

## National identity and judicial interculturality in Ireland: The Dáil Courts experience (1919–1924)

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### Abstract

Due to its past colonial status, Ireland has strived to oppose its national identity to the heritage of British rule as it gradually severed ties with its former rulers. Nationalism being a political notion, it is normally reflected in the country's institutions, the latter getting their legitimacy by constitutional means, and this is how the national/foreign, and identity/interculturality dichotomies were shaped. This paper will examine a particular case of these oppositions in the context of the first Republic (1919–1923) whose judicial institutions competed with the existing British court system during the War of Independence, under the tutelage of Gilles Deleuze and Félix Guattari's political and philosophical critique of the State (*A Thousand Plateaus*, 1980). It will deal with the setting up of a system of courts, called the *Dáil Courts*, and how they came to represent some sort of Irish identity in the making, something that Deleuze and Guattari called a “becoming”, while aggregating both British and foreign legal features. The fate of this singular system will first be examined as the setting up of a Deleuzian war machine challenging the rigid structure of the colonial State apparatus (1919–1920); the second part will analyse how the new court system efficiently replaces the old institutions by adopting an unusual “rhizomatic” structure (1920–1921); finally, the third part will show how the *Dáil Courts* were absorbed by the Irish Free State's Apparatus of Capture that reinstated a more familiar, traditional Common Law system (1921–1924).

**Keywords:** Dáil Courts – war machine – State apparatus – rhizome – war of independence – institution – Dáil Éireann – Common Law

### Résumé

En raison de son statut d'ancienne colonie, l'Irlande n'a cessé d'opposer son identité nationale à l'héritage britannique au moment où le pays coupait les liens institutionnels avec l'ancien occupant. Le nationalisme, notion politique, se reflète dans la mise en place d'institutions autonomes légitimées par l'adoption d'une constitution, construisant ainsi des dichotomies du type national/étranger, identité/interculturalité. Le présent article examinera le cas particulier de la mise en place d'un système judiciaire autonome lors de la formation de la première république irlandaise pendant la guerre d'indépendance (1919–1923), celui des *Dáil Courts*. Ces dernières participèrent de la création d'une identité politique irlandaise, d'un « devenir » agrégeant des éléments du droit irlandais et anglais, pour reprendre le concept élaboré par Gilles Deleuze et Félix Guattari dans leur critique politique et philosophique de l'Appareil d'État (*Mille Plateaux*, 1980). Le destin de ce système singulier sera tout d'abord analysé comme la mise en place d'une « machine de guerre » deleuzienne défiant la structure rigide de l'appareil d'État colonial (1919–1920). La deuxième partie examinera comment ce nouveau système judiciaire a remplacé efficacement les institutions existantes en adoptant une forme plus inhabituelle, plus « rhizomatique » (1920–1921). Enfin, la troisième partie montrera la manière dont l'*Irish Free State*, issu du Traité Anglo-Irlandais de 1921, a capturé et absorbé les *Dáil Courts* et a adopté un système judiciaire plus traditionnel calqué sur celui de la Common Law (1921–1924).

**Mots-clés:** Dáil Courts – machine de guerre – appareil d'État – rhizome – guerre d'indépendance – institution – Dáil Éireann – Common Law

I say it to my countrymen, as The Nation said to them in 1843, “You have it in your power to resume popular courts and fix laws, and it is your duty to do so. If you resort in any of your disputes to any but your own judges, you injure yourselves and commit treason to your country”.

Arthur Griffith, *The Resurrection of Hungary, A Parallel for Ireland* (1905)

## Introduction

Like most former colonies, Ireland inherited its judicial system from military conquest; Common Law superseded the old Brehon tradition that had hitherto structured its society up until the Treaty of Limerick was finally signed in 1691 giving complete control over the destiny of the island to the Crown of England. The passing of repressive statutes, known as the Penal Laws, against the Irish Catholics enhanced Irish people's distrust of colonial institutions in general, and justice in particular. This was reflected in the verses of the former court poets, reduced to the status of itinerant hedge schoolmasters; in his 1780 poem known as *Cúirt an Mbeánoiche* [The Midnight Court], Brian Merriman fiercely criticizes the English legal system as an instrument of pillaging and theft in the hand of the ruling Anglo-Irish gentry. The quest for emancipation did not subside with time, and in the late 19th century, a literary and cultural revival, combined with political agitation, accompanied the 1916 Easter Rising and the War of Independence. Political leaders did not all pursue the same agenda, and radical Republicanism, embodied by the banned Irish Republican Brotherhood, coexisted with more moderate autonomist approaches, like the Home Rule Party, and socialism, as embodied by James Connolly's Socialist Party of Ireland. Arthur Griffith, the founder of Sinn Féin, advocated a complete but gradual empowerment of the Irish people by encouraging grassroots initiatives that would eventually loosen England's political control over Ireland. His model was the Compromise signed between Hungary and Austria in 1867 granting the two states equal status within the Austro-Hungarian Empire, hardly a call for a complete breakaway from Great Britain. Part of his plan was to encourage the setting up of local laws and local courts; this pointed toward the redefinition of Ireland's legal identity and judicial tradition, bearing in mind that Common Law had been established for so long that any trace of legal influence from the distant Celtic past or of the legal system that operated in Ireland before the conquest had been obliterated.

This complete disappearance contrasts with the survival, however precarious, of the Irish language and cultural tradition at the turn of the 20th century, the launching of the literary revival known as the Celtic Dawn or the renewed popularity of Gaelic sports, all of which had been promoted by a generation of scholars, writers and poets from the Anglo-Irish middle-class or landed gentry. The paradox of Ireland in the

wake of its insurrection was that nationalism was supported mostly by members of the Ascendancy, who had been educated in the English tradition. Moreover, the distinctive Northern Irish identity is undeniably the result of the blending of Scottish Presbyterianism, of political loyalty to the English Crown during the wars of succession to the throne of Britain, of the systematic Plantation of Ulster in the 17th century resulting in a feeling of alienation among the Irish Catholic population. One can therefore argue that interculturality had fundamentally shaped the intellectual, social and cultural landscape of today's Ireland; however, it seems that the Common Law tradition could neither be offset nor made to harbour any trace of interculturality. Yet, in the short period between the beginning of the War of Independence in 1919 and the immediate aftermath of the Civil War in 1924, a system of courts of law, known as the Dáil Courts, was established by the first illegal Dáil Éireann<sup>1</sup> parallel to the setting up of the Irish Republican Army which fought against the Royal Irish Constabulary and the British troops. It succeeded in hearing cases, keeping court registers and carrying out sentences in very troubled times while the proceedings of the official Common Law courts were suspended. These courts developed across the country as the expression of the people's will, and they disappeared as rapidly as they were set up. One possible explanation for this short-lived and intense experience may be found in their spontaneous “rhizomatic” nature, as analysed by Gilles Deleuze and Félix Guattari in *A Thousand Plateaus* (1980). The authors identified a recurring opposition in all forms of sociopolitical systems, that of the “State apparatus” and of the “war machine”. If the former corresponds to a static, symmetrical structure based on dichotomies (men/women, work/leisure, legality/illegality, etc.), the latter is a nomadic and temporary assemblage occupying a smooth, uncharted space out of the reach of state institutions. This analysis will serve as a theoretical background to the present contribution, the aim of which is to describe the Dáil Courts' structure and foundational legal principles and determine the historical landmarks that punctuated their expansion and demise.

One can identify three stages in this evolution: the first one, between 1919 and 1920, fostered the creation of such courts. These were known then as “Sinn Féin courts”, and symbolized the endeavour to offset the established British legal system, seen as the expression of colonial state power. The second stage (1920–1921) saw the Dáil Courts emerging as the expression of a national state in the making, and were gradually absorbed, captured by the budding Irish state apparatus in the wake of the Anglo-Irish Treaty. Finally, the last stage (1921–1924) witnessed the newly established Free State aligning itself along British legal rules. Ireland thus chose to uphold the continuity between the two political entities, with the Treaty as the pivotal moment when the “war machine” of the revolutionary Dáil Courts was absorbed and neutralized.

<sup>1</sup> The first Irish Parliament, set up in January 1919 by the Irish nationalists in defiance of British rule.

## I— Setting up a war machine: the Sinn Féin courts v. the British state apparatus

### I. What is a “war machine”?

This concept is central to the political theory of Gilles Deleuze and Félix Guattari as exposed in *A Thousand Plateaus* (1980) and discussed in later works by Gilles Deleuze. It is defined as an assemblage of individuals characterized by its nomadism, its mobility, its capacity to morph into different combinations of individuals and its opposition to any State apparatus and the control it imposes on its polity. However, it should not be assumed that its aim is to conduct warfare, but instead, to depart from the social space controlled (“striated”, as the authors put it) by the State and move along an unplanned trajectory in a hitherto unchartered (or “smooth”) space (Deleuze 1990: 50). Warfare seems to be a possible consequence, rather than the cause, of the emerging of a war machine in a revolutionary context. In spite of its diversity in form, a war machine is clearly exterior, even in thought, to the State. In Ireland in the wake of the war of Independence, what kindled the insurrection was the agrarian unrest that was simmering in the West of Ireland, with occasional bouts of violence. The matter was political and legal pertaining to land ownership, which had passed into the hands of the landed gentry since the imposition of the Penal Laws in the 17th century. The land issue was closely linked to a situation akin to other colonisation issues, with land seizures and rents that were associated to injustice. This prompted the setting up of alternative forms of justice steeped in a long tradition that preceded the imposition of the English Common Law, namely the Brehon courts; however few accounts of Brehon procedures were reported in the aftermath of the complete conquest of Ireland. Nevertheless, alternative courts sprang up in the course of the 18th and the 19th centuries, like the Repeal Association arbitration courts, the Ribbon Association courts, the Land League courts, or the United Irish League courts (Laird 2005: 23). These were of course local, unofficial structures that held secret hearings, but insisted on the formality of their proceedings. They were war machines in every respect, because they remained exterior to a State apparatus that had no legitimacy among the Irish peasantry, while reinforcing their own legitimacy by resorting to procedural instruments borrowed from the official courts or elaborating on them (Laird: 26). They also followed the evolution of the land wars and the successive insurrections that tried to offset the Crown’s political supremacy (The United Irishmen in 1798, the Ribbonmen, etc.). The Dáil Courts did not come from nowhere, but were probably the first court system that flourished locally during troubled times, gained support from a fledgling government and were given some official recognition by the revolutionary government in Dublin as well as unofficial attention by the Crown forces and administration. All these courts shared one common sense of injustice regarding the land issue, based on an unfair rent system, a systematic policy of evictions of

those who could not or would not pay those rents (“rackrent” as they were known), and a system of landownership (landlordism) that was increasingly at odds with the local situations in the Irish countryside.

### 2. The land issue

The Irish Land Act 1870, introduced by Prime Minister Gladstone, reformed some unfair contractual aspects of land tenancy, which were particularly hard on the Irish farmers. One of the purposes of the Act was to give equal rights to Irish and English tenant farmers all over the United Kingdom. However, one condition was that the rents could be substantially raised, which was agreed by both landowners and tenants. The lease was also reduced to one year, and the effects of the Act impacted the Irish negatively during the Long Depression of the 1870s. This resulted in a series of upheavals, characterized by rent strikes, “cattle drives” and “monster meetings”.<sup>2</sup> This caused landlords to retaliate by evicting unwilling tenants from their lands, which in turn resulted in a protracted conflict, known as the Land War, between the Land League and the police forces, sometimes backed up by the British Army. There were some sporadic murders of landlords or of their agents, but the most effective means of putting pressure on the landed classes and the British government was the boycotting – or ostracizing – of unpopular people.<sup>3</sup> At Common Law, this was not unlawful and there was no legal remedy against it, since it was implied, negatively, in the very right to engage or not in a commercial transaction or in any form of socialization. The Land War finally subsided when a series of Acts were passed between 1870 and 1909 that gradually granted tenant farmers more rights and entitlements to their freehold and eased off the transfer of property from the richer “absentee landlords” to the Irish farmers.<sup>4</sup> The rural population of Ireland organised itself into an entity that shares some characteristics with the Deleuzian war machine, in that it was the result of a grassroots initiative that had loosened the grip that the State apparatus had on its “space” represented by land ownership. Besides, it was able to adapt to the local context, unlike the State institutions that

<sup>2</sup> Cattle belonging to landowners were occasionally refused grazing on the tenants’ holdings and moved along the roads, with no access to water or hay. “Monster meetings” were huge rallies gathering hundreds of angry farmers, usually addressed to by a member of the Land League, founded by Michael Davitt in 1879. Its aim was to struggle for fairer rent, fixity of tenure and free sale of land to tenant farmers (the “Three Fs”). The first meeting took place in 1879 in Claremorris in Co. Mayo.

<sup>3</sup> The name comes from a landlord’s agent called Charles Boycott. The idea was not to engage in commerce with the designated person or his family, to shun them. It was a voluntary act, and the aim was clearly punitive. Whoever broke a boycott became also the target of ostracism or other forms of shunning.

<sup>4</sup> The most notable ones were the Ashbourne Act of 1885 giving tenants the right to buy their freehold, and the Wyndham act of 1903 that allowed this purchase through UK loans.

followed rules and procedures upheld by the courts. This swiftness and adaptability became the norm when the War of Independence broke out. What characterized this conflict was the determination with which the insurgents engaged in the destruction of state institutions and symbols, and replaced them with a budding, mobile and efficient military system, and a fledgling Government comprising a clandestine Cabinet, an illegal parliament, and an outlawed court system. This was mainly the result of the Irish Volunteers' military and governmental activity across the country.

### 3. The Volunteers' "rhizomatic" network and the boycott of the established courts

By 1916, Sinn Féin, a hitherto minority party promoting a vague nationalist agenda, turned out to be a household name for the liberation of Ireland, as the confrontation between bands of angry men and women and law enforcement troops spiralled into violence (Kotsonouris 1994: 18). In January 1919, the feud took a more radical turn when a local group of armed men assassinated, on its own initiative, officers from the Royal Irish Constabulary (RIC) in Soloheadbeg in Co. Tipperary. This was the first spectacular episode in a long series of attacks on police barracks by IRA Volunteers and "flying columns", which became official IRA policy as of January 1920. This type of organisation can be described as a "pack" or "band-like" assemblage, both flexible in numbers and characterized by its speed and mobility, something reminiscent of the Deleuzian war machine (1980: 360–61).

In local towns the role of the Volunteers was to maintain public order, thus replacing the RIC whose depleting forces were no longer able to do so. This was particularly the case in the West of Ireland, in counties Clare, Mayo and Sligo for example. Parallel to guerrilla actions, local papers increasingly voiced the growing nationalism of the population as the official response became increasingly severe, with the proclamation of the Defence of the Realm Act (DORA) in 1920, which imposed martial law in many western districts. What characterized these nationalist feelings was the diversity of their sources, which included local farmers, political activists and members of the clergy. Regular courts and military tribunals had to deal with acts of agrarian vandalism, possession of firearms and other forms of public unrest. One interesting fact was that there was general public outcry at all the sentences imposed on the offenders (Kotsonouris 1994: 19), and a gradual boycotting of those courts.

Indeed, there was a progressive shift from the local courts of Petty Sessions judging local disputes, to the setting up of impromptu "People's courts" under the supervision of Sinn Féin's local leaders and IRA Volunteers, based on a long tradition of subversive law and alternative courts or tribunals set up and inaugurated by the Land League (Laird: 36). The aim was political and judicial at the same time: first, it

became necessary to show that Ireland was ready to take its destiny in its own hands, so these newly set up courts became a political instrument; secondly, they expressed a grassroots distrust of the established institution of justice which symbolized oppression and injustice. Meanwhile, Sinn Féin became a leading political force that sent candidates for the General Elections of December 1918 and won 73 seats out of 105, in spite of the fact that it was a banned organisation. The British attempt to impose conscription in 1918 contributed to the result, after thousands of people had signed the Sinn Féin and Cumann na mBan sponsored "anti-Conscription pledges" (McCarthy 2014: 94). General discontent had morphed into a motley reunion of varied interests, which even included the landowners, who had appealed to Griffith himself (the then Secretary for Home Affairs in the Dáil Cabinet) to help solve the land disputes that the courts and the police could not (Kotsonouris 1994: 19). This unlikely alliance can be defined along the lines of what Deleuze and Guattari named the "rhizome":

Multiplicities are rhizomatic[...]. A multiplicity has neither subject nor object, only determinations, magnitudes, and dimensions that cannot increase in number without the multiplicity changing in nature (the laws of combination therefore increase in number as the multiplicity grows) (Deleuze & Guattari 1980: 8).

This rhizomatic nature of the grassroots organisation is indeed reflected in the haphazard manner in which the Sinn Féin courts were set up, in the jurisdiction they were given, the rules of procedure they adopted, and the clandestine manner in which they operated.

### 4. The first "Arbitration Courts"

The political agenda pursued by Sinn Féin was to show that Ireland was ready to take its destiny into its hands and form a viable system of government. This being proclaimed illegal by the British authorities forced them to act underground and to replace the failing institutions wherever possible; thus the Volunteers started acting as police constables in western rural areas (Kotsonouris 1994: 20). Beside their self-proclaimed powers in investigating offences, the Volunteers pressed for the resort to some sort of "rule of law", by which the communities were locally administered by a Sinn Féin leader. Parallel to these power-grabbing initiatives, official judges, justices of the Peace as well as Poor Laws guardians either resigned or pledged allegiance to the newly elected (and clandestine) Irish government known as the "First Dáil Cabinet". However, the local administration of justice largely escaped the control of the revolutionary rulers, as well as the established British government (Kotsonouris

5 Cumann na mBan was the all-female support group for the IRA during the War of Independence.

1994: 22–23); and if the Dáil had provided for the creation of arbitration courts as early as June 1919, these were instead firmly in the hand of the IRA. The latter took some measures like policing the local communities, issuing warrants to anyone suspected of breaking public order, and concerned themselves with arbitrating local land disputes. They were presided by local IRA figures. The courts had jurisdiction over parishes and districts, which were the newly-formed administrative units, but the composition of their members was completely novel to the traditional personnel of justice; indeed members of the clergy usually participated in the debates, and women were also deemed eligible to the position of judges. The courts thus filled a vacuum, and served also to demonstrate that the budding Irish Republic was gradually taking shape and forming a strong political regime that would gain credibility in the eyes of the British press as well as high-ranking British politicians and MPs (Kotsonouris 2013: 9). The unusual features of those courts were their *ad hoc* nature, the fact that they created a jurisdiction out of the local problems that needed attention and authority, irrespective of what a distant and sometimes inefficient government might decide. They also resorted to hitherto unknown sentences, like banishment from the community, or the restitution of land. Somehow it meant that those Sinn Féin courts, which were controlled by the war machine of the IRA, were not only defying the British judiciary, but also challenging the authority of the civilian government of Dáil Éireann (Kotsonouris 1994: 23). Some Cabinet members like Austin Stack, Minister for Home Affairs in 1920, began to think that the authority of the elected government needed to assert itself over the power exercised by the IRA supported by Cathal Brugha in the Cabinet; although this was not completely achieved, the government decided to move one step further in administering justice in all its areas by establishing the local arbitration courts as part of an organized judiciary under the auspices of Dáil Éireann.

## II—The Dáil Courts (1920–21): from the war machine to the Irish State apparatus

### 1. The First Dáil Éireann

On 21 January 1919, following Sinn Féin's success at the General Elections of December 1918, the first unicameral parliament of the Irish Republic was convened at the Mansion House in Dublin. The Sinn Féin candidates had refused to swear the oath of allegiance to the British Crown and take their seats at Westminster. They met on the same day as the War of Independence officially broke out, as a gesture of defiance to the British government. During that first session, the only one that was conducted entirely in the Irish language, the Dáil made a formal Declaration of Independence, wrote a Message to the Free Nations of the World and, most

importantly, drafted and voted the first Irish Constitution ever.<sup>6</sup> It comprised only five articles and was very general and sparse in scope. It nonetheless established its first Cabinet on a democratic programme. Cathal Brugha became Ceann Comhairle, or President of the Ministry<sup>7</sup> along with four Secretaries with a limited number of portfolios: Finance, Home Affairs, Foreign Affairs and National defence; Arthur Griffith was appointed Secretary for Home Affairs. The situation across the country was that of a war, with increasing dangers for those acting on behalf of the Dáil and a mounting number of casualties.

On 20 March 1920, de Valera, released from jail was now President of the Ministry and, while visiting the United States to get support for the Irish rebellion, he stated that the Dáil assumed authority over the IRA, which also acted as the Republican Police (Kotsonouris 1994: 26) on behalf of the government. This did not reflect the complexity of the situation, since the IRA had a lot of influence over some Government members, as it was a key player in the conflict. Cathal Brugha had become the Minister for Defence and Austin Stack Minister for Home Affairs on 16 January 1920. The latter set himself the task of organising a sustainable system of courts under the authority of the Ministry. This did change the outlook of the Arbitration Courts, which were based on a decree of June 1919, but remained largely out of Dáil's control. This time, the administration of justice, which had hitherto been limited to land disputes in the form of arbitration, would include broader civil and criminal jurisdiction (Kotsonouris 1994: 29). This was a dramatic change, in that the Cabinet was openly challenging the British court system in its regal prerogatives. Indeed, arbitration did not compete directly with the established Common Law courts, except for the fact that the latter's activities were drastically curtailed due to the boycott to which they were submitted. Any impingement on criminal jurisdiction merely consisted of the Volunteers deciding the fate of informers and traitors during hearings. Stack's decision changed the situation in a radical manner, because its purpose was political: it aimed to promote the legitimacy of the Irish Republican Government in the eyes of the international public opinion. Indeed, the furthering of the independentist agenda meant that the aspiring new nation had to adopt the forms of government that were widely accepted by most democracies, including Great Britain and the United States in the context of political negotiations; Sinn Féin's political propaganda astutely confronted the British courts with their contradictions when it came to decide cases of alleged terrorist activities involving Irish Volunteers (Margulies 2011: 836 and Foxton 2008: 381–382).

<sup>6</sup> Published online at [http://www.firstdail.com/?page\\_id=51](http://www.firstdail.com/?page_id=51) (accessed 15/02/14).

<sup>7</sup> This would correspond to the position of Head of Government, the equivalent of the British Prime Minister. The President of the Irish Republic was Eamon de Valera.

This gradual integration of the Sinn Féin courts (otherwise known as The People's Courts) into State-dominated courts of law had important cultural results. The Sinn Féin courts had no particular agenda concerning procedural matters except that they should distance themselves from their Common Law counterparts; it really meant that they should operate differently in matters of substance and procedure. As far as substance was concerned, only the local conditions and disputes dictated the courts' agenda, which explains why the largest number of cases concerned land disputes. Since the avowed aim was also to reflect the spirit of the nascent Republic, the choice of arbitration was culturally adequate. It was a distant reference to the Old Brehon courts, which operated before the English conquest of Ireland. These courts heard civil matters and decided cases opposing parties that may or may not have been of equal social status. Because of the hierarchical nature of Irish society then, matters were settled by means of an elaborate system of compensation established on the monetary worth of the litigants, and this included compensation for deaths, be they accidental or intentional (Kelly 1988: 214–16). This reminds us of the current American separation between the civil and the criminal aspects of a given case that can be decided either on the basis of a criminal prosecution, or on the basis of a civil claim, or both. In a way, arbitration represented something that was deeply rooted in Irish judicial identity, but yet was very inspired by republicanism in its French or American form. Somehow the Sinn Féin courts were the direct expression of the “government of the people, by the people and for the people” that interacted with the cultural legacy of the ancient, pre-conquest legal system. As such, it was formed on an ad hoc basis, with procedures that varied from place to place, in a very nomadic manner, as Deleuze and Guattari put it when they compare the State institutions to a chess board and the nomadic war machine to a game of Go: “Go pieces are pieces of a non-subjectified machine assemblage with no intrinsic properties, only situational ones” (1980: 353). The impression that the Sinn Féin courts had a distinct Irish identity is sustained by the sudden manner in which they appeared and found adequate solutions to grassroots issues, while challenging an existing state-controlled system. But this situation is invariably unstable, and when the Dáil Cabinet decided to take over the administration of justice, it had to deal with it on the basis that the courts should be the emanation of a State apparatus; in so far as that apparatus was competing for complete power with British rule, it initiated a gradual capture of the existing courts, which morphed into another intercultural hybrid called the Dáil Courts.

## 2. The Dáil Courts as intercultural hybrids.

Dáil Éireann enacted two decrees that granted it nationwide authority over the local Sinn Féin courts: the first one, issued on 13. May 1920, officially established a national Arbitration Scheme as well as an official hierarchy of courts. The legal system was to operate on a geographical scale with, at the bottom, Parish Courts

forming districts (which corresponded to parliamentary constituencies) over which a District Court had mainly civil jurisdiction; however, another layer was added to the District Courts in the form of three-yearly Circuit Sittings, which “would have unlimited jurisdiction both in civil and criminal cases” (Kotsonouris 1994: 30). Finally, a Supreme Court in Dublin would serve as the final appellate jurisdiction; it also had original jurisdiction in “prerogative writs such as *certiorari*, *prohibition* and *habeas corpus*” (ibid: 31).<sup>8</sup> The legal terms used to define the courts' jurisdiction signal that entire legal areas had been borrowed from the Common Law tradition. It could also take cases on its own accord from the Land Commission, given the sensitivity of those matters across the country.

In matters of procedure and jurisdiction, these courts shared many characteristics with the official Petty Sessions (for the Parish Courts) and County Courts (for the District Courts), for which jurisdiction was determined by the maximum amount of damages it could award, just like any Common Law court (Kotsonouris 1994: 31). However, notable differences concerned the sources of law and the personnel of the courts. The applicable law was what the Dáil had enacted as of 21. January 1919, which eliminated all British statutes and case law, but not legal principles, as was mentioned above. Finding some sources of law that would help create a legal continuity with the old Irish tradition was politically motivated. In the Code of Rules of the Dáil Courts, it was clearly stipulated that “citations may be made to any court from the early Irish Law Codes, or any commentary upon them in so far as they may be applicable to modern conditions and from the Code Napoléon or other codes, the Corpus Juris Civilis,<sup>9</sup> or works embodying or commenting on Roman law; but such citations shall not be of binding authority. Save as aforesaid, no legal textbook published in Great Britain shall be cited to any Court” (Hanna J. 1929: 30). The language used in this quote is itself influenced by the Common Law, especially with terms like “binding authority” (a reference to the doctrine of *Stare Decisis*), “applicable to modern conditions”, “cited to any court”, which was not surprising, considering that many of the leading drafters of the Dáil decrees and Dáil representatives had been legally trained at Inns of Courts. The attempt to rid Ireland of all traces of Common Law necessitated the reference to other sources of law that had equal prestige (Code Napoléon or Corpus Juris Civilis), thus making the Irish legal system very intercultural in its quest for judicial identity. As to the personnel, the text of the decree did not stipulate that any legal training was necessary at Parish Court level; each was composed of three elected judges,

8 A writ is a court order; a writ of certiorari is issued by an appellate court, at its discretion, directing a lower court to deliver a record for review. A writ of prohibition is issued by a higher court to prevent a lower court from exceeding its jurisdiction or to prevent a non-judicial officer or entity from exercising a power. A writ of Habeas Corpus is generally issued so as to bring a person before a court, usually to ensure the person's imprisonment or detention is not illegal (Black's Law Dictionary, 2009 edition).

9 Literally “the body of civil laws”, a compilation of laws issued between 529 and 534 AD by Justinian I, Eastern Roman Emperor.

most of them prominent IRA Volunteers or local Cumann na mBan leaders, or Trade Councils members. They were presided over by local parish priests. Each local authority (the Council) elected five District Court justices, who presided over the District Courts, except for the Circuit Sittings, which were composed of three legally-trained judges only. As to the Supreme Court, it was made up of two justices appointed by the Dáil and of four District Court judges. The Land judges were separate from the other personnel of the courts, in that they reported to the Ministry for Agriculture. The system was completed by the setting up of a Registry in the hands of a network of registrars, often lawyers trained in the Common Law tradition, who acted as civil servants under the supervision of the Ministry for Home Affairs. Their task was to copy down and collect court decisions and transfer them to the Ministry in Dublin. Their mission was rendered difficult as the war degenerated into a series of attacks and brutal acts of retaliation; the clandestine courts had to hear cases in makeshift courthouses that were constantly under the threat of British raids (Mitchell 1995: 207). This is a key feature common to war machines, in that they tend to act secretly (Foxton 2008: 187–190), and combine characteristics of underground State apparatuses and nomadic structures (Deleuze & Guattari 1980: 440). However, they kept serving notices to defendants and enforcing court orders throughout the war and after martial law was suspended, pending the signature of the Anglo-Irish Treaty that would put an end to the hostilities. This proved to be a real turning point both politically and judicially, first because it paved the way for the creation and recognition of an autonomous Ireland, then because, by doing so, it gave the newly-created State apparatus the means to deconstruct the intercultural identity that the war had helped create.

### III—The end of Irish judicial interculturality: the Treaty and the Irish Free State (1922–24)

This period marks not only the transition between war and peace, but also the emergence of an official Irish Free State. Between the end of the military operations symbolized by the Truce signed on 11 July 1921 and the ratification of the Anglo-Irish Treaty by the Dáil on 7 January 1922, the Irish provisional government underwent some major changes: first, all traces of “illegality” in the process leading to independence had to disappear in order to acquire equal status with the British Crown in peace negotiations; secondly the passing of sovereignty – even in a limited form – had to uphold institutional continuity; and thirdly, nationalist feelings had to be won over this reigning-in of the war machine, and this took the shape of a “capture” by the Irish Free State, to the detriment of its newly-acquired judicial identity exemplified by the Dáil Courts.

#### 1. From war machine to State apparatus; the formation of the Irish Free State.

The most notable effect of the signing of the Truce in July 1921 was the lifting of martial law and the end of armed operations between the belligerents and reprisals against the civilian population. It also inaugurated a period of negotiations with a view to finalising the passing of the Crown's authority from Britain to Ireland, subject to a few important concessions, among which it was agreed that Ireland would remain within the Commonwealth, and that the island would be partitioned between the Northern loyalist province of Ulster (minus three counties) should the Province decide to withdraw from the Irish Free State within a month of the Treaty coming into effect.<sup>10</sup> Besides, Britain would retain some sovereignty over specific areas like the lighthouses on the coastal lines as well as some ports. Most importantly, the terms of the Treaty should take precedence over the newly-drafted 1922 Constitution of the Irish Free State. The latter was undergoing a dramatic transformation, from a war machine in the literal sense of the term to becoming a party to an official negotiation. Indeed it became necessary for the two belligerents to acknowledge the existence of the Dáil Cabinet while giving it the attribute of a government in the making, on British terms. Thus some kind of “exchange”, of bargaining, was being set up, which was designated to prepare for a transfer of sovereignty, but each delegation came to the negotiation table with different perceptions of what such “exchange” could be. In Deleuzian terms, an “exchange” can only be defined in relation to its “limit”, beyond which it loses its value and interest for the parties. The horizon is set on the “penultimate” stage of the negotiation, the penultimate item that serves as a litmus test for the exchange's mutual acceptability (Deleuze & Guattari 1980: 437–438). For the British, the limit was set on the legal form that the government of Southern Ireland should take, which should preserve the symbols and structure of the established British regime albeit with more autonomy. The Irish, on the other hand, wanted to transform the country into a Republic, which would completely secede from the United Kingdom. This corresponds to another paradigm, that of the “threshold”, beyond which one moves from one type of social assemblage (British rule) to another (the Irish Republic), two different forms of State apparatus. In spite of these diverging positions, one common point emerged, and that was the necessity to create a structure of self-government for Ireland. It implied the transformation of the rebellion, of the all-out opposition to the British institutions, into a State that could

<sup>10</sup> The Treaty gave effect to the Government of Ireland Act 1920 (10 & 11 Geo. 5 c. 67) which provided notably for the creation of two Parliaments, one in Northern Ireland, the other one in Southern Ireland. Interestingly, the provisions under the Act were already obsolete before the end of the War of Independence, as the status of dominion was no longer acceptable in its forms for the Volunteers and the First Dáil, who favoured the creation of a Republic. The remaining provisions of the Act were repealed in 1998 with the signing of the Good Friday Agreement.

only exist if it captured it beforehand and started striating the smooth, uncharted space where the nomads (the IRA Flying Columns and clandestine institutions like the Dáil Courts) roamed, and filled the vacuum, created by the war (Deleuze & Guattari 1980: 385–386). Due to the negotiations in preparation for the signing of the Treaty, most features that characterized the British justice system were officially reintroduced in Ireland; the interlude that had recently brought features of Irish judicial identity to substantial and procedural law was over. Judicial identity was meant to be confined to the political authority. However, the Treaty generated some ambiguities pertaining to the nature of the political regime that was being established, which postponed the disappearance of the Dáil Courts until 1924.

## 2. The Irish Free State's judicial system, between change and continuity

If the Truce, followed by the negotiations that led to the Anglo-Irish Treaty of 1921 was a relief for most people, one crucial political issue was never officially addressed by the provisional Irish government at that time: which political form would the Irish Free State take within the framework of the Treaty and in time to be? The Volunteers had explicitly fought for the establishment of a Republic, and the word “Republican” was present in every political statement made by the Dáil Cabinet (Kotsonouris 1994: 66). In spite of the fact that the Treaty imposed the reinstatement of British courts throughout the country, the government was reluctant to dismantle the Dáil Court network because it would send people the signal that what they had fought against since the Land Wars was being recanted. The period between 1921 and 1924 sanctioned the coexistence of a dual system of courts, one Republican, the other British, to the effect that the Irish officials in charge of the administration of the Dáil Courts saw the situation was soon to become untenable (Kotsonouris 1994: 67–68). In practice, local law enforcement officers, mostly Volunteers, continued to challenge the jurisdiction of British courts, others hesitated in prohibiting Dáil Court hearings. The confusion created by the provisional Irish government (under Treaty terms) only emphasized the contrast between the two judicial identities that were competing with each other at the time. Two groups were actively participating in the dispute: on the one hand, the Volunteers and those in charge of the Dáil Courts, on the other hand, the legal professions and the judiciary who had been removed from office by the War. The Free State was emerging as a State apparatus from Treaty provisions and had to assume the role of the State authority within a British political framework, by organizing the transfer of British authority and guardianship of the institutions. However, the situation was becoming volatile: the Government of Ireland Act 1920 provided for the creation of an Irish Parliament, but it existed already and operated as Dáil Éireann; the new legitimacy of the institution would be established by means of general elections, but the transfer of judicial authority meant that the Dáil

Courts would be illegal under the new arrangements. To make matters even more complicated, the 1921 Proclamation by the Dáil had forbidden the dismissal of court employees and judges formerly appointed by the British: this power struggle between those who supported the Treaty as a temporary arrangement and those who rejected the very idea that Ireland could be anything but a Republic were the seeds for the Civil War that broke out in 1922. The newly-formed Irish State was necessarily shaped like any other State apparatus: it took the same arborescent form as the British State (Deleuze & Guattari 1980: 17), even if semantic differences aimed to underline the crucial differences between them, like using the word “Republic” as a signifier that had little reality from a governmental point of view; inevitably it gradually absorbed the judicial rhizome of the Dáil Courts and their distinct cultural identity.

## 3. From the Rhizome to the Tree: the end of judicial identity, and a new intermediate form of interculturality

As the budding Irish Free State was taking shape, it became essential to assert its authority across the country, particularly in the areas that had been controlled by the Volunteers; the issue was of political legitimacy, a concept that corresponded to a top-down control of space and implied the establishment of striated zones where this authority was exercised. This was a difficult process to implement: after all, the Irish State, whose binding document was a British Act, albeit approved by the Dáil, was endowed with instruments of sovereignty: a bicameral Parliament that could enact binding legislation, a Constitution that could only be superseded by the Government of Ireland Act 1920. Officially, the transfer of authority moved from the British, and within a British institutional framework, to the Irish, who accepted the status of a Dominion. In reality, this transitional period inaugurated the gradual establishing of independence for Ireland, who would draft a Republican Constitution in 1937 to eventually become a Republic in April 1949. Meanwhile, Sinn Féin's agenda (“Ourselves Alone”) clashed with this gradual shift in power, as the matter was essentially one of appearances: for the British, it had to look as though they were granting rights to Ireland,<sup>11</sup> while the anti-Treaty were ready to continue the fight for the official existence of the Republic, since the successive Irish governments (the first Dáil 1919, the second Dáil 1921 and the third Dáil 1922) were the emanation of the will of the Irish people.

<sup>11</sup> From a British perspective, only a Westminster Act of Parliament could give effect to any modification of the Treaty. The Statute of Westminster 1931 stipulated that the British Parliament was not allowed to legislate for the Dominions anymore.

As far as the courts were concerned, the Irish government finally decided to take some measures to wind up the Dáil Courts in 1923, as the Civil War had begun its destructive impact on the fledgling Irish nation. On 8 August 1923, the Dáil passed an Act “to provide for the appointment of Commissioners to dispose of cases which were pending in courts established under the authority of Dáil Éireann, to establish a Register of decrees of such courts and to make other provisions for the purpose of winding up the courts aforesaid, and relieving certain hardships and anomalies which have arisen in connection with those courts” (Kotsonouris 2004: 86). The parliamentary language implies that somehow the Dáil Courts represented an episode that had been both a necessity and an impediment to the establishment of an Irish State. It may be that the gradual return to the Common Law tradition had a lot to do with the training of the legal professions, the lack of time to devise a new legal system (both substantial and procedural), and the pressure from the political and military events during the War of Independence. The Act established a Commission that would take over the cases that had been referred to the Dáil Courts, both civil and criminal; it is estimated that their number reached 5,000 approximately (Kotsonouris 2013: 28). What was never explicitly said in the provisions of the Act, or in its long title, was that the Commission had superseding powers to declare that a case was indeed a Dáil Court case and take it over; in reality it amounted to the temporary reinstatement of the said Dáil Courts in another guise. However the war machine that had willed them into existence had been absorbed by the State institutions, in spite of a long, protracted battle within the Government and Dáil Éireann itself and public figures like William Cosgrave expressing their faith in a truly Irish justice system (Kotsonouris 1994: 110). This reflected the rift within the Irish nation concerning the attitude to adopt vis-à-vis the Treaty and its legal, as well as political consequences. On 1 May 1925, the Dáil Éireann Courts (Winding-up) Act became operative and effectively transferred the judicial authority from the Commission to the newly-established court system of the Irish Free State. Again, what was to associate with these courts depended on a myriad of personal or professional interests: unsolicited women’s groups pressed for the non-criminalisation of children, following the example of Canada with its juvenile courts. Members of the polity (farmers’ associations, trade and county councils, the legal professions) were invited to make recommendations too. But this was indeed a far cry from the sudden, revolutionary setting-up of the “People’s Courts” in the wake of the War of Independence. The overarching position of the State and of the Treaty meant that justice in Ireland would remain firmly anchored in the Common Law tradition: according to the Courts of Justice Act 1924, the changes concerned the courts’ names, but the jurisdictions remained equivalent to their British predecessors; only the existence of a written Constitution evidenced the passing from monarchy to a Republic that would not say its name until after World War II.

## Conclusion

The sudden emergence of an Irish judicial identity, based on an assemblage of Brehon traditions, and influences from Canon and Civil Law was rendered necessary by Ireland’s struggle against colonial institutions. This motley rhizomatic creation only obeyed the logic of the war machine and adopted its chaotic and swift unpredictability. One may say that this enterprise was doomed from the outset, since the very idea of a legal system is the emanation of a State apparatus, whose aim is to control (striae) the territory of the polity. The Dáil Courts attempted to deterritorialise this striated space and give it an Irish flavour, but a mixture of circumstances decided otherwise. The history of judicial identity follows a strict pattern of recognition: in the words of H.L.A. Hart, the essence of the law is to be found in what the officials say it is (Hart 1994: 101–102) and this precludes many forms of discontent, be it popular or generated by dissident factions. One may also reflect on this short and intense moment of judicial experiment and wonder why interculturality in law is both marginally important and centrally non-existent. Unlike other sensitive issues like culture, language, education, it does not seem to need change to adapt to new political circumstances. Sadly, the Dáil Courts, otherwise known as the Sinn Féin or the People’s Courts were relegated to history books, since they were of little importance to the building of the current Irish legal system, so much so that leading legal textbooks do not mention their existence beyond their names, although they devote at least a few paragraph to the old Brehon Law (Byrne & McCutcheon, 2009: 27); this of course vindicates Deleuze’s remark that the war machine can never be part of history and of knowledge because it is part and parcel of a process of destruction that ends either in the abolition of the State or of itself (Deleuze 1996: 171).

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### *Pour citer cet article*

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#### **Référence électronique**

O'Connell, Anne-Marie, «National identity and judicial interculturality in Ireland: The Dáil Courts experience (1919-1924)», *Revue Miroirs* [En ligne], 2 |2015, mis en ligne le 15 juillet 2015, consulté le 9 août 2015, <http://www.revuemiroirs.fr/links/2/article5.pdf>.

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### **III : INFLUENCES ÉTRANGÈRES SUR LA POLITIQUE IRLANDAISE ET NORD-IRLANDAISE**