

The Prerogative and its Survival in Ireland: Dusty Antique or Positively Useful?

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Recently in Britain, there has been a discussion as to whether the Royal Prerogative is still a necessary part of the law. However, in Ireland, there is still confusion over whether the Prerogative actually exists in this jurisdiction. This is an issue which, if it had arisen during the debates on the Irish Free State Constitution, would have been irrevocably settled but it did not come up in 1922 and this has caused some controversy. This article examines the arguments for and against the survival of Prerogative in Ireland and the evidence in support of the various claims. The modern, seminal cases in which it was decided that Prerogative did not survive, and a more recent case in which the finality of the previous decisions was questioned, are first briefly examined. An examination of the various arguments in relation to Prerogative survival follows. Older cases from the 1920s and 1930s are then considered. Conclusions are drawn from the examination of the survival arguments and a solution proposed. Finally, the contemporary relevance of the Prerogative is considered.

I – Introduction

The question of survival of the Royal Prerogative in Ireland is one which has sparked criticism of the Irish Supreme Court and has recently caused more or less open disagreements among Supreme Court judges and academic commentators. The Supreme Court held, in two important constitutional cases, *Byrne v. Ireland*¹ and *Webb v. Ireland*² that the Prerogative did not survive the creation of the Irish Free State, using reasoning which has been strongly condemned by academics such as Niall Lenihan,³ Kevin Costello⁴ and Professor Kelly,⁵ who criticised the judgments of the Supreme Court and argued that the Prerogative was, in fact, alive and well during the Free State years.

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¹ [1972] I.R. 241 [hereinafter *Byrne*].

² [1988] 1 I.R. 353, [1988] I.L.R.M. 565 [hereinafter *Webb*].

³ N. Lenihan, "Royal Prerogatives and the Constitution" (1989) 24 *Irish Jurist* 1 [hereinafter Lenihan].

⁴ K. Costello, "The Expulsion of Prerogative Doctrine from Irish Law: Quantifying and Remediating the Loss of the Royal Prerogatives" (1997) 32 *Irish Jurist* 145 [hereinafter Costello].

⁵ J.M. Kelly, "Hidden Treasure and the Constitution" (1988) 10 *D.U.L.J.* 5 [hereinafter Kelly].

More recently, in *Geoghegan v. Institute of Chartered Accountants*,⁶ the Supreme Court questioned its previous decisions on Prerogative. However, while the Supreme Court may not originally have been entirely correct, it seems that the alternative view can also be challenged. This is not only a fascinating historical question, but also, as will be shown later, of some practical contemporary significance.

It is proposed here to examine the arguments for and against the survival of Prerogative in Ireland and to consider the evidence in support of the various claims. The modern, seminal cases of *Byrne*⁷ and *Webb*,⁸ in which it was decided that Prerogative did not survive, and *Geoghegan*,⁹ in which the finality of the previous decisions was questioned, will first be briefly examined in Part II.¹⁰ Part III will involve an examination of the various arguments in relation to Prerogative survival. Older cases from the 1920s and 1930s will also be considered in this part. In Part IV, conclusions will be drawn from the examination in Part III and a solution proposed. Finally, Part V considers the contemporary relevance of the Prerogative.

II – Modern Case Law

In *Byrne* the Supreme Court was asked to consider whether the State could benefit from the Crown's prerogative power of immunity from suit.¹¹ Walsh J, who gave judgment for the majority of the Court, in a surprising judgment, held that because the Irish Constitutions stated that all authority came from the people, Prerogative could not apply in this State. He reasoned that the basis of Prerogative was that all authority came from the Crown and the Crown was the personification of the state. However, Walsh J. cited Article 2 of the Free State Constitution and deduced that the people, not the Crown, were the personification of the Irish Free State, and this meant that all royal prerogatives ceased to exist in Ireland with the enactment of the Irish Free State

⁶ [1995] 3 I.R. 86 [hereinafter *Geoghegan*].

⁷ *Byrne*, *supra* note 1.

⁸ *Webb*, *supra* note 2.

⁹ *Geoghegan*, *supra* note 6.

¹⁰ As these cases have been examined numerous times, it is not proposed to enter into any detailed examination of them.

¹¹ *Byrne*, *supra* note 1.

Constitution.¹² This was the first case in which such a definitive statement on Prerogative had been made.

Two other judges in the case, O'Dálaigh C.J. and O'Keeffe P. agreed with Justice Walsh. Budd J. gave a separate 20-page judgment in which he gave detailed consideration to the question of sovereignty and what that meant as regards immunity for the state. He eventually stated that he agreed with the reasoning and conclusions of Walsh J. He also stated:

[t]he very nature of the State as exemplified in the wording of the provisions of the Constitution would seem, speaking generally, to be such that old feudal conceptions are irreconcilable with it. The King is completely absent from the Constitution and gone with him is any idea of the King as the personification of the State; I can find no suggestion in the Constitution of anything in the nature of perfection in the State.¹³

However, Fitzgerald J., in a very short one page judgment, dissented on the basis that the majority judgment constituted a radical change in the law.¹⁴

Interestingly, it was Murnaghan J. who had heard the case in the High Court. Although he was one of the original members of the Constitution Committee which, fifty years before, drafted the Irish Free State Constitution, he failed to discuss the survival of Prerogative point. Instead he rejected the plaintiff's claim on the basis of sovereignty: "the simple statement that 'Ireland is a sovereign ... state' is completely inconsistent with the propositions that the State is subject to one of the organs of State, the judicial organ, and can be sued as such in its own courts."¹⁵ He used sovereignty to come to a completely different conclusion from the one eventually arrived at in *Webb*. Murnaghan J. decided that it is because the State is sovereign that it cannot be subject to one of its organs, namely the courts, and so it cannot be sued. However, if this point is teased out further, the reasoning starts to unravel; Murnaghan J. says the State is sovereign, but it is only sovereign because the people are sovereign. He assumed that

¹² *Ibid.* at 272.

¹³ *Ibid.* at 298.

¹⁴ *Ibid.* at 310-311.

¹⁵ *Ibid.* at 255.

the State had replaced the Crown in the UK, where the people do not feature. This reasoning was held to be defective in the Supreme Court.¹⁶

In the second case, *Webb*,¹⁷ the Supreme Court confirmed the Supreme Court's judgment in *Byrne*, in holding that the prerogative of Treasure Trove did not exist in Ireland as it was part of the Royal Prerogative which had been destroyed with the enactment of the Irish Free State.¹⁸ Finlay C.J., giving judgment for the court, stated that he agreed with the judgment in *Byrne* and held that "no royal prerogative in existence prior to the enactment of the Constitution of 1922 was by virtue of the provisions of that Constitution vested in the Irish Free State."¹⁹

A few years later in *Geoghegan*,²⁰ which is the most modern case on the Prerogative, the question appeared to be re-opened. Although the point was *obiter* since the case did not centre on the question of survival of the Prerogative,²¹ *Byrne* and *Webb* were followed in that it was held that no Royal Prerogatives had vested in the Irish

¹⁶ Walsh J. stated:

[i]n the first place I think that the learned trial judge misconstrued the intent of Article 5 if he construed it as a constitutional declaration that the State is above the law. Article 1 of the Constitution affirms that the Irish nation has the 'sovereign right to choose its own form of Government'. Our constitutional history, and in particular the events leading up to the enactment of the Constitution, indicate beyond doubt, to my mind, that the declaration as to sovereignty in Article 5 means that the State is not subject to any power of government save those designated by the People in the Constitution itself, and that the State is not amenable to any external authority for its conduct. To hold that the State is immune from suit for wrong because it is a sovereign state is to beg the question.

Byrne, *supra* note 1 at 264.

¹⁷ *Geoghegan*, *supra* note 6.

¹⁸ However, because of this, the Court was driven to the very spurious conclusion that the same right involved in Treasure Trove (the right to acquire items, such as gold coins, which are discovered and have no known owner), did actually exist in Ireland. The reason the State could claim the find was not because of prerogative but because of the fact that by Art. 5, Ireland was a sovereign State. The Court held that because heritage is such a fundamental facet to the sovereignty of a State, as a consequence, the State should be entitled to items of historical importance where the owner cannot be identified.

¹⁹ *Webb*, *supra* note 2 at 382. Henchy and Griffin JJ. agreed with the Chief Justice. Walsh and McCarthy JJ. gave separate judgments but also agreed on this point.

²⁰ *Geoghegan*, *supra* note 6.

²¹ This case related to an Institute which was established by prerogative power prior to 1922 and the question raised was whether this and other such bodies had survived the enactment of the 1922 Constitution. It was held that although the Royal prerogative had not survived, there was no reason that bodies which had been established before Independence could not have continued to exist under the 1922 Constitution.

Free State. O'Flaherty J. endorsed the views of Murphy J. in the High Court,²² who had drawn a distinction between the content and source of the Prerogative,²³ and then went on to cast doubt on the *Byrne-Webb* line of authority by making the following remark:

[a]s regards the decisions in *Byrne v. Ireland* and *Webb v. Ireland*, since each was concerned with a single question in respect of the royal prerogative (whether the State was immune from civil suit in the one case and the State's entitlement to treasure trove in the other), it may be that if in a future case a wider question is raised concerning the royal prerogative, the parameters of the judgments in these cases may need to be delineated.²⁴

By this comment, the decision in *Byrne* was called into question once again.

III – Arguments on Survival of Prerogative

Various different arguments were put forward in support of the view that the Prerogative actually had survived and additional arguments can be put forward based on judgments from the 1920s. The arguments in favour of survival can be summarised as follows:

- A. Prerogative must have survived because everyone in the 1920s thought it did;
- B. Prerogative survived because of obligation to follow Canadian precedent;
- C. Prerogative survived because specific prerogative powers are provided for in the 1922 Constitution;
- D. Prerogative survived because the entire corpus of Prerogative was carried over by various Articles in the 1922 Constitution; or
- E. Prerogative must have survived because otherwise, Article 49 of the 1937 Constitution is pointless.

It is now proposed to examine the merits of each of these arguments.

²² Hamilton C.J, Denham and Egan JJ. do not mention Murphy J.'s finding but Blayney J. states that he agrees with O'Flaherty J.

²³ This will be discussed *infra* at Part IV.

²⁴ *Geoghegan*, *supra* note 6 at 118.

A. Prerogative must have survived: Prerogative in practice

Professor Kelly made a statement in his article on the Prerogative in the Dublin University Law Journal, which has now become rather famous:

I think that for us today, 50 or 60 years later, to take the line that our fathers and grandfathers in legal, political and official life quite misunderstood the nature of the machine they were not only operating but had in fact constructed, is to adopt an unreal and intellectually unamiable position.²⁵

Kelly argued that the Crown and its Prerogative were understood to have survived the enactment of the Irish Free State Constitution and that this much is clear from the practice of the time.²⁶ This is a rather strange argument, akin to stating that because everyone assumes the law is a certain way then it must be. Nevertheless, it has its analogues, for instance adverse possession in property law. Of course there is a lot of doubt here but with any under-developed question of law the evidence of legal and scholarly opinion must be taken into account. In fact, in the much maligned *Byrne* case, Fitzgerald J. dissented on the basis that he believed the majority judgment constituted a radical change in the law.²⁷

Returning then to the principal question, which is whether the Prerogative actually did survive, it will be useful to consider the contemporary opinion. In Kohn's comprehensive work on the Free State Constitution, written during the late 1920s and published in 1932, he discusses the sovereignty of the people. He points out that "the constitutional significance of the insertion ... of a formal declaration that 'all powers of government and all authority legislative, executive and judicial in Ireland are derived from the people of Ireland' need hardly be laboured."²⁸ He also remarks that because it was one of the provisions on which the British agreed, that is confirmation of British

²⁵ Kelly, *supra* note 5 at 14-15.

²⁶ Kelly instances the right to pardon, the existence of King's Counsel and the issuing of passports as examples of prerogative powers in practice. However, the second example is hardly a prerogative and the granting of passports could be argued to be implicit in the powers of the State. Furthermore the power to grant pardon was exercisable by the Governor General and as such, could come under the category of prerogative powers provided for in the 1922 Constitution. *Ibid.* at 15. For discussion on this point see *infra* p 12.

²⁷ *Byrne*, *supra* note 1 at 310-311.

²⁸ L. Kohn, *The Constitution of the Irish Free State* (London: George Allen & Unwin, 1932) at 113 [hereinafter Kohn].

recognition of Irish sovereignty. He notes the republican *leitmotif* which runs throughout the whole Constitution and remarks that while the “monarchical head” had to be included, it had been done so as “a functionary of the Irish people ... almost as the permanent President of an Irish Republic”.²⁹ Kohn then goes on to make a very strong statement: “[t]here is a King; there is no Royal Prerogative.”³⁰ He bases this assertion on the existence of what he terms “the fundamental declaration of the sovereignty of the people” which is contained in the 1922 Constitution. It is difficult to reconcile this view with that of Kelly.³¹

In his judgment on the *Byrne* case, Walsh J. dealt with this argument when he pointed out the following:

[c]onfusion was increased by the fact that the King enjoyed some place under the Constitution of the Irish Free State, 1922, and by the fact that in these years the law was practised and interpreted by persons who, quite naturally, had been mostly orientated by education and practice towards a system in which this concept of sovereign immunity of the Crown held sway.³²

In other, less polite words, he believed that the people of the time were wrong. However, Walsh J. has a fair point and the same point has been used as a reason for the failure of judicial review under the Irish Free State Constitution.³³ The bottom line is that Irish lawyers and judges had all trained in the British tradition, thus it is likely that it would be a long time before the aspects of the new legal system were properly understood.³⁴

²⁹ *Ibid.* at 114.

³⁰ *Ibid.*

³¹ And with other opinions which will be discussed *infra* at 25.

³² *Byrne*, *supra* note 1 at 269.

³³ See V.T.H. Delaney, “The Constitution of Ireland: Its Origins and Development” (1957) 12 *University of Toronto Law Journal* 1 at 9-10. He submits that because the lawyers of the time were steeped in the tradition of parliamentary sovereignty they never quite got to grips with the idea that the Courts could review actions of the legislature. As with Walsh J.’s point, both assert that the older tradition was so inherent in the minds of the people at the time that they simply followed it without reference to the new legal order.

³⁴ Another interesting fact is that Article 42 of Draft B of the 1922 Constitution contained the following clause: “Proceedings may be instituted against Saorstát Éireann in such manner and subject to such regulations as may be prescribed by law.” This provision was eventually dropped at some stage without discussion and it was never included in the eventual document of 1922. It is possible that the Government did not like the idea of the Article and decided to leave the question open but it is also possible that they felt that it was simply unnecessary to state in the 1922 Constitution as it was obvious that proceedings could be instituted. However, there is no proof either way as to why the provision was dropped.

B. Prerogative survived because of obligation to follow Canadian precedent

This argument is propounded by Lenihan, who has noted what he believes to be the major defect in the *Byrne* case:

[i]t fails to consider the provisions of the Constitution of the Irish Free State Act 1922... [and the] Articles of Agreement for a Treaty between Great Britain and Ireland, 1921 ... [which provide] that the law, practice and constitutional usage governing the relationship of the Crown to the dominion of Canada shall govern its relationship to the Irish Free State.³⁵

As a result of this obligation to follow Canada, Lenihan opines that consequentially, even “Article 2 of the Saorstát Constitution is contrary to the Articles of Agreement in so far as it declares all powers of government to be derived from the people rather than the Crown, and is to the extent of such conflict absolutely void and inoperative.”³⁶ But this reasoning assumes that according to the Treaty, Ireland was to follow all of the constitutional precedents of Canada. However, the Irish Free State departed significantly from Canadian legal practice and theory in many instances.

The most obvious difference is that the personification of the Dominion of Canada was the Crown but in Ireland, as detailed earlier,³⁷ it was the people. This was because under the Irish 1922 Constitution it was the people who were sovereign.³⁸ This constitutes a major departure from Canadian precedent. The form of oath was another departure: the oath to be taken by Irish deputies on entering parliament was less consequential than the Canadian oath.³⁹ Kohn has written in relation to the Irish oath that:

³⁵ Lenihan, *supra* note 3 at 3.

³⁶ *Ibid.* at 4.

³⁷ *Supra* note 12 and accompanying text.

³⁸ This was the defect in the reasoning of Murnaghan J. in the High Court in *Byrne*, *supra* note 1, considered *ibid.*

³⁹ The Canadian oath (which can be found in the 5th Schedule to the *British North America Act 1867*) read “I A.B. do swear, that I will be faithful and bear true allegiance to Her Majesty Queen Victoria,” whereas the Irish deputies had to swear:

I AB do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established, and that I will be faithful to HM King George V, his heirs and successors by law in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

[a]llegiance is pledged exclusively to the Constitution of the Irish Free State, in which the King, in so far as he forms part of that constitutional structure, derives his authority not from any inherent prerogative, but from the sovereign will of the Irish people It is from the allegiance to the Irish citizen to his own State that the declaration of faithfulness to the King as head of the British Commonwealth of Nations is derived.⁴⁰

Furthermore, Professor Keith wrote that the new form of oath “emphasised that the fidelity and allegiance of the Members of the Parliament of the Free State are primarily to the Constitution of the State and only secondarily to the Crown.”⁴¹ In addition, the Canadian Parliament did not have the power to amend its Constitution. Neither did it have the power of dissolution or assembly.⁴² The Crown preserved the power of disallowance in Canada, whereas it was excluded from the Irish 1922 Constitution. In Canada the Governor-General had some discretion in relation to dissolution but Ireland he had no such power.⁴³ Even in regard to the appeal to the Judicial Committee of the Privy Council, in Canada this was possible both as of right and by special leave whereas in Ireland it was only permitted where special leave was obtained.

So, following the line of reasoning that Ireland had to conform to all the Canadian precedents would have led to the absurd conclusion that Ireland was in complete violation of the Treaty. Now it is true that many of these instances where Ireland had departed from Canadian precedent were contained in provisions which had been agreed to by the British when the Draft Constitution was brought over to London. Because of this, it could be argued that the British gave their consent to many of the departures from Canadian precedent and therefore perhaps it follows that Canadian practice was to be followed apart from the agreed exceptions.

However, the fact is that some exceptions developed in practice and without any express British agreement. In these situations, the Irish neither followed Canadian practice nor obtained British consent for this failure, and nobody objected. One such

This form of oath was specified by Article 4 of the Anglo-Irish Treaty 1921.

⁴⁰ Kohn, *supra* note 28 at 53.

⁴¹ IV Journal of Comparative Legislation 105, as cited by Kohn, *ibid.* at p 54.

⁴² Article 50 provided for the power of amendment of the Constitution of the Irish Free State. Articles 24, 28 and 53 provide for convocation and dissolution of the Oireachtas.

⁴³ The Governor General is specifically deprived of this power under Art. 53.

example is the Governor-General situation where Ireland was constantly striving to achieve more than the Canadian position.⁴⁴ Another example is the unilateral abolition of the Appeal to the Judicial Committee of the Privy Council.⁴⁵ There are many more examples such as the creation of Irish citizenship⁴⁶ and Irish passports,⁴⁷ and the practice of sending diplomatic representatives to other countries.⁴⁸ Perhaps it is not going too far to argue that the Irish Free State was slowly shedding its acquired skin of Canadian law and practice for something more original while the British stood by and watched. Lenihan concludes his point on abrogation of the Treaty with the following comment: “[t]he Articles provided that the relationship between the Crown and the dominion of Canada govern the Crown’s relationship to the Saorstát, and that is the end of the matter. ... If prerogative powers were exercisable in the dominion of Canada in 1922, then they were also exercisable in the Saorstát”.⁴⁹ But in reality, as the examples given above show, this was not the case.

However, that is not to say that there was no support for the use of Canadian precedent in this respect. In *Galway County Council v. Minister for Finance and the Attorney-General*,⁵⁰ Johnston J. dealt what he called “prerogative right” when he held that the Minister for Finance was entitled to rely on the prerogative whereby there being no indication in the legislation that it was the intention of the Legislature to bind the Crown or the State, the State could not be bound. He commented that: “[t]here can be no doubt, and it has not been argued in the present case to the contrary, that the

⁴⁴ Ireland was the first Dominion to appoint one of its own citizens to the post. Once the precedent had been established in the appointment of T.M. Healy, the Irish Government regarded it as a right. See D.R. Gwynn Morgan, *The Irish Free State 1922-1927* (London: Macmillan & Co., 1928) at ch V.

⁴⁵ The appeal was abolished unilaterally by the *Constitution (Amendment No. 22) Act 1933*, which was retrospectively validated by the Judicial Committee of the Privy Council itself in *Moore v. Attorney General* [1935] A.C. 484. See T. Mohr, “Law without loyalty – the abolition of the Irish appeal to the Privy Council” (2002) 37 I.J. 187.

⁴⁶ The idea of a distinctive Irish citizenship was another novel departure, for although certain types of Dominion nationality had been created, no other Dominion had conceived a truly national citizenship. Canada had created a Canadian nationality but only with regard to re-immigration into the jurisdiction and also in relation to the appointment of Canadian members to the Court of International Justice. See C. Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (London: Stevens & Sons Ltd., 1957) at 450-451.

⁴⁷ This was also a uniquely Irish venture. See J. P. O’Grady, “The Irish Free State Passport and the Question of Citizenship, 1921-4” (Nov 1989) 26 (104) *Irish Historical Studies* 396 at 398.

⁴⁸ T.A. Smiddy was officially recognised as an ambassador to Washington in 1924. See generally E.J. Phelan, “The Sovereignty of the Irish Free State” (Geneva: Review of Nations Publishing, 1927) at 35- 49.

⁴⁹ Lenihan, *supra* note 3 at 5.

⁵⁰ [1931] I.R. 215 [hereinafter *Galway County Council*].

Prerogative and prerogative right can be relied upon by the Irish Free State, and is part of the law of the land”.⁵¹ This is the first case where such a declaration was made. To support this he cited *Maritime Bank v. Receiver-General of New Brunswick*,⁵² “an important decision of the Privy Council upon the law, practice, and constitutional usage in relation to Canada - where it was decided that prerogative right can be relied upon not only by the Dominion Government, but also by the Provincial Governments of Canada.”⁵³

Walsh J. in *Byrne* criticised the use of Canadian precedent here:

[i]n my view, the reference to the constitutional usage of Canada, in addition to being the basis of a concession, was used too generally in the context because it did not follow that, because in the law of Canada the Crown had the prerogative ... the right necessarily existed also in the Irish Free State.⁵⁴

In the case of *Re Irish Employers Mutual Insurance Association Limited*⁵⁵ Kingsmill Moore J. also considered the use of Canadian precedent. In regards to Article 2 of the Treaty he stated:

[i]t seems to me that Article 2 was intended to impose on the new Free State those limitations on autonomy and restrictions of status at least until the law practice and constitutional usage of Canada was changed. But it was not intended to do more. ⁵⁶ It did not purpose [*sic*] in any other way to restrict the autonomy or legislative power of Saorstát Éireann and it was quite competent for the new state either by its Constitution, or by subsequent enactment, or by its procedure and the forms it adopted, to regulate its own finances and control its own property in any way it wished.⁵⁷

⁵¹ *Ibid.* at 232.

⁵² [1892] A.C. 437.

⁵³ *Galway County Council*, *supra* note 50 at 232.

⁵⁴ *Ibid.* at 270.

⁵⁵ [1955] I.R. 176 [hereinafter *Re Irish Employers*].

⁵⁶ The limitations referred to are those in relation to powers of the Governor General, Appeal to the Judicial Committee of the Privy Council and restrictions on extra-territorial legislation; *ibid.* at 218.

⁵⁷ *Ibid.* at 218.

Kingsmill Moore J. went on to consider the differences in conception of the Irish and Canadian constitutions⁵⁸ and then in relation to the case cited by Johnston J., he stated: “it does not seem to me to have any bearing on the position in Saorstát Éireann ...”⁵⁹

In *Galway County Council*, Johnston J. also cited *Re Bateman’s Trust* in which it was held that “the Queen is as much the Queen of New South Wales as she is the Queen of England”.⁶⁰ However, this was hardly a suitable precedent as, unlike the Irish situation, the Queen was recognised as the sovereign authority in New South Wales. Johnston J. failed to deal with the question of the actual survival or compatibility of the Royal Prerogative with the Irish Free State Constitution.

A further point on the Canadian argument is that during the British discussions on the 1922 Constitution, Lloyd George commented to his cabinet that there was nothing in the Treaty which required the Irish 1922 Constitution to conform to the Canadian Constitution “so far as internal arrangements were concerned.”⁶¹ The Prerogative can surely be defined as an internal arrangement.

C. Specific Prerogative Powers in the 1922 Constitution

Kevin Costello has argued that the *Byrne* decision is not sound because some forms of prerogative power were specifically provided for in the Irish Free State Constitution.⁶² He refers here to the power to grant titles in Article 5 and the appeal to the Judicial Committee of the Privy Council in Article 66. He attributes the inclusion of these provisions to “the anxiety of individual dominions to gain the maximum collection of executive prerogatives into their own hands.”⁶³ Thus, the implication is that the Irish representatives wanted these provisions. However, this view completely ignores the legal reality of the constitutional discussions with the British, where the Irish were forced to accept these Articles in which the Crown, not the State or the people, was to

⁵⁸ “When the events leading up to the passing of the Act of 1867 are compared with those which presided over the birth of the Saorstát Constitution it will be seen how unsafe it is to base any argument on a mere resemblance of phraseology”; *ibid.* at 222.

⁵⁹ *Ibid.* at 230.

⁶⁰ [1873] L.R. 15 Eq 355 [hereinafter *Re Bateman’s Trust*].

⁶¹ British National Archives Cabinet Minutes CAB 43/6 at 53.

⁶² Costello, *supra* note 4.

⁶³ *Ibid.* at 189.

exercise these rights. Furthermore, inclusion of prerogative provisions in the 1922 Constitution was not an explicit recognition of the continuing power of Crown Prerogative in Ireland but rather a recognition that the Royal Prerogative had been, for the most part, discontinued but that certain aspects could be retained by the State.⁶⁴ If these prerogatives were already understood to apply to the Irish Free State, then there would have been no need to include specific provisions enumerating this fact and if it was not only these prerogatives which survived why not include all the other prerogative powers also?

D. Prerogative survived because it was carried over in its entirety by Articles in the 1922 Constitution

In contrast to the previous argument which dealt with specific prerogative powers which were enumerated in the 1922 Constitution, this argument looks at two Articles which could possibly have carried over the Prerogative into independent Ireland.

(i) Prerogative survived because of Article 51

Article 51 states:

[t]he Executive Authority of the Irish Free State (Saorstát Eireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown

The case of *Re Irish Employers* concerned the winding up of a company.⁶⁵ The Commissioners of Public Works claimed an amount of money as payable in priority to other creditors on the basis of *inter alia* the common law prerogative of priority accorded to Crown debts. In his enlightening High Court judgment, Kingsmill Moore J. undertook a detailed study of the history of that particular prerogative right and he

⁶⁴ See statements of Minister O'Higgins, *infra* notes 116-117 and accompanying text.

⁶⁵ *Re Irish Employers*, *supra* note 55.

came to the conclusion that it was inconsistent with the 1922 Constitution.⁶⁶ However, in the course of his judgment, he references a distinction made by Blackstone in his definition of Prerogative:

Blackstone divides the prerogatives of the king into two classes, the ‘direct’ and the ‘incidental.’ The direct prerogative he defines as ‘such positive substantial parts of the royal character and authority, as are rooted in and spring from the king’s political person,’ and such prerogatives would, in general have been preserved by the Saorstát Éireann constitution, which vested executive authority in the king, and would now (by Article 49 of our Constitution) belong to the People and be exercisable by the Government. The incidental prerogatives on the other hand are defined as ‘exceptions in favour of the crown, to those general rules that are established for the rest of the community,’ and the right to priority payment of debts is given as an exam [*sic*] of such prerogatives.⁶⁷

While on the one hand, he resurrects an interesting and useful distinction, also he appears to provide a basis for the survival of the Prerogative in Article 51 of the 1922 Constitution which declared that “[t]he Executive Authority of the Irish Free State (Saorstát Éireann) is hereby declared to be vested in the King...” The Supreme Court also took this view; despite the fact that the point is not dealt with as such in the

⁶⁶ Following his historical consideration, Kingsmill Moore J. drew a number of conclusions, including the following:

[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.

Re Irish Employers, ibid. at 215. This led him to accept the proposition of Gavan Duffy J. in *Irish Aero Club* [1939] I.R. 204, see *infra* note 83, that “[t]he common law prerogative of prior payment of his debts belonged to the king, not because he was the supreme executive authority, but because of the personal pre-eminence over all subjects which attached to him at common law, on the principle expressed in the phrase *detur digniori*.” *Ibid.* at 199.

⁶⁷ *Ibid.* at 199. Holdsworth also mentions this divide in the prerogative. He explains that the incidental prerogatives came into being in the mediaeval period when “the King was regarded quite as much as a superior feudal lord with special privileges as a ruler entrusted with the executive powers of the state”, *ibid.* Whereas, the direct prerogative, was a product of the sixteenth and early seventeenth centuries, when the royal lawyers created for the king “a politic capacity and emphasised his powers in such a way that, through his prerogative he was able to act as the executive of a modern State”; W. Holdsworth, *History of English Law*, 3rd Ed. (London: Methuen, 1923) vol. 3, at 459. The same distinction is also referred to elsewhere using different terms; Bradely and Ewing refer to the ordinary and extraordinary/absolute prerogatives. “[t]he ordinary prerogative meant those royal functions which could only be exercised in defined ways and involved no element of royal discretion ... By contrast, the absolute or extraordinary prerogative meant those powers which the King could exercise in his discretion”; A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law*, 13th Ed. (Harlow: Longman, 2007) at 246.

Supreme Court, the judgment of Kingsmill Moore J. is stated to be correct and Murnaghan J. makes the following comment: “[i]n my opinion there is no room [in the Irish Constitution] for that part of the prerogative which gave Crown debts priority of demand.”⁶⁸

However, the reasoning based on Article 51 is not sound because as early as 1927 it had been emphatically affirmed that the Crown was nothing but a fiction in the Irish Free State. Kennedy C.J. in *Re Reade* stated: “[t]he Crown is in each Dominion the permanent symbol of executive government, but the actual government is in fact and in constitutional reality in the hands of the national ministers responsible to, and changeable at the will of, the national parliament.”⁶⁹ Kennedy’s statement on the purely symbolic position of the Crown was not revolutionary because it was obvious in Ireland at the time. Kevin Costello has shown how during the discussions on the 1922 Constitution with the British “the Crown was degraded to a purely symbolic position.”⁷⁰ And he has correctly noted how: “[t]he Crown was removed from the sphere of administration, and from the exercise of those common law executive powers known in those jurisdictions which adopt the English constitutional model as prerogatives.”⁷¹ It is obvious that the Crown was never more than a symbol in the Irish Free State. It therefore does not make sense to argue that Article 51 brought the Prerogative into the Irish Free State because to do so would imply that the King had a real role in the Irish Free State.

(ii) Prerogative survived because of Article 73

Article 73 provided:

[s]ubject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát

⁶⁸ *Re Irish Employers*, *supra* note 55 at 241.

⁶⁹ [1927] I.R. 31 at 50.

⁷⁰ Kennedy, who was Attorney General at the time, ensured there was to be no semblance of continuance in terms of monarchical rule in Ireland and he had deleted a sentence, which the British were insisting upon, which stated that the executive power of the Irish Free State was declared to “continue to be vested in the King”. See Costello, *supra* note 4 at 172-179.

⁷¹ *Ibid.* at 179. He also notes that evidence extracted from law reports, from governmental legal opinions, and from administrative practice confirms the construction of Article 51 whereby the Crown is merely a symbol.

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.

Cooper v. Attorney General & Ors involved the right of fishing in tidal waters where a British statute had created a private fishery in 1837.⁷² It was argued that the prerogative, whereby the right of fishing in tidal waters was reserved for the Crown, should apply. Johnston J. found for the plaintiff but significantly, on the prerogative point itself, he stated: “[i]t is true, no doubt, that the prerogative rights of the Crown were carried over as part of the law of the Irish Free State by Article 73 of the Constitution.”⁷³ Again, he relied on *Re Bateman’s Trust*⁷⁴ as support for this contention which, as we have seen,⁷⁵ was not suitable authority.

Article 73 was also cited as the basis for prerogative power in Ireland in the case of *Cork County Council & Burke v. Commissioners of Public Works*.⁷⁶ The case involved the question of whether the State was liable for rates. Again, it involved a consideration of whether the State was bound by statute or whether, like the Crown, it was immune because of Prerogative. The Supreme Court was asked to answer three questions. Among them was the following: “[a]re the defendants, the Commissioners of Public Works in Éire, entitled to enjoy the like immunity from liability for rates as was

⁷² [1935] I.R. 425 [hereinafter *Cooper*]. The plaintiff was heir to the private fishery and brought the case to establish legal title over the special defendants who had been fishing in the area on the basis that “the right of fishing in the tidal waters was vested in the Crown in trust for the public generally”. Johnston J. considered the argument of the Attorney General whereby the right of fishing in the tidal waters “was vested in the British Crown in trust for the public generally and that the said British statute did not affect the prerogative of the Crown or detract from the right of fishing in the said tidal waters enjoyed by the public.” *Ibid.* at 432. Basically, the argument put forward, which was never going to succeed, was that the prerogative right trumped the statutorily created right. Johnston J. felt that the plea was ingenious but that it did not represent the law: “[t]he fallacy, in my opinion, is to be found in the allegation that the public’s right to fish in tidal waters ‘was vested in the British Crown in trust for the public generally.’” *Ibid.* at 440. He cited the cases of *Mersey Docks & Harbour Board v. Cameron* 11 H.L.C. 443 and *Clyde Navigation Trustees v. Adamson*, 4 Macq. 931 and stated that:

[t]he matter was settled as early as the time of Coke in the *Case of Non Obstante*, where it was laid down that ‘no Act of Parliament can bind the King from any prerogative which is sole and inseparable to his person, but he may dispense with it by a *non obstante* ... But in things which are not incident solely and inseparably to the person of the King, but belong to every subject and may be severed, there an Act of Parliament may absolutely bind the King.

Ibid. at 441.

⁷³ *Cooper, ibid.* at 440.

⁷⁴ *Re Bateman’s Trust, supra* note 60.

⁷⁵ See *supra* at 11-12.

⁷⁶ [1945] I.R. 561 [hereinafter *Cork County Council*].

formerly claimed and enjoyed by the Crown prior to the Constitution of the Irish Free State?” However, Murnaghan J. stated that it was not necessary to deal with this question:

[i]t has, however, become unnecessary to give any answer to the general question as propounded because the plaintiffs have admitted that, having regard to the history of the lands with which the case is concerned, the Minister for Finance is entitled to the same prerogative as was, prior to 1921, enjoyed by the Crown.⁷⁷

O’Byrne J. stated that although “it was conceded by counsel that this general question was propounded in terms too wide to admit of a categorical answer ... ,”⁷⁸ he felt that he should deal with the point anyway:

[w]hen the Irish Free State was established, a Constitution was enacted which provided for the creation of a Legislature consisting of the King and two Houses (Art. 12), and further provided that the executive authority was vested in the King and exercisable in the manner thereby provided (Art. 51). Article 73 provided that, subject to the Constitution and to the extent to which they were not inconsistent therewith, the laws in force in the Irish Free State, at the date of the coming into operation of the Constitution, should continue to be of full force and effect until the same or any of them should have been repealed or amended by enactment of the Legislature thereby established. In view of these provisions I can see no reason for holding that the prerogative, with which I am dealing, was not transferred to the Irish Free State. It was part of the common law, which was applied to the Irish Free State by Art. 73.⁷⁹

While it looks like O’Byrne J. was playing it safe in referencing both Article 51 and Article 73, he seems to have eventually decided that it was Article 73 which brought the Prerogative into the new State. Significantly too, he went on to rationalise the prerogative in question in such a way that it would not be inconsistent with the 1922 Constitution. He cited the American case of *United States v. Hoar* in which Story J. held as follows:

[w]e find, accordingly, in our own State the doctrine is well settled that no laches can be imputed to the Government and against it no time runs, so as to bar its rights. So that it is clear that the Statutes of Limitations pleaded in this case would be no bar to a suit brought to enforce any right of the State in its own Courts.

⁷⁷ *Ibid.* at 571.

⁷⁸ *Cork County Council*, *supra* note 76 at 576. O’Byrne was a member of the 1922 Constitution Committee.

⁷⁹ *Ibid.* at 578.

Where the Government is not expressly, or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed or the language used that the Government itself was in contemplation of the Legislature before a Court of law would be authorised to put such an interpretation upon any statute. In general, Acts of the Legislature are meant to regulate and direct the acts and rights of citizens and in most cases the reasoning applicable to them applied with very different and often contrary force to the Government itself.

It appears to me, therefore, to be a safe rule, founded in the principles of the Common Law, that the general words of a statute ought not to include the Government, or affect its rights, unless that construction be clear and indisputable upon the text of the Act.⁸⁰

That the right could be recognised in a country with a republican constitution was significant. Black J, in the same case, followed the reasoning of O'Byrne J. saying:

[m]uch time was devoted to discussing the true nature of this right and to combating the supposition that so far as it still exists, it is inseparable from the institution of kingship. If that were so, one would not expect to find such a right recognised for over a century by the Courts of the United States of America where the institution of kingship has no existence.⁸¹

Thus, both judges wished to draw a distinction,⁸² which was later emphasised by Kelly, who explained it as:

[b]etween those aspects of the royal prerogative which appeared to be appendages of a royal personality, like the old right of prior payment from an insolvent estate which Gavan Duffy J. had declared dead as long ago as 1938,⁸³ and other aspects, such as the implicit exemption of the State from the burdens imposed by its own statutes which could be presented as 'broad-based upon the public interest'.⁸⁴

Basically, the argument was that the State could have retained aspects of the Prerogative which could be rationalised in terms of public interest and so could have been carried over by Article 73 as they would not conflict with the 1922 Constitution. Interestingly, the rationalisation which was drawn upon in this case is not unlike the

⁸⁰ (1821) 2 *Mason* 311 at 577 [hereinafter *Hoar*].

⁸¹ *Ibid.* at 587.

⁸² See *infra* at 24.

⁸³ The case which Kelly refers to here, we can presume, is *Re Irish Aero Club* [1939] I.R. 204, in which it had been claimed that State was entitled to enjoy the prerogative which accorded to the British Crown a right to payment in full in priority to its subjects. However, during the course of the hearing this claim was abandoned. Gavan Duffy J. responded as follows: "[v]ery properly, if I may say so, for such a claim would be hard to reconcile with the Constitution." *Ibid.* at 209.

⁸⁴ Kelly, *supra* note 5 at 7.

distinction resurrected by Kingsmill Moore J. in *Re Mutual* in relation to direct and incidental prerogatives.⁸⁵

The idea of a distinction or rationalisation broadly based on public interest can be traced back further. In *Leen v. President of the Executive Council & Ors* the court had to consider the existence of the prerogative right of executive privilege in relation to the disclosure of documents.⁸⁶ Gavan Duffy QC, who was counsel for the plaintiff, argued against the existence of Prerogative in the Irish 1922 Constitution: “[w]e submit that anything savouring of Prerogative was done away with by the Preamble to the Constitution and by Article 2 thereof; and the main case made by the defendants was hardly distinguishable from Prerogative.”⁸⁷ However, Meredith J. ruled against him. He held that executive privilege existed as a prerogative, not to be claimed by the Crown but by the State on the basis of public interest:

[i]f the defendants are entitled to the privilege that the Crown would have, I cannot go behind this objection. It is contended, however, by the plaintiff that the privilege can only be claimed by the Crown as such. I can find nothing, however, in the authorities on this privilege in respect of discovery to suggest that the rule of law which has always been in force, and which has to be administered as heretofore under the Constitution of the Irish Free State, is dependent upon the magic of any particular nomenclature. On the contrary, it appears to me to be *broadbased upon the public interest*, and in this connection the remarks of Rigby L.J. in *Attorney-General v. Newcastle-upon-Tyne Corporation*: “I may say that in these days the prerogative of the Crown is about equivalent to the rights of the public,” cited by Mr. Costello, are apposite.⁸⁸

Interestingly, in the more modern case of *Murphy v. Dublin Corporation* which also concerned executive privilege against the disclosure of official documents, Walsh J. decided the case using the same reasoning as Meredith J.⁸⁹ Notably, there is no reference to Prerogative in that case.

⁸⁵ *Supra* at 13-15. For more discussion see *infra* at 24 *et seq.*

⁸⁶ [1926] I.R. 456.

⁸⁷ *Ibid.* at 461.

⁸⁸ *Ibid.* at 463 [emphasis added].

⁸⁹ [1972] I.R. 215. It was decided in this case that the courts (as opposed to the Minister) can decide whether to preserve the confidential nature of official documents in the public interest.

E. Why would Article 49 have been included in the 1937 Constitution?

Lenihan argues that: “[t]he People would hardly have bothered to insert Article 49⁹⁰ into the 1937 Constitution if they did not believe that prerogative rights and powers had survived the enactment of the 1922 Constitution and that, therefore, if needs be, the Crown was the personification of Saorstát Éireann.”⁹¹ Kelly also put forward a similar argument.⁹² While they may have a point about the purpose of Article 49, it is submitted that the architects of the 1937 Constitution would never have intended an interpretation whereby the Crown would be the personification of the State. In fact they went to great pains to underline the fact that it was the people who were sovereign. As argued below, it is more probable that Article 49 was intended merely as a carry-over Article and it is certainly ludicrous to suggest, by a mere implication, that it was intended to cover something which is inconsistent with the rest of the 1937 Constitution.

Kevin Costello has also expressed the view that the interpretations of Article 49 by Lenihan and Kelly are “defective”:

[t]hey rest on the following propositions (i) that the royal prerogatives are the administrative powers of the Crown; (ii) that in the Irish Free State executive power was vested in the Crown; (iii) that it is, accordingly correct to speak of a royal prerogative operating in the Irish Free State, and (iv) that

⁹⁰ Article 49 provides:

[a]ll powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Éireann immediately before the 11th day of December, 1936, whether in virtue of the Constitution then in force or otherwise, by the authority in which the executive power of Saorstát Éireann was then vested are hereby declared to belong to the people.

2. It is hereby enacted that, save to the extent to which provision is made by this Constitution or may hereafter be made by law for the exercise of any such power, function, right or prerogative by any of the organs established by this Constitution, the said powers, functions, rights and prerogatives shall not be exercised or be capable of being exercised in or in respect of the State save only by or on the authority of the Government.

3. The Government shall be the successors of the Government of Saorstát Éireann as regards all property, assets, rights and liabilities.

⁹¹ Lenihan, *supra* note 3 at 3.

⁹² Kelly states:

I cannot see what ‘prerogatives’, specifically mentioned in Article 49.1, can have been on the mind of the drafters the Dáil, or the People, in promoting, approving, and enacting this Article, except those which on the *Byrne* plus *Webb* hypotheses, had never existed at all in the Irish Free State. On the other hand, if we assume that Article 49.1 is not simply beating on the air and that there was something for it to operate on, it follows that some elements of Royal prerogative did indeed continue to exist in that State.

Kelly, *supra* note 5 at 10.

it is this prerogative which is referred to in Article 49. The problem is that they misconceive the theoretical basis of executive power in the Irish Free State. All of the evidence shows that constitutional opinion in the Irish Free State rejected the notion that executive authority was located in the Crown.⁹³

In dealing with this argument, Costello focused on proposition (ii) and although Article 51 states that executive authority was vested in the King, we know that this was simply a constitutional fiction.⁹⁴ So because proposition (ii) is wrong, the other propositions fall. The King was simply a nominal head with some ceremonial functions. He goes on to suggest that the “powers, functions, rights and prerogatives” referred to in Article 49 could only have meant the symbolic type of functions exercisable by the King. Costello further demonstrates that Article 49 could not have meant any powers exercised by the King at common law because the King was not actually competent in that area.⁹⁵

Why then was Article 49 included in the 1937 Constitution? It is submitted that its inclusion was intended to be an aid to transition, not unlike Article 80 of the 1922 Constitution,⁹⁶ and to provide the means of “enabling the administration to be carried on and the various powers under existing laws to be exercised in all their fullness.”⁹⁷ In other words, it seems the word “prerogatives” need not have meant the Royal Prerogative.

⁹³ Costello, *supra* note 4 at 167.

⁹⁴ See *supra* at 13-15.

⁹⁵ Costello, *supra* note 4 at 179, 180. For an in-depth analysis of the basis of executive power in the Irish Free State see 167-179.

⁹⁶ Article 80 states:

[a]s respects departmental property, assets, rights and liabilities, the Government of the Irish Free State (Saorstát Éireann) shall be regarded as the successors of the Provisional Government, and to the extent to which functions of the department of the British Government become functions of the Government of the Irish Free State (Saorstát Éireann), as the successors of such department of the British Government.

⁹⁷ See Observations from the Department of Finance in D. Keogh & A. McCarthy, *The Making of the Irish Constitution 1937* (Cork: Mercier Press, 2007) at 128. Unfortunately this is simply a sentence from the observations of the Department of Finance on the draft 1937 Constitution and there is no further discussion on the point.

IV – Two Categories of Prerogative: A Synthesis

Having considered the various arguments it is clear that arguments B, C and E do not stand up, nor does the idea of Article 51 bringing over Prerogative in D. In relation to argument A, a historical analysis has shown that the position is not clear-cut. Kelly claimed that lawyers in the 1920s believed Prerogative had survived but Kohn, writing in the 1920s, believed it had not. The cases certainly do not illuminate the matter; in all of the older case law considered, it was only some particular aspect of the Prerogative which was under discussion and each of them assumed the actual survival or compatibility of the Royal Prerogative with the 1922 Constitution. In addition, many of the earlier cases were all decided by Johnston J. who did not actually consider the compatibility of the Prerogative with the 1922 Constitution but obviously believed Prerogative had survived. However, it seems Gavan Duffy J. held a different view.⁹⁸ So how can these views be reconciled? It is possible that a misunderstanding exists in relation to Prerogative survival in Ireland but perhaps this can be explained by a distinction which has been drawn in a number of cases and which we shall now examine.

Thus far, it seems we can conclude that Article 73 brought the Prerogative into the Irish Free State but only prerogatives of a particular type were admitted. However, we have to consider whether this possibility is contradicted in *Byrne*. In *Byrne*, Walsh J. confronted the argument that the Irish Free State inherited Prerogative by virtue of Article 73 and concluded:

[a]ll royal prerogatives to be found in the common law of England and in the common law of Ireland prior to the enactment of the Constitution of Saorstát Éireann, 1922, ceased to be part of the law of Saorstát Éireann because they were based on concepts expressly repudiated by Article 2 of that Constitution and, therefore, were inconsistent with the provisions of that Constitution and were not carried over by Article 73.⁹⁹

⁹⁸ In the High Court case of *Irish Land Commission v. Ruane*, [1938] I.R. 148, Gavan Duffy J. refused to concede that prerogative could be relied upon. During legal argument, he repeatedly challenged counsel for the respondent, who claimed the prerogative of state exemption from statutes, and while Johnston J. took it for granted that the prerogative existed and focused his judgment on whether it was available to the respondent, Gavan Duffy J. refused to deal with the prerogative point and decided the case on statutory grounds. Also see *supra* note 83 and accompanying text.

⁹⁹ *Byrne*, *supra* note 1 at 274.

Walsh J. also took a closer look at the *Cork County Council*¹⁰⁰ case. First, he quoted the following sentence from the judgment of Story J. in *Hoar* which,¹⁰¹ in his judgment on the *Cork County Council* case, O'Byrne J. had omitted: “[b]ut, independently of any doctrine founded on the notion of Prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention.”¹⁰² Walsh J. termed this a “vital sentence because it rationalises the principle expressed by Story J.”¹⁰³ He also quoted a further sentence omitted by O'Byrne J.: “[a]nd though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments.”¹⁰⁴ However, Walsh J. then appears to endorse the rationalisation:

[i]n so far as the State may be exempted from the provisions of a statute, it may possibly be capable of being rationalised on the basis on which it was done in *United States v. Hoar*, and which was adopted by O'Byrne J. as one of his reasons; but it is not necessary to decide that matter in this case as we are not concerned with the construction of a statute or with the question of whether or not the State is bound by the restrictive provisions of some statute.¹⁰⁵

He also says later:

[i]n my view, for the reasons I have already stated, no such immunity was available in Saorstát Éireann by virtue of any inherent quality in the royal person. If immunity from suit could have been claimed for the State, it could only have been on the basis of a rationalisation such as that enunciated in *United States v. Hoar* and adopted by O'Byrne J. in *Cork County Council v. Commissioners of Public Works*; that immunity, if it existed, would have been enjoyed by Saorstát Éireann and not by the King.¹⁰⁶

But as Kelly has written, such a rationalisation was missing in the *Byrne* case itself. However, Kelly also wrote that “[f]or Walsh J., accordingly, the test whether this or that aspect of the Prerogative has survived must depend on its rationale, if it can be rationalised in terms which a republican Constitution can accommodate, it may be relied

¹⁰⁰ *Supra* note 76.

¹⁰¹ *Hoar*, *supra* note 80.

¹⁰² *Byrne*, *supra* note 1 at 276.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* at 278.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* at 279.

on.”¹⁰⁷ Could this mean that, contrary to what has previously been thought, Walsh J. had not ruled out Prerogative finally and completely?

The existence of this distinction or rationalisation drawn by O’Byrne J, in *Cork County Council*¹⁰⁸ and later advocated by Kelly¹⁰⁹ seems to solve a lot of problems. It meets the argument articulated by Gwynn Morgan,¹¹⁰ and significantly accords with the views enunciated in *Geoghegan*.¹¹¹ In that case, Murphy J. had held the following (*obiter*) in the High Court:

[i]t seems to me that the laws carried forward by Article 73 of the Constitution of Saorstát Éireann, 1922, and Article 50 of the Constitution of Ireland, 1937, comprise the full range of laws whether customary or statutory and however they have been made or evolved, subject only to their not being inconsistent with either Constitution. I see no reason in principle why a law enacted in Great Britain in medieval times by the Monarch himself in pursuance of the legislative powers which (as well as judicial and executive powers) vested in him not merely as a theoretical concept but as a practical reality could not have passed into the laws of the Irish Free State. *The filtering process provided by Article 73 of the Constitution of Saorstát Éireann, 1922 (like the comparable provision in the Constitution of Ireland, 1937), related to the content of the law and not its source.*¹¹²

In this passage, Murphy J. first accepted the argument that Article 73 carried over prerogative powers into independent Ireland. Secondly, in the last sentence (italicised in the quotation) he provides a distinction which sustains that of O’Byrne J, Kingsmill Moore J. and Kelly. This view was subsequently endorsed in the Supreme Court by O’Flaherty J, who quoted the above passage by Murphy J. and then stated “I accept and endorse that finding.”¹¹³

¹⁰⁷ J.M. Kelly, *The Irish Constitution*, 2nd ed. (Dublin: Jurist, 1984) at 699. Strangely, this quote does not seem to appear in the newer versions of Kelly.

¹⁰⁸ *Supra* note 76.

¹⁰⁹ Kelly, *supra* note 5.

¹¹⁰ Professor David Gwynn Morgan stated that “even without the extirpation of the prerogative carried out in *Byrne*, no prerogative could exist if it conflicted with the Constitution; that surely is sufficient of itself”. See D.G. Morgan, “Constitutional Interpretation: Three Cautionary Tales” (1988) 10 D.U.L.J. 24 at 35.

¹¹¹ *Geoghegan*, *supra* note 6. This case related to an Institute which was established by prerogative power prior to 1922 and the question raised was whether this and other such bodies had survived the enactment of the 1922 Constitution. It was held that although the Royal prerogative had not survived, there was no reason that such bodies could not have continued to exist under the 1922 Constitution.

¹¹² *Ibid.* at 95 [emphasis added].

¹¹³ *Ibid.* at 118.

Thus, it is possible to argue that some parts of the Prerogative could have survived under Article 73, with the use of a distinction, either O'Byrne's, which was essentially that of Blackstone: the direct versus the incidental prerogatives,¹¹⁴ or Murphy J.'s distinction in *Geoghegan* based on the source versus content of the Prerogative. This would mean that the parts of Prerogative which were inconsistent with the 1922 Constitution were not carried over but others could have been as long as they could be rationalised. In other words, the feudal prerogative powers which were created because the "personal pre-eminence" of the King would not have survived the creation of the Irish Free State but those that are based on public interest could have. This would also make sense of the existence of contradictory opinions.

The idea that certain prerogative powers survived is supported by speeches of deputies during the Dáil debates on the Constitution of 1922 where they recognised that for the most part the Prerogative had died out but there were a few remnants left. In speaking on the provision regarding the right to grant titles of honour,¹¹⁵ the Minister for Home Affairs, Kevin O'Higgins, acknowledged that this was "one of the few remaining prerogatives of the Crown."¹¹⁶ Unfortunately, he did not elaborate on this. However, during the controversy regarding appeals to the Judicial Committee of the Privy Council, O'Higgins declared in the Dáil: "[a]s a Government, we are opposed to this remnant of the Sovereign's Prerogative. We think it ought to be allowed lapse by non-user, just as other prerogatives have lapsed."¹¹⁷ This suggests that certain prerogative powers had survived but had subsequently died out by non-use. O'Higgins, who was a lawyer, failed to elaborate on the point and did not mention which prerogatives had lapsed but it is clear that he believed that, for the most part, Prerogative had been extinguished but that some elements remained.

But does this contradict Kohn's view that there was no Prerogative in the Irish Free State? It is submitted that Kohn believed that Prerogative was extinct because the idea of Prerogative was not consistent with the basis of the new State. However, if the

¹¹⁴ See *supra* note 67 and accompanying text.

¹¹⁵ Article 5 of the Irish Free State Constitution.

¹¹⁶ 1 Dáil Deb. col 680 (25 September 1922).

¹¹⁷ 14 Dáil Deb. col 331 (3 February 1926); the second reading of the *Land Bill 1926*.

State had chosen to retain certain aspects, the content of which did not conflict with the 1922 Constitution, on the basis of public interest, perhaps Kohn would have refined his general statement. So it seems that the Prerogative, to a certain extent, may have survived the enactment of the Irish Free State but not in the same manner as that contended by recent academics. It is submitted that the Prerogative cannot be taken as a single entity and while certain rights of Prerogative were recognised to have had died out in 1922, it may have suited the Irish Government to retain some of them as long as they were not inconsistent with the republican *leitmotif*.

V – Conclusion: “Positively Useful Prerogative”?

Although the British may have forced certain prerogative powers upon the Irish,¹¹⁸ the Irish Government might also have chosen to retain certain aspects of the former prerogative powers later, as despite the antiquarian nature of the powers and their dubious heritage, the Prerogative does contain some useful powers for the government of a modern state. While it may be of less importance in Ireland now, since the 1937 Constitution and statute law cover most of the former prerogative powers, there are still areas which are not covered by any form of legislation and where the Prerogative could prove useful. The situation which occurred in the *Webb* case is an obvious example in that the case would have been much simpler had Treasure Trove been accepted.¹¹⁹ Other examples of useful prerogative powers include the power to keep the peace, the prerogative power which comes into play in the event of a grave national emergency, and includes the power to enter upon, take and destroy private property.¹²⁰ While the latter power might seem unlikely ever to be used in Ireland, in the event of a terrorist attack or any other such national emergency, were the

¹¹⁸ The specific prerogative powers in the Constitution such as the right to grant titles of honour in Article 5 and the Appeal to the Judicial Committee of the Privy Council in Article 64.

¹¹⁹ Had the prerogative power of Treasure Trove been recognised in this case, the very awkward reasoning by the Supreme Court, in an attempt to secure the find for the State, could have been avoided. After the dust had settled, it was considered necessary to bring in the *National Monuments Act 1994*.

¹²⁰ This prerogative was drawn upon when oil fields in Burma were destroyed by the UK during the Second World War in order to prevent the plantations from falling into the hands of the advancing Japanese army. The act of sabotage later became the subject of a court case in relation to compensation payable. See *Burmah Oil Company Ltd. v. Lord Advocate* [1965] A.C. 75. It was held in the case that the British Government had to pay compensation notwithstanding the prerogative power. Obviously, the situation would have been much more serious for the British Government had they destroyed the property without the existence of the prerogative power.

Oireachtas unable to meet in order to pass legislation, there would exist no such power in Ireland.¹²¹

The issue has arisen in the UK recently as part of a review which was carried out into the use of prerogative powers.¹²² The review carried out a useful survey of crown prerogative powers, looking in detail at the use of the powers, and provided a consolidated list for the first time.¹²³ The review concluded that the continued use of prerogative powers involved “no significant negative effects.”¹²⁴ Furthermore it was concluded that: “[i]n many cases it is positively useful. Legislation to replace some of them could itself give rise to new risks: of unnecessary incursions into civil liberties on the one hand, or of dangerously weakening the state’s ability to respond to unforeseen circumstances on the other.”¹²⁵

The power to act in an emergency was one of the powers considered in the review and despite the fact that the UK has passed the *Civil Contingencies Act 2004* (*2004 Act*), which provides a comprehensive system for dealing with grave emergencies, the review deduced that there were still areas not covered by the *2004 Act* and areas where the *2004 Act* could be insufficient: “[a]lthough it seems likely that the Civil Contingencies Act 2004 has covered much of the ‘field’ of the emergency prerogative powers, it appears that important aspects remain for use in cases of particular urgency or disruption where the statute may not operate effectively.”¹²⁶ The *2004 Act* was passed in the UK as a response to a series of crises; the fuel protests and mass flooding in the year 2000 and the outbreak of Foot and Mouth disease in 2001. According to the UK

¹²¹ The only existing powers which come close relate to the seizure of property in relation to the commission of an offence, e.g. section 7 of the *Criminal Justice Act 2006*. Of course the compulsory purchase procedure is also available but this is a time consuming process. Thus, it is clear that Ireland does not have any emergency powers framework outside of the criminal law arena.

¹²² This was carried out as part of the Governance of Britain programme.

¹²³ Ministry of Justice, *Review of the Executive Royal Prerogative Powers: Final Report* (London: HMSO, 2009) <<http://www.justice.gov.uk/about/docs/royal-prerogative.pdf>> (date accessed: 10 December 2009) [hereinafter Ministry of Justice].

¹²⁴ It was noted that some of the prerogative powers were obsolete, such as the right to sturgeon and wild swans. However, it was felt that they had lapsed by non-use and it would only constitute a waste of parliamentary time to remove those older, now useless, prerogative powers.

¹²⁵ Ministry of Justice, *supra* note 123 at 29. Another prerogative power which could prove useful is the power to keep the peace where no emergency exists. See *ibid.* at 26.

¹²⁶ The prerogative is most useful in a situation where there is insufficient time to put statutory provisions into place, *ibid.* at 21.

Cabinet Office, the *2004 Act* “delivers a single framework for civil protection in the United Kingdom capable of meeting the challenges of the twenty-first century.”¹²⁷ The *2004 Act* is divided into two parts; Part 1 establishes “a clear set of roles and responsibilities for those involved in emergency preparation and response at the local level” and Part 2 “allows for the making of temporary special legislation (emergency regulations) to help deal with the most serious of emergencies.”¹²⁸

This is significant here, particularly in view of the fact that Ireland does not even have an equivalent to the UK *2004 Act*. The legislative framework in the UK allows for the means of preparation for emergencies.¹²⁹ The prerogative then covers anything else which is necessary in an emergency. This is quite a wide-ranging power. In Ireland at present, we have none of these powers. The only emergency legislation which exists in Ireland was drawn up in response to IRA activities and criminal gangs.¹³⁰ This constitutes a moderately serious gap in our legal system, which is likely to become more serious in the future. If the Swine Flu situation escalated to a national emergency tomorrow, the Irish Government would have very little in the way of emergency powers available to it. But this is only one example, it is possible that these powers could become necessary, in the event of a terrorist attack, a nuclear disaster, another major war, outbreak of a deadly virus, even for protection against the effects of global warming in terms of building defences against flooding and storms or any form of national emergency. The prerogative power is so wide that it could cover any of these emergencies without the need for legislation. If the UK government has decided that the exercise of prerogative powers is “positively useful”, even where the *2004 Act* has been provided, it would suggest that it could be even more beneficial here, where we have not provided for these sorts of contingencies.

¹²⁷ See <<http://www.cabinetoffice.gov.uk/ukresilience/preparedness/ccact.aspx>> (date accessed: 10 December 2009).

¹²⁸ *Ibid.*

¹²⁹ It also makes it easier to repeal any debilitating legislation; *ibid.*

¹³⁰ The *Offences Against the State Acts 1939, 1972, 1985 and 1998*. Also the *Criminal Justice Acts*. Previously, *Emergency Powers Acts* were passed; the *1939 Act* was amended and the state of emergency lasted until 1976, when it was replaced by the *Emergency Powers Act 1976*. This Act expired in 1995.