UCD GEARY INSTITUTE DISCUSSION PAPER SERIES

Puzzles of Agencification: An Organizational Analysis

Draft: Please do not cite without authors' permission.
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NEWGOV International Seminar

New Modes of Governance in Old & New Member States

Institute of Public Affairs, Warsaw

26 October 2007

The views expressed by the authors do not necessarily reflect those of the Geary Institute. All errors and omissions remain those of the author.

Geary WP/30/2007

1. Introduction

Research on new modes of governance has tended to emphasise either new forms of engagement between government and political actors and groups in civil society, or new instruments of public administration. Treib and colleagues, for example, distinguish between institutional properties (polity), actor constellations (politics), and policy instruments (policy) in the analysis of modes of governance (Treib et al 2005). But analysts of new trends have tended to focus mainly on the latter two areas. The rise of network governance and the blurring of the boundaries of formal and informal participation, for example, is often seen as an indication of new patterns of engagement in policy making and implementation (Peterson 2003; Sabel & Zeitlin 2007; Waelti et al 2004). The growth of new instruments in regulatory governance such as risk assessment, quality audits, and benchmarking might be seen as innovations in the modalities through which new policy objectives are identified and implemented (Radaelli & de Francesco 2007). In practice, of course, these various strands are often inter-related. It is our contention that changes in institutional arrangements can reveal more about the dynamics of governance than had previously been supposed. It is not necessarily the case that new modes of governance are weakly institutionalised and best examined through analysis of 'soft' policy practices. This has long been recognized in areas of governance such as regulatory policy – where new institutional arrangements are designed to achieve new policy objectives, often with the involvement of new actors to whom public power may indeed be devolved in new ways (Thatcher 2005; 2007). But apart from the case of regulatory governance, institutionalized practices have tended to be rather under-analysed in comparative literature.

This paper draws on time-series data generated within the IRCHSS-funded 'Mapping the Irish State' project to offer an organizational perspective on changing modes of governance. We take as our starting point the pattern of reliance by government on state agencies, and especially the proliferation of agencies since the 1980s which has been one of the more salient developments in the organization of political life in the European Union generally. The changing profile of state agencies has implications for our understanding of the range of state responsibilities and how they are managed.

Through an analysis of state agencies, we draw out a typology of trends in governance, aspects of which we believe have been relatively under-explored to date.

2. Commonality and diversity in state agencies

The identification of agencies is itself a contentious activity. Categorization according to different definitions, animated by different theoretical purposes, will capture different ranges of observations and, quite simply, a different total number of bodies that are deemed to qualify for inclusion. Among the merits of our database as a research tool is that a range of identifying features can be built into the coding of agencies, which will facilitate comparison of different schemata.

In this paper we adopt a typology based principally on functions, to enable us to analyse areas of state activity in which agencies have become more active over time. We can therefore identify changes in the mode of governance, identified in terms of the scope of state activity and the organizational structures through which public policy has been enacted. Possible recent drivers of agencification include the construction of new regulatory capacities, sometimes but not always or necessarily under an EU mandate; incorporation of organized interests into consultative fora; separation of service delivery from core policy making; depoliticization of contentious decision-making about resource allocation through creation of technically specialized and visibly independent bodies. Some even recently recently created agencies may reflect mutations of state functions that are long-established. Continuities as well as innovations in state activities merit consideration, and it is only in a longer-term perspective that we can truly appreciate whether new organizations represent innovation or adaptation.

It is by now generally accepted that the creation of new state agencies is not primarily driven by technical imperatives. Even where we may identify cross-national commonalities in the model of agency construction, this is generally more usefully analysed as an instance of policy diffusion or policy transfer, rather than as convergence round a technically mandated organizational requirement. For example, in many European countries, major utilities such as electricity supply and telecommunications had been held in public hands, or subject to monopoly supply, or

both, over the postwar decades. Privatization and deregulation during the 1990s resulted in many countries adopting similar kinds of independent regulatory agencies. But there was nothing automatic about such convergence. Rather, we may note several congruent political processes at work, such as a convergence of expert opinion about policy appropriateness, a willingness to adopt practices from other jurisdictions, particularly in European countries, along with EU baseline competition policy requirements (Levi-Faur 2005; Thatcher & Sweet 2002). Nonetheless, we may also note a good deal of variety in the organizational forms of regulatory agencies in many areas: financial services regulation, for example, evinces very different degrees of political independence across Europe (Perez & Westrup 2004; Way 2005). This must be understood against a backdrop of variations in national political economy and political culture: the constellation of domestic actors, with their competing preferences and interests based on different structural contexts, may produce quite different responses to similar challenges. (Hancke et al 2007; Scott 2003).

Regulation is but one broadly defined functional area in which states have become more active in recent decades. Across other areas of political life, common challenges may similarly produce organizational convergence in some policy areas but continuing diversity in institutional structures in others, both of which must be explained with reference to the dynamics of domestic politics as it interacts with pressures emanating from the wider economic and transnational political context. Identifying patterns in national public administration overall is of course notoriously difficult in view of the historically grounded diversity of structures, public administration practices, and legal and constitutional frameworks involved. Roness, for example, identifies at least four very different nationally-specific classifications drawn from the national experiences of Britain, Norway, New Zealand, and the Netherlands (Roness 2007). And yet there is considerable scope to explore trends in commonality and variation more extensively. Analysts of regulatory governance have contributed richly to our understanding of organizational diversity within one thematic concern, albeit broadly defined. Our objective in this paper is to attempt to set out a framework for classifying and comparing both commonality and variation in state structures which will enable us to explore how similar activities might be carried out through different institutional forms, or how similar institutional solutions might be devised for commonly shared problems. Furthermore, our approach to analysing

state functions through their embeddedness in organizational forms helps us to identify trends in state functions that may be emerging relatively unnoticed. We consider that the emphasis on regulatory governance in recent years may have overshadowed some equally interesting new trends in state functions; while we can identify these trends empirically in the Irish case, we consider that they are likely to be present in other countries too. Finally, we explore briefly the tension often assumed to exist between legitimacy and efficiency considerations, or input and output legitimacy, where new structures and new roles for public bodies emerge. Among the concerns are that the lines of accountability to democratic, elected authorities are attenuated; patronage and clientelism undermine efficiency; and a decline in the quality of decision-making results due to the fragmentation of state capacity (Clancy & Murphy 2006; Papadopoulos 2003). But this must not be assumed to be the case: it is also possible that agencies may enhance policy credibility and effectiveness by removing important activities from short-term election horizons and party-political competition (Coen & Thatcher 2005; Gilardi 2002). We suggest therefore that issues of accountability and legitimacy are more likely to be experienced as a continuum than a dichotomy.

3. Typologies of agencies

The puzzle of agencies is related to the conception of the state, its organizational expression, and its functions. The simplest model of state organization would take constitutional structures as foundational. Typically, in English-speaking countries (though not Britain itself), government ministries and their related administrative departments would be deemed the core institutions at national level, with local government and local administration providing a second tier of state organization. State agencies have typically been created as executcive bodies within government departments. However, it has long been recognized that this model is quite inadequate to capture many important features of state activities. For a start, it does not travel well beyond common-law systems. Continental European constitutional arrangements are framed by legal systems that draw rather different boundary lines between government power, state bureaucracy, and private interests, and which organize the relationship between departments and agencies differently. Swedish constitutional law, for example, recognized executive agencies with a significant degree of

organizational and operational autonomy from government as central to their public administration from an early date. Moreover, in Britain, the derivation of many state functions from pre-modern political arrangements left many anomalies. Some of these were translated though in different form to other common law jurisdictions such as Ireland, Canada, and Australia, and new ones added besides. But countries with strong administrative law traditions also often incorporated pre-modern forms of administrative organization into modern state organization: the semi-public responsibilities of employer organizations and trade unions in German industrial relations might be one such example (Crouch 1993).

Furthermore, ad hoc agency building is no new phenomenon in many countries, and is certainly not confined to the most recent phase in which it has attracted the attention of political scientists. In the United States, for example, the proliferation of agencies with diverse lines of accountability was recognized as early as the 1930s to have created a bureaucratic tangle which the Brownlow Commission sought to rationalize within the Executive Office of the President. However, the rapid expansion of presidential powers and functions driven by New Deal executive activism quickly brought new complexity to the system.

There is merit in taking a comprehensive view of state agencies, rather than assuming a priori a dichotomous distinction between 'ministries' or 'departments' or 'core executive' on the one hand, and 'agencies' on the other. The puzzle of agencification is as much a puzzle about where, how, and why the boundary lines are drawn, as it is an analysis of what exactly the organizationally distinct agencies are doing.

3. 1 The diversity of state agencies: continuous not dichotomous

State agencies have come into sharp focus periodically in comparative political science and public administration, with rather different theoretical questions in mind. The expansion of state economic activities in most western countries in the decades after World War 2 brought about many new organizational forms, especially in the area of state ownership of productive enterprise and commercial activities. These were not necessarily confined to natural monopolies, energy sources, or industries considered to be of strategic national interest, such as steel production. Perhaps the most exuberant example of state commercial activity was Italy, where at its height in

the1980s there was virtually no sector of economic life in which state interests were not present. The wave of privatization that swept across Western Europe during the 1980s and 1990s changed the definition of the public sector quite profoundly (Helm 1989; Wright 1994). The theoretical issues that were paramount in considering the division between public and private, and the scope of the public sector, centred on the efficiency of resource allocation, the accountability of state corporations to market pressures, to customer interests, and to political interests.

The debate about the scope of the state gained a new focus with the development during the 1980s of theories of New Public Management, with its conception of the dissociation between departmental policy-making and executive agencies delivering those policies at a remove from the core department. Most developed in Britain, these organizational innovations sharpened debate about political accountability of the devolved units to the centre (Hood et al 1999). But if we are to consider institutional structures defined in terms of the degree of autonomy from central government enjoyed by an agency or organization, we must take note of a much wider variety of organizational forms. Rather than a twofold distinction, we may identify a continuum, with departmental organizations at one end, then a variety of non-departmental bodies, and non-governmental or civil society organizations at the other, many of which in turn may play a role in policy delivery under delegated powers (explicitly, using legislation, or implicitly through observation and/or encouragement of the use of private powers), public contract or in exchange for financial grants (Hood 1986; Wettenhall 2003, p.229). Indeed, this definition begins to bring private organizations into focus too, since it is not only in New Zealand that, as Wettenhall notes, we may see 'private and community organizations providing services under contract to one of the main governmental bodies' (Wettenhall 2003, p.232).

'Agencification' within the EU has generated a whole new rich debate about the consequences of isolation of deliberation from centres of democratic accountability, which mirrors the concerns expressed within states (Geradin et al 2005).

Thus the issue about agencies has moved beyond a purely taxonomical concern with identifying the boundaries of executive agencies, to focus on the tensions involved in delegating expert functions to specialist bodies. Majone has suggested that some

agencies are properly kept beyond direct democratic control the better to be able to maintain professional or ethical standards that are not subject to the logic of majoritarian political competition and to develop or sustain credible commitments to policy domains, such as regulation, which benefit from a demonstrated commitment to stability (Majone 1994). Yet the creation of new agencies may equally represent avoidance of difficult political choices, and an opportunity to staff the boards and directorates with politically friendly appointees (Clancy & Murphy 2006). Clearly a more fine-grained analysis is required.

If the central question about the creation and functioning of state agencies centres on the degree to which they are politically accountable, then the definition of agencies will pay close attention to the nature of political control and the extent of political autonomy they enjoy. It would therefore be appropriate to adopt a classification system similar to that of one of the authors of this paper, distinguishing between ownership, legal form, funding, functions, powers, and governance level (Scott 2003). The full database of Irish state institutions will encode all this information for a wide variety of organizational structures relating to the Irish state. For purposes of the present paper though we focus primarily on functional classification.

3.2 Functional classification of state bodies

Each system of classification is designed to capture a different theoretically specified set of structures and practices of the modern state. A standard classification, the United National Classification of Functions of Government (UN COFOG), provides a template for organizing state bodies by policy domain. The principal divisions are: General Public Services; Defence; Public Order and Safety; Economic Affairs; Environmental Protection; Housing and Community Amenities; Health; Recreation, Culture and Religion; Education; Social Protection; Defence.

http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=4&Top=1&Lg=1 .

This has the merit of comparability across countries and is particularly useful in comparing budgetary allocations cross-nationally. However, it is intended to flatten out all information about organizational variety.

Dunleavy's functional classification was motivated by his interest in allocation of public budgets, and by a concern to improve on older 'bureaumetric' analyses. His

interest in a 'bureau-shaping' model of control over expenditure streams led him to focus on the domains of public sector activity over which bureaucrats might be expected to have some policy influence. His study of the British 'central state', defined as 'the ministerial departments in Whitehall and their directly controlled subordinate agencies' (Dunleavy 1989, p.249), involved a functional classification of state agencies as follows: delivery, regulatory, transfer, contracts, control, taxing, trading, servicing (Dunleavy 1989, pp. 254-5).

Though we find this classification helpful, as it puts the static ordering of public administration into a dynamic context, we have found it necessary to elaborate on the number of functions, as for many public agencies in Ireland their primary function is not captured by the list. Central examples include bodies the primary function of which is to engage in adjudication or grievance handling, which have considerable analytical importance for our study. A further addition we have made to this list – developmental function, was, perhaps, not strictly necessary but gives us greater purchase of observations of change within the pattern of agency functions. Helpful as it is, this way of clustering state structures pays little or not attention to issues of ownership, extent of political control, employment status, or sources of funding, so we analyse these elements separately. But it does give us a good deal of purchase on their activities.

Even prior to analysing functional categorization of state agencies in Ireland, enumerating them poses a challenge. On the broadest definition of a state agency we would include all government ministries, the executive agencies established within them, the wide range of statutory corporations and other non-departmental public bodies and the distinctive constitutional agencies (such as the ombudsman, judiciary and comptroller and auditor general) which operate outside the control of government. We would include educational establishments that are state-funded but autonomous. In the Irish context, we would include not just universities and other third-level institutions, but also most second-level and primary schools, most of which are privately owned and under private management (generally denominational in character), and many hospitals and a range of social services, for the same reason. In addition the statutory corporations, the private company forms (public (listed), private

(unlisted) and company limited by guarantee) have been deployed for public purposes, and under public ownership since the early years of the state.

For the purposes of our present discussion, where our interest is primarily in tracking changing state functions through organizational differentiation, this is too broad and inclusive a conception. Alternatively, as Dunleavy does, we might consider only central government departments and the agencies directly accountable to them. For our purposes, this is too restrictive a definition. Our organizational map of the Irish state reveals a range of accountability structures – a continuum not a dichotomy – and drawing the line at civil service agencies alone is not only creates an artificial cut-off point but also excludes many of the most interesting examples of functional variety.

Irish public sector organizations are defined for official purposes as follows:

> An Irish public sector organisation is defined as any employing body which: (a) directly derives the majority of its share capital from Irish public funds, or (b) has the majority of its Board/Executive members appointed by an Irish Minister, or (c) directly derives the majority of its revenue from Irish public sources. The Irish public sector comprises the following administrative sub-sectors: the Oireachtas (or National Parliament) and the Judiciary, the Civil Service, the Garda Síochána (or National Police Force), the Defence Forces, the Local Authorities, the Health Services, education, the Harbour Authorities and the State-Sponsored Bodies … Private sector employing organisations are defined as the residuum (Humphreys and Gorman, 1987:8). (Subsequently adopted by the Central Statistics Office.(McGauran et al 2005, p.31) .

We have used this definition to identify state agencies that are part of the central constitutionally defined apparatus of the state, but which are public sector organizations according to the criteria set out here. Even using these guidelines, the number of agencies counted can vary. One recent study identified 482 central public bodies, while excluding regulators of both public and private sectors, working groups and tribunals (both investigatory and adjudicatory). Another found in excess of 600 (Clancy & Murphy 2006; McGauran et al 2005). Our database, using stricter criteria than either of these, identifies a little over 400. A full discussion of our criteria and rationale for inclusion will be available in a Working Paper.

State agencies are not at all a new phenomenon in Irish politics, but were already a recognized feature of government at the time of the foundational Ministers and

Secretaries Act 1924, shortly after the establishment of the state in 1922. This is perhaps unsurprising, as Ireland already had a mature public administration system derived from the British Whitehall model. It had similarly benefited from the Trevelyan reforms of the mid-19th century, creating a largely meritocratic and legal-rational public bureaucracy. Many of the idiosyncracies of British public administration were also directly inherited by Ireland, such as the use of the Crown Charter to establish institutions such as the Royal College of Surgeons or the Royal Irish Academy.

But it is also noteworthy that the number of state agencies shows a sharp upward trend beginning in the 1980s and accelerating thereafter, as Fig.1 shows.

(Figure 1 about here).

One study of Irish state agencies attempting to classify agencies by function (though on a slightly different basis from our database), suggested that a great many were primarily advisory in nature:

(Table 2 about here)

But a closer analysis of the functions of state agencies reveals a number of interesting features. Firstly, functional innovation through organizational creativity is not confined to a single historical phase. In any particular area of activity we find that the emphasis on what the state does can shift over time in response to new historical circumstances. Secondly therefore, we seek to locate 'agencification' in a clearer political and economic context, which we see as types of policy regime or distinct aspects of 'stateness'. And thirdly, drawing on this regime-like approach, we note that some state agencies do not seem to have been subject to as much systematic analysis as others. We think Ireland displays some distinctive features in the way it has institutionalised the activities associated with the 'developmental state' and the 'regulatory state'. We also propose two new categories of state activity which we identify through the evolution of state agencies: the 'adjudicatory state' and the 'moralizing state' – neither of which is either new or indeed distinctive to Ireland, but

we believe there is scope for a wider systematic comparative analysis of these trends in state functions.

4. Four Modes of State Activity

We analyse four categories of state agency, organised around functions, as follows:
1. the developmental state
2. the regulatory state
3. the adjudicatory state
4. the moralizing state

4.1 The developmental state

Irish state agencies played a vital role in generating and managing economic development from an early date. To some degree we find active state supports for the market even in states with classically liberal economies. The market economy is not devoid of institutional structures backed by state power: the market economy itself is a complex of institutional structures supported by a combination of statute law and bureaucratic procedure. The British state had been heavily involved in direct productivist activity especially in the colonial context: the East India Company, for example, or early oil exploration activities, started out as private initiatives that were then taken over by the state. But the dominant trend from the mid-nineteenth century on was to move away from mercantilist priorities and to construct a distance between state institutions and emergent industrial interests. As Polanyi has noted, 'There was nothing natural about *laissez-faire*; free markets could never have come into being merely be allowing things to take their course… *laissez-faire* itself was enforced by the state' (Polanyi 1944, p.139). At the time of Ireland's independence from Britain in 1922, the British state itself entailed a patchwork of state competences, but the dominant economic stance was liberal. Then in common with many other European countries, Britain took major sections of industry and services into public ownership during the years after World War Two, thus acquiring a significant role in commercial, productive, distributive and transport activities. The wave of privatization in Britain and elsewhere during the 1980s and 1990s reversed the trend; rather than privatization we should perhaps speak of 're-privatization' of many of

these activities, as a preference for market-led allocative mechanisms took hold across Europe.

The pattern of state engagement with economic activity in Ireland is rather different. . The Irish state, at its foundation, inherited the apparatus of the liberal state from Britain; for the first ten years of its existence, macroeconomic policy was run on impeccably free-trade, market-conforming lines (Fanning 1978). This was helped by the retention of the value of the Irish pound at parity with sterling until 1979. But between 1932 and 1948, Ireland adopted a policy of economic protectionism, and set out to develop a fledgling domestic industrial base in what was still a largely agriculturally-based economy. But starting in the 1920s, even prior to protectionism, we see the development of whole array of state agencies committed to supporting economic development. Some of these were wholly state-owned commercial bodies (or 'semi-state companies' as they are known in Ireland), taking an early lead in nationalizing activities such as the rail network and train and bus services, gas, etc.; and setting up new state companies in areas such as electricity generation, turf production, sugar and food, etc. From this early date too we can see the establishment of state-owned investment banks and other financial supports to domestic industry and agriculture.

These functions of the 'developmental state' go well beyond anything comparable in Britain at this time. However, they share a developmental orientation in common with the Old Commonwealth states of Canada and Australia, where it has been noted that 'irregular' state agencies, diverging from the British prototype, supported a range of economic activities, including but not confined to public commercial enterprise (Wettenhall 2003, p.223). And in the US during the 1930s, federal state economic activism in direct economic activity became more common, most familiarly perhaps with the establishment of the Tennessee Valley Authority (TVA) in 1937 (Selznick 1949). But the scale of Irish state endeavour is perhaps more akin to the roles the state might play in modern developing countries, as identified by Peter Evans. He has identified what he calls the 'demiurge' role – the direct involvement of the state in production – and the 'midwife' role – active preferential support for domestic enterprise through the use of tariffs, subsidies and other fiscal instruments (Evans 1995).

After Ireland adopted outward-oriented economic policies from the early 1960s on, we see a change in the way the developmental state role functioned. It was from this time on – and especially after Ireland's increasing integration into the European economy after EEC membership in 1973 – that the Industrial Development Authority (IDA), established in 1949, came into its own. This was not a directive investment body on the Asian model, but a 'flexible developmental' agency committed to an active role in soliciting and facilitating foreign direct investment (FDI), supported by the favourable corporate tax regime that had been evolving since the 1950s. It functioned as a 'glocal' facilitator – mediating between global actors and local needs (FitzGerald 2000; O Riain 2000; Ó Riain 2004).

A further set of development-supporting structures were set up over the following decades, which can be seen as consistent with the developmental needs of a small open economy adapting to increased exposure to international trade, in the manner proposed by Katzenstein (Katzenstein 1985). The following decades see the emergence of new state bodies to support the export and marketing needs of domestic industry, and of new functions such as bodies to manage public debt, borrowing, and public investment needs, property acquisition to build roads, and so on. We also see the development of state-led tripartite consensus-seeking on economic priorities and in pay determination; to extend the networks of consultation from economic actors to non-governmental organizations (Hardiman forthcoming). We might see these trends as evidence of 'flexible network governance' (Hardiman 2006), very much part of the spectrum of development-oriented state activities.

The expansion of welfare services may also be understood as having a developmental aspect to it –the 'compensation hypothesis' suggests that increasing trade exposure generates growing demand for stronger state supports to insulate workers against market hazards (Hardiman et al forthcoming 2008). We might therefore see the growth of social services through the expansion of health and welfare agencies in Ireland. As in many other countries, this involves a complex mix of public and private funding, public and private pooling of authority and responsibility for service delivery. In the Irish case this is because of the long-established devolution of responsibility for many welfare services to denominational interests, especially the

Catholic Church. But it is analogous in this to, for example, the role of the Catholic Church in service provision in Germany or the Netherlands, or of some Jewish welfare agencies in Israel. We do not see wholesale shedding of service delivery from government departments on the British 'New Public Management' model at all; it is only in very recent years that we see new organizational systems emerging in areas such as health services, prison services and so on.

4,2. The regulatory state

The Irish state, as is common on other countries and especially across the EU, experienced a wave regulatory agency creation since the 1980s. As Table 3 below shows, Ireland now has an array of free-standing and semi-independent regulatory bodies on a par with other EU member states: the regulatory state has come to stay.

Table 3 about here.

But the evidence of our database of Irish state agencies from the foundation of the state suggests that the regulatory function itself is not new. Certainly the areas into which state regulation has ventured have changed over the last two decades, and the manner in which regulation takes place has changed over time. But the concept of 'regulation' extends beyond the market understanding of a framework for ensuring efficiencies in economic activities or supply of services. State regulatory powers must be understood in a broader sense, if we are fully to comprehend the changing nature and scope of state functions.

The establishment of authoritative bodies to regulate areas of economic and indeed social life is therefore not a new one. For example, the great expansion of British municipal powers in the nineteenth century was strongly based on the enforcement of public health and sanitation regulations, backed by legal sanction. And part of the extension of the regulatory power of the modern state has involved the delegation of public power to private bodies who, under licence, can engage in professional activities that have a public interest dimension to them. The Irish state inherited these early regulatory capacities at independence. Hence we see a flurry of new licensing agencies created between the 1920s and the1950s, particularly in the area of health care. These grow up alongside some other long-standing agencies exercising

delegated public powers such as the Law Society of Ireland, established in 1830 both to train and to authenticate the professional accreditation of legal practitioners. We must additionally recognise the importance both of government ministries within the 'old regulatory state', particularly as licensing authorities. Furthermore the loss of credibility of the British policing model prior to the establishment of the Free State in 1922 led the newly independent government to establish *Garda Síochána* ('guardians of the peace') on a broader basis reminiscent of the multi-purpose implementation and regulatory functions of the Prussian *polizei* or public authority (Mulcahy forthcoming).

4.3. The adjudicatory state

The role of the state in conflict resolution and the redress of grievances is, in one sense, inherent to the functions of the state itself, if by this we mean the capacity to have recourse to law – criminal, civil, contract, tort – to vindicate rights and recoup losses. However, we have a more specific understanding of state adjudicatory functions here, the evolution of which can be tracked through the establishment of state agencies.

Criminal law and commercial law may perhaps be thought of as the foundation of the modern state, establishing defence of the person, property rights, and other classic liberal protections. But we have identified a range of additional functions carried out by the Irish state, which we believe are also widely in evidence in other states too.

The first wave in the creation of new adjudicatory mechanisms by the Irish state came during the 1940s, in parallel with the activist role of the state in economic modernization. This may be seen as the extension of redress facilities beyond the courts and judicial proceedings and into the heart of economic and commercial life. In the early 1940s, the then Minister for Industry and Commerce, Seán Lemass, had attempted to reconfigure trade union organization away from the pluralist and voluntarist British tradition, but had failed due to constitutional protections for the rights of the individual to organize. Undaunted, he was instrumental in legislating for the establishment of the Labour Court, a bipartite and voluntary, but authoritative and quasi-judicial industrial dispute resolution mechanism. This was intended to play a leading role in wage determination, and indeed did so for a time. Its importance in

industrial relations stabilization has fluctuated, but on balance the Labour Court and its associated agencies have become more firmly institutionalised in industrial relations over time (MacCarthy 1977; Roche et al 2000). The expansion of adjudicatory powers in the employment relationship can be further seen in the creation of agencies such as the Employment Appeals Tribunal.

The use of quasi-judicial agencies to investigate and adjudicate can also be seen in the use made in Ireland of Tribunals of Inquiry, that is, investigatory bodies set up to examine policy failures, shortcomings in executive functioning, or suspicion of political malpractice. Evidence produced at these Tribunals has no standing before the courts, yet they carry weight and authority. They are not recent innovations; but many more of them were set up during the 1980s and 1990s to investigate a whole range of problems (Mac Cárthaigh 2005).

Alongside Tribunals of Inquiry, this period also saw the creation of a new kind of state agency, the redress board. These were set up to investigate and compensate victims of state neglect or misconduct across a range of experiences, as an alternative to the very much more expensive formal judicial route.

In parallel with these boards, other new agencies were also set up to support individuals in the vindication of their rights in areas such as claims about unfair rents, planning decisions, etc. We might also note here the establishment of the office of the Ombudsman in Ireland in 1984 – rather later than comparable institutions elsewhere in Europe. This is likely to reflect some weakness in the capacity of the individual to press claims against the state, compared with other countries; this would indeed be consistent with the argument that Ireland, like Britain, is characterized by particularly strong executive powers and particularly weak powers available to the legislature in general and to the parliamentary opposition in particular (Mac Cárthaigh 2005).

What we see nonetheless is an extension of the scope of the rights that individuals may hope to vindicate through state agencies. We distinguish between statutory and non-statutory claims, and statutory and non-statutory channels through which these might be progressed, resulting in a four-way distinction displayed in Table 4 below.

(Table 4 about here)

Statutory rights, advanced through judicial channels, represent the conventional or mainstream means of vindicating grievances and seeking adjudication. It would not be possible to press claims that did not have formal recognition of some sort through the courts; this is a null category. The interesting categories are the remaining two. We have seen the development of a range of non-judicial agencies through which individuals may process claims and seek vindication that have statutory recognition and vindication. But in addition, we have seen the emergence of a new aspect of the adjudicatory state: this is where a category of grievances is legitimated by virtue of being able to produce experiential evidence, and where the means of processing the claim will accept evidence that falls far short of legally compelling status.

This last category reflects a broadening of the conception of the rights that individuals may be able to claim, particularly personal rights claims that are made against the state. Going well beyond investigation of claims of maladministration that are proper to the role of the Ombudsman, we might see this as a reflection of a more generalized sense of rights claims and grievance processing. The boundaries of these claims may be quite fluid and open to being expanded by public opinion or political vulnerability: for example, a special body during the 1990s was set up to adjudicate claims about deafness suffered by members of the Army in the course of their duties. That innovation was inspired in part by concerns about the rise of litigation and the emergence of 'a compensation culture' with adverse impacts both state bodies and on the insurance industry. A more generalised response was the establishment of a Personal Injuries Assessment Board in 2004 as an intermediary stage in processing personal injuries claims. Most claims are intended to be resolved by bureaucratic assessment, and litigation may only be pursued once those efforts have failed (Quigley & Binchy 2004). It may be useful to envisage this aspect of state agency activity as a manifestation of the long fallout of the 'rights revolution', the pervasiveness of rights claims, and therefore the inevitability of demands for adjudicatory mechanisms (Sunstein 1993). The adjudicatory state is likely to be with us to stay.

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4.4 The moralizing state

The fourth area in which we see new trends in the role of state agencies is what we term the moralizing state. The state has always played a central role in the regulation of private life – most obviously in the statutory regulation of family life, individuals' rights within the household, custody of children and the extent or indeed absence of their autonomous rights. States have varied enormously in the way they have regulated these roles (Therborn 1993; 2004). Moral issues have been so significant that they are continue to constitute an independent dimension of political values and party competition, orthogonal to competition on left-right economic issues (Laver 2005; Mair et al 2004). Changes in the conception of the proper boundaries between personal morality and legal regulation have varied across countries. There has been some convergence on a liberal agenda, but in no direct or automatic fashion, and the sequencing of liberalization of laws on availability of contraception, availability of divorce, and abortion rights has shown great variation across countries over time.

But quite apart from the highly consequential regulation of personal morality, there is another aspect of state function in the area of public morality, which we term the moralizing state. This captures the role of the state in seeking to promote a certain climate of moral values – the state as the 'engineer of human souls', albeit in the context of liberal democratic politics. From our analysis of Irish state agencies, we can broadly identify two waves of institutional innovation in this area. During the 1920s, we see a concern with promoting Catholic moral values – not because government represented Catholic interests directly, nor because Catholic Church interests were directly represented on state bodies, but because in an almost wholly Catholic and conservative society, these values were in fact widely subscribed to (Inglis 1998). The Catholic Church did not need to exercise influence to have legislation congruent with its preferences enacted (thought there is plenty of evidence that bishops did indeed speak out both directly and indirectly to secure their aims); there was virtually no organized alternative body of opinion to resist these values. Therefore we see the establishment of the public censorship agency in the 1920s, as well as statute law in areas such as the prohibition of contraception, licensing of dance halls, licensing of the sale and consumption of alcohol.

By the 1980s and 1990s, the organizational supports for Catholic social values had all but disappeared. However, what we now see is the emergence of new role for the state in the promulgation of values. In this case, the consequences are very much less visible: rather than prohibiting, regulating, and constraining, the objectives are to shape values and change dispositions through exhortation, discourse, and education. The agencies in question are concerned with issues ranging from promoting attitudes of equality, supporting a positive view of older people, opposing racism, promoting healthy eating and an active lifestyle. In some cases they originated in, or continue to work through the extension of state funding to non-governmental organizations; in others the agency was set up de novo by government to pursue some worthy objective. The new equality agenda has been in evidence since the 1970s, with acceptance of European directives on sexual equality in the workplace and equal pay for men and women, which came hard on the heels of admission to EEC membership. Some of the value-forming agenda in the current period certainly emanates from Brussels, and may be thought of as an example of the extension of the logic of appropriateness, of elite consensus on the desirability of particular values, that are then transmitted into national discourse (Dolowitz & Marsh 2000). The practical policy application of the activities of such agencies, though, can seem somewhat remote at times. Ireland is not unique in the spread of such agency creation: Lindvall and Rothstein note the existence in Sweden of a whole layer of 'ideological state apparatus' of just this sort (Lindvall & Rothstein 2006)

4.5 The evolving role of the state

Putting together these four trends, drawn from our analysis of the creation of state agencies in Ireland, we can analyse trends in the phasing of institutional creation and functional differentiation. We suggest not only that each of these regime types is found in the constellation of public agencies established in Ireland but that each has a traditional and modern form, summarized in table 5.

(Tale 5 about here)

For each of the four modes of state activity, which we have located in patterns of organizational innovation and functioning, we distinguish between a traditional and a modern mode of governance, identified in terms of the primary locus of action and initiative. In the Irish case, the traditional phase is approximately identified as the

1920s to 1960, and the modern phase from 1960 to the present. The traditional modes of action involve a direct state role and a proactive policy stance; the modern modes of action involve more indirect state initiative and a coordinating rather than directive relationship with social actors. There is some overlap in phasing though: as already noted, what we have identified as a modern function, the 'flexible developmental' approach to industrial policy, was initiated in 1949, though it has evolved significantly since then.

The analysis begs the further question whether some transition to a late modern form might also be in train, which might variously be associated with neo-liberal, post-regulatory or post-modern governance, each of which down-plays the steering role of central state actors in making and implementing policy. We leave this possibility open for further exploration at a future date.

5. Legitimacy, efficiency, accountability

Changing forms of state activity between and within the four models discussed in the previous section have entailed changes in the configurations of institutional actors which have caused anxieties over the legitimacy of public governance. Legitimacy has both a substantive dimension (how well are the jobs of government being done?) and a procedural dimension (for example concerning accountability). Extensive delegation to agencies and to non-governmental actors, directed at enhancing efficiency or economy in the provision of public services, may require reconceptualization of traditions of accountability. We believe that issues of legitimacy, efficiency, and accountability require a more nuanced treatment than they often receive.

As long ago as 1970, in a major public review of the state bureaucracy, it was argued that 'every new decision to set up a state-sponsored body is an avoidance of the main issue involved and we suggest that the time has now come to rationalise the whole structure of the public service' (Devlin Report 1970, p.90). Yet agencies have expanded rapidly in number since then. In their recent work on Irish state agencies, Clancy and Murphy suggested that there is no coherent rationale for the creation of agencies, that insofar as they are not subject to Freedom of Information legislation

they can too easily evade appropriate accountability, and that many appointments are made directly by government ministers and are therefore open at least to the suspicion of the exercise of political patronage over considerations of probity and competence (Clancy & Murphy 2006).

Yet recent administrative history in Ireland reveals that there is significant variation in the nature and function of the public agencies that have been created. With the growth in the number of agencies has come an extension of the nature and scope of accountability mechanisms applying to such actors. The parliamentary system has adapted to this fragmentation through intensifying select committee scrutiny of agencies. It has accepted innovations of the kind such as the establishment within the newly set up Health Services Executive (amalgamating a wide range of health agencies in 2006) of a separate unit to systematically address parliamentary questions *in lieu* of the normal expectation of a ministerial response. Statistical evidence, at least, suggests an intensification of judicial scrutiny of public agencies, alongside the development of adjudicatory mechanisms, discussed above, some of which are concerned with holding public agencies to account for their actions. The establishment of the Office of the Ombudsman and of the Information Commissioner provides new mechanisms of accountability in respect of maladministration and failures to fulfil freedom of information requirements. The public sector audit regime, centred on the ancient office of the Comptroller and Auditor General, has been extended from probity audit to encompass value for money audits concerned with investigating the extent to which public agencies meet criteria of effectiveness, efficiency an economy. Public service recruitment and conditions have been subjected to new oversight arrangements.

We believe that the classification of organizations by function may help to advance the debate on these issues. We would suggest that in the developmental, regulatory, and adjudicatory areas, state agencies must operate in accordance with the logic of non-majoritarian institutions (Coen & Thatcher 2005; Majone 1996; Thatcher & Sweet 2002). Nevertheless, a good deal more work needs to be done on issues such as powers of appointment to the boards of state agencies, as well as lines of accountability and assessment of efficiency. A more systematic analysis is required before definitive conclusions can be drawn.

6. Conclusion

This paper has shown that an organizational analysis of governance can be revealing in two ways. Firstly, it can remind us of continuities as well as innovations in styles of governance, and can give us a better purchase on the underlying reasons for variation both cross-nationally and within a single country over time. Our typology of traditional and modern is grounded in an analysis of the particular local conditions that account for institutional evolution, as well as situating the categories within a more general and cross-nationally relevant comparative context. Secondly, our typology can highlight previously under-analysed aspects of governance. We think the changing modalities of the developmental state are far from distinctive to the Irish case and can be generalized further. We believe that the flourishing literature on recent aspects of regulatory governance may tend to overlook longer-established modes of regulation. And we suggest that there are two other governance regimes that have received relatively little attention to date – the adjudicatory state, and the moralizing state – and that these are likely to provide fertile grounds for further comparative analysis.

Fig.1 Number of state agencies in Ireland, 1924-2004

Number of State Agencies in Ireland, 1924 - 2004
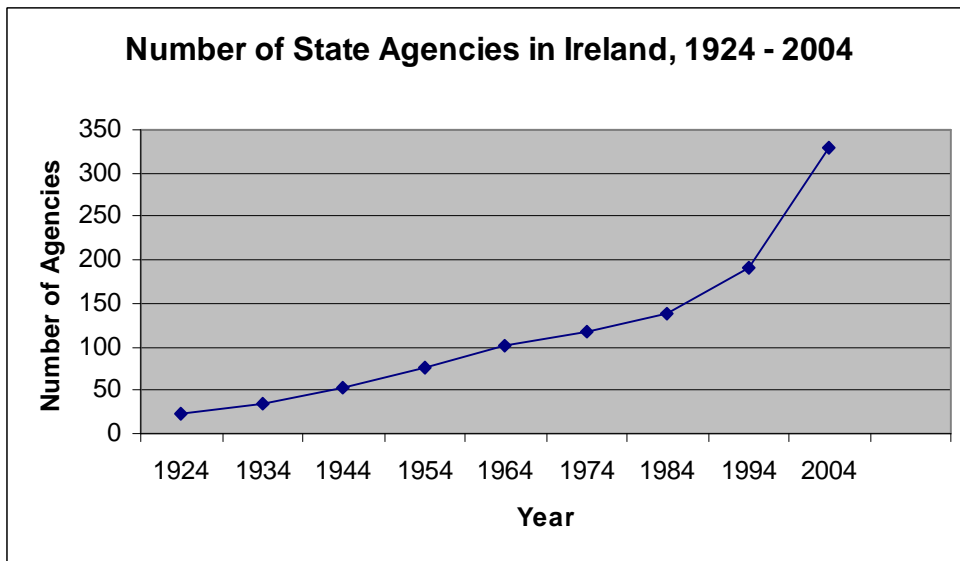
Source: Mapping the Irish State database

Table 1. Preliminary Classification of the Functions of Irish State Agencies

Adjudication/Grievance Handling
Advisory/Consultative
Contracting
Delivery
Developmental (commercial and non-commercial)
Information-Providing
Investigatory
Ministries – General Purpose – Policy Formation and Execution
Regulatory (over public and private sectors)
Representation/Advocacy
Research/ Information-Gathering
Taxing
Trading
Transfer

Source: (Scott forthcoming), *Mapping the Irish State* project

Table 2. Percentage Distribution of Irish State Agencies by Function

Provide advice	23
Other	18
Implement policy	15
Regulate	13
Provide information	13
Registration	6
Promotional development	6
Co-ordination	4
Commercial development	3

Source – Anne-Marie McGauran et al (McGauran et al 2005).

Table 3. Irish Regulatory Agencies

SECTOR	AGENCY/REGULATOR	YEAR CREATED
Competition	Competition Authority	1991
Environment	Environmental Protection Agency (EPA)	1992
Pharmaceuticals	Irish Medicine Board	1995
Telecommunications	Commission for Communications Regulation (ComReg) (originally Office of the Director of Telecommunications Regulation, ODTR)	1996
Food Safety	Food Safety Authority of Ireland	1998
Electricity	Commission for Energy Regulation (CER) (originally the Commission for Electricity Regulation)	1999
Aviation	Commission for Aviation Regulation	2001
Financial Markets	Irish Financial Services Regulatory Authority	2002
Accounting	Irish Auditing and Accounting Supervisory Authority (IAASA)	2003
Taxis	Commission for Taxi Regulation	2004

Source: Jonathan Westrup (Westrup 2007).

Table 4. A typology of the adjudicatory state

	Court-like/ legal arena	Non-court-like procedures

Legal rights	Judicial proceedings	Employment Appeals Tribunal
		Personal Injuries Assessment
		    Board
		Redress Boards
		Private Residential Tenancies
		    Board
		Mediation

Non-legal claims	-	Labour Court Tribunals of Inquiry Ombudsman functions

Table 5. Trends in modes of governance discernible through analysis of state agencies in Ireland

	Traditional: State direction	Modern: State coordination
Developmental	**Productivist:** direct production, also aid via tariffs, subsidies etc.	**Facilitatory:** 'flexible developmental', industrial policy; also **'flexible network',** consultative, advisory, tripartite
Regulatory	**Licensing:** devolution of state power to actors who provide goods or services	**The competition state:** policing bad initiatives by private actors; regulation
Adjudicatory	**Juridical:** Statutory grievances Statutory remedies	**Resolution-seeking:** Non-statutory claims, formal remedies
Moralizing	**Conservative:** Censorship, Catholic values	**Liberal:** Promotion of tolerance, pluralism, anti-racism

References

Clancy P, Murphy G. 2006. *Outsourcing Government: Public Bodies and Accountability*. Dublin: tasc at New Ireland

Coen D, Thatcher M. 2005. The New Governance of Markets and Non-Majoritarian Regulators. *Governance* 25:329-505

Crouch C. 1993. *Industrial Relations and European State Traditions*. Oxford: Oxford University Press

Devlin Report. 1970. Devlin Report: A Summary. An Abridged Version fothe Report of the Public Service Organization Review Group 1966-1969., Institute of Public Administration, Dublin

Dolowitz D, Marsh D. 2000. Learning From Abroad: the Role of Policy Transfer in Contemporary Policy Making. *Governance: An International Journal of Policy and Administration* 31:5-24

Dunleavy P. 1989. The Architecture of the British Central State, Part 1: Framework for Analysis. *Public Administration* 67:249-75

Evans P. 1995. *Embedded Autonomy: States and Industrial Transformation*. Princeton, NJ: Princeton University Press

Fanning R. 1978. *The Irish Department of Finance, 1922-1958*. Dublin: Institute of Public Administration

FitzGerald J. 2000. The Story of Ireland's Failure - and Belated Success. In *Bust to Boom? The Irish Experience of Growth and Inequality*, ed. B Nolan, PJ O'Connell, CT Whelan, pp. 27-57. Dublin: IPA

Geradin D, Munoz R, Petit N, eds. 2005. *Regulation Through Agencies: A New Paradigm for EC Governance*. Cheltenham: Edward Elgar

Gilardi F. 2002. Policy Credibility and Delegation to Independent Regulatory Agencies: a Comparative Empirical Analysis. *Journal of European Public Policy* 9:873-93

Hancke B, Rhodes M, Thatcher M, eds. 2007. *Beyond Varieties of Capitalism: Conflicts, Contradictions, and Complementarities in the European Economy*. Oxford: OUP

Hardiman N. 2006. Politics and Social Partnership: Flexible Network Governance. *Economic and Social Review* 37:347-74

Hardiman N. forthcoming. Governing the Economy. In *New Trends in Irish Governance*, ed. N Hardiman

Hardiman N, Murphy P, Burke O. forthcoming 2008. The Politics of Economic Adjustment: the Compensation Hypothesis Revisited. *Irish Political Studies*

Helm D. 1989. *The Economic Borders of the State*. Oxford: Oxford University Press

Hood C. 1986. The Hidden Public Sector: the 'Quangocratization' of the World. In *Guidance, Control and Evaluation in the Public Sector*, ed. F-X Kaufman, G Majone, V Ostrom. New York: de Gruyter

Hood C, James O, Jones G, Scott C, Travers T. 1999. *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*. Oxford: Oxford University Press

Inglis T. 1998. *Moral Monopoly: the Rise and Fall of the Catholic Church in Ireland*. Dublin: UCD Press

Katzenstein PJ. 1985. *Small States in World Markets: Industrial Policy in Europe*. Ithaca, NY: Cornell University Press

Laver M. 2005. Policy and the Dynamics of Political Competition. *American Political Science Review* 99:263-82

Levi-Faur D. 2005. The Global Diffusion of Regulatory Capitalism. *Annals of the American Academy of Political and Social Science* 598:12-32

Lindvall J, Rothstein B. 2006. Sweden: The Fall of the Strong State. *Scandinavian Political Studies* 29:47-63

Mac Cárthaigh M. 2005. *Accountability in Irish Parliamentary Politics*. Dublin: Institute of Public Administration

MacCarthy C. 1977. *Trade Unions in Ireland 1894-960*. Dublin: Institute of Public Administration

Mair P, Muller WC, Plasser F, eds. 2004. *Political Parties and Electoral Change: Party Responses to Electoral Markets*. London: Sage

Majone G. 1994. The Rise of the Regulatory State in Europe. *West European Politics* 17:77-101

Majone G. 1996. Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions, Robert Schumann Centre, EUI, Florence

McGauran A-M, Verhoest K, Humphreys PC. 2005. *The Corporate Governance of Agencies in Ireland: Non-Commercial National Agencies*. Dublin: Institute of Public Administration

Mulcahy A. forthcoming. The Governance of Crime and Security in Ireland. In *New Trends in Irish Governance*, ed. N Hardiman

O Riain S. 2000. The Flexible Developmental State : Globalization, Information Technology and the 'Celtic Tiger'. *Politics and Society* 28:3-37

Ó Riain S. 2004. *The Politics of High Tech Growth: Developmental Network States in the Global Economy*. Cambridge: Cambridge University Press

Papadopoulos Y. 2003. Cooperative Forms of Governance: Problems of Democratic Accountability in Complex Environments. *European Journal of Political Research* 42:473-501

Perez SA, Westrup J. 2004. Two Regulatory Divides? Financial Regulation and Macro-Economic Choices in Five European Countries.

Peterson J. 2003. Policy Networks, Vienna

Polanyi K. 1944. *The Great Transformation*. New York: Octagon Books

Quigley P, Binchy W. 2004. Navigating the PIAB Procedure. In *The Persoanl Injuries Assessment Board: Implications for Legal Practice*, ed. P Quigley, W Binchy. Dublin: First Law

Radaelli CM, de Francesco F. 2007. *Regulatory Quality in Europe: Concepts, Measures and Policy Processes*. Manchester: Manchester University Press

Roche WK, Larragy J, Ashmore J. 2000. Ireland. In *The Societies of Europe: Trade Unions in Western Europe Since 1945*, ed. B Ebbinghaus, J Visser, pp. 339-69. Basingstoke: Macmillan

Roness PG. 2007. Types of State Organization: Arguments, Doctrines and Changes Beyond New Public Management. In *Transcending New Public Management: The Transformation of Public Sector Reforms*, ed. T Christensen, P Laegreid. London: Ashgate

Sabel CF, Zeitlin J. 2007. Learning from Difference: The New Architecture of Experimentalist Governance in the European Union. In *European Governance Papers (EUROGOV) No. C-07-02*

Scott C. 2003. Organizational Variety in Regulatory Governance: An Agenda for a Comparative Investigation of OECD Countries. *Public Organization Review* 3:301-16

Scott C. forthcoming. Variety in Public Agencies. In *Mapping the Irish State Working Paper*

Selznick P. 1949. *TVA and the Grass Roots: A Study in the Sociology of Formal Organization*. Berkeley and Los Angeles: University of California Press

Sunstein CR. 1993. *After the Rights Revolution: Reconceiving the Regulatory State*. Cambridge, MA: Harvard University Press

Thatcher M. 2005. The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe. *Governance* 18:347-73

Thatcher M. 2007. *Internationalisation and Economic Institutions: Comparing the European Experience*. Oxford: Oxford University Press

Thatcher M, Sweet AS. 2002. Theory and Practice of Delegations to Non-Majoritarian Institutions. *West European Politics* 25:1-22

Therborn G. 1993. The Politics of Childhood. In *Families of Nations*, ed. FG Castles. Dartmouth: Aldershot

Therborn G. 2004. *Between Sex and Power: Family in the World, 1900-2000*. London: Routledge

Treib O, Bähr H, Falkner G. 2005. *Modes of Governance: A Note Towards Conceptual Clarification*. http://www.connex-network.org/eurogov/pdf/egp-newgov-N-05-02.pdf

Waelti S, Kuebler D, Papadopoulos Y. 2004. How Democratic is 'Governance'? Lessons from Swiss Drug Policy. *Governance* 17:83-113

Way C. 2005. Political Insecurity and the Diffusion of Financial Market Regulation. *Annals of the American Academy of Political and Social Science* 598:125-44

Westrup J. 2007. Regulatory Governance. In *New Trends in Irish Governance*, ed. N Hardiman

Wettenhall R. 2003. Exploring Types of Public Sector Organizations: Past Exercises and Current Issues. *Public Organization Review* 3

Wright V, ed. 1994. *Privatisation in Western Europe: Pressures, Problems and Paradoxes*. London: Pinter