



Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

The dispersed and centralised models of constitutional review¹

Delivered by Mr Justice Brian Murray² in Comparing the common-law and civil-law approaches to constitutional review conference at Dublin City University on 29 May 2024

Introduction

- 1.** I am grateful to President Accetto³ for joining us, for identifying the topic of this discussion and for sharing his insights into it. It is a good time to discuss the subject he has proposed. This week, of course, marks the centenary of the establishment of our court system. Indeed, it is in that connection that President Accetto is in Dublin. And, as it happens, the Constitution of the Irish Free State, the court system it envisaged and the first constitutional courts in continental Europe embodying what we now call centralised review, all crystalised within a short time frame in the early to mid-1920s.
- 2.** The *leitmotif* of the centralised model of constitutional review as it was originally conceived – a judicial body invested with the exclusive power to review legislation but sitting somewhere between the normal judiciary and the legislature reflected the theories of Hans Kelsen, who drafted the Austrian Constitution of 1920. While this was an arresting novelty when first adopted, the concept had gained some traction when, in the 1930s, the constitutional arrangements adopted in this jurisdiction in the previous

¹ This is an edited and expanded version of a paper delivered at round table seminar in Dublin City of University on 29 May 2024. I am grateful to my Judicial Assistants Sarah Branagan and Amanda Tso for their assistance in preparing it.

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decade came to be reviewed. The report of the Constitution Committee in 1934 mooted the prospect of a '*Constitution Court*' but its members were unable to agree on whether the power to review of legislation should be vested in such a body, or in the Supreme Court, or in the High Court with an appeal to the Supreme Court.⁴ The manner in which those options came in and out of focus during the process that led to the drafting of the 1937 Constitution has been charted by Dr. Coffey and Mr. Justice Hogan in their respective studies.⁵ I will summarise the history later, but would note for the moment that while the end point may have been inevitable, one can readily see how the dispersed system of review which we adopted – constitutional questions being resolved by the High Court discharging one aspect of its full and original jurisdiction with an appeal to the Supreme Court – certainly looked like a better fit with the common law legal system onto which it had been mapped, than the alternative. That really set us on a course which has tended to point counsel and judges when resolving issues of constitutional law firmly in the direction of the models adopted by, and jurisprudence of, other common law jurisdictions. It also embedded the inevitable instinct that constitutional law would be developed in Ireland according to the essential methodologies of the common law.

- 3.** This seminar affords a welcome opportunity to review what that system looks like today, and how it relates to the procedures for constitutional review as they have developed in other jurisdictions, and in particular, in other EU jurisdictions. President Accetto has laid the foundations for that debate, and I just want to emphasise some factors he has noted and add in one or two more which I think are important when we undertake such review in this jurisdiction here. In particular, the topic of convergence of dispersed and centralised models of constitutional review has garnered

⁴ Report of the Committee is recorded in Gerard Hogan, *The Origins of the Irish Constitution 1928-1941* (2012) Royal Irish Academy at p. 74.

⁵ See, for example: Gerard Hogan, *The Origins of the Irish Constitution 1928-1941* (2012) Royal Irish Academy; Gerard Hogan, 'John Hearne and the Plan for a Constitutional Court' (2011) *DULJ* 33(1) 75; Donal Coffey, *Constitutionalism in Ireland, 1932-1938: National, Commonwealth and International Perspectives* (Palgrave Macmillan 2018); Donal Coffey *Drafting the Irish Constitution 1935-1937: Transnational Influences in Interwar Europe* (Palgrave Macmillan 2018).

renewed attention in the international literature, and that seems a good point of departure for our discussion today around the topic.⁶

4. Certainly, structurally, in Ireland we are some distance from a centralised model. Yet, while in no sense do I wish to overstate the point, as both systems have developed over the past century, the fact is that substantively the differences between dispersed and centralised review may have become less pronounced than they first appear. In some respects, constitutional review is more like a civil law process than a common law one. It depends on extracting from the latter system the parliamentary supremacy that is a defining feature of the common law, it requires at least some departure from the methodologies of textual interpretation traditionally applied within that system. It invites and, depending on one's perspective, may require judges to reason more by reference to general principle rather than incrementally developed rules.
5. Those considerations, the influence on our legal system of our membership of the European Union and adherence to the European Convention on Human Rights, and the direction in which our constitutional jurisprudence has been pointed by the Supreme Court's new jurisdiction following the Thirty-third Amendment to the Constitution all merit reflection on the extent to which the dispersed system (at least as we operate it) and the methodologies adopted by centralised systems today, diverge.
6. Before doing that, however, I am going to come back to the central features of the two systems and to place our constitutional structure within them. I will test your patience by allowing me to retrace a little of the ground covered by President Accetto.
7. Generally, dispersed systems tend to be either common law legal systems, or civil law systems from certain legal traditions, in particular, the Nordic

⁶ See, for example, Alex Stone Sweet, 'Why Europe Rejected American Judicial Review – And Why It May Not Matter' (2003) 101(8) *Michigan Law Review* 2744.

countries. Centralised models tend to be found in jurisdictions that are Germanic or Romano influenced civil law systems, often presenting some type of federal structure. Within both models there are a wide range of variants, but it is helpful to identify the main elements of the centralised system, at least as originally conceived: (a) a constitutional court with jurisdiction only over issues of constitutional law; (b) consequently, an ordinary court system which does not have a jurisdiction to review the validity of legislation; and, (c) a power of abstract pre-enactment or pre-enforcement review, often at the instigation of political actors. Latterly at least, these processes have incorporated a power of concrete review of legislation after its enactment – usually at the instigation of persons with a defined interest of some kind in the challenge, sometimes because validity arises incidentally in a broader dispute.

The place of the constitutional court in the drafting of Bunreacht na hÉireann

8. Dr. Coffey refers to the 1937 Constitution as being '*situated at the cross-currents of European Constitutionalism at the time*'.⁷ It is well known that those involved in drafting the 1937 Constitution toyed with what was then a constitutional court structure.⁸ This was fairly remarkable: as Mr. Justice Hogan points out, the idea of a constitutional court was, at this time, unknown in the English-speaking world.⁹ When the process of review of the Free State Constitution began in the middle of the 1930s, the first constitutional courts were little over a decade old. It was in that context that from an early point in the process of drafting the 1937 Constitution, consideration was given to removing the jurisdiction of the High Court and of the Supreme Court as they then stood to determine the validity of legislation having regard to the Constitution, and investing the constitutional jurisdiction previously exercised by those Courts in a new body having a jurisdiction that would be both original, and final.

⁷ Donal Coffey *Drafting the Irish Constitution 1935-1937: Transnational Influences in Interwar Europe* (Palgrave Macmillan 2018) p. 3.

⁸ Gerard Hogan, *The Origins of the Irish Constitution 1928-1941* (2012) Royal Irish Academy at p. 342.

⁹ Gerard Hogan, 'John Hearne and the Plan for a Constitutional Court' (2011) 33(1) *DULJ* 75, 77.

9. The history of this and the allied proposals to allow pre-enactment review by the Supreme Court are explained at some length by Dr. Coffey and Mr. Justice Hogan in their respective publications on the drafting of the Constitution and I will just summarise it, while recording my gratitude to them for what follows. The report of the Constitution Committee in 1934 aired the idea that the power of deciding the constitutional validity should be vested in either (a) the Supreme Court, (b) in a special '*Constitution*' court appointed or designated for that purpose, or (c) in the High Court with a right of appeal to the Supreme Court.¹⁰ The Committee was unable to reach unanimity on the question and accordingly, made no recommendations on the issue. By the time a decision had been made to proceed with the drafting of a new Constitution, the proposal was closely related to the operation of the power to refer Bills for constitutional adjudication prior to enactment as it eventually appeared in Article 26 of the 1937 Constitution. At one point the drafters considered the Constitutions of jurisdictions with constitutional courts properly so called – Czechoslovakia, Austria and Spain – the suggestion being that a similar body might be established here. A draft from early October 1936 envisaged exclusive jurisdiction to determine the validity of a law being vested in a constitutional court comprising seven members¹¹ – two from the Supreme Court, two from the High Court and three (including the Chairman) appointed by (depending on which source one consults) the Taoiseach or the President.¹² Another draft was prepared vesting in the Supreme Court full original jurisdiction to determine the validity of a law.

10. Self-evidently these proposals – a power of pre-enactment reference (itself a form of '*abstract review*'), constitutional adjudication, a dedicated constitutional court, and the vesting of an exclusive and original jurisdiction

¹⁰ Gerard Hogan, *The Origins of the Irish Constitution 1928-1941* (2012) Royal Irish Academy at p. 42.

¹¹ As Hogan J. has observed, the number of judges and their mode of appointment is strikingly similar to that in Article 3 of the Czechoslovak Constitution of 1920 (Gerard Hogan, 'John Hearne and the Plan for a Constitutional Court' (2011) 33(1) *DULJ* 75, 80).

¹² Donal Coffey *Drafting the Irish Constitution 1935-1937: Transnational Influences in Interwar Europe* (Palgrave Macmillan 2018) 182 (the President); Gerard Hogan, 'John Hearne and the Plan for a Constitutional Court', (2011) 33(1) *DULJ* 75 at fn. 15 (the Taoiseach). The doubt arises because the draft refers to '*President*' which may have been the President of the Executive Council (i.e., the Taoiseach).

in the Supreme Court to determine the validity of laws – were civilian in origin, as was the prohibition on the publication of dissenting opinions in constitutional challenges. Putting to one side the ancillary question of mandating single judgments in some cases, only one central part of that package – the Article 26 Reference procedure – was maintained in the final text. The concept of a constitutional court obtained its last mention in January 1937, and the proposal that the Supreme Court would have an original jurisdiction in constitutional cases was abandoned during the Dáil debates.

- 11.** The concerns expressed around these issues at the time now seem unremarkable and are reflected in the debates one sees around centralised review today. These included the fact that, if implemented, the proposal might encourage constitutional challenges, that it was better to maintain the function of the Supreme Court as an exclusively (or almost exclusively) appellate court and that the resulting obligation on courts to stay cases until the constitutional challenge within an action was determined, would cause unnecessary and unwelcome delay and expense. There was also a well-informed objection around whether the fact of the proposed constitutional court and conditions of its jurisdiction would prevent the grant of *habeas corpus* where grounded on a challenge to the validity of a legislative provision. The commentators who have discussed the proposal for the creation of a ‘*Constitution Court*’ have variously suggest that it fell because of ‘*drafting difficulties*’,¹³ or difficulties in agreeing the composition of the court¹⁴ or because it was believed that the proposal to establish such a court would likely have been regarded with deep suspicion by both the bar and the bench.¹⁵

¹³ Donal Coffey, *Constitutionalism in Ireland, 1932-1938: National, Commonwealth and International Perspectives* (Palgrave Macmillan 2018) 158.

¹⁴ Donal Coffey, *Drafting the Irish Constitution 1935-1937: Transnational Influences in Interwar Europe* (Palgrave Macmillan 2018) 182.

¹⁵ Gerard Hogan, *The Origins of the Irish Constitution 1928-1941* (2012) Royal Irish Academy at p. 42.

The reasons for centralised review

- 12.** The Irish experience is usefully matched against the analysis conducted by Cappelletti and Adams of why those continental European jurisdictions that had adopted judicial review following the Second World War, chose to depart from the then well-established model set by the Constitution of the United States as interpreted by the courts in that jurisdiction.¹⁶ The answer they propose lies somewhere in the influence of Kelsen's 1920 Austrian Constitution and his belief that judges exercising a review jurisdiction were in a constitutional grey zone between the legislative and judicial. There were other factors – the advantages for post-war States in making bold statements about the status of the court to be charged with constitutional review being the most obvious. Moreover, and negatively, the fact that common law jurisdictions operate a principle of *stare decisis* and that continental jurisdictions do not, pointed towards the advisability in the latter of a single constitutional court system. Disparate courts exercising a jurisdiction to strike down legislation *without* a binding rule to follow decisions of an apex court are an obvious recipe for chaos.
- 13.** But there were also important cultural factors in play: they describe the Anglo-American legal tradition as being '*allergic to adjudication of matters of general principle*'.¹⁷ And that is important in relation to a key feature of the US system, which was at the same time articulated in and the basis for the decision in *Marbury v. Madison*.¹⁸ Two propositions were central to the judgment of Marshall CJ in that case:
- (a) that any judge of any Federal Court could declare a law unconstitutional, and
 - (b) that the power to do so arose from and thus could be exercised only in the context of a '*case and controversy*' within the meaning of Article III of the United States Constitution.

¹⁶ Mauro Cappelletti and John Clarke Adams 'Judicial Review of Legislation: European Antecedents and Adaptations' (1966) 79 *Harvard Law Review* 1207.

¹⁷ *ibid*, at p. 1219.

¹⁸ *Marbury v. Madison* 5 U.S. 137 (1803).

14. Thus, in the United States, the Federal Courts at every level of that system enjoy that power, while the case and controversy requirement is policed, defined and controlled in such a way as to prevent the litigation of cases by persons without standing, or when issues are premature or moot.¹⁹ US constitutional review has been termed '*concrete*' rather than '*abstract*': a litigant brings a case, and the statute's constitutionality is determined through that case process and because it is necessitated by it.

15. At the other end of the spectrum lies the pure constitutional court conceived of by Hans Kelsen and reflected in the Austrian Constitution of 1920. In that model, the constitutional court exercises an exclusive power of constitutional review, enjoying a power of abstract (or pre-enforcement) review of legislation vested only in that court, together with power on the part of political actors to initiate proceedings before the court. Since the Second World War and, in particular, following the establishment of the German Federal Constitutional Court in 1958, these have included powers to strike down legislation on the basis of guarantees of fundamental rights (which Kelsen had opposed), with rights of individual petition and powers to require the referral of disputes by other courts. This centralised system typically situates that court outside the traditional structure of the judicial branch occupying their own distinct space that is neither '*judicial*' or '*political*' as those terms are commonly understood.²⁰ There exists a specialised procedure for the determination of constitutional questions in the court, where legislation is usually reviewed in the abstract, without the need for concrete facts. There may be '*concrete*' review, where a judge refers a question to the constitutional court, during a pre-existing legal process, but that review tends to, generally-speaking, remain abstract in an '*overt and formal*' way.²¹ Ordinary courts cannot determine constitutionality or invalidate legislation on that basis, and similarly, constitutional courts are limited to determining constitutional disputes.²²

¹⁹ See, for a good example, *Clapper v. Amnesty International USA* 568 U.S. 398 (2013), 133 S.Ct. 1138 (2013).

²⁰ Stone Sweet, 'Why Europe Rejected American Judicial Review – And Why It May Not Matter' (2003) 101(8) *Michigan Law Review* 2744, 2770.

²¹ *ibid*, at p. 2771.

²² *ibid*, at p. 2769.

16. One of the analyses gathers the context of all of this together well: the main reasons for the divisions in approach lie in the profound differences in political and constitutional culture on either side of the Atlantic.²³ The centralised system of judicial review is more consonant with the European understanding of the separation of powers, as well as the civil law approach to precedent, the authority of the traditional civil law courts and the psychology of their judges.²⁴ Moreover, in many of the European countries in which the judicial review was adopted as a democratising measure following a period of authoritarian rule, the existing courts were unable to offer sufficient guarantees of '*structural independence and intellectual assertiveness*'.²⁵

Back to Ireland

17. It may be that had one of the versions of the early proposals for a constitutional court in Ireland been adopted here, constitutional law in the State would have developed differently: it may be that a bespoke constitutional court would have encouraged more, and earlier, challenges to the validity of legislation. It is possible that a cadre of specialised constitutional law judges would have evolved, that a more intense culture of constitutional review would have emerged, that we would have developed sooner within the judiciary an autochthonous legal and constitutional culture, and it might be that our constitutional law would have grown in a more doctrinally structured and principled way than it did.

18. But, in truth, none of this would have been a comfortable fit with the habits and traditions of the legal profession or judiciary and I wonder how it would have sat in a legal culture that has inclined to favour pragmatic generalism. We would have been the only purely common law jurisdiction with such a court,²⁶ and we had not had since the Judicature Acts (of the

²³ Lech Garlicki 'Constitutional courts versus supreme courts' (2007) 5 *ICON* 44 at p. 45.

²⁴ *ibid*, at p. 45.

²⁵ *ibid*, at p. 45.

²⁶ Gerard Hogan, 'John Hearne and the Plan for a Constitutional Court' (2011) 33(1) *DULJ* 75.

mid-1870s) a tradition of running parallel subject matter jurisdictions. The factors I have referred to earlier as animating the establishment of such courts did not apply here and at around this time the legal profession had proven itself as dogged as it was effective in maintaining traditional structures – down to obstructing entirely changes to court dress, and delaying the evolution of local circuit courts. Moreover, the structure was ill-suited to the method and importance attached by common law systems to the finding of facts by reference to, more often than not, oral evidence – as indeed the High Court proceedings in *Ryan v. Attorney General* graphically showed at an early stage in the development of the State’s constitutional law.²⁷

- 19.** But, more fundamentally, it might be said that the reasons for the establishment of a dedicated constitutional court never quite held force here. The enlightening scholarship tracing the factors influencing the choice of this type of system, highlighted the importance to that choice of the nature of the State’s pre-existing legal systems but also less obvious influencing factors. This appears to be contested territory, but I will just list them here, albeit at the risk of some repetition. Some stress the absence of *stare decisis* in some of the systems to have adopted concentrated review:²⁸ the case for a single constitutional court is considerably stronger in jurisdictions in which dispersal of constitutional jurisdiction would risk divergent findings as to the validity of legislation. The culture of the post-war continental magistrate class and their essentially bureaucratic mindset has been similarly alleged and emphasised:²⁹ whether that is arrogant and unfair, I do not know. Kelsen’s view that judges who struck down legislation were acting as legislators was influential, as was the desire to increase the prestige of the new Tribunals. Some writers relate the attraction of a constitutional court structure to the emergence of states from certain forms of government: states emerging from authoritarian government into democracy tend to favour centralised

²⁷ *Ryan v. Attorney General* [1965] IR 121.

²⁸ Mauro Cappelletti and John Clarke Adams ‘Judicial Review of Legislation: European Antecedents and Adaptations’ (1966) 79 *Harvard Law Review* 1207, 1215.

²⁹ *ibid.*, at 1215.

review with a new constitutional court, both making a statement about the rule of law in the new system and ensuring that judicial review is not in the hands of judges who favoured the *ancien regime*. Another factor is simple geography, some States opting for regional legitimacy by adopting the constitutional model favoured by their neighbours.³⁰ As I have noted already, this form of review carries particular attractions to States with federal systems. None of these considerations, when transposed to the Ireland of the 1930s, would have pointed us in the direction of concentrated and centralised review.

Convergence

20. But, even if our system is structurally located in the dispersed model, one has to wonder what the substantive differences are today. There is some literature now urging that there has been a '*convergence*' between US constitutional judicial review in its dispersed system, and the centralised models of European constitutional systems. Following the establishment of the influential German Federal Constitutional Court, rights of individual petition and powers to require the referral of disputes by other courts are common. As I have noted, in this way there may within these systems be '*concrete*' review, where a judge refers a question to the constitutional court, during a pre-existing legal process.

21. Thus, it is suggested, concrete judicial review in the centralised system starts to look more and more like the resolution of cases and controversies, and that is particularly the case with the evolution of widely applied proportionality doctrines. Moreover, the commentators record that as constitutional law comes to permeate the entire structure of the legal system it becomes impossible to maintain a firm delimitation between the functions of the constitutional courts and the ordinary courts.³¹

³⁰ Pablo Castillo-Ortez 'Constitutional Review in the Member States of the EU-28: A Political Analysis of Institutional Choices' (2020) 47(1) *Journal of Law and Society* 87.

³¹ Lech Garlicki, 'Constitutional courts versus supreme courts' (2007) 5 *ICON* 44 at p. 44.

22. Ireland affords a good vantage point from which to survey the traffic travelling in the opposite direction. For a start, the system of review in Ireland, is notably different from that in the United States in a number of respects. The framework within which constitutional review is conducted has always been more flexible than that in that jurisdiction. Doctrines like standing, mootness and prematurity which in that jurisdiction are fixed requirements of Article 3 of the United States Constitution, are subject here to discretionary abatement. The consequential dilution of the case and controversy requirement as that is understood in the United States is, I think, an almost inevitable consequence of the trend whereby apex courts that are not under an express constraint in the terms of Article III of the US Constitution, pick their own dockets by reference to clearly defined criteria which include whether a point of law in a case is of general public importance. The decision of the Court in *Odum v. Minister for Justice* is an important one in stressing that the jurisdiction conferred on the Supreme Court following the 33rd Amendment to the Constitution is an entirely new one, and useful in providing a list of cases – each of them significant in their own terms – in which the Court has over the past four years proceeded to hear cases that were, in fact, moot.³² *Delaney v. PIAB* in which judgment was delivered earlier this year was a case that was similarly of systemic importance, but was, on the basis of conventional analysis, quite arguably premature.³³ Relaxations in the rules of standing in cases where there may never be a plaintiff who can challenge a measure are well-established, and of course mootness, standing and prematurity are part of the same essential principle, defined more by timing than content.

23. Moreover, we have as I have noted already, adopted one feature of the Kelsenian constitution in the form of Article 26 of the Constitution whereby the Supreme Court enjoys a limited and exceptional first instance jurisdiction to adjudicate on the validity of a Bill when referred by the President. In and of itself that has resulted in the imposition on the

³² [2023] IESC 3, esp. at para. 51.

³³ [2024] IESC 10.

Constitution of one of the hallmarks of the centralised system.³⁴ For obvious reasons, our legal system is generally subject to greater influence from civil law jurisprudence than other common law jurisdictions. When a declaration of invalidity issues, the statute is void *ab initio* with the effects of that declaration not limited to the parties to the case (as is, in theory, the position in the United States).

24. While it is a mistake to equate the civil law and centralised review, the fact is that we are becoming more and more like a civil law jurisdiction. I have alluded earlier generally to the methodologies imposed on judges by the very fact of constitutional review (indeed, there are studies showing how civil law strongly influenced constitutional interpretation in the first century of the United States Constitution).³⁵ Our constitutional law is inevitably influenced by the language and mode of analysis adopted by the Strasbourg and Luxembourg Courts (each of which has in their own way been influenced by the methods of common law courts). Many parts of our law are entirely codified, the rules by which we interpret the resulting legislation accommodate and accentuate considerations of context and purpose alongside the text of a statute, the doctrine of precedent is not as rigid as it was in 1937, and inevitably our place in Europe has introduced not only new laws, but a new way of interpreting those laws, new language, and new concepts. That, if only by a process of osmosis, has changed how we do many things across the whole spectrum of our legal system, and many of those changes can be characterised as '*civil law*' in spirit and, perhaps substantively, '*centralised*' in approach.

³⁴ Henchy J. writing extrajudicially predicted many of the problems that subsequently emerged from the Article 26 procedure in an article he published about the doctrine of precedent in the *Modern Law Review* in 1962: the Article 26 procedure, he said, was foreign to the common law, and meant that in the absence of practical experience of the legislation the decision of the Supreme Court is more likely to be what he described as a prognosis than a diagnosis (Séamus Henchy, '*Precedent in the Irish Supreme Court*' (1962) 25 *Modern Law Review* 544, 558.

³⁵ Thomas H. Lee, 'Civil Law's Influence on American Constitutionalism' available at https://www.law.nyu.edu/sites/default/files/upload_documents/Lee%20Civil%20Law%20Tradition%20NYU%20Final%20Draft.pdf.

Conclusion

- 25.** This brief review suggests that an understanding of the past and the present of centralised models of judicial review prompts some useful points for reflection around how constitutional cases are addressed today in our legal system. Would our processes of constitutional review of legislation operate more effectively if vested in a dedicated constitutional court? What would our constitutional law look like today if that path had been taken in 1937? Would it be better if pre-enactment abstract review was more common? What has our experience of References under Article 26 of the Constitution taught us about the advantages and disadvantages of that process? Are those (perceived) disadvantages a product of our common law culture, or do they stand independently of that? What, exactly, is the relationship between our past as a common law jurisdiction, and our present as a legal system in which legal reasoning and principle are increasingly dominated by constitutional analysis, not merely in public law but also in some respects in private law? Does our drift towards civil law methodology improve our legal system, and more importantly what does it bode for its future?
- 26.** One occasionally sees reference in the literature to the term '*common law constitutionalism*'. Whatever, precisely, that means (and it seems to mean a number of different things), its two components might at first glance appear to be in tension with each other: parliamentary sovereignty is a key defining feature of the common law, and constitutionalism (itself a term with different shades of meaning) usually, at least, assumes some constraint on that sovereignty. But insofar as the term describes a legal culture or mindset,³⁶ an interpretative technique, or a mode of analysis or method, to understand our constitutional law, we must appreciate the impact of our history as a common law jurisdiction on its development. That appreciation can only be enhanced by the exercise in comparison proposed by the subject matter of this discussion.

³⁶ See, for example, the discussion by Hogan J. in '*Harkening to the Tristan Chords: The Constitution at 80*', (2017) 40 *DULJ* 71, in particular, at pp. 80-81.