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The Influence of the Weimar Constitution on the Common Law World

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Abstract

It is commonly thought that the Weimar Constitution had little influence in the common law world. This article traces the translation of the Weimar Constitution in the Irish context, and demonstrates its importance in the drafting of the Irish Free State Constitution of 1922 and the Irish Constitution of 1937. It specifically looks at the way in which translation occurred in relation to the Directive Principles of Social Policy. The translation of the Irish Constitution into the South Asian context is analysed, with a particular focus on India.

Keywords: Constitutional history, Irish history, Indian history, common law history, imperial legal history

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The Influence of the Weimar Constitution on the Common Law World

Irish Free State

The Weimar Constitution of 1919 did not directly influence the constitutions of either the United Kingdom or the United States of America, but it did still have an influence on some constitutions in the common law world. Within the British Empire, a distinction was drawn in the aftermath of the First World War between those parts which were self-governing (called »Dominions«) and those parts which were not yet self-governing. The Dominions in 1918 were composed of Canada, Australia, New Zealand, Newfoundland, and South Africa. Within the United Kingdom itself, the Irish War of Independence broke out in 1919, and at the cessation of hostilities in 1921, it was agreed that Ireland would become a Dominion to be known as the Irish Free State (this, in turn, provoked a civil war within Ireland). The translation of Weimar in a common law context occurs most clearly in the case of the Irish Free State, where the constitutional drafters were not content to rely solely on British precedents, or on precedents from the other Dominions. The nationalist ideals of the new Irish state, and the distrust of leaders such as Arthur Griffith of the Westminster parliamentarian model,[1] meant that there was a perceived need to adopt other normative models to underpin the new constitutional settlement.

In attempting to construct a new constitutional order for the Irish Free State in 1922, Irish drafters drew upon continental models, in particular more liberal nationalist ones. Weimar's influence as a constitutional *Urtext* thus rested more upon its liberal pedigree than any familiarity with the case-law that had developed in Germany. The influence may be most clearly seen in a document drawn up as part of the constitutional drafting exercise which was presented to the Irish Constituent Assembly and later published as *Select Constitutions of the World*.[2] The volume provided both the texts of various extant constitutions and a narrative about the adoption of individual constitutions.

The book presented a narrative of the Weimar Constitution as being intimately connected to the liberal nationalist tradition as embodied in the Frankfurt Constitution of 1848. The authors' sympathies were clearly on the side of liberal nationalism, evidenced by a brief aside to counter the arguments of »unnecessary dilatoriness« levelled against the Frankfurt deputies, and they emphasised the influence which the ideology had on Hugo Preuß.[3] The appeal of the Weimar Constitution for an Irish nationalist government can be seen in the manner in which it was presented:

> The dominant principle of the Constitution in the Preuss Draft was the frequent insistence on the sovereignty of the people, not merely as a pious expression, but everywhere as a practical mode of government. In the forefront of his draft was placed a section dealing with the Fundamental Rights of the people; and, according to his original plan, the State organisations followed after, being based upon, these Fundamental Rights.[4]

This emphasis on popular sovereignty, a common feature of interwar constitutions, struck a chord with Irish nationalists; Laura Cahillane argues that popular sovereignty was »without any doubt […] the greatest influence« on the drafters of the Irish Free State Constitution.[5] The particular influence of the Preussian draft (rather than the final version) of the Weimar Constitution may perhaps be discerned in the placement of the fundamental rights provisions at the beginning of the Free State Constitution; in the Weimar Con-

1 Griffith (1918) ix–xii.
2 Select Constitutions of the World (1922).
3 Ibid. 172.
4 Ibid. 176.
5 Cahillane (2016) 87.

stitution as promulgated on 11 August 1919, the German States' influence had moved them to the second part of the text, after the provisions on the political system and institutions. The translation of the title of the new German state in *Select Constitutions of the World* cannot but have been formulated in a manner to appeal to Irish nationalists – it was referred to as a »Reich-Republic«[6] and contained a footnote about terminology:

> The word »Reich« has been retained in the translation; there is no satisfactory equivalent in English and the German word is coming into current use. It is perhaps necessary, however, to point out that while the present title of the German Republic is the same as was applied to the German Empire, the word itself has no Imperialist significance, but conveys much the same idea of national feeling and organisation as the English word »Commonwealth«.[7]

The insistence of a lack of imperialist intent was intended to reassure Irish nationalists about the new constitutional direction of Germany, despite imperialism's lingering influence within the Weimar Constitution – where, although Germany no longer had any colonies after 1919, legislating on colonial matters was listed as an exclusive power of the Reich under Article 6.2 – and on the Weimar government.[8] Indeed, one of the leading contemporaneous commentaries of the Weimar Constitution noted the continuity of the Empire even under the new Weimar Constitution.[9] Notwithstanding these considerations in Germany, the success of the method of presentation in *Select Constitutions of the World* may be gauged from the adoption of this republican nomenclature in the Constituent Assembly.[10]

Brian Farrell has noted that the optimism which characterised constitutional thought in the aftermath of the First World War was also present in Dublin during the drafting of the Free State Constitution.[11] As has been shown by Laura Cahillane, the drafters of the Free State Constitution, particularly Darrell Figgis, clearly relied on the Weimar Constitution.[12] In 1922, however, the Irish Free State retained a constitutional structure within the British Empire – that of a Dominion – which retained the Crown in the executive, legislative, and judicial spheres. No innovation was possible, for example, regarding the British Queen as head of state, such as by providing for a president. Instead one finds the influence of Weimar in other provisions, particularly those intended to provide a means for popular sovereignty to permeate the new Irish State, such as the possibility of holding a referendum on legislation passed by parliament (the Oireachtas)[13] and for the initiation of legislation by popular demand.[14] These were adapted in the Irish context in order to fit a unitary, rather than federal, form of government.

While Weimar was influential in terms of constitutional construction, it was less so in relation to the jurisprudence of the new state. The latter clearly owed more to the British common law system, despite an early aborted attempt to integrate ancient Irish Brehon law into the court structure. As an exercise in translation, the Weimar Constitution helped provide some liberal nationalist underpinnings to the Constitution, but the understanding of German jurisprudence was superficial and limited to the text of the document.

1937 Constitution of Ireland

In 1935, the work on drafting a new Irish Constitution began.[15] At that point in time, it was clear that the Weimar Constitution had not stopped the rise of dictatorship in Germany. When the parliamentary debates about the Irish Constitution took place in 1937, the possibility of a dictator establishing themselves under the auspices of the presidency was a pressing concern for some elected representatives, although the more convincing argument aired was that no dictator would volun-

6 Select Constitutions of the World (1922) 174, 177.
7 Ibid. 177.
8 See, for example, the actions of Gustav Stresemann recounted in Gründer (2017) 169.
9 Anschütz (1929) 3: »Die Revolution hat das Reich nicht zerstört, sondern nur seine Verfassung geändert. Das Reich als solches bestand und besteht auch heute noch weiter.«
10 In the Dáil Debate of 26 Sept 1922, Deputy Thomas Johnson referred to it as the German Republic.
11 Farrell (1970) 121.
12 Cahillane (2016) 4, 83–84.
13 Weimar Constitution, Article 74; Irish Free State Constitution, Article 47.
14 Weimar Constitution, Article 73; Irish Free State Constitution, Article 48. See Cahillane (2016) 111.
15 The reasons for this are outlined in Coffey (2018a) 78–80.

tarily restrict themselves to a set of enumerated and confined powers as outlined in the Irish Constitution.[16] It might be thought, given its failure, that the drafters would not rely upon the Weimar Constitution when working on the new document. Moreover, on 14 March 1937 Pius XI issued the encyclical *Mit brennender Sorge*, which indicated a growing rift between the Vatican and the National Socialist regime, a development that to a deeply Catholic country like Ireland would have further indicated the difficulties with the constitutional architecture in Germany. Notwithstanding these developments, the 1937 Constitution did rely on the Weimar text for reasons outlined below. As we shall see, this reliance continued after *Mit brennender Sorge*.

What accounts for the adoption of elements of Weimar in the 1937 Constitution of Ireland? The drafters of the Irish Constitution were influenced by two important monographs which shaped Irish constitutional thought at the time – one in political theory; the other in law. The first was Agnes Headlam-Morley's *The New Democratic Constitutions of Europe*, which was published in 1928 and viewed Weimar as the paradigmatic constitution of the time. The monograph elaborated on how a liberal nationalist impulse could influence the institutional structure of the state; a position that was obviously attractive to Irish nationalists considering similar issues. Headlam-Morley acknowledged that the Weimar constitution was marked by a scepticism of parliamentary institutions in the new democracies,[17] noted the belief in popular sovereignty, and analysed provisions such as the initiative / referendum in light of the influence of these beliefs.[18] As we have seen, the Irish Free State Constitution self-consciously followed a nationalist model, at least initially, and provided for an initiative power under Article 48, in distinction to the traditional model of parliamentary sovereignty in the United Kingdom.[19] In her monograph, Headlam-Morley gave particular prominence to the German Constitution of 1919; invariably it was the first or second example she considered in relation to each subject matter. She provided an analytical overview of comparative constitutionalism in a fashion that was conducive to Irish political thought, and was to prove an important intellectual resource for the drafters of the Irish Constitution in 1937. This preoccupation with the Weimar Constitution as a paradigm was shared internationally, with scholars such as Zhang and Li drawing parallels in the Chinese context.[20] The private drafting materials indicate that this volume was used as a reference work in the deliberations on the role of the president.[21]

This comparative view was adopted and elaborated in an Irish context by Leo Kohn, who completed his PhD on the Constitution of the Irish Free State in Heidelberg. The PhD was published in two articles in the *Archiv des öffentlichen Rechts* and later expanded in the monograph *The Constitution of the Irish Free State*, published in Ireland in 1932, just as the party opposed to the Dominion settlement in the Irish Civil War came into government. Kohn argued that the Free State Constitution was the first example of a continental constitutional model existing within the British Empire.[22] This point was pursued more vigorously in his monograph where he made further explicit comparisons between the Irish constitutional tradition and continental, particularly German, constitutional practice. In relation to a temporary implicit amendment of the Irish Free State Constitution under Article 50, for example, Kohn highlighted the doctrinal difference between a *Verfassungsänderung* and a *Verfassungsdurchbrechung* in German constitutional theory.[23] Later, he drew attention to the ability of the president under the Weimar Constitution to appeal to the electorate when there was a disagreement between the parliamentary chambers – an idea which was adopted

16 Cormac Breathnach, Dáil Debates 12 May 1937 »An dóigh le héinne thall go gcuirfead Hitler nó Mussolini ceangail den tsaghas san ortha féin?«.
17 Headlam-Morley (1928) 8.
18 Ibid. 132–147.
19 Coffey (2018a) 10–12 outlines how the provision relating to the initiative came to be abolished.
20 See the article of Fupeng Li in this *Focus* section, section 2.1 (210–212).
21 Coffey (2018b) 34.
22 Kohn (1928) 33: »Auf politischen und staatsrechtlichen Grundlagen erwachsen, die von denjenigen der britischen Selbstverwaltungskolonien, denen der Freistaat nominell gleichgestellt ist, wesentlich verschieden waren, stellt die irische Verfassung die erste umfassende staatsrechtliche Kodifizierung innerhalb des britischen Weltreiches vom Typus der kontinentalen Konstitutionen dar, eine Kodifizierung, in welcher zum ersten Male auch das ungeschriebene Gewohnheitsrecht der englischen Verfassung gesetzliche Normierung erfahren hat.«
23 Kohn (1928) 153.

(with some adaptation) in the Irish Constitution of 1937.[24] The importance of Kohn's book within Irish political and legal culture may be judged from the fact that the foreword was written by the Chief Justice, and from its continued use as the most influential contemporaneous monograph about the Constitution of the Irish Free State to this day.[25] The intellectual currents to be found in the works of Headlam-Morley and Kohn meant that the Weimar Constitution was not overlooked in Ireland during the drafting of the new Constitution, despite its patent failure to restrict the Hitler regime.

If the influence of the Weimar Constitution on the Irish Free State Constitution was mainly characterized by a reliance on a liberal nationalist ideal rather than based on caselaw which had been derived from Weimar, this was not the case with the 1937 Constitution, which was rather more interested in the intricacies of the operation of Weimar. This is not because the Irish Constitution of 1937 abandoned nationalism – it was, in fact, a self-consciously autochthonous document. However, the adoption of a new Head of State in the presidency allowed for more constitutional innovation than had been possible with a Governor-General under the Dominion model; the Free State had abolished the office in 1936. Moreover, the new academic literature provided a means to assess the operation of the Weimar Constitution after approximately a decade, which meant there was more experience of its performance in practice than had been available in 1922.

The traces of the Weimar Constitution can be seen most clearly in the provisions relating to the office of the presidency under the 1937 Constitution. The Irish presidency was set up to hold a suspensive veto, with the power to refer a bill passed by the Oireachtas to either the Supreme Court (for a determination of its constitutionality) or to the people in a plebiscite. The earlier Irish drafts also included provisions in relation to the suspension of constitutional guarantees which were modelled on the Weimar example, but these were dropped during the drafting process.[26] One point of difference was that under the Weimar Constitution, the president could abrogate either wholly or partially the right to property established under Article 153. The Irish proposal did not provide for such a power; instead, property was recognised in the final draft as being »antecedent to positive law«, based on a Roman Catholic theory of the time.[27] We have already noted that Headlam-Morley's monograph formed part of the background analysis in relation to the presidency, and an undated note is to be found in the de Valera archives of the private drafting materials in relation to the manner in which ministers were held responsible to parliament in the following terms:

> The chairman of the Reich determining the main lines of policy for which he is responsible to the Reichstag. Within these lines each Min[ister] of the R[eich] shall direct indeped[ent]ly the department entrusted to him + for which he is personally responsible.[28]

In a less clearly linked fashion, the Weimar Constitution was to inform the drafting of the provisions in relation to socio-economic rights under the Irish Constitution. In Kohn's work on the Constitution of the Irish Free State, he drew attention to the lack of provisions relating to a »programme of social, economic or educational reform, which are so characteristic of modern Continental constitutions«.[29] Headlam-Morley similarly regarded the social and economic provisions of interwar constitutions as their most characteristic feature.[30] Indeed, in 1922 Deputy Thomas Johnson had specifically tried to include a provision dealing with socio-economic interests on the basis of the German model.[31] It was unthinkable in 1937 that the new constitution would not include some provisions in relation to such a socio-economic programme, and in a private conversation with John Hearne, de Valera made clear that he hoped to include provisions »not unlike« those laid out in Articles 119 to 141 of the Weimar Constitution.[32] There were two difficulties with such a proposal from the Irish point of view: first,

24 Kohn (1928) 199.
25 For more on Kohn, see Mohr (2019).
26 Coffey (2018b) 138.
27 Coffey (2018b) 236–241 traces the evolution of the Article.
28 Coffey (2018b) 35.
29 Kohn (1928) 172.
30 Headlam-Morley (1928) 264.
31 Dáil Debates 26 Sept 1922.
32 National Archives of Ireland: Department of Foreign Affairs 147/2 Hearne to Bewley (1 Apr 1937).

that individuals might be entitled to rely on such rights in court proceedings and that statutes passed might be held unconstitutional, and, second, that the provisions might be seen to be »meaningless« if the state did not carry out its duties under these sections. Accordingly, the legal advisor responsible for the drafting process, John Hearne, wrote to the Irish representative in Berlin, Charles Bewley, to enquire about how these provisions had operated in practice in Germany. Significantly, the exchange took place only a few weeks after *Mit brennender Sorge* had been issued by the pope.

Bewley's answer indicated that the German system had in practice taken the form of a weak constitutionalism, lacking effective judicial review of federal legislation. He claimed that the provisions on citizens' fundamental rights and obligations in Part II of the Weimar Constitution were no more than an »amiable statement of the democratic intentions« of the new state and not a practical safeguard to the individual; they had not proved to be of use to individuals in their dealings with the state. Bewley relied on Anschütz's *Die Verfassung des Deutschen Reichs* for the proposition that there was no special constitutional authority that was superior to the legislature under German constitutional law; the idea was »entirely foreign to German constitutional law, in distinction from North America«. He maintained that the provisions relating to »The Life of the Community« and »Economic Life« had never been the subject of a case involving the review of legislation passed by the Reichstag, although Article 153 could be used against orders or laws passed by the individual German states. He concluded with the damning analysis: »I think it is evident that the Weimar Constitution was a piece of window-dressing and was not intended to have a practical effect.«

Bewley's presentation of the position under the Weimar Constitution was, however, misleading. Michael Stolleis has documented the manner in which constitutional interpretation of the rights provisions under the Weimar Constitution varied in the 1920s.[33] He argues that before 1924 the rights provisions were not understood as legally binding, but that this changed after the inflation crisis of 1923, when the norms of the basic law were understood to be conflict with – and therefore had to be guaranteed against – parliamentary laws. This theoretical distinction »provided a means of countering socialist or excessively reformist lawmakers«.[34] Stolleis points out that a distinction was drawn between »defensive basic rights and rights that provided for something«,[35] and it could be argued that this distinction meant that Bewley's analysis was accurate in relation to the provisions relating to »Economic Life« and »Life of the Community«, but they were misleading as to the general scheme of the Weimar Constitution. Nonetheless, Bewley's representation of a complete absence of judicial review was misleading, because the *Reichsgericht* (Supreme Court of the German Reich) had in fact claimed the ability to judicially review laws of the Reich on the basis of a negative implication that such laws had not been expressly excluded from their jurisdiction.[36] This was, in fact, acknowledged by Anschütz himself, although he remained critical of the line of argument which underpinned the decision and clearly preferred the position taken before the Weimar Constitution, where German courts possessed no such power of review.[37] Moreover, there was at least one case where the provisions of Section II, which Hearne had specifically asked about, had been used by the *Reichsgericht* to strike down a law of the Reich under Article 129 of the Constitution.[38] What accounts for the nature of Bewley's advice? It is possible that he was simply unaware of the case-law in relation to the question, although it should be noted that the textbook he relied upon took a different position to that which he advised the Irish government upon – it is more likely that as a supporter of National Socialism he simply disavowed the prior liberal regime.[39]

It was ironic, given Bewley's misleading advice, that the approach taken by the Irish drafters to Article 45, entitled »Directive Principles of Social

33 Stolleis (2004) 88–89 and Stolleis (2003) 266.
34 Stolleis (2003) 273.
35 Stolleis (2004) 88.
36 RGZ [Entscheidungen des Reichsgerichts in Zivilsachen] 111 (1926) 323: »Da die Reichsverfassung selbst keine Vorschrift enthält, nach der die Entscheidung über die Verfassungsmäßigkeit der Reichsgesetze den Gerichten entzogen und einer bestimmten anderen Stelle übertragen wäre, muß das Recht und die Pflicht des Richters, die Verfassungsmäßigkeit von Reichsgesetzen zu prüfen, anerkannt werden.«
37 Anschütz (1929) 323–327.
38 RGZ 124 (1929) 173.
39 On Bewley's views of National Socialism, see Nolan (2008) 78.

Policy« was to specifically state that the provisions inspired by the »Economic Life« section of the Weimar Constitution »shall not be cognisable by any Court under of the provisions of this Constitution«. This inclusion was not without its opponents, notably John Charles McQuaid, who was involved in the drafting process and was subsequently to become Archbishop of Dublin, and argued in favour of judicial enforcement.[40]

India and South Asia

The Irish Constitution of 1937 was to prove influential in some respects in the decolonisation that occurred in South Asia in the aftermath of the Second World War. Ironically, one of the most influential elements was that which, as we have seen, was influenced in its construction by the Weimar Constitution. The advisor to the Indian Constituent Assembly, B.N. Rau, was well aware of the Irish example and copied the idea of a non-justiciable element, which appears as the »Directive Principles of State Policy« in the Indian Constitution, which came into force in 1950. The adoption of the Irish example may have been due to its common law pedigree, but it should also be borne in mind that there was a dearth of constitutions that had survived the interwar period, so necessity may also have played a part. Moreover, Rau's brother B. Shiva Rao had compiled a slightly updated version of *Select Constitutions of the World* in Madras as early as 1934 and had been granted permission by the government of the Irish Free State to include their translations in the volume.[41] Tarunabh Khaitan argues that the Directive Principles allowed the Indian government to accommodate groups (socialists, Gandhians, and cultural nationalists) that would otherwise have been antagonistic to the constitutional project.[42] The expression of legislative principles without judicial recourse meant that the rather more complicated task of enshrining the principles in specific statutory provisions – which would have meant compromise and decisions that risked alienating different groups – was delayed until after the constitution was passed and the concretisation became subject to the ordinary legislative procedure. The Directive Principles of the Indian Constitution covered more than the Irish example. They included provisions in relation to the village panchayats in Article 40 and also adopted a more gender-appropriate formulation in relation to women's interests (»for maternity relief« in Article 42) than is to be found in the Irish Constitution (which speaks of women's »life within the home« and mothers' »duties in the home« in Articles 41.2.1-2°). The provisions of the Indian Constitution seek to avoid judicial oversight by providing that the Directive Principles »shall not be enforceable by any court« but nonetheless are to be taken into account by the state in making laws and governing the country.

The Indian adoption of the Irish model was to prove important throughout South Asia. In the 1948 Constitution of the Union of Burma, chapter IV was also entitled »Directive Principles of State Policy« and provided that the application and administration of the principles outlined there »shall not be enforceable in any court of law«. The advisor to the Burmese Constituent Assembly, Chan Htoon, had visited New Delhi during the sittings of the Indian Constituent Assembly. Rau had reciprocated with a visit to Rangoon (now Yangon) to advise the Burmese Assembly.[43] Rau wrote in 1948 that the Burmese principles were directly adopted, with additions, from materials prepared for the Indian Constituent Assembly.[44] Pakistan did not have such an overlap in personnel, but its 1956 Constitution again contained in Part 3 an article on the »Directive Principles of State Policy«. This, too, included the proviso that »such provisions shall not be enforceable in any court«. Golam Wahed Choudhury commented contemporaneously on the debt owed by the Pakistani drafters to the Irish and Indian examples (curiously, he did not mention Burma).[45] Elsewhere in Asia, the Weimar Constitution exerted significant direct influence on Chinese constitutional drafting.[46]

40 Coffey (2018b) 244.
41 See Preface in Shiva Rao (ed.) (1934). See further Kumarasingham (2018) 880–881.
42 Khaitan (2018) 389.
43 Narsing Rau (1948) 288.
44 Ibid. 292.
45 Choudury (1956) 248–249.
46 See the article of Xin Nie in this *Focus* section, section 5 (203–205).

The Legal Translation of Weimar

Legal translation calls for us to »pay special attention to social practices, to knowledge and the concrete conditions of these translation processes«.[47] Comparative legal history provides a particularly fruitful lens through which to consider the process of translation, as one can see similar controversies take place in different jurisdictions, which may in turn generate different results within those systems. Conversely, something that might appear unique to a particular legal system might, upon examination, transpire to be a more universal concern. Here, the Directive Principles articles provide an interesting ground for analysis in two dimensions. First, to what extent did the Directive Principles provide a unique form of constitutional expression for the polities in question? Second, to what extent were the Directive Principles successful in precluding the possibility of judicial review of legislation on the basis of their explicit commands?

In terms of the expressive potential of the Directive Principles, in his monograph on the Indian Constitution, Granville Austin argues that one finds in them »an even clearer statement of the social revolution«; a social revolution based on egalitarianism where citizens would be free of state or private coercion. He quotes Article 38 as expressing the essence of the Directive Principles: »[T]he State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political, shall inform the institutions of the national life.«[48] What Austin does not note is the strong textual overlap with the provisions of the Irish Constitution, where the phrase, however, included one crucial difference: »The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.« The connection is clear, but the Irish insistence on the role of charity in the operation of the state was not copied in India – nor had it been part of Article 151 of the Weimar Constitution: »[T]he organisation of economic life must correspond to the principles of justice.« In contrast, neither the Burmese nor the Pakistani Constitutions' Directive Principles contained such an explicit adoption of this justice / charity idea. Crucially, the Irish insistence on the normative value of »charity« implicitly denied a legal basis to the principles that were laid out in Article 45; »justice« being something that is legally due to another. The Indian and Weimar Constitutions are more teleologically linked by their insistence on the sole importance of justice in the economic organisation of the State.

In relation to the second question, judicial cognisance of the Directive Principles reveals some interesting jurisdictional developments, particularly in light of the specific aim of the drafters of the constitutions to avoid oversight of these provisions by the courts. The rights jurisprudence in Weimar distinguished between »programmatic rights without legal recourse« and »immediately and directly applicable rights«.[49] Dreier has examined how the common belief that the Weimar Constitution was only characterised by the first limb is misleading.[50] In Ireland, the charge immediately levelled against the Directive Principles of Social Policy was that they amounted to nothing more than »pious aspirations« – as we have seen, this was a particular concern of the drafters. In response, the government argued that it had been the basis of its legislative policy for its term in office.[51] In India, a similar pattern was to be seen in the early years after the constitution's enactment, presented by Singh as follows: »Since the directive principles are not enforceable by any court, it has been advocated that they are not law, much less constitutional law and therefore their non-observance by the State does not entail any legal consequences.«[52] This proposition was not accepted as the Indian jurisprudence expanded.

The working out of the inclusion of rights principles took different courses. In Germany and Burma, they were cut short by totalitarian rule and failed to find an anchor in judicial review of

47 Duve (2014) 59.
48 Austin (1966) 65.
49 See RGZ 102 (1921) 146, which distinguished between »allgemeine Programmsätze ohne unmittelbare rechtliche Wirksamkeit, rechtlich bindende Richtlinien für die Gesetzgebung, insbesondere der Länder, mit der sofortigen Geltung in das bestehende Recht eingreifende Einzelvorschriften«.
50 Dreier (2018).
51 Coffey (2018b) 242.
52 Singh (1997) 298.

legislation. In the Burmese case, there were attempts to create governmental programmes which fulfilled the Directive Principles based on the idea of *pyidawtha* or »the happy land«.[53] One even begins to find the idea that the Directive Principles could be used in judicial construction of the law in Burma.[54] This impulse has been expressed only weakly in the Irish context, where courts have used the Directive Principles as an interpretative measure, albeit in a limited number of cases.[55] It has been adopted more forcefully as an interpretative technique by the Supreme Court of India. In fact, it was felt necessary to clarify the ambit of the Directive Principles via the 25th amendment to the Constitution in 1971. This stated that laws giving effect to the Directive Principles were not reviewable for compatibility with fundamental rights provisions and sought to restrict the judicial review of any law expressed to be for such a purpose (though the latter restriction was struck down in the »basic structure« case, *Kesavananda Bharati v The State of Kerala*).[56]

The Indian example shows how translation can give rise to similar crises even in different jurisdictions. In Weimar, the question was the extent to which the rights provisions could be relied upon in practice or were merely programmatic declarations. The Indian case showed an attempt to convert programmatic declarations into laws that would not be reviewable by the courts, inverting but mirroring the constitutional priority under Weimar. The translation of Weimar into the constitutions of the common law world was sometimes direct; sometimes it indirectly shaped the formation of specific provisions. What is most interesting about the translation of Weimar in the common law world, however, is the extent to which it exposes perennial issues which cannot be linked clearly to a single jurisdiction – the role of the judiciary, constitutional review of legislation, and the economic organisation of the state. The translation of constitutional ideas into different contexts suggests a common preoccupation with these questions which is not confined to a civil or common law approach.

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Bibliography

- Anschütz, Gerhard (1929), Die Verfassung des Deutschen Reichs vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis, 11th ed., Berlin
- Austin, Granville (1966), The Indian Constitution: Cornerstone of a Nation, Oxford
- Cahillane, Laura (2016), Drafting the Irish Free State Constitution, Manchester
- Choudury, Golam W. (1956), The Constitution of Pakistan, in: Pacific Affairs 29,3, 243–252
- Coffey, Donal K. (2018a), Constitutionalism in Ireland, 1932–1938: National, Commonwealth, and International Perspectives, Cham
- Coffey, Donal K. (2018b), Drafting the Irish Constitution, 1935–1937: Transnational Influences in Interwar Europe, Cham
- Dreier, Horst (2018), Grundrechtsrepublik Weimar, in: Dreier, Horst, Christian Waldhoff (eds.), Das Wagnis der Demokratie: Eine Anatomie der Weimarer Reichsverfassung, München, 175–194
- Duve, Thomas (2014), European Legal History – Concepts, Methods, Challenges, in: Duve, Thomas (ed.), Entanglements in Legal History: Conceptual Approaches (Global Perspectives on Legal History 1), 29–66, online http://dx.doi.org/10.12946/gplh1
- Farrell, Brian (1970), The Drafting of the Irish Free State Constitution: I, in: Irish Jurist 5,1, 115–140
- Furnivall, John S. (1961), Foreword, in: Maung (1961) v–xii
- Griffith, Arthur (1918), Resurrection of Hungary, 3rd ed., Dublin
- Gründer, Horst (2017), Kolonialismus ohne Kolonien, in: Gründer, Horst, Hermann Hiery (eds.), Die Deutschen und ihre Kolonien: Ein Überblick, Berlin, 161–175
- Headlam-Morley, Agnes (1928), The New Democratic Constitutions of Europe. A Comparative Study of Postwar European Constitutions with Special Reference to Germany, Czechoslovakia, Poland, Finland, the Kingdom of the Serbs, Croats & Slovenes and the Baltics States, Oxford
- Hogan, Gerard (2001), Directive Principles, Socio-Economic Rights and the Constitution, in: Irish Jurist 36, 174–198

53 Maung (1961) 109–113.
54 Furnivall (1961) xii.
55 Hogan (2001) 174.
56 (1973) 4 SCC 225.

- Khaitan, Tarunabh (2018), Directive Principles and the Expressive Accommodation of Ideological Dissenters, in: International Journal of Constitutional Law 16,2, 389–420
- Kohn, Leo (1928), Die Verfassung des Irischen Freistaats. I, in: Archiv des öffentlichen Rechts 54 (NF 15),1, 33–83
- Kumarasingham, Harshan (2018), Written Differently: A Survey of Commonwealth Constitutional History in the Age of Decolonisation, in: The Journal of Imperial and Commonwealth History 46,5, 874–908
- Maung, Maung (1961), Burma's Constitution, 2nd ed., The Hague
- Mohr, Thomas (2019), Leo Kohn and the Law of the British Empire, UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 12, online https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3352030
- Narsing Rau, Sir Benegal (1948), The Constitution of the Union of Burma, in: Washington Law Review 23,3, 288–301
- Nolan, Aengus (2008), Joseph Walshe: Irish Foreign Policy 1922–1946, Douglas Village
- RGZ [Entscheidungen des Reichsgerichts in Zivilsachen]: 102 (1921), 111 (1926), 124 (1929)
- Select Constitutions of the World (1922), prepared for presentation to Dáil Eireann by Order of the Provisional Government, Dublin
- Shiva Rao, Benegal (ed.) (1934), Select Constitutions of the World, Madras
- Singh, Mahendra P. (1997), V. N. Shukla's Constitution of India, 9th ed., Lucknow
- Stolleis, Michael (2004), A History of Public Law in Germany 1914–1945, translated by Thomas Dunlap, Oxford
- Stolleis, Michael (2003), Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic, in: Ratio Juris 16,2, 266–280