# Editors' Introduction

DAVID CAPPER, CONOR McCORMICK AND N. M. DAWSON

This volume publishes selected papers from the 25th British Legal History Conference (BLHC), co-hosted by Queen's University Belfast and the Irish Legal History Society (ILHS) in 2022. That was the second occasion on which the ILHS co-hosted a BLHC, the first being in 2003 at University College Dublin, when the conference theme was 'Adventures of the Law', an echo of Judge William Johnston's suggestion that the Anglo-Norman invasion of Ireland in the twelfth century was 'the first adventure of the common law'.[1] Even as Judge Johnston's legal-historical paper was published in the *Law Quarterly Review* in 1920, events of immense constitutional significance for both Great Britain and Ireland were unfolding. Within two years, some of the public records on which he had relied were reduced to ashes in the fire at the Four Courts in Dublin, the opening engagement in the Civil War in Ireland (1922–23). The looming centenary of that tumultuous and testing time for the Union – the partition of Ireland, the creation of the Irish Free State, and the creation of Northern Ireland as a province within the United Kingdom – prompted the choice of theme for the 25th BLHC, 'Law and Constitutional Change', initially scheduled for July 2021. Although the Covid-19 pandemic necessitated postponement to July 2022, the conference theme lost none of its 'centenary' significance for British and Irish legal historians, as it still fell within the ambit of the so-called Decade of Centenaries in Ireland (2012–23).[2] At the same time, the organisers hoped that the conference theme was wide enough to be of international significance – and so it proved to be.

[1] W. J. Johnston, 'The First Adventure of the Common Law', *Law Quarterly Review*, 36 (1920), 9–30. Johnston was an Irish county court judge before and after partition, advancing to the Irish High Court in 1924 and to the Irish Supreme Court in 1939: see 'Johnston, William John (1868–1940), barrister and judge', by P. Gageby in *Dictionary of Irish Biography* (online, open access).

[2] https://decadeofcentenaries.com/about/ (accessed 27 February 2024).

For historians everywhere, the prospect of the loss of a national archive is a sobering thought. Before reconstruction could even be contemplated, it would be necessary first to audit the losses sustained, in itself a massive undertaking. The 'Virtual Record Treasury of Ireland' (VRTI) is a unique archives reconstruction project, established by Trinity College Dublin in collaboration with the National Archives of Ireland, the Public Record Office of Northern Ireland, The National Archives (UK) and the Irish Manuscripts Commission. The aim is to reconstruct, in virtual form, the 'Record Treasury' of the Public Record Office of Ireland, lost to the Four Courts fire in 1922. We invited the VRTI team (led by Dr Peter Crooks of Trinity College Dublin) to address the conference in plenary session, and were pleased to have a virtual presentation from Dr Tim Murtagh, a member of the team, heroically delivered while he was suffering from Covid-19. In this volume, we are delighted to showcase the VRTI project in a chapter prepared by Dr Crooks and Dr Murtagh, with their colleagues Ciarán Wallace and Joel Herman. Their chapter outlines the history of legal record-keeping in Ireland up to the establishment of the Public Records Office of Ireland in 1867, traces the events of 1922 and the destruction of most of a vast collection of legal records, and explains how it has been possible to ascertain the scale of the losses and to mitigate them by finding substitute records. The scale and extent of Anglo-Irish, then British–Irish relations, meant that duplicates of many records could be found in state repositories in London, while church and other semi-public or private collections have also facilitated substitution. Crooks, Murtagh and colleagues remind readers of the need to be aware of 'the archival turn', the process by which historical understanding may be influenced by the institutional nature and arrangement of state archives.

In providing this introductory digest of the chapters in this volume we take an essentially chronological approach, reflecting the main theme of the conference. The first five chapters address topics from the Middle Ages to the seventeenth century, the latter being a period of profound constitutional change in England and Scotland. The next four chapters are set in the eighteenth century, a period of great constitutional change. Themes connected to the tumultuous events in Ireland a century ago are the subject of the following four chapters as well as the final contribution to the volume by Crooks, Murtagh and colleagues, outlined above. Two contributions (Chapters 14 and 15) detail constitutional change in other parts of the world, and a plenary lecture by Lady Hale discusses a profound constitutional change in the United Kingdom in recent times, the 'bringing home' of the European Convention on Human Rights.

## The Middle Ages to the Seventeenth Century

Constitutional change has not infrequently been viewed as treason by adherents of the regime *in situ* before the change occurred. Gwen Seabourne's chapter opens this volume by discussing treason of a different kind – wives killing their husbands. She begins by relating an early fifteenth-century case in which three persons were convicted of murder – the wife of the victim and her two male accomplices. The latter were hanged while the wife was burned, a feature of the case that raises interesting questions about the nature of the offence of husband-killing and the legal status of women at that time. The association of husband-killing with the offence of treason as well as murder gave rise to a highly nuanced legal position, the concept and terminology of treason playing differently across a range of scenarios and causing much complexity in matters of criminal procedure, sometimes involving other family members. The chapter explains how this complexity might even be exploited by wives who were 'both homicidal and canny', how it challenged the thinking of the common lawyers in the late medieval period, and how it informs our understanding of the status of women in both familial and legal contexts at that time.

Ashley Hannay's chapter discusses the processes of legislative drafting, political negotiation and litigation that culminated in the enactment of the Statute of Uses 1536 (transposed to Ireland in 1634). The Statute of Uses was the core stratagem in Henry VIII's policy of 'fiscal feudalism', which aimed to prevent landowner avoidance of feudal incidents, particularly those payable on death. Hannay's forensic examination of surviving bills and other contemporary documents advances an original account of the genesis of this legislation. Fresh light is shed on the relationship between the Crown, the legislature and the courts during the Reformation Parliament, a pivotal period in English constitutional and legal history.

Stephanie Dropuljic then takes us north to Scotland in a discussion of the Scots law doctrine of 'art and part'. This denotes a form of criminal liability that attaches to persons who collectively participate in an offence while sharing a common purpose. The chapter provides explanations of how this doctrine was understood in some early sources of Scots law, before assessing the extent of sixteenth-century legislative modifications. Dropuljic argues that, notwithstanding the ostensible intentions of Parliament represented in these provisions, the courts and the Privy Council seem to have been persuaded subsequently to recognise defences

which knocked the hard edges off what would otherwise have been an unfairly wide and strict conception of criminal liability.

In one of the conference's plenary lectures Sir John Baker traces the roots of judicial review back to a set of fundamental constitutional principles that were revived in the late sixteenth century, namely that 'the king could do no wrong' and that 'the king could not acquire or part with property except by matter of record'. Sir John explains how these doctrines came to underpin what are now called the prerogative writs – principally habeas corpus, prohibition, mandamus and certiorari – each of which developed incrementally to form the collective basis of an extensive legal jurisdiction over executive actions. The King's Bench is credited, alongside the High Court of Parliament, with using these tools to shape the initial contours of judicial review and public law.

Chapter 5, Ian Ward's 'The Aspirations of James Stuart', brings us squarely into the revolutionary seventeenth century. This chapter, rich in seventeenth-century literary and cultural allusion, discusses the kingly and political hopes of James VI of Scotland and I of England. Three aspirations in particular are addressed. First is James's unshakeable belief in the divine right of kings to rule, unequivocally expressed in his political writings as king of Scotland, a belief that would eventually set him on a collision course with the common law judges of England. Second, James's aspirations for the Union of the Crowns in 1603 is explored. His hopes for an 'inner empire' of '*Great* Britain' were less widely shared in England than those for an 'outer empire' beyond the seas (including the Plantation of Ulster). Finally, Ward considers James's much narrower aspiration for Britain's relationship with continental European powers. The nature of monarchy and its role within the constitution; the political outworking of union within these islands; Europe and Britain's place within it – all these seventeenth-century constitutional concerns remain of vital interest today.

## The Eighteenth Century

Robert Brett Taylor opens this group of chapters by interrogating the extent to which British constitutional law has been consonant with English constitutional law after the Acts of Union between England and Scotland in 1707. Taylor argues that the relevant provisions of the Acts of Union did not replace Scots public law with English public law. Nor was Scots law retained as an entirely distinct body of jurisprudence. Instead, it is argued that the Acts of Union created a unified British

public law in respect of the Crown and Parliament, over which the UK Supreme Court (like its predecessor, the House of Lords) is the ultimate arbiter. As such, Taylor suggests there is nothing to stop Scots public law from having a greater influence over the content of British public law than it has done to date. Moreover, when viewed from this perspective, the author sees plenty of scope for the public laws of England and Scotland to diverge legitimately as regards everything but the Crown and Parliament.

Kevin Costello charts changes to the way in which judicial review by quo warranto was used to oversee parliamentary borough elections in the eighteenth century. His chapter explains the common law background to quo warranto before focusing on its operation after being placed on a statutory footing by the Municipal Corporations Act 1711. Costello demonstrates how, despite being preferred over a partisan parliamentary alternative, the quo warranto process under the 1711 Act became 'tainted by association' with a range of dishonourable electoral strategies. Nonetheless, he concludes that it should be recognised as an important turning point in the constitutional transition from parliamentary to judicial oversight of electoral malpractices.

Chapters 8 and 9 focus upon Ireland. Julia Rudolph discusses laws introduced in the eighteenth-century Irish Parliament regulating mortgage transactions. There were two significant contexts in which this legislation should be viewed. Legislation allowing Roman Catholics to lend on the security of a mortgage were viewed by proponents as a precursor to Catholic emancipation. Opponents were defenders of the Williamite settlement and its restrictions on Roman Catholics owning land. Enforcement of the security in the event of a debtor's default would lead to Catholics becoming landowners. The other context was as much, if not more, a reflection of developments in the United Kingdom and the wider British Empire. It concerned mortgage legislation, sometimes protective of the debtor and other times pro-creditor, that was a response to wider political and economic developments. One example of where the Irish Parliament was ahead of other jurisdictions in this regard concerned legislation passed in 1707 to set up a registry of deeds as protection against clandestine mortgages.

Maike Schwiddessen discusses the impact of the 'Constitution of 1782', under which the Irish Parliament acquired the right to initiate legislation. Previously, if the Irish Parliament wanted specific legislation enacted it had to propose a bill for the approval of the British Privy Council under the 'Heads of Bill' procedure. Schwiddessen acknowledges the symbolic

significance of acquiring this power, but she is somewhat sceptical about its practical impact. The 'Constitution of 1782' lasted only until the coming into force of the Act of Union 1800. In that time the volume of legislation passed by Grattan's Parliament certainly increased but its quality was not significantly different from that which had been enacted using the 'Heads of Bill' procedure prior to 1782. Nor would it appear that the economic and social impact of the legislation passed was transformative. The Privy Council retained a right of veto over Irish legislation. It was rarely used, but the Catholic Relief Acts of 1792 and 1793 were pushed through against a reluctant Irish Parliament. Schwiddessen also acknowledges that had the Irish Parliament survived long after 1800 it might have further evolved, and the 'Constitution of 1782' might then have been viewed as a more significant milestone on that journey.

## The Treaty

First, Richard McBride provides an account of the career of a significant legal personality of this time, Sir John Ross, the last Lord Chancellor of Ireland. Ross was an Ulsterman but for most of his legal career he was based in Dublin. He was a Unionist but of the Southern variety, decidedly unenthusiastic about partition. Ross served as a Chancery judge in Ireland from 1896 and lobbied for the position of Lord Chief Justice of Northern Ireland when the Northern Ireland state was established in 1921. McBride's view is that Sir James Craig, first Prime Minister of Northern Ireland, preferred Sir Denis Henry, a Catholic Unionist, as being more reliably disposed towards the Northern Ireland state. Not long after this disappointment Ross became the last Lord Chancellor of Ireland, but he was in truth Lord Chancellor in name only. The Government of Ireland Act 1920 provided for two 'Home Rule' Parliaments in Ireland, one for Southern Ireland and the other for Northern Ireland. There were two court systems with a Court of Appeal for each jurisdiction. Above these appellate courts was a High Court of Appeal for Ireland and Ross was the president of this court. His appointment was for life, unlike previous Lord Chancellors who had presided in court but left office when the government changed hands. McBride provides an account of the cases Ross judged in the High Court of Appeal from 1920 to 1922. When the settlement of the Irish conflict proposed by the Government of Ireland Act 1920 was rejected by Sinn Féin, the High Court of Appeal in Ireland ceased to exist and Ross's judicial career ended. His attempts to secure a judicial position in England came to nothing.

'The Treaty' refers to the ending of the British–Irish conflict a century ago. Two chapters consider the negotiations over the Treaty that established the basis for the founding of the Irish Free State and then the further negotiations over the constitution of the Free State.

Colum Kenny's chapter on 'Lord Birkenhead, Ambiguity and the Irish Border' is concerned with one particular aspect of the Anglo-Irish negotiations, namely how and where the border between Northern Ireland and the Irish Free State should be located. Kenny focuses on the disparity in legal expertise between the two negotiating teams. On the British side was F. E. Smith, Lord Birkenhead, then Lord Chancellor of the United Kingdom. Nobody on the Irish side matched his brilliance and experience. The Treaty provided for the establishment of a Boundary Commission to fix the border's location and until the time it reported in 1925 there was much speculation about how far its recommendations would depart from the border provisionally fixed in 1921/22. Hence the Treaty provisions relating to the Boundary Commission, its remit and modus operandi, were potentially crucial. Kenny considers who might have been suitable advisers to the Irish negotiating team who were labouring under great political pressure. Frank Russell (son of Lord Russell of Killowen), then a Chancery judge in England, was proposed by Lord Birkenhead as someone who might usefully advise the Irish team, and another potential candidate was Viscount Bryce, a noted constitutional law expert. Neither was consulted. As Kenny observes, the exploitation of legal ambiguity for political ends has clear contemporary resonance in the context of Brexit and its impact on Northern Ireland.

Thomas Mohr produces an account of the British–Irish negotiations on the drafting of the constitution of the Irish Free State. Michael Collins, Arthur Griffith and Hugh Kennedy were under huge pressure from the anti-Treaty wing of Sinn Féin, who had voted against the Treaty in the Dail debates of January 1922. In an attempt to bring Éamon de Valera and his anti-Treaty faction into coalition with supporters of the Treaty and avert civil war, Collins and his team drafted a constitution which significantly diluted the Irish Free State's Dominion status over issues like the oath of allegiance to the king and the Privy Council serving as the final court of appeal for law cases from Ireland. The British firmly rejected the draft constitution. Nevertheless, Mohr points out that the Irish delegation had more than modest negotiating successes of their own. It seems tolerably clear that had they not done so there was a severe risk hostilities would resume. This was averted but tragically the Civil War in Ireland commenced only two weeks after these negotiations concluded.

Colin Murray's chapter, 'No Way to Run a Railroad', is an account of the post-partition story of the Great Northern Railway of Ireland (GNRI). If a border is placed east–west across an island this is clearly going to present implications for any north–south transport network. In the immediate aftermath of partition, two governments somewhat reticent about engaging with each other were forced to do so to a minimal degree, dealing with customs at any rate. Murray's story is mostly focused upon the post-World War II experience of the GNRI. The railway's economic troubles forced a joint nationalisation by the governments of Ireland and Northern Ireland in 1953. Money problems persisted and the Northern Ireland government had difficulty in keeping its end up. Murray brings to light the toxic relationship between the governments of the United Kingdom and Northern Ireland and the inadequacy of the overall devolution funding system. Westminster believed the future lay with road transport and insisted on savings. These took the form of closing uneconomic lines, mostly west of the Bann. Murray places much of the blame for the eventual dissolution of the operating company on Westminster, one example of its tendency to engage in doublethink being the insistence on acquiring more expensive British locomotives in preference to cheaper and probably more efficient German models. At the same time Stormont does not emerge from this with its copybook entirely unblotted. The line running through the Unionist heartland of County Antrim to Coleraine and on to Derry did not suffer the fate of the lines west of the Bann. The Irish government certainly did not want to see the demise of the GNRI and the Belfast to Dublin Enterprise service was preserved. As anyone who travelled that route in the 1970s to 1990s can testify, the rolling stock was only slightly less ancient than that used by Northern Ireland Railways until the relaunch of the Enterprise service in 1997. Murray considers that the GNRI experience was a wasted opportunity for better North–South relations.

## Contemporary Law and Constitutional Change Issues

Merike Ristikivi, Katre Luhamaa and Karin Sein's chapter tells the story of the wholesale reform of the Estonian legal system after Estonia ceased to be governed by Soviet-style Communism in 1991. It highlights how young lawyers were deliberately put at the forefront of this constitutional transformation because they were perceived to be more capable of innovative thinking. However, it also highlights that, over time, those

young lawyers engaged in more collaborative projects which proactively involved established legal professionals 'who had received their education during Soviet times and brought experience of those times to the table'. Likewise, the authors emphasise the importance of non-intrusive support provided by foreign experts during Estonia's constitutional refurbishment. Their chapter exemplifies the importance of 'maintaining the delicate equilibrium between innovation and tradition' by reference to an empirical analysis of a unique but telling episode in modern European history.

Gabrielle Appleby and Megan Davis's chapter on 'First Nations Constitutional Recognition in Australia' contrasts the apparent embedding of the rule of law in the foundations of present-day Australian constitutional law with the 'weaponisation' of the rule of law in order to deny the *prior* sovereignty of Aboriginal and Torres Strait Islander people, present when the colonial settlement of Australia took place in the eighteenth century. They argue that Blackstonian justifications for British sovereignty following colonisation fall away when it is recognised that Australia was not in fact *terra nullius* but occupied – accepted in principle in *Mabo (No. 2)* in 2000 – and that settlement was not in fact peaceful. Appleby and Davis use this rule-of-law history to interrogate more recent developments in Australian political and constitutional thought, culminating in the Uluru Statement from the Heart to the Australian people (2017), which called for the embedding of a 'First Nations Voice' in the constitutional arrangements of Australia. As this was rejected in a referendum in 2021, the authors contend that the search for foundational coherence in Australian constitutional law continues.

Lady Brenda Hale's plenary lecture, 'The Rise and Fall of the UK Human Rights Act', explores some constitutional background to the Human Rights Act 1998 together with an examination of its impact on domestic law and policy in the United Kingdom. Lady Hale begins by explaining why the Act was enacted and how it was given effect in domestic law, before chronicling the extent to which various critiques of the Act have intensified since 2010. She comments, in particular, on several threats posed by a Bill of Rights Bill which would have repealed the 1998 Act, prior to its withdrawal from Parliament on 23 June 2023. Concluding that the future of the 1998 Act remains uncertain in the context of recent calls to withdraw from the European Convention on Human Rights altogether, as well as several instances of discrete disapplication by way of legislation in specific policy areas, Lady Hale reminds

us of the conceptual tensions that have always been inherent in the goal of establishing a human rights culture.

There is a veritable feast in this collection. It is hoped that this Introduction will give those readers who want to read the book from cover to cover and those who want to 'dip in' to whatever appears to interest them a clear view of what they can expect.