.[53] The Irish had good reason to be satisfied with the new title. The new wording acknowledged Irish autonomy from Great Britain and also seemed to recognise the unity of the island of Ireland. The distinction of 'Ireland' from the 'British Dominions beyond the seas' was also attractive in that many Irish people had real difficulty in perceiving their self-governing state as a Dominion of the British Empire.

The enactment of the Royal and Parliamentary Titles Act 1927 at Westminster changed the title of the King throughout the British Empire. King George V was recognised as head of state in the Irish Free State under the settlement brought about by the 1921 Treaty and by the provisions of the Irish Constitution. Consequently, the Royal and Parliamentary Titles Act 1927 changed the title of the Irish head of state with the consent of the Irish government but without any legislation passed by the Oireachtas. In 1926 Irish ministers had given assurances to the Dáil that any legislative action that was needed to secure the change of title would be made by the Oireachtas.[54] The Irish government never fulfilled this pledge. It is doubtful whether a British government would have recognised the power of any Dominion parliament to legislate on matter of this nature before the enactment of the Statute

[52] This title was almost identical to one drafted in 1922 by the then home secretary, Edward Shortt. TNA-PRO, CAB 27/154 PGI 55, memorandum on the 'Style and Title of the King'. The Irish did not actually get the title that they had advocated at the start of the Imperial conference. This was 'King of the United Kingdom of Great Britain and of Canada, Australia, New Zealand, South Africa, and the Irish Free State, Emperor of India'. UCD Archives, Costello papers, P190/106, untitled memorandum, 2 November 1926.

[53] This comma has gone down in history as the 'O'Higgins comma' after Kevin O'Higgins, first Irish minister for justice and leader of the Irish delegation to the Imperial conference of 1926. In fact the new title was the fruit of the labour of many persons over four years and should not be attributed solely to O'Higgins. Ridgway F. Shinn, Jr. 'Changing the King's Title, 1926: An Asterisk to "O'Higgins' Comma"' (1981) 26 *Irish Jurist* 114 at 134.

[54] *Dáil Debates*, vol. 17, col. 761, 15 December 1926.

of Westminster Act 1931.[55] This ensured that the sole authority for the change in the title of the Irish head of state was contained in an Imperial statute passed at Westminster. The Irish government was saved from embarrassment by a lack of inquiry into this subject by the members of the Oireachtas and by the Irish media.

THE ARMY AND AIR FORCE (ANNUAL) ACTS

The 1921 Treaty permitted the United Kingdom to retain control of a number of key military facilities in the Irish Free State. These included the 'Treaty ports' at Lough Swilly, Berehaven and Cork Harbour which remained under British control until they were relinquished under an Anglo-Irish agreement concluded in 1938.[56] British deserters often took refuge in the territory of the Irish Free State that lay beyond these Treaty ports in the 1920s and 1930s. In 1926 the question arose as to whether the civil authorities of the Irish Free State had the power to arrest these deserters and hand them over to the British military.[57] These powers were provided by a number of important Imperial statutes. The negative stance of the Irish government towards the continued operation of Imperial statutes under Irish law provided a powerful incentive to argue that no such powers of arrest existed. This ensured that British deserters enjoyed a safe haven within the territory of the Irish Free State that lay beyond the Treaty ports.

[55] See A.B. Keith, *The Sovereignty of the British Dominions* (London, 1929), p. 252.
[56] Eire (Confirmation of Agreements) Act 1938, First Schedule, Section 2 of Agreement regarding Articles 6 and 7 of the Articles of Agreement of December 6, 1921.
[57] TNA-PRO, HO 45/20026, desertion of members of His Majesty's Forces to the Irish Free State, Case for the opinion of the law officers, December 1927.

In 1928 British law officers advised their government that the Irish civil authorities did have the power to arrest deserters from the Royal Navy.[58] This power was based on the Naval Deserters Act 1847 and the Navy Discipline Act 1866. These were pre-1922 Imperial statutes which were seen as extending to the Irish Free State.[59] The situation with respect to deserters from the army and air force was more complicated. The raising and keeping of a standing army and air force in peace time required the consent of the Imperial parliament. This consent was renewed every twelve months in Imperial statutes known as the Army and Air Force (Annual) Acts. The power to arrest and detain deserters from the army and the air force was dependent on the validity of these statutes which had to be renewed every year. This consideration raised difficulties as to the relationship between Irish law and post-1922 Imperial statutes. Did the annual statutes passed from 1923 onwards apply to the Irish Free State?

This question raised difficulties for the British government as a result of the convention that new Imperial legislation could only be extended to the Dominions on the basis of Dominion consent. No such consent had been provided by the Irish Free State in relation to the Army and Air Force (Annual) Acts. In 1928 British law officers were prepared to argue that '[a]s a matter of strict law the power of the Imperial Parliament to pass legislation having the force of law in the Irish Free State is absolute'.[60] Nevertheless, it also had to be recognised that it was politically impossible to rely on this contention in the changed circumstances of the late 1920s. The report of the Imperial

[58] TNA-PRO, HO 45/20026, opinion of the law officers (Sir Thomas Inskip and Sir Boyd Merriman), 30 April 1928.
[59] *Ibid.*
[60] Note on the law officers' opinion of 30th April 1928 as reproduced in TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, Chapter IX.

conference of 1926 provided formal recognition of the convention that the consent of the Dominions was required before new Imperial statutes could be extended to them.[61] This ensured that, although the British were prepared to argue that the Army and Air Force (Annual) Acts were in force in the Irish Free State as a code of discipline for British troops stationed there, they were not willing to contend that these Imperial statutes affected the civil administration and population of the Irish Free State.[62]

STATUTE OF WESTMINSTER ACT 1931

The Statute of Westminster is the last Imperial statute that can be seen as extending to the Irish Free State. This important milestone in the history of the British Commonwealth had far-reaching implications for the practice of passing Imperial statutes for the Dominions. One of the most important reforms brought about by the Statute of Westminster was the removal of the overriding position enjoyed by Imperial statutes over the laws of the Dominions. Section 2 of the Statute of Westminster repealed the effect of the Colonial Laws Validity Act 1865 with respect to the Dominions. This ensured that no Dominion law could ever be struck down again on the basis that it was inconsistent with the provisions of an Imperial statute. The Statute of Westminster also made it clear that the Dominions enjoyed the power to repeal or amend Imperial statutes.[63]

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[61] Cmd. 2768, p. 18. The Irish believed that the words 'in accordance with constitutional practice' within Section 4 of Westminster's Irish Free State Constitution Act 1922 had already enshrined this convention into written form with respect to the Irish Free State. UCD Archives, McGilligan papers P35/167, note on paragraph 55 of the 1929 report, undated.

[62] Note on the law officers' opinion of 30th April 1928 as reproduced in TNA-PRO, HO 45/20026, report of the interdepartmental committee on questions arising out of the report of the Imperial relations committee of the Imperial conference 1926, chapter IX.

[63] Section 2(2) of the Statute of Westminster Act 1931.

Section 3 of the Statute of Westminster confirmed that the Dominions had the power to make laws that extended beyond the bounds of their own frontiers.[64] The inability of the Dominions to legislate with extra-territorial effect had provided one of most important justifications for the retention of Westminster's power to pass Imperial legislation for the self-governing Dominions.[65] This position ensured that it was necessary for Westminster to pass extra-territorial legislation for the Dominions in a number of different areas. For example, matters pertaining to the custody of prisoners on the high seas were considered to fall outside the legislative powers of the Dominions. Consequently, Westminster had been compelled to pass such Imperial statutes as the Extradition Acts 1870 to 1906, the Colonial Prisoners Removal Acts 1869 and 1884 and the Fugitive Offenders Act 1881. The removal of the restrictive doctrine on extra-territorial legislation eliminated one of the most important justificatory grounds for the continued enactment of Imperial statutes for the Dominions.

The Statute of Westminster confirmed the continuation of the power of the Imperial parliament to legislate for the Dominions. However, Section 4 provided that this power could only be used if the Dominion or Dominions in question had requested and consented to the relevant legislation. This was nothing more than the formal enactment of a convention that had been recognised at the Imperial conferences of 1918 and 1926 and had been followed in practice for several preceding decades.[66]

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[64] There was a body of opinion that argued that the Dominions had always had the power to legislate with extra-territorial effect but this was contradicted by a number of important court decisions. See *Macleod v. Attorney-General for New South Wales* [1891] A.C. 455, *Ray v. M'Mackin* (1875) 1 V.L.R. (Law) 274 and *In re Gleich* (1879) 1 O.B. & F. 39 and F.S.C 79. The Statute of Westminster put this matter beyond any doubt. For more on this subject see Thomas Mohr, 'The Foundations of Irish Extra-Territorial Legislation' (2005) 40 *Irish Jurist* 86-110.

[65] See Leo Kohn, *The Constitution of the Irish Free State* (London, 1932) pp. 181-2 and W.P.M. Kennedy, *The Constitution of Canada* (Oxford, 1922) p. 450.

[66] Henry Harrison, *Ireland and the British Empire, 1937* (London, 1937), p. 148 and Cmd. 2768, p. 18.

In 1929 the Irish Free State went so far as to attempt to secure the complete abolition of Westminster's powers to pass Imperial statutes for the Dominions, irrespective of considerations of consent.[67] Westminster's powers to legislate for the Irish Free State were often raised by domestic opponents of the Irish government, even though Irish consent for such legislation was unlikely to be forthcoming in most cases.[68] The Irish delegation to the special Imperial conference held in 1929 argued that the retention of the power to pass Imperial statutes was clearly inconsistent with the principle of the equality of members of the Commonwealth. The Irish position only received limited support from South Africa and was rejected in its totality by the remaining Dominions.[69] The formal abolition of Westminster's power to legislate for the Dominions under any circumstances was almost inconceivable for most British and Dominion statesmen. In 1931 the Canadian prime minister, R.B. Bennett, told his parliament that no Imperial conference 'has for a single moment thought of renouncing the supremacy of the Imperial Parliament, lest it be taken as a termination of the ties that bind together under the Crown all the overseas Dominions'.[70]

It is unlikely that the Statute of Westminster could have been successfully enacted without some provision recognising the continuance of Westminster's power to pass Imperial statutes for the Dominions on the basis of consent. The retention of this power permitted the enactment of a number of important legislative acts in subsequent decades. These include such measures as the 'patriation' of the Canadian Constitution in the Canada Act 1982 and the enactment of the Australia Act 1986. Academics have often

[67] TNA-PRO, 32/69 D.L. 1st and 5th meetings.
[68] *Dáil Debates*, vol. 39, col. 2335-6, 17 July 1931
[69] TNA-PRO, 32/69 D.L. 5th meeting.
[70] A.B. Keith, *Speeches and Documents on the British Dominions, 1918-1931* (Oxford, 1961), p. 256.

questioned the efficacy of the legal impediment imposed by Section 4 of the Statute of Westminster which purported to prevent Westminster from enacting Imperial statutes for a Dominion without the request or consent of a Dominion government.[71] It is argued that the limitations imposed by this provision are incompatible with principles of parliamentary sovereignty. These arguments were rejected by Viscount Sankey in *British Coal Corporation v. R* who noted that while the Imperial parliament could 'as a matter of abstract law', alter or repeal the provisions of the Statute of Westminster, 'that is theory and has no relation to realities'.[72]

The anomalous relationship between Imperial legislation and the Irish Free State is nowhere more apparent than in relation to the Statute of Westminster. The Irish played a leading role in the creation of this historic piece of legislation at successive Imperial conferences in the 1920s and 1930s. The Irish government also made sure that the Oireachtas passed a special resolution that was seen as providing Irish consent for the enactment of the Statute of Westminster. It is also significant that the Irish government made strenuous objections when attempts were made to amend the provisions of the statute in relation to the Irish Free State.[73] Yet once this historic measure was safely in force, the Irish government insisted that the Statute of Westminster had no effect on Irish law and added that the Irish Free State had always possessed the powers granted by it.

The Irish government argued that the real purpose of the Statute of Westminster was to allow the British to renounce certain erroneous claims concerning the Irish Free State

[71] For example see K.C. Wheare, *The Statute of Westminster and Dominion Status*, (Oxford, 5th Edition, 1953), pp. 153-4.
[72] [1935] A.C. 500 at 520. See also W. Ivor Jennings, *The Law and the Constitution* (London, 1933), pp. 125-9.
[73] See NAI, department of the Taoiseach, S5340/19, Cosgrave to MacDonald, 21 November 1931; NAI, department of the Taoiseach, S5340/19, McGilligan to Thomas, 21 November 1931 and TNA-PRO, LCO 2/1190, extract from a speech by President Cosgrave on Sunday, November 22nd at Charleville Co. Cork.

that had been made in the past. John J. Hearne, legal adviser to the department of external affairs, called it 'an Act of Renunciation by the Parliament of a disrupted Empire'.[74] More recently, the Irish Supreme Court has held that 'the Statute of Westminster, 1931, should be regarded as declaratory of the law [in Ireland] and not as making any change in it'.[75] In fact, Irish governments have not always claimed to enjoy all the powers granted by the Statute of Westminster. For example, it should be remembered that Section 3 of the Statute of Westminster provided that the Dominion parliaments could enact legislation that had extra-territorial effect. This was not a power that was claimed by Irish Free State at the time of its foundation. In 1922 the Irish provisional government rejected a proposal to place a provision in the draft Constitution that would have claimed that Oireachtas enjoyed the right to pass extra-territorial legislation.[76] Kevin O'Higgins, the Irish minister for home affairs, justified this stance by asserting that a provision of this nature would be meaningless unless it was recognised by other countries.[77]

EAMON DE VALERA AND IMPERIAL STATUTES

In 1932 the Fianna Fáil party led by Eamon de Valera came to power in the Irish Free State. The new government was hostile to the legal settlement imposed by the 1921 Treaty. Over the next five years the de Valera administration dismantled the settlement imposed by the 1921 Treaty piece by piece. The enactment of the Statute of Westminster ensured that

[74] NAI, department of the Taoiseach, S12046, memo by John J. Hearne on 'The legal basis of the establishment of the Irish Free State' 31 March 1932.
[75] *Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129 at 148.
[76] *Dáil Debates*, vol. 1, col. 1742-3, 19 October 1922.
[77] *Dáil Debates*, vol. 1, col. 1743, 19 October 1922. See also Thomas Mohr, 'The Foundations of Irish Extra-Territorial Legislation' (2005) 40 *Irish Jurist* 86.

statutes passed by the Oireachtas were no longer open to challenge on the grounds that their provisions were incompatible with Imperial statutes. This included the provisions of Westminster's Irish Free State Constitution Act 1922 which was recognised by the British courts as constituting an Imperial statute.[78]

In early 1932 Eamon de Valera seriously considered the possibility of justifying his programme of constitutional reform by reference to the provisions of the Statute of Westminster.[79] This course of action would have allowed de Valera to circumvent a number of obstacles presented by domestic Irish law. It was possible to argue that the constituent assembly of 1922 was an entity of a very different nature from subsequent Irish parliaments.[80] This approach seemed to suggest that the Oireachtas could not amend the statutory provisions enacted by the constituent assembly. These included the infamous 'repugnancy clause' that rendered Irish laws void and inoperative if found to be incompatible with the provisions of the 1921 Treaty.[81] The provisions of the Statute of Westminster ensured that no such obstacles existed with respect to the amendment of the restrictive provisions of the Imperial statute known as the Irish Free State Constitution Act 1922. By a strange twist of fate, an acceptance of Imperial statutes offered a position of greater autonomy to the Irish Free State than was provided by Irish domestic law. There were real advantages in recognising that the Irish Free State Constitution Act 1922 and the Statute of Westminster Act 1931 formed part of Irish law. Yet such an approach would

[78] *Moore v. Attorney-General for the Irish Free State* [1935] I.R. 472 and [1935] A.C. 484.
[79] NAI, department of the Taoiseach, S12046, memo by John J. Hearne on 'The legal basis of the establishment of the Irish Free State' 31 March 1932.
[80] This argument would receive judicial recognition in the judgments of Kennedy CJ and FitzGibbon J in *State (Ryan) v. Lennon* [1935] I.R. 170, 202-4 and 224-230. See also Nicholas Mansergh, *The Irish Free State – Its Government and Politics* (London, 1934), p. 49 and Thomas Mohr, 'Law without Loyalty - The Abolition of the Irish Appeal to the Privy Council' (2002) 37 *Irish Jurist* 187-226.
[81] Preamble, Irish Free State Constitution Act 1922. An identical provision appeared in Section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922. The term 'repugnancy clause' was introduced by Leo Kohn. Leo Kohn, *The Constitution of the Irish Free State* (Dublin, 1932), p. 98.

have abandoned the stance taken by the previous Irish government in relation to Imperial legislation. The use of the Statute of Westminster to justify constitutional reforms would have conceded that Imperial legislation could indeed apply to the Irish Free State and that the Irish Free State itself had been created by means of Imperial statute.

The legal advisers to the de Valera government, including John J. Hearne, who had been inherited from the previous administration, were horrified by this proposal. They made the emotive, though hardly realistic argument that if the Irish Free State could be seen has having been brought into existence by one Imperial statute it could be taken out of existence by another.[82] As events transpired, Eamon de Valera was dissuaded from taking this fateful step. This course of action would have recognised that the Irish Free State was not an autochthonous entity that had enjoyed untrammelled legislative sovereignty from the time of its creation. The impact of this position on popular perceptions as to the origins of the modern Irish state would have been profound.

In the years that followed de Valera took great care never to place direct reliance on the provisions of the Statute of Westminster as the legal justification for the dismantling of the Treaty settlement.[83] This stance allowed de Valera to maintain an ambiguous position as to the significance of Imperial statutes under Irish law. This sense of ambiguity is reflected in the provisions of the Irish Nationality and Citizenship Act 1935

[82] NAI, department of the Taoiseach, S12046, memo by John J. Hearne on 'The legal basis of the establishment of the Irish Free State' 31 March 1932.

[83] This tactic was raised during a legal challenge to de Valera's constitutional reforms heard by the Judicial Committee of the Privy Council in 1935. It was argued that the legal provisions that put these reforms into effect could not be considered valid under the provisions of the Statute of Westminster since the Oireachtas had never purported to be acting under the authority of that Imperial statute. The Privy Council held that it had to be assumed that the Oireachtas had abolished the appeal in the only way in which it legally could do so. This meant that the Oireachtas must be deemed to have been proceeding under the Statute of Westminster notwithstanding its attitude towards that Imperial statute. *Moore v. Attorney-General for the Irish Free State* [1935] I.R. 472 and [1935] A.C. 484. De Valera did make use of the enactment of the Statute of Westminster as means of countering the theory that the Anglo Irish Treaty had only given the Irish Free State the status of Canada as it had existed in 1921 without any possibility of further advances in terms of autonomy. See *Dáil Debates*, vol. 41, col. 572, 27 April 1932 and col. 1090, 29 April 1932.

which provided for the repeal of a number of Imperial statutes 'if and so far as they respectively are or ever were in force' in the Irish Free State.[84] This ambiguous position was abandoned in the decades that followed in favour of a straightforward rejection of the assertion that Imperial statutes ever formed a part of Irish law.[85]

THE LEGACY OF THE POWER TO PASS IMPERIAL STATUTES FOR THE IRISH FREE STATE

Irish legal textbooks tend to ignore the statutes passed by the parliament at Westminster, under its identity as the legislature of the British Empire, as potential sources of Irish law.[86] In the early twentieth century Irish lawyers took this stance as an act of defiance against a source of law that they considered to be incompatible with the nature and origins of their state. In the early twenty first century the failure to properly examine the application of Imperial statutes stems less from defiance and more from an absence of awareness of the significance of these statutes.[87] Even the contention that Imperial statutes applied to the Irish Free State has tended to fade from memory. It may be recalled that Article 12 of the Constitution of the Irish Free State, which gave 'sole and exclusive' legislative powers to the Oireachtas was drafted in order to prevent any further Imperial statutes passed at Westminster applying to the Irish Free State. This provision is

[84] Section 33(1) of the Irish Nationality and Citizenship Act 1935.
[85] For example, see *Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129.
[86] For example, see Raymond Byrne and J. Paul McCutcheon, *Byrne and McCutcheon on the Irish Legal System* (Dublin, 5th Edition, 2007) p. 434.
[87] The difficulties with the list of statutes that are specifically repealed by the Statute Law Revision Act 2007 have already been noted. For example, see fn. 51. It should also be noted that the Statute Law Revision Act 2007 ignores some Imperial statutes passed before 1922 e.g. Naval Discipline (Dominion Naval Forces) Act 1911. It also ignores all Imperial statutes passed after 1922 e.g. Statute of Westminster Act 1931.

reproduced in almost identical form in Article 15.2.1 of the subsequent Irish Constitution of 1937.[88] This provision is now seen as upholding an important aspect of the constitutional doctrine of separation of powers which seeks to maintain a clear distinction between the powers of executive, legislature and judiciary.[89] The original purpose of this provision has been almost entirely forgotten.

The relationship between Irish law and Imperial statutes might have been very different if the British had insisted on a strict interpretation of Article 2 of the 1921 Treaty which tied aspects of the constitutional status of the Irish Free State to that of the Dominion of Canada. Until 1982 amendments to the Canadian Constitution could only be made by means of an Imperial statute passed at Westminster.[90] The British insisted that a similar procedure be followed with respect to the Irish Free State during the revision of the draft Constitution that took place in the summer of 1922. They proposed adding the following sentence to the provisions dealing with constitutional amendments in Article 47 of the draft Constitution: 'Provided that no law amending this Constitution shall have effect unless and until it is confirmed by an Act of the Imperial Parliament'.[91] The British were dissuaded from insisting that this provision be included in the final text when the Irish accepted the repugnancy clause which provided that all Irish laws, including constitutional amendments, that were found to be inconsistent with the 1921 Treaty would be 'absolutely void and inoperative'.[92] The new Conservative government

[88] Article 15.2.1 of the 1937 Constitution provides that 'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has the power to make laws for the State.'
[89] See *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] I.R. 381.
[90] The involvement of the parliament at Westminster in amending the Canadian Constitution was terminated by Section 2 of the Canada Act 1982.
[91] NAI, department of the Taoiseach, S8955, memorandum by Hugh Kennedy, 11 June 1922.
[92] Preamble, Irish Free State Constitution Act 1922. An identical provision appeared in Section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922.

that came to power in London in November 1922 tried to revive the need for the enactment of an Imperial statute when amending the Irish Constitution.[93] This eleventh hour initiative did not meet with success. There can be little doubt that the relationship between Irish law and Imperial statutes would have been very different if this approach had been reflected in the final text of the Constitution of the Irish Free State. Indeed, the course of Irish constitutional history itself would have been very different if Irish constitutional amendments had required the enactment of Imperial statutes.

IRISH ACCEPTANCE OF THE POWER TO PASS IMPERIAL LEGISLATION FOR THE IRISH FREE STATE

In 1932 Eamon de Valera decided not to recognise Imperial statutes notwithstanding the practical advantages offered by this course of action. This decision reflected a refusal to acknowledge the power of the parliament at Westminster to legislate for the Irish Free State. This policy was seen as having been established by the preceding Irish government led by W.T. Cosgrave. Although the Cosgrave administration publicly refused to acknowledge the power of the parliament at Westminster to pass Imperial statutes for the Irish Free State, its actions were not always consistent with this policy. The ambiguities surrounding such Imperial statutes as the Irish Free State Constitution Act 1922; the Royal and Parliamentary Titles Act 1927 and the Statute of Westminster Act 1931 have already been analysed in some detail. There are also grounds for arguing that the Irish provisional government implicitly recognised the power of the parliament at Westminster to pass

[93] TNA-PRO, CAB 27/157 CIL 1st meeting and 2nd meeting.

Imperial statutes for the Irish Free State during the final stages of bringing the 1922 Constitution into force.

It may be recalled that a serious Anglo–Irish dispute over Imperial legislation threatened to derail the entire Treaty settlement in late 1922. The Irish could not remove the words 'sole and exclusive' from Article 12 of the draft Constitution without recalling the constituent assembly and making an embarrassing *volte face* on the issue of Imperial legislation in the full glare of publicity. This article has already described how the British eventually broke this impasse by inserting a special provision in Section 4 of the Irish Free State Constitution Act 1922 that gave express recognition to the power to pass Imperial legislation for the Irish Free State. In the eyes of the general public, this appeared to be a unilateral act that was not recognised by the Irish government. In reality, it was nothing of the sort.

The Irish government realised that the impasse over Imperial legislation was endangering the creation of the Irish Constitution together with the entire settlement represented by the 1921 Treaty. The British offered them a choice of inserting a special provision into the Constitution that would link the legislative position of the Irish Free State to that of Canada or of presenting this matter for adjudication at the next Imperial conference.[94] The Irish provisional government chose the former option. The acceptance of Imperial legislation was a difficult pill to swallow but the alternative could not be contemplated.

The Irish were anxious that the provision that recognised the power to pass Imperial legislation for the Irish Free State not appear in the substantive articles of the Constitution. They requested that it appear in the covering provisions of the Imperial

[94] TNA-PRO, CAB 43/1 SFB 33rd, Articles 12 and 65 of draft Constitution, 10 October 1922.

statute that purported to bring the Irish Constitution into force. The Irish emphasised their need to avoid raising this matter in the constituent assembly. The British finally agreed to this solution. Both sides also agreed that the matter might be appealed for adjudication at a future Imperial conference.[95] The Irish had little interest in this option which offered them little chance of success. All the other Dominions recognised the position of Imperial legislation and an Irish initiative in 1929 aiming at the total abolition of the enactment of Imperial statues for the Dominions won little support.[96]

In 1922 the two governments agreed on the wording of the provision that later appeared in Section 4 of the Irish Free State Constitution Act 1922. The Irish were anxious to avoid any publicity on the matter, in particular at this delicate stage in bringing the Constitution into force.[97] In fact, the Irish role in the creation of Section 4 was never revealed by the British in any of the Anglo–Irish controversies that followed throughout the course of the 1920s and 1930s. Irish ministers remained haunted by Section 4 and seriously considered lobbying for its removal at the special Imperial conference of 1929. They seem to have doubted their chances of success and this course of action was finally abandoned on the basis that it was not 'practicable'.[98] The Irish government may also have feared that this initiative would publicise the Irish role in creating the provision that recognised the power of the parliament at Westminster to legislate for the Irish Free State. This secret as to the Irish involvement in the creation of Section 4 of the Irish Free State Constitution Act 1922 has remained intact until now.

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[95] TNA-PRO, CAB 27/157, C.I.L. 2, legislation in connection with the Irish Free State Constitution, 25 October 1922. NAI, department of the Taoiseach, S8957A, copy of telegram from Lionel Curtis to Sir James Masterson Smith, 15 October 1922 and unsigned letter to W.T. Cosgrave, 20 October 1922.
[96] TNA-PRO, 32/69 D.L. 1st and 5th meeting.
[97] NAI, department of the Taoiseach, S8957A, copy of telegram from Lionel Curtis to Sir James Masterson Smith, 15 October 1922.
[98] UCD Archives, McGilligan papers P35/167, undated note on paragraph 55 of the report on the operation of Dominion legislation conference of 1929.

CONCLUSION

This article, together with its companion piece on the position of Imperial statutes passed before 1922, has examined a potential source of Irish law that is largely unknown to many lawyers in twenty first century Ireland. Irish lawyers in the inter-war years did not enjoy the same luxury of being able to ignore the contention that Imperial statutes formed a part of the law of their infant state. The treatment of this source of law by the Irish courts and by successive Irish governments in the 1920s and 1930s was not a process that was as certain, consistent or as unambiguous as authorities in later decades might have liked to believe. It was still possible in the mid-1950s for an Irish judge to suggest that Imperial statutes, such as the Colonial Laws Validity Act, had applied to the Irish Free State.[99] Nevertheless, British Imperial statutes were finally rejected as a source of Irish law because they were seen as incompatible with popular perceptions as to the origins and nature of the self-governing Irish state. For many Irish people the contention that the Irish Free State came into existence as anything less than a fully sovereign state is unacceptable and offensive. This ensures that popular opinion cannot accept the contention that the Irish Free State was a Dominion of the British Empire. The contention that the self-governing Irish state was not autochthonous but was, instead, the gift of a statute passed by Westminster is also rejected by many Irish people. These conclusions are the product of cherished convictions that have been fully embraced by the Irish courts in recent decades. The position of British Imperial statutes as a source of Irish law was incompatible with

[99] Kingsmill Moore J in *Re Irish Employers Mutual Insurance Association Limited* [1955] I.R. 176 at 218.

these convictions. The result was a rejection of Imperial statutes followed by an erasure of memory of the very claim that they could ever be considered a source of Irish law.

British Imperial statutes are not the only potential source of Irish law to face challenges of this nature. Statutes that were passed for Ireland as part of the United Kingdom are now facing a similar threat. This article began by describing the statute law revision project initiated by the Irish government. The consolidation of the sprawling Irish statute book has obvious practical advantages. Yet, the objective of repealing all statutes that were enacted 'prior to Irish independence in 1922' raises a number of important issues that are relevant to popular perceptions of Irish law.[100] Irish students are often asked by their lecturers in jurisprudence to consider the extent to which Irish law really is 'Irish' in nature. The creation of the self-governing Irish state in the early twentieth century did not alter the position under which most sources of Irish law had their origins outside the island of Ireland. In the early years of the self-governing Irish state a number of lawyers expressed a desire to 'patriate' Irish law and so create a legal system that was more in tune with some form of Irish *Volksgeist*.[101] Similar sentiments have been given expression in twenty first century Ireland by the statute law revision project which aims to consolidate the entire corpus of Irish statutes on the basis of the political and geographical nature of the parliaments that enacted these statutes. The ideological background to this project was made clear by Bertie Ahern, then 'Taoiseach' or prime minister of Ireland, who launched the project with the following words:

[100] http://www.attorneygeneral.ie/slru/slrp.html Accessed 24 October 2009.
[101] See Thomas Mohr 'Law in a Gaelic Utopia: Perceptions of Brehon Law in Nineteenth and Early Twentieth Century Ireland', O. Brupbacher et al. (eds.) *Remembering and Forgetting: Yearbook of Young Legal History* (Munich, Martin Meidenbauer, 2007) pp. 247-76.

My objective is simple, I will ensure that the Irish statute book comprises only laws passed by the Oireachtas [the Irish parliament] under the authority of the Irish people. Ancient laws passed by foreign parliaments in the name of the British monarchy have no place in our modern democracy.[102]

It is clear from this context that all the statutes passed by Westminster as a 'foreign parliament' are rejected on the grounds that they are seen as being incompatible with the values of the modern Irish state. Yet it is interesting to note that just as one external source of Irish law is being eliminated by the statute law revision project another is being vigorously expanded. The rejection of two major European Union treaties by the Irish electorate over the past decade has astonished and bewildered politicians and academics in Ireland and beyond. They are baffled by the repeated resurrection of concerns relating to such matters as abortion and neutrality despite reassurances that these issues have little, if any, connection with the legal provisions of these treaties. It may be that these issues are actually symptoms of wider concerns. It should be remembered that a vast corpus of European law was incorporated into Irish law in 1973. It is also asserted that the various laws of the European Union enjoy a superior status over statutes passed by the Oireachtas.[103] This position has much in common with the position of British Imperial

[102] *The Nation* (newsletter of the *Fianna Fáil* political party) Autumn, 2005, p. 7.
[103] *Falminio Costa v. ENEL* [1964] ECR 585, 593. The Third Amendment of the Constitution Act 1972 inserted the following provision into what was then Article 29.4.3 of the Irish Constitution: 'The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.' This provision was renumbered and its wording changed in subsequent amendments before being removed by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009. Article 29.4.6 of the Irish Constitution now provides that:
'No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of

legislation in the early twentieth century. British authorities argued that a substantial body of Imperial statutes had been incorporated into Irish law in 1922. It was also argued that Imperial statutes passed before and after 1922 enjoyed superior status over other sources of law in Ireland. The story of the relationship between British Imperial statutes and Irish law may prove to be instructive in this context. It should not be forgotten that the status of British Imperial legislation as a source of Irish law remained ambiguous in the early part of the twentieth century. This source of law was ultimately rejected as being incompatible with popular perceptions as to the genesis and nature of the independent Irish state. The statues that applied to Ireland as a part of the United Kingdom may soon go out of existence on the basis of similar considerations. The longevity of the relationship between Irish law and the laws of the European Union has yet to be tested.

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membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—
i the said European Union or the European Atomic Energy Community, or institutions thereof,
ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or
iii bodies competent under the treaties referred to in this section,
from having the force of law in the State.'