The contribution of Irish-Australian lawyers

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Introduction

There is a strong tradition of Irish contribution to the Australian legal system. This is particularly true in relation to the role played by Irish lawyers in the nineteenth century to the Australian colonies. These contributions helped develop the laws of those colonies and, in some cases, underpin the development of a legal system that could be said to be identifiably 'Australian'.

Today, I wish to consider this contribution - both in general terms, but also by examining the specific contributions of a few notable Irish lawyers. While the men I will focus on today would likely have characterised themselves as purely 'Irish', due to the fact that they were all Irish-born and educated, they all spent substantial parts of their lives in Australia. As such I feel it is justifiable to describe them not just as 'Irish', but 'Irish-Australian'.

In any survey of the development of Australian law it is impossible to miss the large number of Irish lawyers prominent in the colonies in the nineteenth century. The first question that arises, therefore, is why did so many legally-trained Irish men (and it must be admitted that they were all men) travel half way around the world to work? Alex Castles explains that the Irish domestic situation was not particularly stable, and that work for lawyers in Ireland was scarce:

> Even before the great famine of the 1840s Ireland was in a perilous situation. In Dublin and other places there were large numbers of barristers and attorneys who were unable to make a reasonable living in their profession... With the additional lure of gold and the wealth it engendered, Victoria became a major centre for emigrating Irish lawyers. With others who had arrived earlier, many were amongst the most outstanding of several generations of their compatriots. They brought a store of intellectual energy, forensic abilities of a high order and reformist zeal, which could find far better opportunities for expression in the colonial milieu.[1]

In addition to the prospect of gaining wealth in the colonies, for some Irish lawyers making the long journey to Australia, provided the opportunity for appointment to positions that simply would not have been available to them had they remained in Ireland or England.

Former Chief Justice of the High Court Gerard Brennan has argued that the Australian colonies of the nineteenth century were governed by and under English law. He points out that:

> colonial modification of, or abrogation of, English laws that were applicable to the colonies were valid only to the extent authorised by English law.

It follows, of course, that Irish lawyers in the Australian colonies had but a limited opportunity to contribute to the development of a peculiarly Australian legal system. They were necessarily priests of an established oracle, and it was an oracle with which they were familiar.[2]

While it is undoubtedly true that this situation constrained the outcomes that could be achieved through the law, it is also true that the significantly different social conditions that faced the inhabitants of the colonies meant that the process of legal divergence was inevitable. Many Irish lawyers were well placed to contribute to these developments. Indeed, through the nineteenth century Irish lawyers could be found in parliaments, as judges, working as lawyers and as holders of other public offices in each of the Australian colonies. As Alex Castles describes:

> In politics, legal education and the working of the law, Irish barristers and attorneys, many with Trinity degrees, were often the mainspring of important social and other developments; sometimes without parallel elsewhere in Australia or Britain. [3]

Chief Justice Brennan has characterised the contribution of the Irish to the Australian legal system as both 'significant and indefinable'.[4] He notes that the significance of this contribution 'can be charted in part by reference to some of the great lawyers who came from Ireland to this country, and who were distinguished practitioners, judges and legislators in the infant colonies.'[5] In this respect, men such as Roger Therry, John Hubert Plunkett and Sir Robert Molesworth were highly significant in the early development of a distinct Australian legal system.

It is worth noting Patrick O'Farrell's observations about the effect of the Irish contribution to Australia:

> The direct Irish contribution to Australian liberties is very great, in terms of effective protest against religious and political monopolies, refusal to accept discriminatory laws, and demands for social equality. Perhaps even more vital is the impact of their energetic activities and independent opinions in liberalizing and humanizing the climate of Australian life, on freeing the atmosphere of authoritarianism, pretence and cultural tyranny. The Irish had no philosophic notion of an open pluralistic society. It

> might be argued their pretences were ideally the opposite. Yet an open society in Australia was the effect of their determination to prise apart a society which threatened to become closed.[6]

Tony Earls states that this is a 'bold and controversial' claim. Nevertheless, it can help to put the contributions of Plunkett and other Irish-Australian lawyers to the nascent Australian legal system into a broader context. Earls argues that although the Irish did not come from an 'open pluralistic society' they were 'not without philosophical notions favourable to such a society'. He suggests that Plunkett provides an illustrative case study of someone whose formative experiences in Ireland, resulted in strongly egalitarian beliefs.

Sir John Hubert Plunkett

Plunkett was, like many other Irish lawyers who came to Australia, educated at Trinity College Dublin. He practiced as a barrister in Ireland for several years. This work brought Plunkett distinction and the respect of his fellows at the bar.

In Plunkett's case in particular, the campaign for Catholic emancipation in Ireland spearheaded by Daniel O'Connell and his Catholic Association, had a significant effect on the young Plunkett.

O'Connell founded the Catholic Association to promote the Catholic cause in Ireland. It is likely that the Association's methods and philosophy had a great effect on Irish Catholic emmigrants. O'Connell was committed to several principles relating to the pursuit of political change:

- that violence in pursuit of political objectives was counterproductive;
- that any political objective could eventually be achieved by marshalling public opinion;
- civil liberties were universal, irrespective of class, colour or creed.[2]

The association's activities in Ireland resulted in the Catholic emancipation and the elimination of barriers to participation inpublic life faced by Catholics. Tony Earls explains the impact of this:

The successes of the Catholic Association in Ireland in the 1820s can be seen as a factor which encouraged the Irish to actively participate in the developing legal and political institutions through the 1830s, 1840s and 1850s in New South Wales. The context of that political engagement is apparent when one compares the New South Wales and Irish newspapers of the period. The similarity in sectarian rhetoric points strongly to a conclusion that the gradual extension of the franchise and civil rights in Australia involved not only a contest between emancipists and exclusives, but religious and ethnic debates that had been well rehearsed in the homelands.[3]

Tony Earls, in his extensive analysis of Plunkett's life and work, Plunkett's Legacy, calls the Catholic Emancipation the 'single most significant event in Plunkett's life' for two reasons. First, his participation in the Association's political campaign made his subsequent career possible. Secondly, the campaign leading up to Catholic emancipation 'inculcated values and methods that he carried with him throughout his life.' In particular, Earls notes, expansion of the fundamental principle of the Catholic Association 'civil rights through just law', would be the 'touchstone' of Plunkett's career. I will return to some of the ways in which he sought to put this into effect in his work in Australia.

As a result of the success of supporters of O'Connell in the Irish general election of 1830, Daniel O'Connell won substantial bargaining power with the newly installed government. He was responsible for lobbying to have Plunkett appointed as solicitor general for the Colony of NSW in 1831. As Earls explains, the opportunity the position offered was one that Plunkett was unlikely to come by if he remained in Ireland. Further, the salary – £800 a year – would have been a consideration, and the position provided a young man of his talents significant prospects for advancement. Finally, 'as someone who had dedicated himself to the cause of Catholic emancipation, he cannot have been unaware of the fact that, by virtue of the appointment, he would become the first Catholic appointed to high office in Australia.'[4]

Plunkett accepted the position, and travelled with his new bride to Sydney on the *Southworth* in 1832.

On his arrival, Plunkett took up his duties as solicitor general for the colony. However, the colony's attorney general at that time, John Kinchela, was partially deaf. As a result Plunkett was forced to take over the attorney's court duties. This meant that he was effectively simultaneously the colony's de facto attorney general and its solicitor general. In this capacity, between

August and November 1833, Plunkett appeared for the attorney general in the criminal session in 91 cases. He obtained convictions in 64 of those cases. [5]

T L Sutor, writing in the *Australian Dictionary of Biography* has said that some people believed that he was given a double load (that is, the work of both solicitor general and attorney general) in the hope that he would resign. However, he did not and when Kinchela retired in 1836, Plunkett was officially appointed as attorney general.

In considering, and acknowledging Plunkett's contribution to the law in New South Wales, I wish to discuss several of his more notable achievements. I will discuss his prosecution of the perpetrators of the Myall Creek massacre in 1838 and his contribution to Australian legal scholarship and practice.

In his recent work, *Plunkett's Legacy*, Tony Earls, considers the prosecution by Plunkett of those alleged to have carried out what has become known as the Myall Creek Massacre. He holds that it 'was, and remains, unique in Australian annals'.[6] Certainly we are unlikely to see anything like it again, even if just because we would hope that such an atrocity would never again be committed in Australia.

The prosecution followed the killing of a group of about 30 Aboriginal people at a site known as Myall Creek by a group of 12 stockmen. The group of people killed included around 10 to 12 children and a similar number of women. The bodies were burnt by the killers. The fact that the incident was reported was extremely uncommon, and the overseer who brought the incident to the attention of authorities lost his job and never worked as an overseer again. [12] Additionally, the new governor of the colony, George Gipps, had been issued instructions from the Colonial Office to ensure the protection of Aboriginal people in the colony. As a result he was keen that all Aboriginal deaths linked with conflict with white people would be investigated.

Investigations following the Myall Creek killings identified 12 alleged perpetrators, 11 of whom were caught and returned to Sydney for prosecution. Plunkett prepared the case against the accused men carefully. However, he faced a problem. In particular, a lack of evidence about the identity of the victims, as well as a lack of any eye witnesses who could give evidence meant that Plunkett had no proof of what any of the accused had done, nor to whom. Nevertheless, they were all charged with aiding and abetting the murders. Plunkett was very careful to only prosecute the deaths of two of 28 possible victims.

In the end, the evidence was insufficient to establish the prosecution's case and the jury acquitted all of the accused.

However, as Earls explains: 'Plunkett saw this case as a rare opportunity to set an important example'. By only prosecuting two of the deaths, Plunkett had left open the possibility of prosecuting some of the other deaths separately, which he now proceeded to do. In order to improve the chances of a successful prosecution, only seven of the original 11 defendants were charged.

Unsurprisingly, the seven defendants entered a plea of autrefois acquit. A jury determined that the trial could go ahead. Although, much of the same evidence was presented to the new jury, Plunkett also managed to expose the 'tactics of the powerful landowners who sanctioned the extermination of the native peoples; and secured a guilty verdict'.[7]

Public opinion, heavily influenced by financially powerful and influential interests in the colony, had been strongly against Plunkett's prosecution of the case. As Earls explains, 'squatting was a profitable business, and those who benefited from squatting did not want to see their ways of solving the problem with Aborigines hindered by the law'.[8] The controversy surrounding the case followed Plunkett. Earls notes that:

> even to the end of his career, Plunkett suffered the open enmity of those who disagreed with his prosecution of the cases, to which his standard reply was that he would have been ashamed had he acted otherwise.[9]

A key reason for Plunkett's attitude was that he held to the principle of 'one law for all'. That is, he believed that all people should be subject to equal application of the law. This principle underpinned Plunkett's view that emancipated convicts should be given the right to sit on juries and that convicts should be assignedas labour to private individuals.[10] It also drove Plunkett's campaign to change the law in NSW to allow Indigenous people to give evidence in court. A central reason that Plunkett pursued the Myall Creek prosecutions was that he had access to eye witness accounts of the events. However, as the witness was Aboriginal, the evidence was inadmissible. Earls notes that Plunkett campaigned

unsuccessfully for 12 years to change the law, arguing that he was unable to prosecute the mass killings of Aboriginal people which continued to occur, without their evidence. In Earls' view 'that he failed is one of the saddest stains on the history of New South Wales'.[11]

In 1835 Plunkett authored Australia's first published legal text, *An Australian Magistrate*. The book was intended to instruct the Australian magistracy. It was an A-Z compilation (or as Tony Earls points out 'Abduction' to 'Wrecks'), of all the issues a magistrate might come across in the course of his work.[12] Plunkett's book used the equivalent book for English magistrates *Justice of the Peace and Parish Officer* as a model, compressing, updating and amending the six volumes of that work, to a single volume which addressed local circumstances. For example, Plunkett had to add sections on 'Aboriginal natives', 'Bushrangers' and 'Tickets of Leave'.[13]

What is perhaps most impressive about this book is the conditions under which it was prepared. Undertaken between 1833 and 1835, Plunkett was also undertaking two jobs at the same time - the roles of attorney and solicitor general. The preface to the book explains how he approached the task:

> I commenced the following pages in the midst of public business, which left me little time even for ordinary recreation; but having once embarked on the work, so great was my anxiety to complete it, (without interfering with my official duties) that the greater portion of it was compiled and arranged after the hour of twelve o'clock at night.[14]

This brief summary overlooks some of the other significant contributions Plunkett made to the developing colony of NSW such as his role in the introduction of the Church Act in 1936, which paved the way for a separation between church and state; his support for non-denominational public schooling; and his contribution to the drafting of the New South Wales Constitution. Nevertheless, I do not want to neglect other significant Irish lawyers and their contributions.

Some other significant Irish lawyers: Sir Roger Therry

Therry was born in Cork, and was educated at Trinity College, Dublin. He was a member of both the English and Irish bars. In 1829 he was appointed commissioner of the Court of Requests in Sydney. This appointment is significant as it was enabled by the Catholic Relief Act of 1829 which removed barriers to Catholics holding office, and Therry was one of the first Irish Catholic lawyers to benefit from the Catholic emancipation in Australia.

Therry acted as attorney general of New South Wales from March 1841 to August 1843, while Plunkett was absent in England, and sat in the Legislative Council because of this. He was appointed resident judge of Port Philip in 1844 and held this role until 1846 when he took up a position in the Supreme Court of NSW. Therry was primary judge in equity in the Supreme Court and C H Curry points out that 'no decree of his in that jurisdiction was reversed'.[15]

Therry's appointment as commissioner allowed him to engage in private practice so prior to his elevation to the bench, Therry practised as a barrister. Therry appeared as Plunkett's junior in the Myall Creek prosecution. Governor Gipps praised Therry and Plunkett as 'the two most distinguished barristers of New South Wales'.[16]

Sir Robert Molesworth

Another Trinity College Dublin graduate, Sir Robert Molesworth served as a judge of the Victorian Supreme Court for 30 years from 1856 to 1886. Reginald Scholl notes that 'he was noted for his industry, courtesy, learning and expedition; very few of his decisions were successfully challenged'.[17]

His most significant contribution, however, was as chairman of the Court of Mines. He presided over this jurisdiction at a time when mining activity in Victoria was widespread. Molesworth's obituary in the Argus recognises the impact of his administration of the mining jurisdiction in Victoria:

> [H]e was for 20 or 23 years chief judge of the Court of Mines, and he practically settled the mining law of the country, the number of mining cases which now come before the Supreme Court being very few indeed. Indeed, he may be said to have created the mining law as now administered in this colony.[18]

Reginald Sholl notes that the body of precedent developed by Molesworth 'gave much satisfaction to the legal profession and the mining industry and became a guide in other Australian colonies and overseas'.[19]

Sir Robert Torrens

Robert Torrens was not a lawyer. However, he was Irish-born and, like many of his contemporaries, educated at Trinity College Dublin. His reforms to the South Australian property law system, were adopted in the other Australian colonies, as well as elsewhere (notably in New Zealand). The reforms can be seen to have established a uniquely 'Australian' system of property law, created in response to the state of land law in South Australia in the mid-1850s. As Douglas Whalen explains, land titles in thecolony at that time were in an unsatisfactory state. As Torrens explained it 'land was no longer the 'luxury of the few', therefore 'thorough land reform…[was] essentially the people's question'.'[20]

Torrens arrived in South Australia in 1840. He took up a position as collector of customs. His performance in this position was not without its controversies. For example, he was sued by the crew members of the ship Hanseat for false imprisonment.[21] He assaulted journalist George Stevens in the street after Stevenson had satirised the outcome of complaints to the English authorities against Torrens by Torrens' own chief clerk.[22] Nevertheless, he was a nominated member of the South Australian Legislative Council from 1851 to 1857 and in 1855 became a member of the Executive Council.

He took up the issue of land law reform in 1856 and his bill passed through both houses and was assented to on 27 January 1858.[23] The system provided for the transfer of land through the register of title on a public register, rather than by the execution of deeds.

Although as Douglas Whalen notes, Torrens 'claimed authorship' of the system, 'it is clear that many people and influences helped considerably'. For example, the system drew on registration schemes operating elsewhere, such as in Germany. Nevertheless, Torrens' campaigning on the issue of land titles reform led to both his electoral success and the ultimate passing of his bill, bringing the 'Torrens title' system into existence.

George Higinbotham

I wish to finish my brief survey of Irish lawyers and their contributions to Australian law by discussing George Higinbotham. Higinbotham was nominated by H V (Doc) Evatt as one of Australia's great judges, alongside notable American judges such as Justice Holmes and Justice Cardozo.[24]

Higinbotham was born in Dublin and educated at Trinity College. He was called to the bar in 1853, having been enrolled as a student at Lincoln's Inn. In the same year he travelled to Melbourne where he worked as a journalist for the *Melbourne Herald*, while also practising successfully at the bar. In 1861 he was elected to the Victorian Legislative Assembly where became attorney-general in 1863. As attorney-general, Higginbotham promoted secularism in the government of the colony. He was also strongly committed to responsible government and was opposed to imperial interference in the government of the colony. As Gwyneth Dow explains, he 'seized on any challenge to responsible government and any ambiguities in the Constitution Act to establish precedents in the development of colonial democracy', although she points out that 'whether or not he was always legally sound is not settled by constitutional historians'.[25]

Higinbotham was invited to become a Supreme Court judge in 1880, and in 1886 on the retirement of Sir William Stawell, he was promoted to the position of chief justice.

As Chief Justice Higinbotham continued to promote his views about the importance of responsible government. These views – put particularly in the judgment in *Toy v Musgrove* in 1888 – were that the Victorian Constitution conferred on the Victorian colonial government 'very large and almost plenary powers of self government'.[26]

Commenting on the effect of Higinbotham and other who held similar views, Alex Castles argues that:

> Irish-born radicals like Higinbotham were not the only ones who espoused such causes [such as responsible government, and freedom from interference of the Colonial Office in local affairs]. But some like him were prominent among those who supported the evolution of far more effective autonomy in the Australian colonies which successive British governments did not wish to concede. Those with legal training were often especially important in these processes, giving technical strength to

constitutional debate which could not readily be ignored, with influences on the nature of government in Australia flowing down to the present day.[27]

Conclusion

At this point, I would like to return to Chief Justice Brennan's identification of the contribution of of Irish lawyers to Australian law as 'significant and indefinable'. Indeed, it is clear that there has been significant contribution, and while it may be indefinable, it is clear that some general themes do appear to run through these contributions. I have developed some of these to a greater extent than others today. In particular, I might identify the idea espoused by men such as Plunkett and Higinbotham that law should provide equal protection, and that it should seek to protect the underprivileged or marginalised.

Additionally, we can see the idea the promotion of a secular society, with a clear separation between church and state. Such views were held by both Catholics and Protestants. Chief Justice Brennan identifies that Irish lawyers in Australia, both Catholic and Protestant, were 'genuinely tolerant and open men'.[28] Tied up with these efforts was the promotion of concepts of democracy and responsible government.

Finally, where particular individuals sought to reform specific areas of the law, or to bring coherence to the jurisprudence of a particular body of law, in the way that Torrens or Molesworth did, these efforts helped bring the laws of the Australian colonies closer together.

1. A Castles, 'Now and Then: Irish connections with Australian law' (1992) 66 *Australian Law Journal* 532, 536.
2. G Brennan, 'The Irish and law in Australia' (1986) *The Irish Jurist* 95, 95.
3. A Castles, 'Now and Then: Irish connections with Australian law' (1992) 66 *Australian Law Journal* 532, 536.
4. G Brennan, 'The Irish and law in Australia' (1986) *The Irish Jurist* 95, 95.
5. Ibid.
6. P O'Farrell, *The Irish in Australia* (1987) 11 quoted in T Earls, 'The opportunity of being useful': Daniel O'Connel's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 170.
7. T Earls, 'The opportunity of being useful': Daniel O'Connel's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 171.
8. T Earls, 'The opportunity of being useful': Daniel O'Connel's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 170.
9. Ibid 173.
10. T L Suttor, 'Plunkett, John Hubert (1802-1869)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/plunkett-john-hubert-2556/text3483.
11. T Earls, *Plunkett's Legacy: An Irishman's Contribution to the Rule of Law in New South Wales* (2009) 91.
12. Ibid.
13. T Earls, 'The opportunity of being useful': Daniel O'Connel's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 175
14. T Earls, *Plunkett's Legacy: An Irishman's Contribution to the Rule of Law in New South Wales* (2009) 95.
15. T Earls, 'The opportunity of being useful': Daniel O'Connel's influence on John Hubert Plunkett' in L M Geary and A J McCarthy (eds) *Ireland, Australia and New Zealand: History, Politics and Culture* (2008) 170, 175.
16. Ibid., 170, 174.
17. Ibid., 175.
18. T Earls, *Plunkett's Legacy: An Irishman's Contribution to the Rule of Law in New South Wales* (2009) 64.
19. Ibid. 65
20. Quoted in ibid. 65.
21. Currey, C. H., 'Therry, Sir Roger (1800-1874)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/therry-sir-roger-2723/text3837.
22. Quoted in G Brennan, 'The Irish and law in Australia' (1986) The Irish Jurist 95, 97.
23. R Sholl, 'Molesworth, Sir Robert (1806-1890)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/molesworth-sir-robert-4217/text6795.
24. 'Death of Sir Robert Molesworth', *The Argus*, Melbourne, 20 October 1890, 5.
25. R Sholl, 'Molesworth, Sir Robert (1806-1890)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/molesworth-sir-robert-4217/text6795.
26. Torrens quoted in D Whalan, 'Torrens, Sir Robert Richard (1814-1884)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/torrens-sir-robert-richard-4739/text7869.
27. D Whalan, 'Torrens, Sir Robert Richard (1814-1884)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/torrens-sir-robert-richard-4739/text7869.
28. Ibid.
29. Ibid.
30. H V Evatt, 'Mr Justice Cardozo' (1938-39) 52 *Harvard Law Review* 357, 359.
31. G Dow, 'Higinbotham, George (1826-1892)', *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, http://adb.anu.edu.au/biography/higinbotham-george-3766/text5939.
32. *Toy v Musgrove*, quoted in G Brennan, 'The Irish and law in Australia' (1986) *The Irish Jurist* 95, 101.
33. A Castles, 'Now and Then: Irish connections with Australian law' (1992) 66 *Australian Law Journal* 532, 536.
34. G Brennan, 'The Irish and law in Australia' (1986) *The Irish Jurist* 95, 105.